



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

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.



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



constitutionally invalid if (i) its provisions are in conflict with a right in the Bill of Rights and (ii) it was adopted in a manner that is inconsistent with the provisions of the Constitution.¹ We contend that both conditions exist in respect of the current bills. In this regard reference is made to the Constitutional Court judgment of ..., where Cameron J asserted that, in spite of a ruling on the constitutionality of a bill having been made by the court based on the President's reservations, this does not rule out the consideration of "supervening constitutional challenges" that arise after the bill has been enacted.²

To avoid the eventuality highlighted by Cameron J – an eventuality which is a real one if other lingering issues that are at the heart of the constitutional validity of the bills are not fully addressed – we are of the view that Parliament should use this opportunity to deliver effective bills capable of advancing rather than deterring the progress of the creative industries. In this regard we advise that the Portfolio Committee should adopt a programme of action that will ensure that all other lingering constitutional issues raised by stakeholders in relation to the bills are adequately addressed – even if it means creating such an opportunity as part of the National Assembly's engagement with the National Council of Provinces (NCOP) process that will ensure as part of the section 76 tagging decision.

To assist the committee in relation to this proposal, while our submission will address the issues raised in the President's reservations, our submission also highlight other possible cases in the bills where constitutional issues arise and also make a case for the consideration of other problematic areas in the bills which would make it difficult to effectively implement the bills in practice. Our submission therefore, as a way of assisting the committee, is divided into PART A, which addresses the specific reservations made by the President; PART B, which highlights additional "supervening constitutional

¹ *Doctors for Life International v The Speaker of the National Assembly et al* [2006] ZACC 11 at para 16.

² *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* [1999] ZACC 15 at para 19.



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 industries³.

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

³ ***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]



In his letter to the Speaker of the National Assembly the President argued that the two bills were incorrectly tagged as section 75 bills while in fact they should have been tagged as section 76 bills. As is common cause section 75 bills are ordinary bills not affecting the provinces, while section 76 bills are ordinary bills affecting the provinces, as provided for in section 76(3), (4) or (5) of the Constitution. This includes bills dealing with the functional areas mentioned in Schedule 4 of the Constitution.

The President has highlighted the fact that the Bill should have been tagged as a section 76 bill because it affects cultural matters and trade, which form part of the functional areas listed in Schedule 4 of the Constitution. We are in agreement with the President in his assessment in this regard, as highlighted below. We are aware that the Joint Tagging Mechanism has agreed with the President's submissions in this regard and accordingly pleased in this regard. We are however aware that there are others who continue to dispute the fact that the bills need to be retagged in this manner and for this reason wish to elaborate on the matter.

Regulation of matters of trade

With respect to the issue of *trade*, the Bills do not merely enunciate the principles of protection in respect of copyright works and performances, as would be expected of legislation of this nature. Except in limited cases where a system of remuneration rights is permitted, copyright and performers' rights are protected as exclusive economic and moral rights, leaving the manner in which such rights are traded in the hands of the rights-holders.

The rights-holders have the exclusive rights to use or to authorise the usage of the subject-matter of the rights, and this gives room to contractual freedom and private negotiation.



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*:⁴

[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.*⁵

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

⁴ *Video Parktown North (Pty) td 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)

⁵ *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

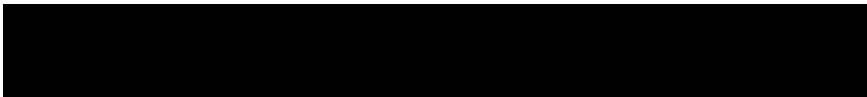
Lon Fuller, who is credited with formulating principles that “capture the essence of the rule of law” and which “specify necessary conditions for the activities of lawmakers to count as lawmaking”,⁶ identify as one of those principles the idea that laws need to be prospective and not retroactive.⁷ Such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

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

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

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

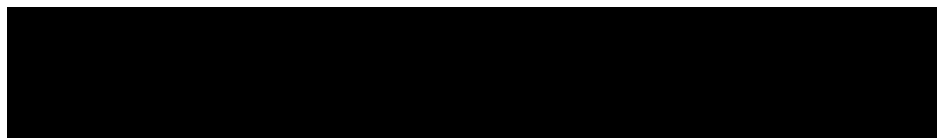
⁸ *Ibid.*



proposed amendments. However, as highlighted, even if the provisions applied prospectively, they would still fall afoul of the Constitution and international treaty provisions as they amount to the erosion of exclusive economic and constitutionally-protected rights.

