

## **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).

### INDEPENDENT BLACK FILMMAKERS COLLECTIVE

#### **AZANIA MUENDANE - CO-CHAIRPERSON IBFO**

Image courtesy of

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.

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# 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
- effect
- To seek further public participation in relation to sections of the Bill, clause 20 (section 19C)
- international treaty obligations

• To delete sub-sections 6A(7), 7A(7) and 8A(5) that create a retrospective

namely clause 13 (sections 12A to 12D), clause 19 (section 19B) and

• Further, to seek public comment on whether the Bill is compliant with



**NOBANTU PHUMLA MFEKA** 

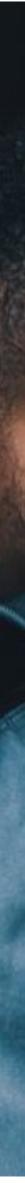
#### COMMENTS IN RELATION TO THE COPYRIGHT AMENDMENT BILL (B13B-2017) AND THE PERFORMERS PROTECTION AMENDMENT BILL (B24B-2016)



#### 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





# **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 renumeration
- 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



#### DE BAZA

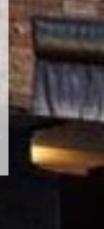
## **CONSTITUTIONALITY OF THE COPYRIGHT AMENDMENT BILL & SA TREATY OBLIGATIONS**



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 and research and payment of royalties to alleviate the plight of the creative industry.
- Introduction of the 'copyright exceptions' to realise the above objective

copyright work, promote access to information for the advancement of education



#### **Procedural and Substantive defects**

- 0 unconstitutional
- 0 used to realised the objective of the Bill are not appropriate
- 0 their property in terms of section 21 (1) of the Constitution.
- private property

Procedural: Exceptions not put out for public comments- renders the Bill

Substantive: copyright exceptions are broad and constitutionally invalid. Means

The copyright exceptions infringe on authors rights right not to be deprived of

Definition of deprivation-interference with the use, enjoyment or exploitation of



#### The Constitutional test:

- the Constitution? (limitation clause)
- society based on human dignity, equality and freedom are permitted.

Is it reasonable or justifiable to limit the authors rights in term of section 21 (1) of

Only limitations that are reasonable and justifiable in an open and democratic

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

- Marrakesh Treaty, and the Berne Convention.
- Effect of accenting to international treaties
- exception or limitation
- Fair Use provisions in conflict with the 3 step
- $\bigcirc$
- conflict with the Constitution

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

Article 9 of the Berne Convention & with Marrakesh Treaty- 3 step test applicable to copyright

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



#### **O-CHAIRPERSON IBFC AZANIA MUENDA**

# IN CONCLUSION

Image courtesy of the the Durban Film Mart



- wealth creation and in our context, transformation agenda.
- generate.
- We look to global benchmarks that yield positive results,
- artists to seek royalties.
- partners.
- If we devalue our content, we will be undermining our economic growth, devaluing our authors.

South Africa must diversify it's economy. The creative industries are large employers contributing to the country's

Authors must be offered adequate protection for a period where they too can create value from the content, they

Furthermore, platforms such as digital platforms would be forced to seek licences for content in order to allow

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





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.



INDEPENDENT BLACK





## 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

ENDENT BLACK AKERS COLLECTIVE