# COPYRIGHT COALITION OF SOUTH AFRICA NPC

10 March 2023

The Hon. Chair of the Standing Committee on Finance, Economic Opportunities & Tourism

Hon. C. Murray

Western Cape Provincial Parliament

Cape Town

Attention: Zaheedah Adams, Procedural Officer

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Dear Honourable Chair,

**The Copyright Coalition of South Africa (CCSA) Submission in relation to the call by your committee for comments on The Copyright Amendment Bill (B13D-2017) and The Performers Protection Amendment Bill (B24D-2016)**

This submission is made on behalf of the Copyright Coalition of South Africa (CCSA) and its members. The CCSA is a broadly representative group of associations mainly comprised of local trade and industry associations representing hundreds of local companies that drive investment into South Africa (SA)'s creative and education sectors, creating jobs and opportunities for tens of thousands of SA's creatives in the publishing, music, film, animation, and other industries.[1]

[1]***The Copyright Coalition of SA comprises of:***

Our member associations are grateful to be afforded this opportunity by your committee to air their voices and submit their positions and reservations in relation to the Copyright Amendment Bill (B13D-2017) and The Performers Protection Amendment Bill (B24D-2016).

Beyond this written submission, we wish to participate and appear in the upcoming scheduled hearings in your committee to elaborate on points raised in our submission. We can be contacted at: 0609773053 and chola.makgamathe@samro.org.za .

Where possible, the following members of CCSA shall also appear in person at the upcoming hearings in support of this submission:

Academic and Non-Fiction Authors of South Africa (ANFASA);
Animation SA;
Audio Militia;
Composers, Authors and Publishers Association (CAPASSO);
Commercial Producers Association of South Africa (CPASA);
Dramatic, Artistic, Literary Rights Organisation (DALRO);
The Independent Black Filmmakers Collective (IBFC);
The Independent Producers Organisation (IPO);
Music Publishers Association of South Africa (MPASA);
PEN Afrikaans;
Printing SA (PIFSA);
The Publishers Association of South Africa (PASA);
Recording Industry of South Africa (RiSA), RiSA Audio Visual (RAV);
Southern African Music Rights Organisation (SAMRO); and
Writers Guild SA.

We thank you for your consideration.

Yours faithfully,

**COPYRIGHT COALITION OF SOUTH AFRICA**

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*The Independent Black Filmmakers Collective (IBFC),The Music Publishers Association of South Africa (MPASA), The Publishers Association of South Africa (PASA), Academic and Non-Fiction Authors of South Africa (ANFASA), PEN Afrikaans, Printing SA (PIFSA), Recording Industry of South Africa (RiSA), RiSA Audio Visual (RAV), Dramatic, Artistic, Literary Rights Organisation (DALRO), Writers Guild SA, Audio Militia, Animation SA, Musicians Association of South Africa (MASA), Southern African Music Rights Organisation (SAMRO), Composers, Authors and Publishers Association (CAPASSO, The Independent Producers Organisation (IPO), Commercial Producers Association of South Africa (CPASA) ).*

**SUBMISSION**

In his State of the Nation Address on the 10th of February 2022, President Ramaphosa stated:

"…South Africa needs a new consensus. A consensus that is born out of a common understanding of our current challenging situation and a recognition of the need to address the challenges of unemployment, poverty, and inequality. This should be a new consensus which recognises that the State must create an environment in which the private sector can invest and unleash the dynamism of the economy"[2].

CCSA is in full agreement with the President's observations above and asserts that an enabling Copyright Act and Performers Protection Act, are important cogs in the wheel of the envisaged new consensus calculated to usher in the well-needed economic recovery of the country and to unleash inclusive economic growth. The role of the copyright industries in economic growth has been well-documented, with WIPO studies previously showing that the copyright industries contribute 4.11% to the GDP and 4.08% to employment.[3] This exceeds the contributions of the agricultural, food, beverages and tobacco industries.

In an environment that is urgent and dire need of economic recovery, this contribution of the copyright industries cannot be overlooked, trivialised or ignored. The decisions that are taken at this juncture will either further spur and support this contribution to GDP, or completely destroy it beyond recovery. In an environment with a dire state of unemployment, poverty and inequality, with economic growth limping below 2% of the GDP, responsible leadership compels the need to refrain from adopting decisions that will further exacerbate this dire situation.

