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DG Trade Draft Letter

To: Art. 4(1)(b) (Economic advisor)

To: Art. 4(1)(b) (Legal advisor)

We are writing to add the voice of the Department of Trade of the European Commission to those who have raised concerns over trade related implications of the two bills[1] currently before the Honourable President Ramaphosa. We share their concern that the two bills risk harming European investors in South Africa.

Innovation is a key focus for Europe. An efficient system of intellectual property rights ranks among the most important element to foster innovation and growth, given IP's capacity to encourage creativity throughout the economy. In Europe alone, a study conducted by the European Union Intellectual Property Office (EUIPO) and the European Patent Office (EPO) quantified the contribution made by IPR-intensive industries and found that it accounted for 38.1% of jobs - both directly and indirectly dependent on IPR industries – in the EU during 2011-2013 and generated more than 42% of the total economic activity (GDP) in the EU, worth €5.7 trillion.

President Ramaphosa has set a commendable goal: to attract US$100 billion in new foreign direct investment to the South African economy over the next five years and we firmly believe the European market can contribute to help reach that goal. However, an efficient, well-designed and balanced intellectual property system is a key lever to promote foreign direct investment. Intellectual Property Rights is one of the key principal means through which companies, creators and inventors generate returns on their investment.

The proposed Copyright Amendment and Performers' Protection Amendment Bills pose cause for great concern. They risk causing economic harm to EU interest and deterring EU investment in South Africa.

For example:

In 2017, the National Film and Video Foundation released its report on the Economic Impact of the South African Film Industry, which report was commissioned to determine the economic contribution of the South African film industry. The study found that, during the 2016/2017 financial year, the film industry in South Africa had a direct impact of R4.4 billion on economic production. In total, the operations of the film industry in South Africa raised the level of production by approximately R12.2 Billion. European producers are big contributors to this figure. The National Film and Video Foundation Co-Productions Report of 2014 found that there were more than 120 co-productions between European and South African filmmakers, which translated into at least $858 million in co-production funds. At the time, South Africa had co-production treaties with 5 European markets – United Kingdom, France, Ireland, Italy and Germany.

European investment in the film sector in South Africa is at risk because of the proposed bills. The interference with contractual freedom and ministerial intervention in negotiations and outcomes

[1] The Copyright Amendment Bill and the Performers' Protection Amendment Bill

creates great uncertainty on whether investments will be recouped, which serves as the main anecdote for investors' anxiety and deterrence.

Record companies are also large investors in artists & repertoire (A&R), investing a third of their revenues back into A&R and marketing. Most record company investments are not recouped because only the minority of new artists "break through", but these continued investments are indispensable to develop each new generation of artists. The positive signs of growth in the South African music industry are now at risk as a result of the proposed bills, and particularly the 25-year limit on assignments[2], which would reduce record company revenues, artists' incomes, and investments in South African artists.

The International Publishers Association and its member Publishers Association of South Africa (PASA) have also been opposing the copyright bill as it establishes over-broad exceptions & limitations (including fair use), without remuneration or statutory damages, which may cause important impacts on parallel imports. As a result, the bill will be detrimental to foreign and national investments in local publishing, as it will harm licensing and sales of published works. According to this PwC Impact Assessment, the bill's approach to having both 'fair dealing exceptions' and 'fair use', there will be an average decline in sales of 33% which implies a decrease in sales revenues of approximately R2.1 billion. The study predicts that this will translate in a decline in employment of 30%, equating to 1250 full-time jobs.

Different provisions of the bill negatively affect the different stakeholders in various ways, whish we do not believe was the intention of the legislator. In addition, the bills will not result in acceding to the important international treaties which Cabinet recommended South Africa become party to – WCT, WPPT and the Beijing Treaty.

For the above reason, we strongly urge that these concerns be considered carefully and for the bills not to be signed into law. We look forward to working together to ensure that both South African and European interests are safeguarded, while adapting the South African copyright law and simultaneously acceding to important International Treaties.

[2] For example, the proposed automatic reversion of performers' rights 25 years after their assignment would mean that the affected sound recordings would cease to generate revenues for producers, performers, and songwriters alike because the rights in the sound recording would become (typically irreconcilably) fragmented. This would mean that a record company could no longer, for example, license a digital streaming service to make the affected recordings available. When sound recordings cannot be licensed for use by third parties they cannot generate revenues, which has a direct negative impact upon the investments that can be made in South African (and other) artists. This is not a hypothetical issue. In Indonesia, a similar reversion clause has resulted in large catalogues of recorded music becoming unusable in practice and unavailable on licensed digital music services as a result. Experience also shows that fair use has been used repeatedly as a shield for the unauthorised use of copyright protected content on digital services. The recorded music industry in South Africa is a digital industry, with 50 3% of revenues coming from digital uses of recordings. Fair use would introduce uncertainty into the South African legal framework, providing opportunities for digital services to claim that they do not need to pay for music. This are just two examples of the direct negative impact that the bills will have upon all members of the South African music community, and upon the ability for the music industry in South Africa to grow.