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MPA represents major international producers and distributors of high-quality film and television. We welcome South Africa's ambition to modernize its copyright (CAB) and performers' protection laws (PPAB) and, in particular, to bring these laws into line with the WIPO Internet and Beijing treaties. A well-functioning copyright system would be a key driver for investment and growth in the creative sector, bringing more 4th Industrial Revolution jobs to South Africa. Regrettably, however, the proposals as currently drafted will reduce the incentives for investment in the South African creative industries - to the detriment of South Africa's creative sector and the wider economy.

There is a simple answer to this situation – to suspend the progress of the Bills to allow for them to be redrafted by a qualified team of experts, classified accurately (as a Section 76 bill) and subjected to the proper impact assessment process (including treaty compliance) before being considered again formally for signature and implementation. We believe it is possible for these bills to be drafted in a fashion that they achieve the below, without harming the creative sector:

- Protect individual artists, creators and companies as well as the business of the sectors;
- Open the door to reliable foreign direct investment that will encourage also the continued development of local content, creators and artists as well as the wider South African creative economy; and
- Deliver compliance with international treaties and best practices that have proved, already – and in multiple territories – that they help to build and support formidable creative sectors that deliver sustainable 4th Industrial Revolution jobs, vibrant local creative sectors and significant revenues to local/provincial and national economies (domestically and via increases in exports).

What's at Stake

According to a report commissioned by South Africa's National Film and Video Foundation, from 2016 – 2017 the South African film market has contributed R5.4 billion to the country's GDP and represents a total market size of R1 255 560 830. Our members have invested in local production and global distribution of such major feature films as "Safe House", "District 9", "The Avengers", "Tomb Raider", "The Dark Tower", "The Maze Runner", "Blood Diamond", "Mad Max", "Invictus", "Blended", "Mandela: Long Walk to Freedom" and the television series "Black Sails", to name but a few. We believe bringing South African Copyright and Performers' Protection bills in line with the WIPO Internet and Beijing treaties - as well as with internationally recognized best practices – would help foster the creative and commercial success of South African audiovisual works and the people and businesses who make them possible.

We support the aim of the Copyright Amendment Bill and the Performers' Protection Amendment Bill to ensure the fair payment of South African creators for their artistic endeavors – this already being of central importance to all of the creative and intellectual property-intensive sectors in most areas of the world.

We offer this position in the context of President Ramaphosa's quest for significant levels of foreign direct investment over the next few years. – He has urged that the jobs created and the revenues contributed

help to deliver the 4th Industrial Revolution landscape and business frameworks that are critical to South Africa's future prosperity. The President's comments at Davos show that he embraces the potential of the creative industry as a key component in that prosperity. Getting there will require a sound foundation for the country's own artists, creators and rightholders (and their families and beneficiaries, after their death) to make and realize recognizable benefit.

Why the Current Proposals Fall Short

As drafted, the proposals will weaken copyright in South Africa. That will make it less attractive for both local and international producers to invest in local production and global distribution of high-end films and TV series. They will also put South African creators, performers and innovators at a disadvantage when compared to their counterparts in other places where the regulatory frameworks protect individual artists, creators and companies as well as the business of the sectors.

The Bills are not compatible with the WIPO internet treaties to which South Africa intends to accede. [REDACTED] reportedly raised many treaty violation concerns with the Technical Panel of Experts. One core concern is that many of the provisions in the Copyright Amendment Bill simply do not implement the minimum standard of protection required by treaty obligations. We urge that the Government make the necessary changes now to comply with the treaties. While the draft language is being reviewed and revised, we would encourage using this opportunity to address also the plethora of other concerns about the two Bills.

We are member of and support the concerns expressed by The International Federation of Film Producers Associations (FIAPF) on various previous formal occasions and have shared them with the Committee Chairs (letter attached) and with appropriate EU and US authorities. We mention these actions to confirm that we have engaged in good faith, albeit unsuccessfully, throughout the process.