The copyright industries are a low-hanging fruit to propel economic recovery, which is why the CCSA, through its representative group of associations, supports the proposed reform of the Copyright Act and the Performers' Protection Act. Although these legislations were fit for purpose when enacted, they belong to a past era and are not conducive for a fast-paced digital environment. The need to align copyright legislation to the digital era in order to foster an enabling environment for investment is therefore completely embraced.

In this regard it is imperative that the process to amend such important legislation as the ones under consideration should be impeccable and not merely tick the box. It is for this reason that the CCSA and its members and many others have over the years, consistently aired their opposition to Copyright Amendment Bill (CAB/Bill) and Performers' Protection Amendment (PPAB) (collectively the Bills) in their current versions. We have asserted, and continue assert that the Bills are fundamentally flawed, failing to adequately provide reform that will ensure the effective functioning of the copyright industries to enhance economic growth and recovery. In their current versions the Bills will not encourage but rather disincentivise creators, authors and performers from creating

[2] https://www.gov.za/speeches/president-cyril-ramaphosa-2022-state-nation-address-10-feb-2022-0000
[3] https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf

original works and performances that are the fodder of a thriving creative industry. The Bills furthermore continue to fail in to address HE President Cyril Ramaphosa's concerns around their constitutionality and treaty compliance.

The copyright industries have consistently raised the alarm in respect of the manner in which the reform process is being undertaken, completely inconsiderate of the concerns and issues raised by those who are at the coalface of the creative industries and thus understand what is needed and critical to ensure positive progress. Instead the Legislature and policy-makers have up to now been hell-bent on pursuing an agenda whose merits is known only to them, with bizarre and unconventional provisions that can only spell disaster for the copyright industries and discourage investment. Any changes which made to date to the original Draft Bills published in 2015 have merely been largely cosmetic, amounting only to a tick box exercise, with the fundamental defects in the Bills remaining. We have previously raised these concerns and given this opportunity we will summarize our views and submissions below.

This failure to fix the defects remains in spite of numerous submissions (written and oral), not only from CCSA and affiliated associations but from many stakeholders who depend on effective copyright and neighbouring rights legislation to function and are thus negatively affected by what has proven to draconian legislation. Opinions of copyright experts, academics and senior counsels with hands-on experience in the daily functioning of copyright and neighbouring rights legislation, some of whom were engaged directly by the previous Parliamentary Committees in the National Assembly, have been largely swept under the carpet. Instead the policy and lawmakers have been enamoured by the fanciful and theoretical views of "experts" with no hands-on experience of the daily functioning of the creative industries and the issues that rights-holders are confronted with in the economic exploitation of their rights in a digitalised world.

The CCSA affiliate associations have throughout the process remained committed and hopeful that Parliament will evaluate comments objectively. We have so far been dismally disappointed in this regard. Despite our best efforts to point out the fundamental errors in the Bills (in all our previous submissions), those errors remain glaring – begging the question as to whether their persistence is not, perhaps, deliberate. We have also submitted letters dated 15 November 2021 and 29 November 2021 addressed to the then Chairperson of the Parliamentary Portfolio Committee, Mr. Nkosi[4], and recently on 28 January 2022 to the Honourable Ms. Judy Hermans, current Chairperson, wherein we succinctly raised the issues of concern. Those letters can be made available upon request. Our concern is that the issues raised remain unattended in the current version of the Bills.

[4] https://twitter.com/CCSA_Official/status/1461281869404815362?s=20

To demonstrate the magnitude of the issues raised by the President, the major reason the Bills were retagged as Section 76 Bills is the impacts the Bills will have on trade and cultural matters relating to the Provinces. The importance and contribution of the cultural and creative industries, as well as the broader knowledge (including indigenous knowledge systems), and their crosscutting nature in different sectors in the provincial and national economies, has been recognised. These industries contribute significantly to the Services sector, that in turn now contribute 69% to the Gross Domestic Product (GDP) as well as supporting traditional primary sectors such as Agriculture, Mining, and Manufacturing.

