



**COPYRIGHT COALITION OF SOUTH AFRICA NPC**

16 July 2021

The Honourable Mr. Duma Nkosi

Chairperson: Portfolio Committee on Trade and Industry

Attention Mr. A Hermans

Parliament of the Republic of South Africa

CAPE TOWN

By email only to: [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za)

Dear Mr. Nkosi,

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

**1. INTRODUCTION**

This submission is made by the Copyright Coalition of South Africa (CCSA) in response to the call for public submissions and comments in relation to the Copyright Amendment Bill (hereinafter the CAB) and the Performers Protection Amendment Bill (hereinafter the PPAB), pursuant to the referral of those bills back to Parliament by the President, subsequent to their passing. This also serves as a formal request by the CCSA to be invited at the public hearings scheduled for 4 and 5 August 2021, for purposes of making oral submissions in relation to this matter.

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In making this submission we are cognisant of the fact that Parliament's call in this regard is construed in a narrow manner, whereby stakeholders are requested to limit their submissions to the issues raised by the President when referring the bills back to Parliament. The issues raised in the President's referral relate generally to the constitutionality of the bills and include aspects such as the incorrect tagging of the bills as section 75 bills rather than section 76 bills; concerns relating to the retrospective and arbitrary deprivation of property; issues relating to the introduction of various new exceptions, including fair use; issues relating to the impermissible delegation of legislative power to the Minister and the international treaty implications of the bills. The call for nominations has reiterated the need for stakeholders to limit their submissions to those issues.

In this submission we attempt to limit ourselves to the scope defined in the call for submissions and comments. We do however wish to indicate that there are a myriad of other fundamental flaws in the bills, previously raised by rights-holders authors and various other stakeholders and affected parties and not considered by the previous Portfolio Committee, that cannot be cured by merely addressing the issues highlighted by the President. **More importantly, there are additional constitutional issues in relation to the Bill that the President has not pointed out to.** This means that addressing the issues raised by the President will not diminish the threat of a constitutional challenge being launched against the bills if they are passed without these additional issues having been addressed.

We are of the view that a holistic approach that uses this window of opportunity to thoroughly address *all issues* that mired the bills in such controversy and make them defective and susceptible to constitutional challenges, should be adopted. It is important in this regard to observe that the Constitutional Court has held that legislation may be



challenges”; and PART C, where we implore Parliament to ensure that all other problematic areas in the bills are addressed to ensure an effective legislation.

## **2. INTRODUCING THE COPYRIGHT COALITION OF SOUTH AFRICA**

The Copyright Coalition of South Africa is a broadly representative group mainly comprised of local trade and industry associations representing hundreds of local companies that drive investment into SA’s creative and education sectors, creating jobs and opportunities for tens of thousands of SA’s creatives in the publishing, music, film, animation, and other industries<sup>3</sup>.

## **3. COMMENTARY ON THE BILLS**

As noted above, our submission herein is divided into PART A (issues raised in the President’s reservations); PART B (additional constitutional challenges); and PART C (an overview of other problematic areas).

### ***3.1 PART A – RESPONSE TO THE PRESIDENT’S RESERVATIONS***

As is common cause, the President has raised a number of reservations in relation to the bills, which cast doubt on their ability to survive a constitutional challenge. We respond to those issues below:

#### **3.1.1 Incorrect Tagging**

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<sup>3</sup> ***The Copyright Coalition of SA comprises of:***

*The Independent Black Filmmakers Collective (IBFC), Trade Union for Musicians of South Africa (TUMSA), The Music Publishers Association of South Africa (MPASA), The Publishers Association of South Africa (PASA), Academic and Non-Fiction Authors of South Africa (ANFASA), PEN Afrikaans, Printing SA (PIFSA), Recording Industry of South Africa (RiSA), RiSA Audio Visual (RAV), Dramatic, Artistic, Literary Rights Organisation (DALRO), Writers Guild SA, Audio Militia, Animation SA, Musicians Association of South Africa (MASA), Southern African Music Rights Organisation (SAMRO), Composers, Authors and Publishers Association (CAPASSO) and the Visual Arts Network of South Africa (VANSA), Independent Producers Organisation (IPO), Academy of Sound Engineering]*





