7th July 2017

Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Attention Mr A Hermans
Parliament of the Republic of South Africa
Cape Town

By email to: ahermans@parliament.gov.za

COPYRIGHT AMENDMENT BILL [B13 – 2017]
WRITTEN SUBMISSION
by the
International Federation of Film Producers Associations [FIAPF]

The International Federation of Film Producers Associations [FIAPF] is a non-profit organisation representing producers of audiovisual content worldwide. FIAPF is grateful for this opportunity to respond to the consultation of the Portfolio Committee for Trade and Industry (**The Committee**) on the Copyright Amendment Bill. We consider the Bill to be of the utmost importance in determining the future growth and success of South Africa's dynamic audiovisual industries and the country's international trade in this cutting-edge sector, which makes a key contribution to GDP growth and cultural diversity.

FIAPF has had over eight decades of experience addressing issues concerning the role of copyright law in encouraging creativity and innovation in our sector around the world. We are a registered NGO with the World Intellectual Property Organisation [WIPO] and participate actively in other UN agencies and forums where issues affecting the sustainability of this creative sector are debated and where potential new international norms are being considered. FIAPF also participates in discussions concerning national legislation and regulation, where our member organisations are present, and where changes to copyright law may have a bearing on international trade and creative/business cooperation in film and TV production. Further information on FIAPF's membership, governance and advocacy activities are available from our website: www.fiapf.org

In this submission, we address some key matters arising from the Copyright Amendment Bill. Where appropriate, our observations and suggestions also cover aspects of the Performers Protection Amendment Bill (**PPAB**), where its dispositions connect with clauses in the present Bill. We understand PPAD is scheduled to be laid before The Committee once scrutiny of the present Bill will have been completed, or shortly thereafter and we look forward to also contributing our perspectives on this important companion piece of legislation.

We first provide a brief summary of our submissions and subsequently set out our main submissions in more detail. We offer these comments to describe the kind of legal framework we believe best incentivises the production and distribution of audio-visual content (and all the benefits that go with that including employment, exports and consumer choice), in the belief that a well-regulated South African audio-visual sector can continue to make a substantial contribution to the country's GDP and export earnings, and present its citizens with a rich and culturally-diverse output of original works. We believe that an effective legal framework is one which includes recognition of exclusive rights; limited, well-defined exceptions to those rights; remuneration for use of the rights based on arm's length negotiation; and effective enforcement to address the infringement of copyright. We also believe that the review of this Copyright Act presents an opportunity for South Africa to ratify international copyright treaties such as WIPO's World Copyright Treaty and to implement those fully in your national law, with the attendant benefits from modernising the copyright framework, and ensuring it is fit for purpose in the digital age. In this regard, we welcome the statement in paras 1.1. and 1.2. of the Memorandum on the Objects of the CAB (P35 of the Draft Bill), which emphasize the need to update South Africa's copyright law for the digital age and mention the Bill's strategic alignment with the WIPO's Internet Treaties. We hope our comments in the present paper will help Parliament ensure such a vital alignment is achieved in the minutiae of the future Act.

Copyright promotes a robust, competitive environment that constantly generates new sources of original content for audiences to enjoy. That, in turn, supports investments in further content as well as in the many related applications, devices, and other technologies viewers rely on to access and consume this content with increasing ease and flexibility. The primary goal of policymakers should be to preserve or expand the incentives in copyright law that have yielded this unprecedented success for consumers.

FIAPF hereby formally requests the opportunity to also address The Committee at the forthcoming oral hearings on this matter, scheduled for August 1s to 3rd. We believe our organisation will be able to make a helpful contribution to this important process, especially with regard to the impact of this Bill on South Africa's trade with - and inward investment from – other countries in the world.

Summary

The FIAPF is supportive of the introduction of a communication to the public right in South Africa, although we are concerned about omission of the exclusive right of distribution as required by the WCT. Moreover, we are troubled by a number of proposed provisions, including, in particular, the following:

- A new unwaivable right to royalties, which not only qualifies the exclusive rights of the copyright owner by the way that it has been drafted as a proviso to the list of exclusive rights, but undermines contractual arrangements for remuneration including in particular collectively bargained agreements which already include the payment of residuals for legal exploitations of works.