Without going into details, we want to highlight the following particularly urgent concerns:

- **Severe interference with contractual freedom** (Sections 8A(5)(b) and 39B CAB and Section 8D PPAB): The rule that key content of contracts may be largely determined by a Minister will constrain authors and performers in negotiating their contracts. This leads to heightened investors' anxiety as producers will not have the freedom to construct contracts in accordance with the will of the concerned parties – and it also concerns South African artists, creators and innovators who cannot be certain that a Minister, however well intentioned, would have sufficient knowledge to prescribe key components of contracts.
- **Challenges to unification of rights** (Sections 5(3)(2); 22(a)(1); 22(b)(3), 23(c)(8) CAB): Films and other audio-visual content, like other creative content, require that the rights are unified in the producer. For example, for a feature film, the rights in the script, the costume design, the set design, the cinematography, etc. included in that film, are all unified in the producer. This unification of rights with the film producer is the only approach that has proved to provide legal and business certainty in the development, financing and production of a film project - as well as the subsequent exploitation of films and audio-visual content, including catalogue titles. The current draft bill is thus incompatible with the core business model of our sector.
- **Reversion of rights** (Section 22(b)(3) CAB): the limitation on the term of assignments for literary or musical works appear to be absolute; it is not even qualified by, for example, a proviso that reversion would only take place after 25 years in the event of a total failure to exercise the

assigned rights. The consequence of this would be that the inability to agree a renewed assignment with just one party (creative content such as movies comprises many contributions of vastly varying degrees), would mean the work in question could no longer be exploited and revenues from it would cease automatically for all parties. This would risk serious harm to the South African film industry and performers, because a major incentive for the industry to invest in South Africa would be removed through the effective halving of the term of protection from 50 years to 25 years.

- **Overbroad copyright exceptions violating international treaty norms** (Sections 12 and 19 CAB and Section 5 PPAB): South Africa is not well served by adopting a fair use model on top of a closed list of (expanded) exceptions. The proposed “hybrid” system broadens some exceptions to the point of treaty violation in that exceptions do not pertain to a ‘certain special case’ as required by both the Berne Convention and TRIPS. The proposed approach will lead to uncertain, unremunerated and unauthorised use - and will effectively expropriate the property of creators and investors. South Africa will lose potential to develop the next generation of creators and will fail in its objectives to support the current generation.
- **Constitutional issues:** Retrospective provisions, new criminal sanctions, limitations on the freedom of contract and exceptions taking away property rights all raise doubts whether the Bills pass muster under the Constitution.
 - Particularly, retrospective application will nullify existing contracts. Under the South African Constitution, these contracts are binding based on the doctrine of *pacta sunt servanda*, a constitutionally recognized principle of respecting the sanctity of contracts.
 - Procedurally, the Bills have likely been mis-classified as not requiring full scrutiny from the NCOP – and therefore not candidates for outright rejection or proper hearings and discussion in individual provinces.
- **Technological protection measures** (Section 28P CAB and Section 8F PPAB): As discussed above, the bills are not compatible with the very Treaties South Africa intends to join.
 - One problematic example arises from the definitions of ‘technological protection measures’ and ‘technological protection measure circumvention device’, which are difficult to reconcile with the WIPO treaties.
 - Similarly, the bills do not apply the rights of interactive communication to the public, which must be granted as exclusive rights.
 - The proposed exceptions to the reproduction right do not pass muster under the Berne Convention’s three-step-test, as they will seriously conflict with normal exploitation of works, notably for the educational market.
- **Vagueness:** Several sections of the proposed language in the Bills are confusing and vague – raising questions about interpretation and how or if they would work in practice.
- **National Treatment:** We question whether applying ‘National Treatment’ under international treaties obligations was considered when drafting many of the sections in the bills, especially those relating to the unwaivable right to a royalty for authors and performers.

In summary, there are serious questions about legal certainty, practicality, constitutionality and international treaty compliance. The Bills as proposed currently have not been subject to the requisite formal impact assessments, which raises the probability of harm.

We support suspending the progress of the Bills, to draft them again, classify them accurately (as a Section 76 bill) and subject the bills to the proper impact assessment process (including treaty compliance) before considering them again formally for signature and implementation.

As we could not raise all concerns in this limited consultation, we welcome an opportunity to present our specific concerns in person and remain to your disposal in case of any questions.