February 12, 2020

Hon. Stella Tembisa Ndabeni-Abrahams

Minister, Ministry of Communications and Digital Technologies

Private Bag X860, PRETORIA, 0001

South Africa

Dear Minister Ndabeni-Abrahams:

On behalf of the U.S. Chamber of Commerce's U.S.-South Africa Business Council (USABC), Global Innovation Policy Center (GIPC), and the American Chamber of Commerce in South Africa (AmCham), we appreciate the opportunity to offer our comments in response to the Ministry's Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020" (or "The Strategy"), released in late 2020.

The U.S. Chamber of Commerce is home to the U.S.-South Africa Business Council, the premier Washington-based organization dedicated to strengthening the economic relationship between the two countries. The Council represents America's leading companies doing business with South Africa and in the Southern Africa region, and it is made up of senior executives of U.S. companies from every sector investing in South Africa. The Global Innovation Policy Center (GIPC) is a sister organization of the USABC, with a particular focus on encouraging IP-led socioeconomic development around the world. The American Chamber of Commerce in South Africa is the collective voice of U.S. investment in South Africa and through their elective board of directors and committees, serve South African/American commerce and industry with a primary focus on U.S. investment in South Africa.

We are pleased, then, that the government has identified the creative industries as a future driver of the country's economic growth, workforce, and culture. The numbers are clear: South Africa is the African continent's largest IP-intensive economy and is a hub for foreign investment in African music, films, series, books, and much more. According to South African Audiovisual Observatory data, the creative industries provided R74.39 billion in economic outputs in 2018 (1.7% of GDP). In 2017, the creative industries provided jobs to 7% of South Africa's working population.[i] Realizing the benefits of these investments will require a focus on not just implementation, but supporting South Africa's intentions to enhance and strengthen the bilateral commercial relationship.

It is our observation that creativity flourishes in an environment that provides transparent and predictably enforceable ownership rights to creative works, combined with a regulatory model that prioritizes the ease of doing business, including the licensing of those rights. This combination of legal certainty and entrepreneurial openness promotes both the allocation of investment resources to the creative arts and a dynamic market for the license or sale of creative works, performances and services. In such a market, vibrant ecosystems for creativity can emerge and become economic multipliers, where creators in film, music, publishing, art, and many other supports jobs and business opportunities in a wide array of associated industries. This situation is one that optimizes both creative output and access to the creative arts by citizens.

Through this lens, our organizations support the Strategy's goal to promote "inclusive audio and audiovisual content services (AAVCS) as well as diversity, transparency, independence, universal access, access to information, regulatory parity, economic growth, accessibility by persons with disabilities, promotion of fair competition, promotion of South African content, and consumer protection." (Goal 1.2.9, Page 29) Over the past two decades, the protection of intellectual property on digital platforms has allowed for greater access, affordability, and diversity of content than ever before.

However, some of the Strategy's proposals may affect South Africans' ability to create and access digital content, including:

- The adoption of a new licensing system inspired by the EU AVMS Directive and 2012 Australian Convergence Review (3.2.10, Page 56). This scheme also establishes income thresholds and exemptions for companies seeking licenses as well how foreign providers may be required to license certain types of content to local providers (3.3.11 and 3.3.12, Page 61).
    - The creative industries are not a monolith—they include single-person operations to large global corporations. In this diversity of scale and scope, new ideas and projects can flourish. But these benefits can only be secured if underpinned by global contracting norms for parties to negotiate terms and timeframes. We feel that greater government involvement in these conversations would hamper or slow down licensing activity in this space—reducing the amount of investment flowing to South African creators and consumers.

- Enforcing the government of South Africa's "cultural toolkit," which mandates local content, language, and must-carry requirements for sports broadcasts deemed "in the national interest." The Strategy also seems to contemplate the expansion of "public interest" declarations for other types of content (5.2.5, Page 96 and 5.2.7.15, Page 103).
    - As stated elsewhere in this document, the past twenty years have borne witness to an incredible expansion of access, affordability, and diversity of audiovisual content. Rightsholders, supported by IP protections, have been able to use digital tools like never before to meet consumers' needs—wherever they may be. For this reason, we believe that mandated quotas and must-carry requirements may have the unfortunate effect of hampering the quick, tailored delivery of audiovisual content to South African consumers.

- Empowering South Africa's Competition Commission to work in partnership with the broadcasting regulator to enforce competition policies that address concerns of "market concentration and media plurality." In prior communications, the Commission has stated that digitized firms may become "gatekeepers" to market access, resulting in exclusionary conduct. It is noted that this may occur through the act of self-preferencing by which digital platforms give preferential treatment to their own services over the services of other companies and, as such, maintain their positions of dominance.