- Similar dispositions in the draft Performers Protection Amendment Bill, which makes the transfer of rights of audio-visual performers subject to the payment of royalties, thus pre-empting other potential forms of remuneration which may be more adapted to certain forms of commercial exploitation of audio-visual works.
- A limitation of assignments of copyright to a period of 25 years, jeopardising the market value of film rights in South Africa.
- A draconian provision providing for ownership of works by the State and local organisations where they have made, funded, or directed the creation of a work. This provision will significantly jeopardise inward investment in South Africa and international co-productions, contrary to South Africa's stated policy of attracting investment.
- A new disposition meant to extinguish the commissioning clause that does not go far enough in supporting the ability of South African audio-visual producers to retain copyright and attendant economic rights over and above the specific rights licensed to a national broadcaster as part of a commission.
- The introduction of numerous, vague new exceptions to copyright, including ones for fair use and temporary copying, generating considerable uncertainty and likely to result in time-consuming and expensive litigation to clarify the law.
- Provisions going to undermining the legal protection of technological measures (**TPMs**) and South Africa's current regime for protection of the same; this protection is key to safe and sustainable distribution of content online.
- A blanket ban invalidating contractual terms that override acts permitted by the Copyright Act, once amended. This approach will not only undermine contractual freedom but also generate uncertainty in any transaction relating to copyright, thus creating the conditions for disputes to multiply, to the lasting detriment of both users and rights holders.
- Considerable additional powers granted to the DTI Minister to issue implementing regulations concerning certain sections of the Bill – these are to include, in particular, prescribing royalty rates and tariffs for various forms of use. We are concerned that this will encourage regulatory overreach and that it may undermine the South African audio-visual sector's own efforts to develop a mature and effective infrastructure for industrial relations and collective bargaining.
- The absence of an explicit commitment to adoption of international copyright treaties, such as the WIPO Copyright Treaty.

Overall, we are worried that the Bill falls short in a number of respects (as illustrated below). As a consequence, some of the provisions are likely to pose a real obstacle for South African productions and South Africa-based film and production companies as well as for talent and hence to attract investment from outside of South Africa. This would obviously not help to build up a bigger share of the world film markets and funding in South Africa.

Communication to the Public[1]

FIAPF welcomes and is strongly supportive of the addition of a communication to the public right for works including cinematograph films. This would serve to bring South Africa's copyright framework in

[1] Clauses 4-7

line with the WIPO Copyright Treaty (**WCT**) and the WIPO Performances and Phonograms Treaty (**WPPT**). We are pleased to see that the drafting for this new exclusive right put forward in 2015 has now been much improved. We note that it could benefit from further refinement.

As a minor point, we note that section 27 of the Copyright Act needs to be consequentially amended to reflect the addition of the new exclusive right.

Hand-in-hand with updating the Act with the communication to the public right, effective remedies to combat online infringement are also essential.

Distribution

We note with regret that South Africa does not protect an exclusive right of distribution and that the DTI has not included one in the Bill. Nevertheless, curiously, the Bill does propose to introduce a provision for the exhaustion of the distribution right.[2] Furthermore, the Bill would remove the secondary infringements of selling and offer for sale infringing articles, thus making the pursuit of unauthorised distribution more difficult. We assume, therefore, that the failure to introduce a distribution right must be an oversight and urge The Committee to correct that accordingly.[3]

FIAPF notes that both the WCT[4] and the WPPT[5] require the introduction of an exclusive right of distribution. From a practical perspective, the ability to pursue parallel imports is important to ensure the protection of South African creators and rightholders from having to compete with cheaper goods unauthorised for distribution in the South African territory. That is in turn vital to incentivising investment in local production to satisfy consumer demand for local content.