This also includes the right not to authorise any usage relating to the copyright work or the performance. As Slomowitz AJ has observed in *Video Parktown North*:<sup>4</sup>

[Copyright] might just as well be called “ownership”, but we have chosen to call it by another name, reserving “ownership” as the appellation for the proprietary interest in corporeal things, by way of semantic, but not, as I see it, legal, distinction. ... Ownership in a thing is ... the right ... *to do what one pleases with the thing to which it relates, to use it, consume it or exploit it.*<sup>5</sup>

As the President has asserted however, the bills, in several instances, introduce provisions that dictate the manner in which the rights-holders must conduct trade in respect of their copyright works (and performances), which curtails the rights-holders’ ability and freedom to transact freely in respect of the works and performances. Particular cases in this regard relate to the proposed sections 6A, 7A and 8A of the CAB, which seek to control the sharing of royalties instead of leaving it to the parties to do so; the amendment to section 23(2) of the Copyright Act (CA) (also clause 4(f) of the PPAB); which appear to limit the period of assignment of copyright to 25 years (also not indicating what happens thereafter, considering that copyright is protected for the life of the author and fifty years after their death); and the proposed section 39(cG) and (cI), which seek to prescribe compulsory and

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<sup>4</sup> *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others* [1986] 1 All SA 1 (T)

<sup>5</sup> *Id* at 7. Emphasis added. This is a position recognised in foreign and international law also. In this regard see for example Sookman B, Mason S and Craig C *Copyright – Cases and Commentary on the Canadian and International Law* 2 ed (Carswell, 2013: Ontario) 3 and 6, who observe: ‘In order to gain a fuller understanding of the term “intellectual property,” it may be useful to approach it in terms of the notion of “property” in general. The most important feature of property is that the owner of the property may use it as he wishes; nobody else can lawfully use his property without his authorization. ... *The owner of copyright in a protected work may use the work as he wishes, and may prevent others from using it without authorization. Thus, the rights granted under national laws to the owner of copyright in a protected work are normally “exclusive rights” to authorize others to use the work, subject to the legally recognized rights and interests of others.*’ Emphasis added. See also in this regard WIPO Intellectual Property Handbook 2 ed (WIPO, 2004: Geneva) 43, where this position is reiterated.



standard contractual terms and to prescribe royalty rates and tariffs “for various forms of use”.

Apart from being unconstitutional, as this intrudes into the rights-holder’s exercise of his or her exclusive economic rights, the above-mentioned provisions indeed seek to dictate matters of trade and thus should have been tagged under section 76 of the Constitution.

### *Cultural matters*

We also agree with the President that the two bills regulate cultural matters as they seek to deal with matters relating to indigenous and traditional works, indigenous cultural expressions and knowledge and indigenous communities. These areas clearly fall within the auspices of provincial and local government and the bills should therefore also be dealt with within the NCOP.

### **3.1.2 Retrospective and arbitrary deprivation of property**

Lon Fuller, who is credited with formulating principles that “capture the essence of the rule of law” and which “specify necessary conditions for the activities of lawmakers to count as lawmaking”,<sup>6</sup> identify as one of those principles the idea that laws need to be prospective and not retroactive.<sup>7</sup> Such principles underline what he terms the “inner morality” of the law.<sup>8</sup>

We indeed agree with the President that the provisions of the proposed sections 6A(7), 7A(7) and 8A(5) not only constitute an arbitrary deprivation of property, as hinted to in the discussion above, but also denote retrospective application as the transitional provisions proposed in the CAB do not make any reference to the commencement date of the

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<sup>6</sup> C Murphy “Lon Fuller and the Moral Value of the Rule of Law” (2005) 24 *Law and Philosophy* 239 240 - 241.

<sup>7</sup> LL Fuller *The Morality of Law* 2 ed. (Yale University Press, New Haven: 1969), generally and at 46 – 90 particularly.

<sup>8</sup> *Ibid.*













“such as” regime poses a serious Constitutional issue. This is because it goes to the very heart of providing a fair platform for all parties to participate in legislative processes. In this regard the observations of Sachs J in the *New Clicks* case,<sup>15</sup> namely the fact that the facilitation of public participation in legislative processes required of Parliament amounts to ensuring that “a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say”, are apt.