  - We caution against blanket presumptions against self-preferencing as it can, in certain circumstances, result in pro-competitive and efficiency benefits. Furthermore, mergers in the digital space normally promote even greater synergy, driving efficiencies for consumers.

We also note measures to increase South Africans' access to creative content, including through:

- Measures to address signal piracy in South Africa.
  - Developing markets around the world have struggled with illegal "signal piracy" for years, and South Africa has proven no exception. We were pleased to see the government's intent to address this issue, as it greatly affects the incomes of South African creators. In that vein, we note that signal piracy comes in many forms, including: shared signals or "hook-ups," retransmission of signals, sale of free-to-air devices, non-compliance with local laws and regulations, and online piracy. Often governments do not have easily-available information at their disposal to truly address the problem. We encourage the government of South Africa to devote resources to both study the problem of signal piracy and fund federal enforcement authorities to enforce existing anti-piracy laws. The government of South Africa could also consider adopting a wide-ranging plan to tackle piracy in all its forms. Such a move would help organize and conserve precious manpower and resources to address the most-dire situations.

- Raising foreign investment restrictions in South African broadcasters to 49% (from 20%). (7.2, Page 141) and removal of cross-ownership restrictions between radio and broadcast providers.
  - Another challenge to creative industry development in key markets are longstanding barriers to foreign investment. To complement our suite of original research (like the IP Index), in Fall 2019 the U.S. Chamber launched the Innovation and Creativity Access Barometer ("The Barometer").[ii] The Barometer is a tool that measures and compares consumers' ability to access innovative and creative works in 20 leading economies (the G20 nations plus Algeria). The ability of a local creative industry to grow is also affected by consumers' ability to access content—conditioning consumers to turn to piracy, reducing the overall quality of content available in a country, and hampering investment and resources for local creators. South Africa, for its part, scored rather well on the openness of its market for creative products. There are no restrictions, for instance, on the importation of motion pictures, but barriers remain in the broadcast and Pay-TV space. To that end, our organizations support the government's plan to allow for greater foreign investment in South African broadcasters—noting that such a move could raise the country's Barometer score. It would also complement recent moves by BRIC counterparts like India, which has recently allowed for 100% foreign investment in so-called "direct to home" services.[iii]

The importance of legal certainty:

For years, the U.S. Chamber's GIPC has advised countries on how legal certainty can fuel an IP-led transformation of a country's workforce and economy. This work is supported by our signature research product: the International IP Index (or "Index"), which benchmarks the IP framework in 53 economies (including South Africa)—or 90% of global GDP. The Index's companion Statistical Annex further illustrates that economies with strong IP systems show the following positive correlations:

- Are 70% more likely to produce innovative outputs
- Are 39% more likely to attract foreign investment
- Are 26% more globally competitive
- See a 78% average increase in the competitiveness of human capital
- Have nearly 6 times more highly skilled researchers in a given labor force

Currently, South Africa is one of the highest-ranking African markets in the 2020 IP Index, with a score of 18.31 points (or 42nd of 53 economies). With just an additional 2.0 points, South Africa could overtake Kenya (18.41) and India (19.23); 3.5 points would boost South Africa past Brazil (21.26); and 5.0 points would put South Africa right above Colombia, at 29th. Intellectual property protections will be key to the continued success of the creative industries in South Africa, and we note the inclusion of a section on Copyright (5.6.1, Page 122) and Piracy. However, legal uncertainty persists for local and global rightsholders as the government continues deliberations on South Africa's laws for copyright and contracting. In 2018, the U.S. Chamber noted its concerns that key terms in the bills were not adequately defined. We ask, then, that the government of South Africa work to establish legal certainty for rightsholders doing business in South Africa.

We underscore our commitment to long-term, substantive engagement with you and your colleagues to strengthen commercial ties between the U.S. and South Africa. Please do not hesitate to reach out to us directly with any questions at: seisner@uschamber.com; pkilbride@uschamber.com, and ceo@amcham.co.za

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[i] "Mapping the Economic Value of the Creative Industry." South African Cultural Observatory. (June 26, 2020). https://www.southafricanculturalobservatory.org.za/article/mapping-the-economic-value-of-the-creative-industry

[ii] "Sustaining the Wave: The U.S. Chamber Innovation and Creativity Access Barometer." U.S. Chamber of Commerce. (2019). https://www.theglobalipcenter.com/report/innovation-creativity-access-barometer/

[iii] "Cabinet Approves 100% FDI in DTH Services." The Indian Express. (December 24, 2020). https://indianexpress.com/article/india/cabinet-approves-100-fdi-in-dth-services-7117600/#:~:text=The%20Union%20Cabinet%20on%20Wednesday,licence%20period%20to%2020%20years.&text=The%20government%20has%20also%20allowed%20DTH%20operators%20to%20share%20infrastructure.