While the moral basis for the proposed sections is understandable, their legal rationality is dubious. This is because at the core of the proposed provisions is the mandatory requirement for the assignee to pay royalties to the assignor author, thus making the payment of royalties a precondition for the assignment – implying that the assignment would not be valid without an agreement to pay royalties. Doing this amounts to imposing conditions on the regime of assignment of copyright that are not recognized in international treaty law (whether the Berne Convention or the TRIPs Agreement). Those provisions would thus be at odds with the principle of minimum rights provided for under the Berne Convention, which designates rights in copyright to be ownership rights of an exclusive nature.

In essence the proposed provisions curtail the right of the assignee to enjoy full title of the rights transferred to him or her, by imposing conditions on the exercise of the rights, thus in essence reducing the ostensible assignment to a mere licence, albeit exclusive licence. However, because copyright is a right of ownership, such provisions should not impose conditions that make it difficult for the author to do as he or she pleases or wishes with the work, and furthermore for the assignee, being the new owner of the copyright, to likewise do as he or she pleases or wishes with the work. In private negotiations which are at the hallmark of the exercise of exclusive rights the parties may agree that the author will assign his rights in exchange of shares in a company; or receive a substantial up-front payment. The proposed provisions rule out such possibilities because of their instance in the payment of royalties.



This situation is further aggravated by the fact that the requirement for payment of royalties does not only apply in the case of the assignment of the right but also in respect of any other authorisation to use a work (section 6A(2)(b)). However the right to authorise means that the rights-holder may elect to grant free use of the rights (e.g. in exchange of exposure or the promotion of the work). The proposed provisions rule this out, in this way drastically reducing the proprietary nature of the rights. We therefore agree with the President that this amounts to an arbitrary deprivation of property and thus unconstitutional and at odds with international law requirements.

3.1.3 Fair use and other expansive exceptions

Fair Use

One of the severe criticisms levelled against the CAB is the introduction of a new fair use exception in South African copyright law. Fair use is a defence originating in the USA and is only used in a few other countries, with the rest of the world instead using the “fair dealing” defence. Fair dealing originates from English law, and permits users to use copyright works without authorisation only under certain defined circumstances (e.g. research or private study; personal or private use; criticism or review; reporting on current events). This, we submit, is in line with the system of exceptions to and limitations of copyright protection permissible in international treaty law, where exceptions are allowed (1) in certain special cases; (2) where the reproduction does not conflict with the normal exploitation of the work and (3) and does not unreasonably prejudice the legitimate interests of the author, i.e. the so-called three-step test.⁹


⁹ The three-step test is provided for in various international treaties, i.e. in article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, 1886 (1971 Paris Text) (Berne Convention); article 13 of the Agreement on Trade-Related Aspects of Intellectual Property, 1995 (TRIPs Agreement); article 10 of the WIPO Copyright Treaty 1996 (WCT); article 16(2) of the WIPO Performances and Phonograms Treaty, 1996 (WPPT); article 13(2) Beijing Treaty on Audiovisual Performances (Beijing Treaty) and article 11 and other provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or

The fair use exception however is not like that, as it does not prescribe definite cases where unauthorised use is permissible but instead provide for limitless possibilities where unauthorised use is permissible. In this regard the fair use system is a litigation-prone system as it implies that rights-holders must be prepared to go to court in order to ensure unauthorised use of their works. In a developing country like South Africa with high levels of poverty, with authors and performers also affected, the ability of rights-holders to lodge expensive litigation against users – many of whom, including large tech companies, have limitless budgets for litigation – is close to non-existent.

Various countries including the United Kingdom (UK), the European Union and Australia – which have traditionally used a fair dealing system of exceptions – have conducted studies to determine if it was viable to replace this system with the fair use system. Invariably the conclusion has been that the fair use system was not compatible for countries with a legal history involving the use of the fair dealing defence.¹⁰ In the

Otherwise Print Disabled, 2013 (Marrakesh Agreement). Article 15(1) of the Rome Convention for the Protection of Performers, Producers and Broadcasting Organizations, 1961 (Rome Convention) refers to specific cases where limitations are permissible, and provides in sub-article (2) that states may provide for the same kind of limitations applicable to copyright in literary and artistic works.