Without having afforded all parties an opportunity to comment on the revised fair use provision Parliament failed in its duty in this regard. As Ngcobo J has observed:

“It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid.”<sup>16</sup>

#### *Other exceptions*

Apart from the fair use exception in the proposed section 12A in the CAB, the President’s letter to the Speaker makes reference to other new exceptions in the bill that are problematic, namely those in sections 12B – 12D, 19B and 19C. The President contends these exceptions may constitute an arbitrary deprivation of property; may violate the right of freedom of trade, occupation and profession; may be in conflict with the WIPO Internet

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<sup>15</sup> *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC) at para 630, cited with approval by Ngcobo J in *Doctors for Life International v The Speaker of the National Assembly et al* [2006] ZACC 11 at para 125. As Ngcobo J reiterated in para 129, such reasonable opportunity must afford effective participation in the law-making process. Continuing the learned justice added (at para 129): “Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.”

<sup>16</sup> Ngcobo J *id* at para 208.





- It does not make sense that a jurisdiction such as Canada, which is a developed country, should have generous provisions in respect of copyright owners, whereas South Africa, a developing country with a still-developing music industry and where rights-holders are said to die as paupers, should not at least have similar provisions.


- Section **12B(1)(i)** and **12B(2)** introduce a broad private copy exception without providing for a means to compensate the affected rights-holders, e.g. through a private copy levy or royalty. In explaining the rationale for introducing a system of private copy levies or royalties the following has been observed:

In general, the solution [to the problem of having to grant permissions to a large number of individuals and ensuring that the use is indeed for private purposes] was found in an exception or limitation to the exclusive right under the condition that fair compensation was paid to authors and other rightholders for loss of revenues or harm caused to the rightholder whose work had been copied. This is currently the only efficient mechanism for compensating creators for the widespread copying of their works for private or domestic use.<sup>18</sup>

- With the introduction of this broad private copying exception therefore, the legislation must also introduce a system of private copying levies and / or royalties. Failing to do this would mean that the exception is in conflict with the three-step test, as such uses clearly conflict with the rights-holder's normal exploitation of the work and thus prejudice the rights-holder's legitimate interests. In the same vein this would amount to an arbitrary deprivation of property and thus run afoul of the provisions of the Constitution. In this regard the UK High Court quashed the Copyright and Rights in Performance (Personal

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<sup>18</sup> *International Survey on Private Copying – Law and Practice* (WIPO, Geneva: 2015) at 5.



Copies for Private Use) Regulations of 2014 in 2015 because they introduced a private copying exception without providing equivalent compensation to rights-holders.<sup>19</sup>

- **Section 12B(3)** implies that in addition to a work made by the rights-holder, a user may also take the initiative to adapt such a work for purposes of the uses permitted under section 12B(1). This is a drastic erosion of the economic rights of the copyright owner as this will affect the copyright owner's secondary use market and thus his or her ability to earn income from secondary uses. As is common cause, the copyright owner's exclusive right does not only relate to the original copyright work but also extend to the right to make an adaptation of the work (i.e. a "derivative work") or to authorize the making of such adaptations. Section 12B(3) thus amount to an arbitrary deprivation of property and thus infringe the rights-holder's Constitutional rights.

- Another serious erosion of the copyright owner's economic market (which would amount to the infringement of the right of freedom of trade, occupation and profession as asserted by the President) is the haphazard and uncanny introduction of an overriding copyright exhaustion regime (the so-called "first-sale doctrine") in the proposed section **12B(6)** of the CAB. The South African version of this US doctrine is couched in strange and absurd terms. While the first-sale doctrine embodied under section 109 of the US Copyright Act is concerned with lawfully-obtained physical copies of a work – dictating that once such copies have been sold through the authorization of the copyright owner, the person who lawfully obtained the copy (i.e. the person who bought it) may sell, rent out or otherwise dispose of the copy without infringing the rights of the copyright owner – the South African

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<sup>19</sup> *British Academy of Songwriters, Composers and Authors Musicians' Union & Others, R (on the application of) v Secretary of State for Business, Innovation and Skills & Another* [2015] EWHC 2041 (Admin) (17 July 2015)





version is a distorted version of this. It refers to the “assignment of ownership” – which is concerned with the work itself and not with physical copies.