Right to Royalties[6]

Two new rather confusing concepts are proposed in the Bill: (1) the right of the user, performer, owner, producer or author of a film[7] to *"claim an equal portion of the royalty payable for use of the copyright film or fixation."*, notwithstanding prior transfer of the copyright in the film; and (2) making the failure of such payment of royalty an infringement of copyright in the work in question.

FIAPF is concerned about the introduction of these new concepts and urges The Committee to reconsider this serious undermining of contractual freedom. Many producers have contractual remuneration obligations to authors, performers and other creative participants in the audio-visual works they produce, including by means of so-called collective bargaining agreement which include for the ongoing payment of residuals for a range of legal exploitations. To impose an unclear mandated remuneration could duplicate those payment obligations and undermine the producer's ability to recoup investment costs for the benefit of the creative participants. Such a requirement

[2] Clause 12B
[3] Amendments need to be made to incorporate this right in Sections 6, 7, 8, 9, 11A and 11B of the Act.
[4] Article 6
[5] Articles 8 and 12
[6] Clauses 4(c), 5(c), 6, 8, 24(a)
[7] Similar provisions in respect of other types of works are also introduced.

would thus become a disincentive to local and other film producers. It would also be a disincentive to local film and TV content distributors, as the new financial liabilities may be exercisable against them.

In addition, we note that the provision as drafted may be unworkable in practice. Two examples suffice to illustrate this: (1) it is unclear who owes the payment of a portion of a royalty and whether it applies at all stages of the value chain, if so, this would appear to create an absolutely nightmarish number of obligations to pay royalties; and (2) the use of a number of undefined terms in the provisions, such as "user" and "producer".

We note that the Performers' Protection Amendment Bill, which is scheduled to be laid before Parliament sequentially after the present Bill, also contains dispositions that will – as drafted – severely undermine the contractual freedom that professional stakeholders need in order to build a sustainable audio-visual industry in South Africa and to attract foreign direct investment in the form of international co-productions and the use of South Africa's locations and studios by foreign productions. PPAB makes the transfer of an audio-visual performers' rights to the producer for the fixation of his/her performance - a disposition that is indispensible to permit the exploitation of the work – conditional on the performer receiving royalties for any use of the performance.

As with the corresponding clauses in the present Bill, we believe these provisions are overly prescriptive as to the forms and methods of remuneration of the rights holders concerned and fail to take into account the delicate financial ecosystem on which every successful national audio-visual production sector depends. We are concerned that – taken together – they will curtail the ability of the industry itself to develop a workable and flexible collective bargaining infrastructure, based on an intimate understanding of the marketplace for film and TV content and of the costs and risk factors involved in content production.

Assignments[8]

The Bill limits assignments of copyright to 25 years without a clearly demonstrated need to do so. This provision may jeopardise the market value of South African film rights and thus the financing of film through distribution arrangements. For example, in the case of cinematograph films, producers have to acquire a great multitude of rights at a time when it is uncertain if a project will be profitable – where the only certainty is a considerable cost – so, an absolute time bar is too restrictive. In addition, the provision appears to be silent on any retroactive effect on existing assignments and exclusive licences. The resultant litigation and legal uncertainty could jeopardise investments well under way prior to the enactment of an eventual Bill. In our experience the creators contributing to a cinematograph film are well protected by existing legislation.

[8] Clause 21

Automatic Ownership of Copyright by the State and Local Organisations[9]

We read with considerable concern that the Bill proposes the introduction of a provision stipulating that copyright in a work is owned by the State or *"local organisations"* where that work is *" made by, funded by or under the direction or control of" the State/local organisations"*, not only because of its economic and legal impact, but because it in effect undoes the proposed scrapping of the "commissioning" provision in the first part of section 21(1)(c) of the Act.

This provision will seriously jeopardize public-private partnerships, international co-productions and inward investment into South Africa. These provisions could make it much harder, if not impossible in some cases, to secure finance from world-wide film distribution deals for productions that are partly state-funded and emanate from South Africa. They will become a formidable obstacle for South African productions and South Africa-based film and production companies as well as talent to attract a bigger share of the world film markets and funding from outside of South Africa. Over the past decade, South African Provinces have invested substantially in state of the art studio infrastructures designed to boost local production and to create a competitive environment for international productions to shoot in the country. This provision would act as a disincentive for these productions to locate in South Africa, and the attendant loss of business opportunities would undermine return on investment for these infrastructures, as well as local employment and GDP growth.