¹⁰ The UK, from where we get our fair dealing doctrine, strongly debated the possibility of replacing fair dealing with fair use, both under the Gowers Review of 2006 and the Hargreaves Review of 2011. While acknowledging that the fair dealing defence as then applicable in the UK was low in flexibility, the Gowers Review rejected the idea of adopting a US-style fair use defence, and recommended instead an increase in the flexibility provisions of the fair dealing defence to incorporate cases such as parody. *Gowers Review of Intellectual Property*, December 2006 at 6; 44; 61 et seq, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf (Accessed 14 July 2021). In its terms of reference the Hargreaves Review was specifically asked to consider the benefits of introducing the fair use defence into UK copyright law. In this regard it was argued that introducing fair use in the UK would bring “massive legal uncertainty because of [fair use’s] roots in American law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods”. *Digital Opportunity – A Review of Intellectual Property and Growth*, An Independent Report by Professor Ian Hargreaves, May 2011 (“the Hargreaves Review”) at 44 para 5.13, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf (Accessed 14 July 2021). Various reviews aimed at considering whether fair dealing should be replaced by fair use were conducted in Australia from 1996. In the end government concluded that “no significant interest supported fully adopting the Us approach”, and also raised concerns about fair use’s compliance with the three-step test. See <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-dp-79/4-the-case-for-fair-use-in-australia/reviews-that-have-considered-fair-use/> (Accessed 14 July 2021).



Hargreaves Report it was observed that “importing fair use wholesale was unlikely to be legally feasible in Europe”.¹¹ The general conclusion in the various studies conducted was that while it was necessary to extend the flexibility of the fair dealing provisions by creating new exceptions such as parody, satire etc. a general fair use defence would be incompatible with the legal history of fair dealing countries.

The fair use defence has been criticized for “providing flexibility at the expense of certainty.”¹² It is trite fact that the US fair use defence, which is based on section 107 of the US Copyright Act, has a historical background dating back to the days of George Washington. Thus the fair use defence, being of American origin, is not compatible with our legal history (which is, in this regard, based on English law). The importance of legal history in this regard was highlighted by Berger J in the *Moneyweb* judgment,¹³ the first case concerned with the fair dealing defence in South Africa, where he observed:

Both sides referred me to decisions and writings from several foreign jurisdictions on the meaning of the phrase “*fair dealing*”. I understand that foreign authorities are referred to for guidance only. *I also accept that I must be cautious in considering foreign law because its jurisdiction has its own particular history and, in many cases, is bound or influenced by domestic statutory precepts. I therefore I intend, for historical reasons, to focus on English authority.*¹⁴

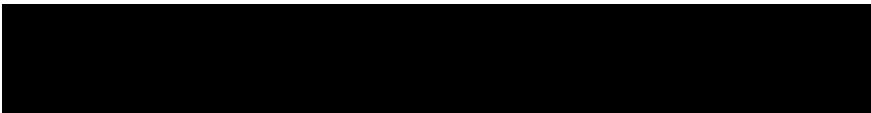
An aggravating factor regarding the fair use provision introduced under section 12A in the CAB is the fact the words “such as” in the phrase “for purposes such as the following” were inserted by the previous Portfolio Committee at-the-last-minute, at the instigation of the proponents of the fair use exception, without affording stakeholders the opportunity to debate the matter. Apart from adding broad uses as exemplars under this new “such as” regime in what is supposed to be a general criterion standard – even broader than what is contemplated in the US fair use regime – the lack of consultation on the introduction of the

¹¹ *Hargreaves Report* 5.

¹² Burrell R “Reining In Copyright Law: Is Fair Use the Answer?” 2001 I.P.Q. (4) 364 – 365.

¹³ *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

¹⁴ *Id* at para 103. Emphasis added.



“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,¹⁵ 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:

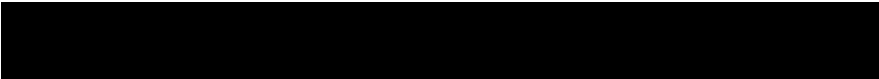
“It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid.”¹⁶

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

¹⁵ *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.”

¹⁶ Ngcobo J *id* at para 208.




treaties (the WCT and the WPPT) and may be in breach of the three-step test. We are in agreement with the President in this regard.¹⁷

- **Section 12B** introduces other additional exceptions which would amount to an arbitrary deprivation of property. In section **12B(1)(a)(i)**, a quotation is permissible, as long as it does not exceed the extent *reasonably* justified by the purpose. The current section 12(4) does not have the word “reasonably” and it is not clear why this word is inserted. Government did not conduct an economic impact assessment on the impact upon rights-holders of adding this word and whether this would align to the requirements of the three-step test. Furthermore the current section 12(4) has the phrase “provided that the quotation shall be compatible with fair practice”. It is not clear why this was removed and why it is deplorable to the lawmaker to retain this phrase, which is aimed at safeguarding the interests of rights-holders.