- Unlike in the United States where certain usages in respect of some works are specifically excluded from the application of the doctrine (e.g. the rental, lease or lending of a sound recording and computer program – in South Africa this would apply to all works. Furthermore, while South Africa did not have a first-sale doctrine even at the national level, the doctrine is drastically introduced at the international level (what is termed “international exhaustion”; see the phrases “in the Republic or outside the Republic” and “locally and internationally”) – where it took the US over a century to extend the doctrine internationally.<sup>20</sup>

- In one stroke, the relevance of provisions relating to the prohibition of parallel importation and unauthorised distribution in three Acts (the Copyright Act, the Trademark Act and the Counterfeit Goods Act) has been taken away, and with it established case law.<sup>21</sup> This would for example, mean that a person can import a video-film (from whatever source, whether making of the film constituted infringement of copyright or not) or buy it here in South Africa, and open a video-hire shop, without the need to obtain a licence from the copyright owner (or such copyright owner’s lawful representative in South Africa), thus for example, overruling the position adopted by our courts in *Mr. Video (Pty) Ltd & Others v Nu Metro & Others*,<sup>22</sup> where such action was confirmed to be unlawful. Not only the usage of the film but also that of the underlying works (including musical works) would be deemed

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<sup>20</sup> With the doctrine having been introduced in 1908 in the case of *Bobbs-Merill Co. v Straus* 210 U.S. 339 (1908) it was only in 2013 in *Kirtsaeng v John Wiley & Sons, Inc.* 568 U.S. 519 (2013) that international exhaustion of copyright was recognised in the United States.

<sup>21</sup> For example, the case of *Paramount Pictures Corporation v Video Parktown North (Pty) Limited* 1983 (2) SA 251 (T).

<sup>22</sup> (472/08) [2009] ZASCA 127 (29 September 2009).



to be lawful, since there would have been a first distribution of such works (through the usage in the film).

- The changes proposed here are sweeping in that, under the current law, distribution (or publication, as defined in the Copyright Act) of a work in South Africa would, without the permission of the copyright owner, be prohibited even if the copies thereof were lawfully imported, or even if the article concerned was lawfully purchased in South Africa. This is because it is understood that such importation or purchase would be for personal use and that without the authorization of the copyright owner the importer or purchaser cannot use the article for commercial purposes. This new section however permits not only the importation and distribution of the article if it was lawfully obtained (an act currently prohibited), but also regardless of whether the article is a pirated copy (in view of excluding the application of any contrary provisions of the Counterfeits Goods Act, the Copyright Act and the Trademark Act). It also remains to be tested whether legislation can annul the application of other legislation – especially since the acts concerned effectively augment the effectiveness of the Copyright Act.

- The proposed **section 12C** introduces a temporary reproduction exception that mirrors article 5 of the EU 2001 Copyright Directive.<sup>23</sup> Article 5 of the Directive read with Recital 33 thereof permits transient reproductions where these form part of and / or complete a technological process that produces copies of a limited duration that are thereafter automatically deleted (as in the case of browsing and caching). Article 5 was the subject of the controversial *Meltwater* decision,<sup>24</sup> where both the UK Supreme Court and the Court

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<sup>23</sup> Information Society Directive 2001/29/EC.

<sup>24</sup> *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* Case C-360/13, CJEU.









In this regard a point on the status (i.e. the legal force or validity) of regulations vis-à-vis legislation is apposite.

Government notices, proclamations or regulations are generally termed subordinate legislation, delegated legislation or secondary legislation.<sup>25</sup> Subordinate legislation is based on original legislation that enables its enactment through an enabling provision.<sup>26</sup> The scope of the subordinate legislation is determined by the enabling provision in the original legislation.<sup>27</sup> Once enacted, the subordinate legislation is seen as being part of the original legislation.<sup>28</sup> In this regard it has been observed that subordinate legislation “adds the flesh” to original legislation.<sup>29</sup> This delegated legislation is termed “legislation by the administration”<sup>30</sup> because the enabling provision in the original legislation often designates certain persons or bodies e.g. a member of the government administration such as a Minister of a particular department, as the person or entity authorized to enact the subordinate legislation from time to time, when the need arises.