This provision runs counter to the policies pursued for some years by South Africa, which has been trying to attract film makers to South Africa through various incentive schemes.

In addition, in the case of the State, the provision amounts to expropriation of property and we query whether it is compatible with the South African Constitution.

We urge the Committee to reconsider these very damaging provisions.

Commissioning Clause

We welcome the attempt made in the Bill to do away with article 21(1)(c), the so-called “Commissioning Clause”, which has been widely considered obsolete and an impediment to a more buoyant trade in content rights inside South Africa. We observe that mature film and TV national industries have often developed a regulatory structure that encourages healthy competition in the marketplace for secondary and ancillary rights in audio-visual content. By leaving the ownership of copyright to the private contract, the proposed provision does not go far enough. Considering the very asymmetric bargaining power between South Africa’s national broadcasters and its independent production sector, the provision will disproportionately favour the vesting of copyright and economic rights thereof in these commissioning broadcasters. In order to encourage the blossoming of a competitive secondary market for such rights, it would be far preferable to establish a presumption of ownership of the copyright and all rights not included in the initial broadcast licence in favour of the producer/author of the commissioned works.

[9] Clauses 3 and 21

Exceptions to Copyright

We are concerned about the numerous vague and uncertain new exceptions that are being considered for inclusion in the Copyright Act. The Bill introduces several layers of exceptions, styled as fair use, fair dealing and self-standing. The sheer number and breadth of the exceptions will render South Africa a less attractive destination for film-making and distribution.

The Bill also proposes to render void contractual terms contrary to exceptions. This provision will remove legal certainty from the South African film environment which is much needed, as all relations essentially rely on legal certainty and legally acquired rights function as securities that guarantee the financing of film production.

We consider two particularly troubling exceptions below.

Fair Use[10]

FIAPF believes that considerable uncertainty will be generated by the introduction of a US-style fair use exception to exclusive rights, as is proposed in the Bill. Fair use is not a doctrine which lends itself to legal certainty, as demonstrated by recent case law in the US. While US rightholders, including audio-visual producers, may not always welcome particular decisions by the US courts, they tend to be supportive of the 'fair use' doctrine in the United States, underpinned as it is by nearly two centuries of case law.

However, transplanting of the 'fair use' doctrine into the South African system, which lacks this case law and other elements of the US legal system, is not a straightforward proposition. It will give rise to a new defence for potential defendants in copyright infringement cases and as such an increase in costly and time consuming litigation, which most stakeholders, both users and rights holders can ill afford. What constitutes fair use will have to be decided by the Courts. Indeed, other common law jurisdictions, like the Canada, the UK and Ireland have eschewed incorporating fair use into their systems (following consultation and expert reports such as the UK Hargreaves Report). In these countries, it was recognised that other elements of US copyright law (and indeed the legal system) would also have to be taken on board. These countries were not prepared to do so. The absence of case law would have made the adjustment to the introduction of fair use highly onerous and would have dampened local creative enterprise whilst failing to satisfy users.

In South Africa, the extension of the "fair dealing" exception to a much broader "fair use" one will likely result in protracted and expensive litigation, which is not in anyone's interest. "Fair use" is a very vague concept when on the statute books; it requires decades of litigation to arrive at case law defining its scope. Specific, tailored and narrow exceptions are infinitely preferable given the context.

[10] Clause 10

Personal Copy Exception[11]

We are troubled by the proposed introduction of an overly broad exception for the purpose of making private/personal copies.