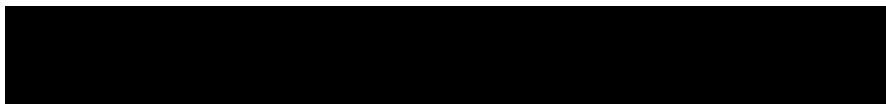
- With regard to the requirement in the current section 12(4) that “the source shall be mentioned, as well as the name of the author if it appears on the work” the amendment precedes this with the phrase “to the extent that it is practicable”. This is repeated in **12B(1)(b)** and **12B(1)(e)**. This is an unnecessary insertion that connotes an undermining of the need to respect the moral rights of authors and the integrity of copyright works. Without insisting on the requirement for the recognition of sources used and the authors of such sources, plagiarism shall be encouraged and the integrity of research works shall be tarnished.

¹⁷ It is also important to note in this regard that this also applies in respect of performers’ rights under the PPAB, in view of the proposed amendment to section 8 of the Performers Protection Act (PPA), in particular in clause 5(f) of the Bill which provides that a performance, an audiovisual fixation or sound recording of a performance or a reproduction of such may be used without the consent required by section 5, if it is for purposes which are regarded as exceptions in terms of the Copyright Act.



- **Section 12B(1)(c)** sadly retains the controversial ephemeral use provisions contained in section 12(5) of the current Act. This provision has had a negative impact on the ability of rights-holders to earn what is termed “broadcast mechanical royalties”, namely, royalties payable in respect of the reproduction of musical works for purposes of broadcasts. In this regard we wish to point out that though article 11*bis*(3) of the Berne Convention permits the enacting of such ephemeral provisions, it in fact leaves it to member states to determine the period within which such provisions would be applicable. It appears that the South African legislature adopted a position proposed in the Tunis Model Law, which recommends a period of six months or more. There is however no reason why our legislature, taking into account the local conditions of South African copyright owners, should follow the Tunis Model Law in this regard. “Ephemeral” in any case means “temporary”, “momentary” or “short-lived”.

- The provisions of the current Section 12(5) (as repeated in the new section 12B(1)(c)), have had a very negative effective on the ability of rights-holders to earn broadcast mechanical royalties, as broadcasters have argued that they are exempted from paying royalties on the basis of this section. In view of this we recommend that the proposed amendment be removed and replaced with a provision similar to that applicable under section 30(8) of the Canadian Copyright Act which provides, *inter alia*, that (a) the ephemeral provisions apply only in respect of a live recording of a copyright work by a broadcaster [“programming undertaking”] authorized to make such a recording; (b) the broadcaster must use its own facilities to make such a recording; (c) the broadcaster must make the recording for its own broadcasts; (d) the broadcaster must destroy the recording within thirty days of making it (unless otherwise authorized by the rights-holder or unless it keeps the recording in an archive), failing which royalties must be paid to rights-holders and (e) the provisions of the section does not apply where the broadcaster has secured a licence from a collecting society (e.g. CAPASSO) to make such a recording.




- 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.¹⁸

- 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

¹⁸ *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.¹⁹

- **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

¹⁹ *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.²⁰

- 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.²¹ 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*,²² 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

²⁰ 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.

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

²² (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.²³ 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,²⁴ where both the UK Supreme Court and the Court

²³ Information Society Directive 2001/29/EC.

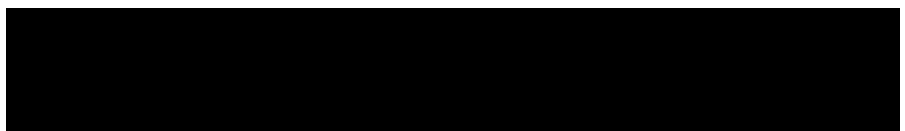
²⁴ *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* Case C-360/13, CJEU.



of Justice of the European Union (CJEU) held that on-screen copies and cached copies created for the purpose of viewing websites comply with the provisions of article 5 of the Copyright Directive (and section 28A of the UK Copyright, Designs and Patents Act of 1988). This made the streaming of copyright content (whether authorized or not) permissible in Europe under article 5 of the Copyright Directive, as long as no downloading took place.