While the designated person can amend or repeal the subordinate legislation (i.e. the regulation), as required and within the prescripts of the enabling provision, the powers of the designated person do not include the amendment or repeal of the original legislation.<sup>31</sup>

It is important in this regard to note that the validity of the subordinate legislation can be

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<sup>25</sup> See for example sections 101(3) and 140(3) of the Constitution of South Africa, 1996. The UK definition of delegated legislation as “law made by ministers or certain public bodies under powers given to them by Act of Parliament [which is] just as much part of the law of the land as are those Acts” is equally applicable in South Africa. See “Delegated Legislation in the House of Lords since 1997”, January 5 2016 available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2016-0001#fullreport> 1 (Accessed 16 July 2021).

<sup>26</sup> For example, in the present case the regulations contemplated in the proposed sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) would constitute the subordinate legislation, and the Copyright Act is the original enabling legislation. The three sections themselves become the enabling provisions in the original legislation (i.e. the Copyright Act).

<sup>27</sup> See Botha CJ *Statutory Interpretation: An Introduction for Students* 4 ed (Juta, Cape Town: 2005) 16.

<sup>28</sup> See Section 239 of the Constitution, definition of “national legislation”, para (a).

<sup>29</sup> Hahlo HR and Kahn E *The South African Legal System and its Background* (Juta, Cape Town: 1973) at 163.

<sup>30</sup> See Botha *Statutory Interpretation* 16.

<sup>31</sup> See *Executive Council Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC).

reviewed by the courts. Another important observation: while the subordinate legislation has to be read and interpreted together with its enabling legislation, *it does not influence the meaning of the enabling legislation*. In this regard in *Moodley & Others v Minister of Education and Culture, House of Delegates & Another*<sup>32</sup> the court observed that, while regulations have the force of law, because they are not drafted by Parliament, the enabling provision in the original legislation must be interpreted “*before [the regulation] is scrutinised and a meaning is assigned to it.*”<sup>33</sup> Similarly, the regulation cannot be used “as an aid to the interpretation” of the legislation, nor “to enlarge the meaning” of the enabling provision.<sup>34</sup>

Essentially therefore, the interpretation of the regulation is subject to the meaning accorded to the enabling provision; *and the interpretation of the enabling provision and legislation is in turn, subject the provisions of the Constitution* (in this case, those relating to the status of copyright as property under the Constitution and as exclusive rights in international law). As section 233 of the Constitution requires, when interpreting any legislation, any reasonable interpretation of the legislation that is consistent with international law must be preferred over any alternative interpretation that is inconsistent with international law. Seeing that the Constitution regards intellectual property rights as property, and seeing that international law accords exclusive rights to the copyright owner in respect of his or her works, any regulation that seeks to deprive the copyright owner of such rights would fall afoul of the provisions of the Constitution. Furthermore, to the extent that the enabling provision is itself the culprit, such provision falls to be abrogated.

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<sup>32</sup> [1989] ZASCA 45 at p. 34.

<sup>33</sup> *Ibid*, emphasis mine.

<sup>34</sup> *Ibid*.













engaging the affected rights-holders, then there is no way to reach the conclusion that proposed exceptions and limitations satisfy the requirements of the three-step test. In view of this we are imploring the Portfolio Committee to ensure that this exercise is carried out prior to the bills being finalised.

### **3.2 PART B – ADDITIONAL CONSTITUTIONAL ISSUES**

Above we referred to the *Liquor Bill* case<sup>35</sup> and the fact that not only the constitutional issues raised in the President’s reservations are capable of being brought to the attention of the Constitutional Court, but that supervening or additional constitutional issues can still be raised with the Court. It is thus incumbent upon the Committee to make all efforts to ensure that all issues that could give rise to constitutional challenges are given adequate attention, and not only those relating to the President’s reservations.

One of the important constitutional issues in this regard is the need to ensure that the bills will translate into *effective legislation* that will achieve their objectives, avoiding yet another “tortuous statutory scheme” that will make the courts to strain to make sense of the statutory provisions.<sup>36</sup> Speaking about the need to have effective legislation Bennion has observed:

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<sup>35</sup> *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* [1999] ZACC 15 at para 19.