Firstly, we note that while an exception to the reproduction right for the purpose of making a personal copy of a work may have made sense in the analogue world, there is no need for such an exception in today's digital world, given that the online market for content has evolved to the point where there is no compelling need to impose exceptions for the purpose back-up copying or format-shifting.[12] Content owners have enabled a range of platforms to provide users with multiple copies of purchased content, and in digital formats that are compatible with most consumer devices while protecting the content against unauthorised further distribution, which is obviously a key consideration for all stakeholders. Platforms also stream content to users on-demand, thereby negating the need for storage of content in the cloud which sometimes raises security issues. Thus, a user should have little need to make his or her own copy. Given the potential for piracy and abuse associated with any backup copying and format shifting exceptions in this context, there is also a compelling reason for not introducing such an exception.

Secondly, if the Committee is minded to introduce such an exception, we are of the view that the exception must be significantly tightened up, to ensure rightholder protection as well as compliance with international copyright norms.

In our view, an exception for the purpose of making personal copies must be limited by the following safeguards:

- It must be clearly stipulated that copies may only be made from lawfully obtained copies/sources.
- The scope of the exception must be limited to the making of copies by private individuals for their own personal use and the number of copies permitted to be made must be limited to what is reasonable for the purposes of personal use.
- The beneficiaries of the exception should clearly exclude legal persons.
- The legal protection of TPMs must not be undermined

In the event a private copy exception is to be enacted that is appropriately limited in the manner suggested above, international copyright norms may still require compensation to address the prejudice to rightholders. In many countries, the law addresses this prejudice through a private copy levy distributed to rightholders. In our view, legally mandated private copy exceptions and accompanying levies are too rigid for the fast-paced technological changes associated with the digital environment; innovations that benefit consumers, rightsholders and service providers are most likely to be achieved through direct licensing approaches.

[11] Clause 11

[12] This point is also equally applicable to part of the proposed new temporary reproduction/adaptation exception.

Temporary Reproduction and Adaptation[13]

The Bill contains an exception whose wording echoes of the exception set out in the EU Copyright Directive for temporary copies, but which, unfortunately, is worded so as to open it up for potentially much broader construction.

In particular, we are troubled by the language permitting "any person" to make such copies coupled with the apparent permission to reformat and adapt use for use on different devices, rendering this less of an exception for temporary copies and more of a comprehensive format-shifting exception.

We are concerned about a number of scenarios including that the broad language could be misconstrued by internet intermediaries to avoid their responsibility in addressing copyright infringements.

In fact, the wording of this exception is serious cause for concern. The language is vague and confusing. The potentially broad nature of the concept of adaptation raises questions as to whether the exception could be considered as compliant with the three-step test. The three-step test permits exceptions only in certain special cases, provided that it does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. What is the special case to be dealt with here?

Override of Contracts/Contractual Terms[14]

Exceptions

An overly broad and very problematic contractual override is introduced providing that a contractual term which purports to prevent or restrict the doing of any act which by virtue of the CA would not infringe copyright or which purport to renounce a right or protection afforded by the CA, such term shall be unenforceable.

This breadth and generality of the provision is unprecedented and will significantly impact on legitimate licensing solutions. FIAPF respectfully requests that the Committee rethink the introduction of this provision as a priority. In order to incentivise film-making and normal exploitation, it is important to recognise the primacy of licensing solutions that can satisfy users whilst also maintaining incentives for film makers to take the risks involved in producing new original content.

This new contractual override unfortunately creates considerable legal uncertainty, particularly at a time when vague and uncertain new exceptions (some of which are considered above) are proposed. Litigation is expensive in South Africa and the threat of having contractual provisions declared void or unenforceable - in spite of a contractual agreement to the contrary– would wreak legal havoc and

[13] Clause 12
[14] Clauses 22, 32-32

place the South African film industry - and South Africa as a location for film making - at a disadvantage.

Licenses

A further contractual override in licenses is introduced in the Bill, providing for an implied term to allow all licensees to sub-license all rights they have under their licences from copyright owners, irrespective of the terms of the head licence. This undermines copyright owners' freedom of contract significantly and results in the authorisation of their rights without their consent to carry out copyright-restricted acts in the works that they own as soon as they grant a licence to South African licensees. This is a highly problematic provision and one which will cause international licensors to rethink licensing in the South African territory, to the detriment of South African consumers and South Africa's film and TV distribution sector.