According to the recent Cultural and Creative Industries (CCI) mapping study done by the South African Cultural Observatory (2022)[5], the CCI alone directly contributes about 3% to the GDP. The CCI include Design and Creative Services (32%), Audio-visual and Interactive Media (30%), Visual Arts & Craft (15%), Books & Press (13%), Performance & Celebration (6%), and Cultural & Heritage (4%). The multiplier effect of these industries ranges from 1,850 to 4,353. The Design and Creative sectors have the highest multipliers. CCSA member associations represent majority of the companies involved in the CCI industries

We contend that the growth potential and contribution of the Cultural and Creative Industries (CCI) in the Provinces will be impaired if the Bills become law in their current state. This is likely to push successful local creators to seek protection in safer jurisdictions in other countries. It will also deter international creators such as film producers from collaborating with South African producers, e.g. bringing international productions to our attractive locations in different provinces. This will deprive local communities from benefiting in downstream economic opportunities.

It is a well-known fact that the CCI contribution in provinces, especially those that have high populations (which thus includes rural provinces) has the ability to bring about economic inclusion. This has the potential to increase the number of creators coming from talented black Africans, women and the youth in particular, who have been previously denied access to the right to property ownership. Such deprivation affects not only land ownership but also the right to ownership of intellectual property in this instance. When for example there are collaborations between local and international film producers in projects, where the local producers participate in intellectual property ownership, this will increase the participation of previously-disadvantaged individuals in key, GDP-contributing projects. The table below indicates the **contribution of provinces to the Creative Economy[6]**:

[6] South African Cultural Observatory, 2022 (p21) https://www.southafricanculturalobservatory.org.za/article/the-sa-cultural-observatory-measuring-and-valuing-sa-s-cultural-and-creative-industries

| Provinces | % CCI contribution to the Creative Economy |
|---|---|
| Gauteng | 46.5 |
| KwaZulu-Natal | 14.2 |
| Western Cape | 12.4 |
| Eastern Cape | 7.5 |
| Mpumalanga | 4.5 |
| Limpopo | 5.2 |
| Free State | 4.2 |
| North-West | 4 |
| Northern Cape | 1.5 |

It cannot be denied that provinces reflect a tapestry of cultural diversity, presenting the potential of stories and content of high value from the periphery, such as rural KwaZulu-Natal and Eastern Cape to the World. The benefits that accrues to creators from the economic exploitation of copyright can only contribute to the economic upliftment of previously excluded communities. Notable brands such as Ladysmith Black Mambazo from the rural eMnambithi, Pretty Yende from Piet Retief, Thomas Chauke from rural Limpopo and the late Madosini from the rural Eastern Cape are a testament to this. A developing trend in this regard relates to how provinces and cities have been grabbing opportunities to host productions and stimulate local talent in various industries, including the media and entertainment industries. In this regard a number of provinces have established film commissions and sponsored studios aimed at building local capacities for creators and hosting film festivals, among others. Examples include the Grahamstown Arts Festival, the Durban Film Festival etc.

At the core of the sustainability of the CCI is an enabling legislative and regulatory environment for South Africa that ensures that local and international creatives (e.g. authors, inventors, innovators) can thrive and are motivated to create. Essential to a thriving CCI environment is the protection of intellectual property - which is the legal mechanism for trading codes based on intellectual and cultural creativity. Copyright and neighbouring rights legislation become critical driving forces for such economic activity.

The Bills as they currently stand, as we have vociferously maintained, threaten the existence of cultural and creative industries and the livelihoods of people dependent on it, including other industries linked to it.

We provide below a summary of the key reasons why the Bills would, in our view, be detrimental to the efforts of the Provinces to enhance economic growth and participation through the use of the creative and cultural industries. We have raised these issues before within the National Assembly engagements but in general, the issues still remain unaddressed and contribute directly and/or implicitly to the deficiencies in the Bills:

## 1. Lack of a proper Socio-Economic Impact Assessment System (SEIAS)

It has often been said, "nothing about us without us". The Bills are a perfect example of the Legislature and policymakers going on a frolic of their own, proposing to introduce legislation that they tout as being good to creators – without heeding the concerns of the same creators and the entities that support them.

The main issue earlier identified in our submissions and reiterated throughout is the failure to conduct a proper Socio-Economic Impact Assessment System (SEIAS) to inform the amendments that need to be effected. This in our view represents the faulty foundation upon which these Bills were built. The fact that Parliament was not provided with a proper SEIAS report of the totality of the effect of the Bill on the creative sector, as well as a professional legal analysis of the Bill's provisions measured against the Constitution and international treaties, when the Bill was introduced, undermines Government's own rules. This is evident from the numerous statements in the DTI's responses to rights-holder concerns that assume that certain circumstances exist without evidence to support such assertions.

