



**INDEPENDENT BLACK  
FILMMAKERS COLLECTIVE**

# **CAB/PPAB PRESENTATION**

**ORAL SUBMISSION TO THE PORTFOLIO COMMITTEE ON  
TRADE & INDUSTRY ON THE REMITTED BILLS**

**PRESENTATION BY: AZANIA MUENDANE - CO-CHAIRPERSON OF THE IBFC, ADV. MAWANDE BAZA, NOBANTU PHUMLA MFEKA (ATTORNEY).**

A close-up, over-the-shoulder view of a person with dark, curly hair looking through the viewfinder of a professional video camera. The camera is black and silver, with various controls and a large lens visible. The background is a soft, out-of-focus light blue and white.

**AZANIA MUENDANE - CO-CHAIRPERSON IBFC**

The IBFC welcome with good intention the opportunity to make this presentation to the Portfolio committee on Trade & Industry.

We believe in the freedom and responsibilities bestowed upon us as citizens to participate in issues of state and society in a bid to better our socio-economic landscape.

# INDEPENDENT BLACK FILMMAKERS COLLECTIVE

## WHO WE ARE

- This submission is part of a collaborative effort of the South Africa AV sector, working with the IPO – Independent Producers Organisation and the ASA – Animation SA.
- The Independent Black Film Producers Collective (IBFC) is a South African collaborative business to business network of wholly Black Owned South African Film and Television companies.
- Updating the copyright laws
- South Africa is party to several treaties and has obligations under same to ensure that our copyright laws are brought in line with 'Trade-Related Aspects' of Intellectual Property Rights Agreement.



# **We Welcome the decisions made by the Committee...**

- Retagging as a section 76 Bill
- To delete sub-sections 6A(7), 7A(7) and 8A(5) that create a retrospective effect
- To seek further public participation in relation to sections of the Bill, namely clause 13 (sections 12A to 12D), clause 19 (section 19B) and clause 20 (section 19C)
- Further, to seek public comment on whether the Bill is compliant with international treaty obligations

**NOBANTU PHUMLA MFEKA**

**COMMENTS IN RELATION TO THE COPYRIGHT AMENDMENT  
BILL (B13B-2017) AND THE PERFORMERS PROTECTION  
AMENDMENT BILL (B24B-2016)**

# OVERALL CONCERNS IN THE BILLS

- Has unintended consequences of disenfranchising the creative sector
- Conflict with a right in the Bill of Rights
- Adopted in a manner that is inconsistent with the provisions of the Constitution
- Amounts to legal uncertainty
- Lack of SEIAS



Image courtesy of Atlantic studios

# SPECIFIC PROVISIONS CONCERNING TO IBFC

## Section (12A) – Expansion clauses including Fair use

- Foreign system imported - not based on South African legal history
- Broad uses - not special cases of use '*such as*'
- Lack of public participation
- Litigious process, burdensome for right holders
- Benefits Big Tech companies - "Digital Colonialism"
- No Socio-Economic Impact Assessment Study produced



# SPECIFIC CONCERNS TO IBFC

## **Sections 8A read with Section 39B**

- Compulsory statutory royalty scheme + Contractual override
- WHILST Intended for fair remuneration
- HOWEVER, results in legal uncertainty
- Arbitrary restriction on the constitutional rights of freedom to trade and contract

## **Section (5 (2), 22(2), 23(1))**

- Vesting of Copyright in works made under the direction/control of the state
- Adding and retaining the words 'local organisation', the provision remains problematic
- Section is phrased vaguely and creates legal uncertainty

## **Section 21 (1)(c), 21(3)**

- Gives commissioners the right to "own" copyright in works.
- Proposes a litigious process to enable authors to obtain a right in respect of commissioned works
- Contain limited redress in our development agenda
- Definition of "performers" is overbroad



ADV.MAWANDE BAZA

# CONSTITUTIONALITY OF THE COPYRIGHT AMENDMENT BILL & SA TREATY OBLIGATIONS

Image courtesy of the ConCourt of South Africa



# Provisions of the Copyright Amendment Bill Susceptible to Constitutional Scrutiny

## The Fair Use Provisions (12A, 12B, 12C, 12D, 19 B and 19 C)

- Section 1(c) of the Constitution - Any law or conduct inconsistent with the Constitution is invalid.
- Objective of the Copyright Amendment Bill: to enhance access to and use of copyright work, promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creative industry.
- Introduction of the 'copyright exceptions' to realise the above objective

## Procedural and Substantive defects

- Procedural: Exceptions not put out for public comments- renders the Bill unconstitutional
- Substantive: copyright exceptions are broad and constitutionally invalid. Means used to realise the objective of the Bill are not appropriate
- The copyright exceptions infringe on authors' right not to be deprived of their property in terms of section 21 (1) of the Constitution.
- Definition of deprivation- interference with the use, enjoyment or exploitation of private property



# The Constitutional test:

- Is it reasonable or justifiable to limit the authors rights in term of section 21 (1) of the Constitution? (limitation clause)
- Only limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom are permitted.
- In casu- limitation not reasonable and justified. No reasons have been provided for the limitation. Means used to realise the objective of the Bill in appropriate.
- The exception clause thus invalid and inconsistent with the Constitution.

# Copyright Bill compliance with South Africa's international treaty requirements

- South Africa is a signatory to the World Intellectual Property Organization Copyright Treaty ('WCT'), World Intellectual Property Organization ('WIPO') Performance and Phonograms Treaty ('WPPT'), the Marrakesh Treaty, and the Berne Convention.
- Effect of acceding to international treaties
- Article 9 of the Berne Convention & with Marrakesh Treaty- 3 step test applicable to copyright exception or limitation
- Fair Use provisions in conflict with the 3 step
- South Africa is restrained from acting in a manner inconsistent with the spirit of international treaties
- South Africa is obliged to give effect to its international agreements, provided that they are not in conflict with the Constitution





AZANIA MUENDANE - CO-CHAIRPERSON IBFC

# IN CONCLUSION

Image courtesy of the the Durban Film Mart



- South Africa must diversify its economy. The creative industries are large employers contributing to the country's wealth creation and in our context, transformation agenda.
- Authors must be offered adequate protection for a period where they too can create value from the content, they generate.
- We look to global benchmarks that yield positive results,
- Furthermore, platforms such as digital platforms would be forced to seek licences for content in order to allow artists to seek royalties.
- We the IBFC believe the changes we propose will unencumber the creative industries to supply content to the black diaspora; America, the Caribbean, Britain, France, Africa, Brazil and of course trade with our BRICS partners.
- If we devalue our content, we will be undermining our economic growth, devaluing our authors.

In conclusion, the IBFC is of the view that the proposed legislative amendments as they stand will not achieve the intended outcomes and offer authors and creators of copyright works the benefits due to them.

Our comments above only reflect the most glaring concerns in the Bill. Given the urgency and importance of the proposed changes, we recommend that the Portfolio Committee immediately obtain expert legal opinion and assistance to;

- Firstly, determine what is required from the Bill to into being an Act that is fit for Purpose, fit for the industries it aims to protect and is in compliance with International Treaties; and
- Secondly, conduct a proper socio-economic impact assessment on the complex provisions in the Copyright Amendment Bill to deal with the shortcomings of some of these provisions in the Bill.





**The IBFC are open to consistent dialogue and are willing to offer our time to make the Bills fit for purpose and work for all South Africans.  
Call on us anytime.**

***WE THANK YOU***