Technological Measures[15]

Technological measures permit wider and more convenient access to content – they are the crucial enabling legal disposition to opening up digital distribution. These technologies permit rightholders to cater to the demands and tastes of consumers in more refined ways, with more flexible pricing options as well as rental and sales models.

We are therefore concerned about new section 28P (and the related definitions in Section 1h) which ostensibly permits the use of devices to circumvent TPMs and the sale of such devices for non-infringing purposes. These provisions would completely undermine South Africa's current protection of TPMs, as set out in the Electronic Communications and Transactions Act 200, and which by and large are consistent, in our view, with the requirements of the WCT. TPMs do not recognise a user's intentions and – without a more controlled legal mechanism - it will be impossible in practice to determine whether or not an act of circumvention will have been motivated by the desire to effect the lawful enjoyment of an exception to copyright rather than simply infringe. Hence, the article as drafted risks making content less secure on conditional access systems and broadband networks, thus undermining a mode of distribution of audio-visual content by affecting a commercial exploitation of copyright works which is rapidly becoming one of the most strategic forms of distribution for audio-visual content in South Africa and the rest of the Continent.

The provisions contained in the Bill permitting circumvention and sale of circumvention devices are not compatible with the WCT. On the contrary, what is required, are effective remedies for circumvention of TPMs, including both civil and criminal remedies/sanctions.

Powers granted the Minister for DTI to issue implementing Regulations

Whilst we understand the need for the DTI Minister to issue implementing regulations concerning certain sections of the Bill, we are concerned that dispositions in this regard in the current draft will encourage regulatory overreach. We refer, in particular to the power to issue Regulations prescribing

[15] Clauses 27 and 32

"compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act" and *"royalty rates and tariffs for various forms of use".*

We believe the capacity to decide on standard contractual terms and modes and rates of remuneration is best left to the stakeholders in the audio-visual sector to determine together through structured negotiations based on the need for balance that takes into account the fragile economic model for audio-visual content production. We are concerned that an approach based on prescriptive regulation may undermine the South African audio-visual sector's own efforts to develop a mature and effective infrastructure for industrial relations and collective bargaining.

We urge this Committee to consider these factors and design a more flexible approach whereby the DTI would act as informal arbiter and provide support for the development of bespoke industrial relations' systems in the national audio-visual industries, able to negotiate standard agreements based on a realistic appraisal of the marketplace for rights in audio-visual works and the investments necessary to finance and distribute original content.

Introduction of a no-fault injunction provision into South African law

Having a robust legal framework to protect creativity is critical to the constant rise of South Africa as a premier location for film-making and for the continued development of legal movie and TV platforms. While the continued expansion of broadband provides significant opportunities for the South African filmmaking community, it also raises opportunities for those who seek to supply and obtain unauthorized access to content without any remuneration to creators. A balanced approach to address the problem of massive copyright infringement on the Internet which involves the shared responsibility of all players is necessary. FIAPF notes that para 2.1. of the Memorandum on the Objects of the CAB states, amongst other, that "The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement[..]". We agree with this important objective and believe such an approach should be general and flexible enough so that it can adapt to the great speed that digital and Internet technologies change and evolve. Therefore, we would like South Africa to consider adopting technology-neutral "no fault" enforcement legislation that would enable intermediaries to take action against online infringement.

In this regard, we suggest that South Africa considers the positive impact that, in particular, Article 8.3 of the EU Copyright Directive (2001/29/EC) has had on the ability to successfully combat content theft in the EU, notably through site blocking. This submission contains an Annex that describes this European framework that has helped fundamentally to protect Copyright and hence the creative industries and creativity while respecting other fundamental rights, such as freedom of expression.

Request for participation in oral hearings [August 1st-3rd]

FIAPF respectfully requests the opportunity to be heard before The Committee during the formal oral hearings scheduled to take place in Parliament on August 1st to 3rd. We thank The Committee in advance for its response.

[END]