In February 2007, Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation, and regulations. The approval followed a study commissioned by the Presidency and the National Treasury in response to concerns about the failure in some cases to understand the full costs of regulations and especially the impact on the economy. In 2015, it became mandatory for all bills to go through the SEIAS. It is therefore alarming to note that, in the case of such important a legislation as the current Bills, Government has consistently resisted the request to conduct a SEIAS prior to presenting the Bills. In the same vein Parliament has likewise, not seen the need to hold Government accountable in this regard by insisting that a proper SEIAS report is provided. This begs the question why Government is hell-bent on resisting this requirement. Is it because Government fears that a SEIAS exercise will inevitably point to the deep flaws in the current versions of the Bills, as it will demonstrate that the proposals in the Bills are out of touch with reality on the ground? As part of a SEIAS exercise it is imperative to ensure that proposed legislative provisions in any piece of legislation are taken through a proper, robust socio-economic impact assessment to ascertain their effect on each of the affected sectors.

Conducting the SEIAS is also the only efficacious and objective way in which Government can assert that it has taken into account the Berne Convention three-step test required when introducing exceptions and limitations to the rights accorded to authors in copyright law.[7] The paintbrush approach that has been used to date in drafting the proposed provisions renders the Bills not fit for purpose, being inconsiderate of the true conditions of the

[7] The three-step test enjoins the lawmaker, prior to introducing any exceptions and limitations in copyright legislation, to ensure that this is done only *(i)* in certain special cases; *(ii)* where this does not conflict with the normal exploitation of the work and *(ii)* does not unreasonably prejudice the legitimate interests of the author.

authors it purports to protect and thus making the Bills detrimental to the welfare of the creative industry and the South African economy.

On this basis, we strongly submit that Provincial Legislatures and the NCOP should reject both Bills and insists on a proper SEIAS being conducted to assess the social and economic consequences of the proposed amendments on copyright holders and investment into the linked sectors.

**The introduction of the *fair use* exception and other expansive exceptions**

The South African Copyright Act currently provides for the fair dealing principle as the main limitation and exception to the protection of the rights according to copyright owners in the Act. However the CAB introduces a new Americanised exception in its proposed section 12A, in the form replacing fair dealing with a *fair use* principle and regime. We submit that this new *fair use* principle – a principle that emanates from United States Copyright, a jurisdiction that our courts have not had to refer to a lot in the development of copyright law, and a system that is used in only a handful of countries in the world – is completely biased against authors and rights-holders, in favour of users.

The bias was perpetuated from the onset by the tainted processes undertaken, such as the appointments of experts in panels, with well-known positions in support of this principle – and neglecting the advice of those who deal practically with the copyright industries on a daily basis, including the South African Institute of Intellectual Property Law (SAIIPL). The process followed was not fair and objective in that those who support a robust copyright legislation that is pro-author rather than pro-user, were deliberately excluded from forming part of such panels. Even when concerns were raised the Department of Trade Industry & Competition (the DTIC) and the Minister persisted with the incorporation of the fair use exceptions, deliberately disregarding the various submissions made to balance the scale. These concerns were noted in our letters of 15 November 2021, 29 November 2021 and 28 January 2022, and to date never addressed.

This, we submit, is antithetical to the system of exceptions to and limitations of copyright protection permissible in international treaty law, where exceptions are, as we indicated, only allowed *(i)* in certain special cases; *(ii)* where the use does not conflict with the normal exploitation of the work and *(iii)* and does not unreasonably prejudice the legitimate interests of the author, i.e. the so-called three-step test.[8]

Fair use is a defence originating in the USA and is only used in a few other countries for instance Israel, with the rest of the world instead using the "fair dealing" defence. Fair dealing originates from English law, and

[8] The three-step test is provided for in various international treaties, i.e. in article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, 1886 (1971 Paris Text) (Berne Convention); article 13 of the Agreement on Trade-Related Aspects of Intellectual Property, 1995 (TRIPs Agreement); article 10 of the WIPO Copyright Treaty 1996 (WCT); article 16(2) of the WIPO Performances and Phonograms Treaty, 1996 (WPPT); article 13(2) Beijing Treaty on Audiovisual Performances (Beijing Treaty) and article 11 and other provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually

permits users to use copyrighted works without authorization only under certain defined circumstances (e.g. research or private study; personal or private use; criticism or review; reporting on current events). Conversely, the fair use exception does not prescribe definite cases where unauthorized use is permissible but instead provides for limitless possibilities where unauthorized use is permissible. In this regard, the fair use system is litigation-prone as it implies that rights-holders must be prepared to go to court to ensure unauthorized use of their works is prevented.

