

07 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

Object: COPYRIGHT AMENDMENT BILL [B13 – 2017]

Dear Ms Fubbs

We are writing on behalf of the South African Screen Federation [SASFED] in response to the Portfolio Committee's invitation to submit formal comments on the draft Copyright Amendment Bill.

SASFED is the national federation of independent film, television and audiovisual content industry organisations in South Africa. Founded in 2006 in response to Government's call for the independent production sector to speak with a united voice, SASFED represents a broad spectrum of industry players, via affiliates representing several thousand individual members and hundreds of member companies employing up to a hundred staff. SASFED membership consists of a representative cross-section of South African audiovisual industry's stakeholders, and currently includes - Animation South Africa (A.S.A), The Documentary Filmmakers' Association (DFA), The Independent Producers' Organisation (IPO), The Personal Managers' Association (PMA), South African Guild of Actors (SAGA), South African Guild of Editors (SAGE) and Writers' Guild of South Africa (WGSA).

Our Federation welcomes Government's initiative to review and modernize the legal framework for copyright in South Africa and implement the provisions of the WIPO Internet Treaties. We collectively believe in the need to make the Copyright Act fit for purpose in the digital age, so that local creators and producers of content may continue to see their works protected effectively whilst taking full advantage of the emergent new digital business models for content production and distribution. SASFED encourages the amendments to the Copyright Act so protect all stakeholders in the value from the Producers, Actors, Agents, Post Production, Crew and Writers. Copyright and related rights are a powerful incentive for our industry to take the considerable creative and financial risks associated with new originated content able to respond to South African citizen's demand for a culturally diverse offer of film and TV. Our industry is a beacon of innovation and makes an increasingly strategic contribution to GDP and job creation. Our state of the art studio infrastructures, skilled technicians and natural locations also combine to attract much needed foreign direct investments, with many overseas film companies using South Africa as a competitive production base

Full SASFED Member Organisations: A.S.A. - Animation South Africa / DFA - The Documentary Filmmakers Association / IPO - The Independent Producers Organisation / PMA - The Personal Managers Association / SAGA - South African Guild of Actors / SAGE - South African Guild of Editors / WGSA - Writers Guild of South Africa

Terms Of Engagement signed with the NFVF - The National Film and Video Foundation
Board Member of SOS - Supporting Public Broadcasting Coalition
Representative for Independent TV Production sector in ICASA Digital Television Advisory Group.
SASFED has Two SAFTA Industry Awards Board Seats

and this contributing to infrastructure growth and foreign earnings. Strong copyright protection will contribute to South African content's competitiveness and to its attractiveness as a production base for internationally mobile productions.

SASFED is therefore concerned that a number of articles in the Bill as currently drafted may go against these valuable strategic objectives and effectively weaken incentives for the independent audiovisual sector to create, produce and distribute local original content for South African and global audiences.

As a voluntary organisation, we have so far not had the time or resources to deliver a detailed, article by article legal analysis of the draft prepared by DTI but we intend to engage fully with the issues during the Bill's forthcoming Parliamentary cycle. We are also aware that some of our members, such as the DFA have submitted specific submissions in respect to the Copyright Amendment Bill, and our submission does not attempt to in any way contradict any of our member's own direct submissions. In the present letter, we have aimed merely to identify the key consensus areas of concern to our joint membership. We hope that this short inventory will be of use to members of the Portfolio Committee and will support the important work they will do in the forthcoming month to establish a balanced draft for a copyright framework that will serve the consumer without undermining the dynamism and sustainability of our country's creative sectors. We also look forward to engaging members of Parliament further on the detail in forthcoming hearings.