- It is submitted that the proposed section 12C in the Bill, understood within developments in European copyright law on which it is based, is not one that is suitable for the South African market where rights-holders have, for a long time, been deprived of income from the digital exploitation of their works and should therefore not be incorporated. With the demise of income from the exploitation of physical products of music, and the switch of users' interests from music downloads to live streaming, a provision that permits live streaming without the need for compensation will virtually impoverish rights-holders and destroy the music industry. It has been said that streaming is the new revolution in the entertainment industry. Several new streaming services are now in operation in South Africa. This is a huge source of income for rights holders but the proposed section will hamper the ability of rights-holders to earn income from this source.

- In view of this, and as a way of building the South African music industry, it is proposed that musical works, lyrics and sound recordings should be exempted from the application of the proposed section 12C of the Bill. What is even more concerning with the proposed section is that it does not incorporate provisions similar to those in article 5(5) of the EU Copyright Directive, which subject the provisions of article 5(1) to the three-step test. If the proposed



provisions are to remain there must at least be a three-step provision in line with article 5(5) of the EU Copyright Directive to counter the harsh effects of the provisions.

- **Section 12D**, the “education exception”, introduces provisions that would have the effect of affecting the literary author’s economic market, including the possibility of copying a whole book without paying any compensation to the author. The copying of a whole textbook is for example permissible if the textbook is out of print; where the owner of the right cannot be found; or where authorised copies of the same edition of the book are not for sale in South African “or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works”. These are absurd provisions in an age where books can easily be obtained electronically so that there should be no concern about a textbook being out of print or copies not being for sale in South Africa.

- It is also not clear what the connection between the owner of the right not being found and the availability of the work. The section also introduces subjective considerations. For example, how does one determine “a price reasonably related to that normally charged for comparable works?” For example there are many reasons why similarly-sized books may be sold for different prices, e.g. the demand for the book in the market; the popularity of the author; the subject-matter etc. As it is now section 12D is calculated to conflict with the author’s normal exploitation of his or her work and to prejudice the author’s legitimate interest, thus contravening the three-step test.

- **Section 19C(4)** poses a serious threat to the rights of the relevant rights-holders, especially when read together with section **19C(5)** which allows a library, archive, museum or gallery to make a copy of a publicly accessible website (which thus includes the various copyright works in such website). If the publicly-accessible website is a music site, then the library, archive, museum or gallery will have copies of the music and video recordings concerned, which, under section 19C(4) it can give access to any person visiting its



premises, without the payment of any royalties. For example, if the library, archive, museum or gallery has a copy of the latest movie, music video or sound recording in any context, it can store it in its collection and give access to it to any person visiting its premises. People can then visit the library, archive, museum or gallery to watch or hear the latest movie or song, without the need to go to a movie theatre or to buy the latest album. This will clearly erode the copyright owner's market and the copyright owner's ability to derive economic benefit from the use of his or work.

3.1.4 the impermissible delegation of legislative power to the Minister

The President also raises the issue of Minister having been conferred with substantial discretionary powers with regard to particular provisions of the CAB, which would amount to an impermissible delegation of legislative authority which is reserved to the National Assembly. This relate in particular to the provisions in the proposed sections 6A(7)(b); 7A(7)(b) and 8A(5)(b) where the Minister is given authority to develop draft regulations regarding how the provisions of those sections with respect to the regulation of royalty sharing must apply in respect of works assigned before those provisions would have come to force, i.e. the retrospective application of those provisions. The proposed insertions provide that the Minister will draft regulations with regard to how to give effect to the royalty-sharing provisions in respect of works assigned before those provisions came into force; conduct an impact assessment in this regard and present the draft regulations and the impact assessment to the National Assembly for its approval prior to promulgating the regulations.

The President expresses a reservation as to the constitutionality of this process on the ground that (a) the process would result in the deprivation of property to those to whom it was assigned in the past; (b) the process does not make provision for public participation; and (c) the NCOP is excluded from the process. We agree with the President in this regard.



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.²⁵ Subordinate legislation is based on original legislation that enables its enactment through an enabling provision.²⁶ The scope of the subordinate legislation is determined by the enabling provision in the original legislation.²⁷ Once enacted, the subordinate legislation is seen as being part of the original legislation.²⁸ In this regard it has been observed that subordinate legislation “adds the flesh” to original legislation.²⁹ This delegated legislation is termed “legislation by the administration”³⁰ 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.³¹

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

²⁵ 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).

²⁶ 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).

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

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

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

³⁰ See Botha *Statutory Interpretation* 16.