In a developing country like South Africa with high levels of poverty, with authors and performers also affected, the ability of rights-holders to lodge expensive litigation against users – many of whom, including large tech companies, have limitless budgets for litigation – is close to non-existent. Different countries including the United Kingdom (UK), the European Union, and Australia – which have traditionally used a fair dealing system of exceptions – have conducted studies to determine if it was viable to replace this system with the fair use system. Invariably the conclusion has been that the fair use system was not compatible with countries with a legal history involving the use of the fair dealing defence.[9]

In the Hargreaves Report it was observed that "importing fair use wholesale was unlikely to be legally feasible in Europe".[10] The general conclusion in the various studies conducted was that while it was necessary to extend the flexibility of the fair dealing provisions by creating new exceptions such as parody, satire, etc. a general fair use defence would be incompatible with the legal history of fair dealing countries. In this regard the fair use

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Impaired or Otherwise Print Disabled, 2013 (Marrakesh Agreement). Article 15(1) of the Rome Convention for the Protection of Performers, Producers and Broadcasting Organizations, 1961 (Rome Convention) refers to specific cases where limitations are permissible and provides in sub-article (2) that states may provide for the same kind of limitations applicable to copyright in literary and artistic works.

[9] The UK, from where we get our fair dealing doctrine, strongly debated the possibility of replacing fair dealing with fair use, both under the Gowers Review of 2006 and the Hargreaves Review of 2011. While acknowledging that the fair dealing defense as then applicable in the UK was low in flexibility, the Gowers Review rejected the idea of adopting a US-style fair use defense and recommended instead an increase in the flexibility provisions of the fair dealing defense to incorporate cases such as parody. *Gowers Review of Intellectual Property*, December 2006 at 6; 44; 61 et seq, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf (Accessed 14 July 2021). In its terms of reference, the Hargreaves Review was specifically asked to consider the benefits of introducing the fair use defense into UK copyright law. In this regard it was argued that introducing fair use in the UK would bring "massive legal uncertainty because of [fair use's] roots in American law; an American style proliferation of high-cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods". *Digital Opportunity – A Review of Intellectual Property and Growth*, An Independent Report by Professor Ian Hargreaves, May 2011 ("the Hargreaves Review") at 44 para 5.13, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf (Accessed 14 July 2021). Various reviews aimed at considering whether fair dealing should be replaced by fair use were conducted in Australia in 1996. In the end, the government concluded that "no significant interest supported fully adopting the Us approach", and also raised concerns about fair use's compliance with the three-step test. See https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-dp-79/4-the-case-for-fair-use-in-australia/reviews-that-have-considered-fair-use/ (Accessed 14 July 2021).

[10] *Hargreaves Report* 5.

defense has been criticized for "providing flexibility at the expense of certainty."[11] This American originating defence, is not compatible with our legal history (which is, in this regard, based on English law).

The importance of legal history in this regard was highlighted by Berger J in the *Moneyweb* judgment,[12] the first case concerned with the fair dealing defence in South Africa, where he observed:

> Both sides referred me to decisions and writings from several foreign jurisdictions on the meaning of the phrase *"fair dealing"*. I understand that foreign authorities are referred to for guidance only. *I also accept that I must be cautious in considering foreign law because its jurisdiction has its own particular history* and, in many cases, is bound or influenced by domestic statutory precepts. *I therefore I intend, for historical reasons, to focus on English authority.*[13]

An aggravating factor regarding the fair use provision introduced under section 12A in the CAB is the fact the words "such as" in the phrase "for purposes such as the following" were inserted by the previous Portfolio Committee at-the-last-minute, at the instigation of the proponents of the fair use exception, without affording stakeholders the opportunity to debate the matter. Apart from adding broad uses as exemplars under this new "such as" regime in what is supposed to be a general criterion standard – even broader than what is contemplated in the US fair use regime – the lack of consultation on the introduction of the "such as" regime poses a serious Constitutional issue.