<sup>36</sup> The phrase “tortuous statutory scheme” was borrowed by the courts from Professor Owen Dean in *National Association of Broadcasters v South African Music Performance Rights Association & Another* [2014] ZASCA 10; 2014 (3) SA 525 (SCA) para 57 and *SAMPRA v Foschini Retail Group (Pty) Ltd* [2015] ZASCA 1888 at para 12. Prof. Owen Dean had used the phrase in his text, *Handbook of South African Copyright Law*, when lamenting the convoluted provisions of the procedure applicable in referring dispute relating to needle-time rights royalties in the Copyright Act 98 of 1978, based on the 2002 amendments that introduced the needle-time regime. It is common cause that many parties, including Prof. Dean, had made comments in relation to the 2002 amendments with a bid to ensuring that the law would be effective, but this fell in deaf ears, resulting in the “tortuous statutory scheme” that the courts had to contend with. In this particular case the courts were thankful for the practical solution proposed by Prof. Dean with regard to disentangling the complication that the courts were faced with. In another instance rights-holders are likely to be the victim if such confusion emerge in legislation.

Unfortunately ... drafters ... have tended to acquire Cyclopean tendencies. ... Whether or not he is otherwise Cyclopean, the drafter must always put in the forefront of his mind the *need for legal effectiveness*. He must ensure, so far as he is able *that the text of his Bill is apt to carry out the intentions of the government in promoting the legislation*. ...<sup>37</sup>

This brings to light the issue of adequate public participation in law-making processes. In this regard the Constitutional Court in *Doctors for Life International v The Speaker of the National Assembly et al*<sup>38</sup> held that the process of public participation in legislative processes is “calculated to produce laws that are likely to be widely accepted *and effective* in practice”.<sup>39</sup> If laws are not aligned to the Constitution and international law and are prone to giving rise to interpretational difficulties then they cannot be said to be “effective”. As indicated earlier, the Constitutional duty imposed on Parliament to facilitate public participation in legislative processes requires that “a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say”.<sup>40</sup>

In light of the above, Parliament should be zealous to ensure all that is required to ensure widely-accepted effective laws is given attention to. In the past twenty years or so it would appear that the intellectual property law domain has suffered from a lack of trust and adequate collaboration between government and industry. This has resulted in the inputs of industry not being taken seriously on the one hand and a selective reliance on other sectors, resulting in the shunning of objectiveness and the embracement of factional concerns. It is important that this impasse be delicately breached to ensure a vibrant industry empowered by effective laws.

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<sup>37</sup> FAR Bennion *Bennion on Statute Law Part 1 – Statutory Texts* (Longman, London: 1990) at 36.

<sup>38</sup> [2006] ZACC 11 at para 115.

<sup>39</sup> Emphasis added.

<sup>40</sup> See note 14 above.









to incorporate a drastic and controversial version of the first-sale doctrine, which is to the effect that once copies of a work have been distributed publicly (in this case regardless of whether this was done lawfully or not), all other usages of the work, whether *rental*, sale, broadcast etc. are permissible.

On the other hand, the PPAB seeks to introduce provisions that grant the performer an exclusive right in respect of the commercial rental of copies of the performer's performances fixed in audiovisual fixations or sound recordings, "even after distribution of such copies" (see the proposed section 3(4)(e) in clause 2 of the Bill and the proposed proposed sections 5(1)(a)(v) and 5(1)(b)(v)<sup>42</sup> in clause 4 of the Bill). However, since performances are fixed in copyright works, namely sound recordings and audiovisual fixations, and since the first sale or distribution of those copyright works exhaust the copyright owner's right to authorise all forms of usages in the South Africa version of the first-sale doctrine (including rental), there is no way that performers can exercise their commercial rental rights. This is one of the incongruences that need to be given careful attention in the bills.

We look forward to having a constructive engagement with the Committee, as an entity representing various key players in the copyright industries.

Yours faithfully,



Chola Makgamathe

Chairperson: Copyright Coalition of South Africa

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<sup>42</sup> Although the placing of the provision under the proposed section 5(1)(b)(v) under section 5(1)(b) – which was originally the needle-time provision in the PPA – is itself problematic.