Herewith, SASFED's salient areas of concern:

1. Limiting assignments of copyright and related rights to a maximum 25 years' term is an unwarranted limitation on the contractual freedom of content creators and producers. It will place unnecessary restraints on the ability of content makers to conclude agreements governing the financing and distribution of audiovisual content made in South Africa. It'll encourage some productions to locate to other jurisdictions where such restraints will not be extant.
2. The presumption of State (and local organisations') ownership of the copyright in works that are made or funded by them is both unnecessary and harmful to local creative industries, including audiovisual; it will severely reduce opportunities to attract financing and distribution from private sector partners at home and abroad and make an already fragile sector less sustainable. The South African film and audiovisual content industries are dependent on a combination of State funding (e.g. DTI tax rebates and direct funding support from the NFVF) and the pre-selling of rights – or coproduction agreements - in order to finance new projects. This proposed provision will make it impossible for content producers to bring finance from the private commercial sector through apportioning rights and copyright as a means of doing so. It will extinguish a vital source of commercial income and reduce opportunities for original South African projects to go into production.
3. A new article designed to change the old "commissioning clause" [21(1)(c) does not go far enough. The clause, which gave public broadcaster SABC automatic ownership of copyright and all ancillary rights in a commissioned film or TV programme, has been widely regarded as obsolete in that it prevents our local independent production and distribution companies from fully exploiting secondary and ancillary rights, with attendant dis-benefits for South African citizens and their ability to choose from a wider range of content offers. The new article proposes to leave this matter to the private contract. This provision is entirely insufficient in that it ignores the fact that SABC and other public corporations have considerable bargaining power over independent producers and will use it to effectively continue to confiscate all rights other than those needed to operate a primary broadcast license. SASFED urges the Portfolio Committee to amend this article in such a way that a genuine level playing field may exist, with a presumption of ownership of secondary and ancillary rights in favour of the producer.

4. Exceptions and limitations: the Bill introduces a wide array of new exceptions and limitations to copyright and also introduces elements of both fair use and fair dealing. Whilst our sector believes in striking a balance between the freedom for creators and producers to exercise their exclusive rights and the ability for citizens to access the content under specific exceptions, we are concerned that the Bill, as drafted, provides for a confusing and potentially over-broad framework, while in some areas not including certain specific exceptions or limitations that may well be important for the creation of new original works. We are concerned that several of the new dispositions will create legal confusion and that the specific issues that will arise will only be resolved through court cases that most stakeholders in our creative community can ill-afford. We also regret that the Bill provides for a blanket override of contractual terms. The disposition goes too far and will prevent rights holders and users of content to come to different terms through legitimate – and mutually agreed – licensing agreements. The disposition is perhaps too rigid in some areas and not specific enough in others and will therefore deprive rights holders of opportunities to generate additional revenue from certain types of ancillary uses. We urge the Portfolio Committee to revisit the contractual override debate further, the flexibility of which will work to the benefit of both rights holders and users of content in creating new works. In this respect we recognise that SASFED makes up a vast sphere of the content creation value chain, from performers and writers, to editors and producers of feature films, reality shows, drama series and even documentary filmmakers. We recognise there are differing views on this and other areas of the proposed amendments within our membership, but all our members agree that the balance in terms of Exceptions and Limitations as presently presented is flawed and needs further interrogation.
5. Disposition regarding the circumvention of a technological protection measure (TPM): as drafted, the Bill may, in some of our members opinion allow any user to circumvent a technological measure such as a DRM to access content on grounds of exercising an exception to copyright. Some of our members, such as documentary and certain magazine show producers, may benefit by this circumvention of TPM, but the concern we have is how it will in practice be managed, and what prevents a further de-professionalization of our industry, currently plagued by pirated material in the public domain. The solution proposed in the Bill is thus arguably unfair to rights holders and – if left un-amended will create legal uncertainty and discourage the emergence of new content distribution models such as transactional and subscription video on demand. We urge the Portfolio Committee to revisit this provision and ensure that a fair and transparent mechanism is put in place to enable the enjoyment of an exception by a legitimate beneficiary, without inviting unintended consequences for rights holders, in the shape of widespread illegal circumvention.

SASFED hopes this short inventory of our concerns will help focus Portfolio Committee members on more balanced solutions. We are confident that Parliament can – and will – engage in open dialogue with us and other industry stakeholders to that effect in the forthcoming scrutiny period.

Finally SASFED would wish to hereby formally request opportunity to make oral representation in this regard. We remain at your disposal should you wish to discuss specific amendments with SASFED in the near future.

With kind regards,



Rehad Desai
SASFED Chairperson 2016/17



Marc Schwinges
SASFED Treasurer 2016/17