***Other expansive exceptions***

Apart from the fair use exception in the proposed section 12A in the CAB, the President's letter to the Speaker that compelled the process of returning the Bills to Parliament after they were sent to the President for signature, makes reference to other new exceptions in the Bill that are problematic, namely those in sections 12B – 12D, 19B and 19C. The President contends that these exceptions may constitute an arbitrary deprivation of property; may violate the right of freedom of trade, occupation and profession; may be in conflict with the WIPO Internet treaties (the WCT and the WPPT) and may be in breach of the three-step test. We remain in agreement with the President in this regard.[14] A detailed submission was presented to the Portfolio Committee.

Generally, government's failure to conduct an economic impact assessment on the 'impact' upon rights-holders of adding these exceptions and whether they would align to the requirements of the three-step test seriously

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[11] Burrell R "Reining In Copyright Law: Is Fair Use the Answer?" 2001 I.P.Q. (4) 364 – 365.

[12] *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

[13] *Id* at para 103. Emphasis added.

[14] It is also important to note in this regard that this also applies in respect of performers' rights under the PPAB, in view of the proposed amendment to section 8 of the Performers Protection Act (PPA), in particular in clause 5(f) of the Bill which provides that a performance, an audiovisual fixation or sound recording of a performance or a reproduction of such may be used without the consent required by section 5, if it is for purposes which are regarded as exceptions in terms of the Copyright Act.

jeopardizes the interests of rights-holders. The expansive exceptions undermine the need to respect the rights of right holders and the integrity of copyright works, encouraging plagiarism and infringement of copyright works. It does not make sense why the South African Legislature, where creators of works and rights-holders are said to often die as paupers, should not at least have more protective provisions and certainty for allowed uses.

We wish to reiterate our submission made in previous calls on the Bills that these proposed expansive exceptions in the CAB seriously erode the copyright owner's economic market, amounting to the infringement of the right of freedom of trade, occupation and profession as asserted by the President.

We submit that the NCOP should reject sections 12B – 12D, 19B and 19C as proposed in the CAB and consider legislation to more effectively benefit authors, performers and all copyrights-holders, while creating a balanced regime for exceptions and limitations through the use of a revised, modern *fair dealing* exception. Specific recommendations against each of these sections are available in the annexed document.

**The exceptions in the Bill remain non-compliant with the international treaty provisions**

One other concern that the President raised in respect of the Bills is the international treaty implications of the Bills. In this regard, the President expressed his consternation as to whether the Bills have fully taken into account the provisions and requirements of the international treaties that South Africa has acceded to and those that she intends to accede to, including the WCT, the WPPT, and the Marrakesh Treaty. One needs to add the Beijing Treaty to this list with a view that it's non-mentioning is an oversight rather than intentional. This is because, in paragraph 1.2 of the Memorandum to the PPAB, it is indicated that the proposed amendments in this Bill are premised upon the WIPO treaties such as the Beijing Treaty and the WPPT. Indeed in reading the PPAB the attempt to incorporate provisions based on the Beijing Treaty can be detected.

We submit that the President was rightly concerned in raising his reservations regarding the alignment of the Bills with the relevant international treaties. It seems like the drafters of the Bills were either not versed in the provisions and requirements of the relevant treaties, or else they were only interested in "throwing in" certain provisions of those treaties, scattering them throughout the Bills, without fully understanding the rationale of those provisions and the impact of doing so. There are also instances of serious omissions that reflect the lack of understanding of the purport of those treaty provisions. This is also reflected in the arbitrariness that is often taken in the definition of terms, which often leads to the meaning intended in the international treaties being blurred or lost.

We recommend that a team of international copyright experts is assembled to ensure that the Bills comply with relevant international treaties in their general scheme.

***Definition of "accessible format copy"***

In respect of the CAB, we wish to single out one example in this regard. This example is deliberated upon in full in the advisory opinion of one of the four experts engaged by the previous Portfolio Committee to assist with technical aspects of the Bills, namely Adv. (now Dr.) J. Joel Baloyi, and relates to the definition of "accessible format copy" in the Bill. We advise the committee to consider Dr. Baloyi's comprehensive submission about this matter[15]. The essence of Dr. Baloyi's submission is that the definition of "accessible format copy" in the CAB is not aligned with that in the Marrakesh Treaty in that:

*(a)* It extends to more works than literary works, as contemplated in the Marrakesh Treaty; and
*(b)* It extends to more beneficiaries than those contemplated in the Marrakesh Treaty, namely to all disabled persons and not only print-disabled persons.

Dr. Baloyi implored the Portfolio Committee to ensure that the definition of "accessible format copy" is aligned to that provided for in the Marrakesh Treaty in line with the intention of that treaty and that a definition of "beneficiary" that aligns with that used in the Treaty be inserted. Dr. Baloyi cautions that, in line with the principle of national treatment, if South Africa introduces exceptions that go beyond what is required in international treaties, only South African rights-holders will suffer from this. Foreign rights-holders will not suffer as their rights cannot be curtailed more than required by international treaties. Furthermore, all users, including foreign users, will benefit from the expansive exceptions, while South African rights-holders will be the victims.

***Some issues from the Performers Protection Amendment Bill***

The PPAB also highlights several instances where there is no consistency with international treaty requirements. Some of those are as follows:

***(a)* The definition of "broadcast"**

The definition of broadcast in the PPAB is not in line with international treaties (e.g. the WPPT) because it refers to "transmission … *by wire* or wireless means". However, in international treaty law broadcasts always entail "wireless" transmission. This should thus be fixed.

[15] https://legalbrief.co.za/media/filestore/2018/10/Baloyi.pdf

***(b)*** **Definition of "communication to the public"**

The definition of "communication to the public" is faulty in the following sense:

- A performance only benefits from the definition of the performance that relates to an audio-visual fixation. It does not benefit from the definition if this relates to a sound recording. Instead "communication to the public" is defined in respect of a sound recording (instead of in respect of a performance). But this is remiss because the PPA is not concerned with sound recordings. Sound recordings are protected under the Copyright Act and a provision about communication to the public in respect of sound recordings is provided for in the CAB (clause 10 of the CAB). It is wrong to limit the scope of performance in this regard. It is understood that the amendments seek to introduce provisions relating to the Beijing Treaty on Audiovisual Performances of 2012. But this should not disregard the fact that the PPA is also concerned with performances in respect of sound recordings (and not about the protection of sound recordings *per se*).

Accordingly, we propose a revision of the definition of "communication to the public" in the following manner:

*"Communication to the public" —*

*i.* *in respect of the performance of an audiovisual work, means the transmission to the public by any medium, other than by broadcasting of an unfixed performance or of a performance fixed in an audiovisual fixation including making a performance fixed in an audiovisual fixation audible or visible, or audible and visible to the public; and*

ii. *in respect of the performance of a sound recording, means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance.'*

***(c)*** **Definition of "producer"**

The definition of "producer" should add "or the entity which" after the phrase "the person who", to align fully with the definition used in the WPPT and seeing that generally producers are corporate entities (record companies) rather than natural persons.

***(d)*** **A poorly understood regime for remuneration rights**

Throughout the PPAB there is a lumping of what would be exclusive rights (i.e. rights requiring the prior authorization of the rights-holder) and remuneration rights (i.e. rights only requiring that payment must be made for usage but which do not prohibit the usage itself). Currently in respect of performances, the "needle-time

rights" system contemplated in section 5(1)(b) of the PPA is an example of a remuneration rights system. The provisions in clauses 2, 3, and 4 (in particular the proposed section 3(4)(g) in clause 2; the proposed section 5(1)(a)(vi) in clause 4; the proposed revision of section 5(1)(b) in clause 4; and the proposed amendment to section 5(4)(a) in clause 4) all need to be revisited to make a clear distinction between exclusive rights and equitable remuneration rights.

The use of the phrase in those sections "against payment of royalties or equitable remuneration" is problematic in that it will not create certainty as to the system contemplated and will spawn disputes. It will not be clear at which state royalties, requiring prior authorization for usages based on exclusive rights, will be payable, and at which a system of equitable remuneration is contemplated. Both the Rome Convention (article 12), the WPPT (article 15), and the Beijing Treaty (Article 11(2)) make provision for a system of equitable remuneration in respect of fixed performances. However, the Beijing Treaty also provides for the possibility of the use of exclusive rights instead of a system of equitable remuneration (right of authorization v right to equitable remuneration).

The legislation cannot create a "royalties or equitable remuneration" regime, as it will create uncertainty. In respect of performances embodied in sound recordings, it is clear from the provisions of the Rome Convention and the WPPT that the system has to be that of equitable remuneration. In respect of performances embodied in audio-visual works, it can either be a royalties system or an equitable remuneration system.

The Act must be clear as to which system will apply and not use an "either-or" provision, to prevent potential disputes. It is critical to do this to also create certainty as to the continuation of the current needle-time rights system.

***A further note on the three-step test***

A great deal has been said about the issues arising from the expansive exceptions regime that the Bills introduced. At the core of this is the need to ensure that the imposition of exceptions and limitations adhere to the three-step test. Whilst international treaty law does not prohibit the introduction of exceptions and limitations to copyright, they require that this must be done in adherence to the three-step test.

An assertion that the proposed exceptions and limitations satisfy the requirements of the three-step test cannot be made easily. It must be demonstrated that, in respect of *each* of the exceptions being introduced, such exception *(i)* is a limited special case; *(ii*) does not conflict with the normal use of the work by the rights-holder, and *(iii)* would not prejudice the legitimate expectations of the rights-holder.

We accordingly challenge the NCOP and Provincial Legislatures to insist on a proper SEAIS in respect of each of the proposed exceptions and limitations, involving and engaging the affected rights-holders, to ensure that

proposed exceptions and limitations satisfy the requirements of the three-step test before the Bills are finalized and signed into law.

**2. Technology Protection Measures are still not Treaty compliant**

As South African copyright owners trade their works in the fast-paced online and digital platforms, effective legal protection measures against unlawful circumvention of Technological Protection Measures or 'TPMs' is crucial against hacking and/or piracy of their content.

The CCSA submits that, despite the amended and improved wording proposed in the definition of "Technological Protection Measures" and "Technological Protection Measures Circumvention Device or Service", these are still not enough to render the Bill Treaty compliant, viewed within the prism of the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT) and the Beijing Treaty.

The CCSA submits that the NCOP should reject all the provisions relating to TPM and reassess them to provide adequate and effective legal protections against the act of circumvention of TPM devices as required in the relevant treaties. As examples, some of the exemption clauses that are proposed to be amended which were not made subject to consultation are Sections 28O, 28P, and 28S. These clauses are highly problematic as they encourage parties who are interested to manufacture and deploy circumvention tactics and devices to base their operations in South Africa.

An introduction of a new enforcement remedy that would assist rights holders and protect consumers in SA against online infringements, piracy, and counterfeiting activities is required.

We urge the NCOP and Provincial Legislatures to review this status and to ensure that the drafters of the legislation introduce meaningful enforcement remedies in the online environment to align with international treaties.

**CONCLUSION AND RECOMMENDATION**

It is important to emphasize the observation that the Constitutional Court has held that legislation may be constitutionally invalid if *(i)* its provisions conflict with a right in the Bill of Rights and (*ii*) it was adopted in a manner that is inconsistent with the provisions of the Constitution.[16] We contend that both conditions exist in respect of the current Bills. In this regard, reference is made to the Constitutional Court in the *Liqour Bill* judgment, where Cameron J asserted that, despite a ruling on the constitutionality of a Bill having been made by

[16] *Doctors for Life International v The Speaker of the National Assembly et al* [2006] ZACC 11 at para 16.

the court based on the President's reservations, this does not rule out the consideration of "supervening constitutional challenges" that arise after the Bill has been enacted.[17]

We have sought to highlight that without a socio-economic impact assessment that deep dives into the proposed provisions in the Bill; the lack of a substantive evaluation of the exceptions, as well as provisions that militate against the provisions of international treaties; and several other defects indicate the extent to which the Bills are incurable at this stage. The insightful message is conveyed by our members (who are at the coalface of these industries) to Provincial Legislatures and the NCOP that the Bills, and in particular the CAB, will, in their current form, have a negative effect on investment into the creative and cultural industries in the provincial and national economies.

This submission to the Provincial Legislatures and the NCOP is the CCSA's relentless bid in averting constitutional tension, disinvestment, and job losses in many diverse sectors and industries where our members operate, including our international counterparts.

We, therefore, urge you to **reject** the proposed Bills which will not advance the interests of South African creatives and copyright holders, and that you **allow the Bills to lapse** and embark on a procedural legislative process inclusive of a **socio-economic impact assessment system** and local and international **copyright expert and industry stakeholder consultations**.

We again offer our continued support and are available to be heard at public hearings and/or workshops.

-End-

[17] *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* [1999] ZACC 15 at para 19.