³¹ 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*³² 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.*”³³ Similarly, the regulation cannot be used “as an aid to the interpretation” of the legislation, nor “to enlarge the meaning” of the enabling provision.³⁴

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.

³² [1989] ZASCA 45 at p. 34.

³³ *Ibid*, emphasis mine.

³⁴ *Ibid*.



3.1.5 International Treaty Implications

One other concern that the President raises in respect of the bills is the international treaty implications of the bills. In this regard the President is worried as to whether the bills have fully taken into account the provisions and requirements of the international treaties that South Africa has acceded to and those that she intends to accede to, including the WCT, the WPPT and the Marrakesh Treaty. One needs to add the Beijing Treaty in this list with a view that its non-mentioning is an oversight rather than intentional. This is because in paragraph 1.2 of the Memorandum to the PPAB it is clearly indicated that the proposed amendments in this bill are premised upon the WIPO treaties such as the Beijing Treaty and the WPPT. Indeed in reading the PPAB the attempt to incorporate provisions based on the PPAB can be detected.

We submit that the President is rightly concerned in raising his reservations regarding the alignment of the bills with the relevant international treaties. It seems like the drafters of the bills were either not versed in the provisions and requirements of the relevant treaties, or else they were only interested in “throwing in” certain provisions of those treaties, scattering them throughout the bills, without fully understanding the rationale of those provisions and the impact including the provisions in the bills in the manner in which this has been done. There are also instances of serious omissions that reflect the lack of understanding of the purport of those treaty provisions. This is also reflected in the arbitrariness that is often taken in the definition of terms, which often leads to the meaning intended in the international treaties being lost. We recommend that a team of international copyright experts be assembled to ensure that the bills comply with relevant international treaties in their general scheme.

Definition of “accessible format copy”



In respect of the CAB we give one example in this regard. This example is deliberated upon in full in the advisory opinion of one of the four experts engaged by the previous Portfolio Committee to assist with technical aspects of the bills, namely Adv. (now Dr.) J. Joel Baloyi and relates to the definition of “accessible format copy” in the bill. We advise the committee to consider Dr Baloyi’s comprehensive submission in relation to this matter. The essence of Dr Baloyi’s submission is that the definition of “accessible format copy” in the CAB is not aligned to that in the Marrakesh Treaty in that:

1. It extends to more works than literary works, as contemplated in the Marrakesh Treaty;
2. It extends to more beneficiaries than those contemplated in the Marrakesh Treaty, namely to all disabled persons and not only print-disabled persons.

Dr Baloyi implored the Portfolio Committee to ensure that the definition of “accessible format copy” is aligned to that provided for in the Marrakesh Treaty in line with the intention of that treaty, and that a definition of “beneficiary” that aligns to that used in the treaty be inserted. Dr Baloyi cautions that, in line with the principle of national treatment, if South Africa introduces exceptions that go beyond what is required in international treaties, only South African rights-holders will suffer from this. Foreign rights-holders will not suffer as their rights cannot be curtailed more than required by the international treaties. Furthermore, all users, including foreign users, will benefit from the expansive exceptions, while South African rights-holders will be the victims.

Some issues from the Performers Protection Amendment Bill

The PPAB also highlights a number of instances where there is no consistency with international treaty requirements. Some of those are as follows:

(1) The definition of “broadcast”



The definition of broadcast in the PPAB is not in line with international treaties (e.g. the WPPT) because it makes reference to “transmission ... *by wire* or wireless means”. However, in international treaty law broadcasts always entail “wireless” transmission. This should thus be fixed.

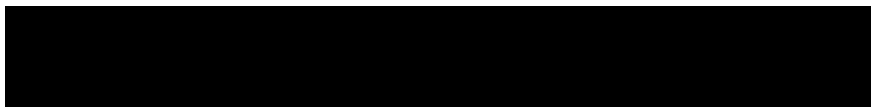
(2) Definition of “communication to the public”

The definition of “communication to the public” is faulty in the following sense:

- A performance only benefits from the definition if the performance relates to an audiovisual fixation. It does not benefit from the definition if this relates to a sound recording. Instead “communication to the public” is defined in respect of a sound recording (instead of in respect of a performance). But this is remiss because the PPA is not about sound recordings. Sound recordings are protected under the Copyright Act and a provision in relation to communication to the public in respect of sound recordings is provided for in the CAB (clause 10 of the CAB). It is wrong to limit the scope of a performance in this regard. It is understood that the amendments seek to introduce provisions relating to the Beijing Treaty on Audiovisual Performances of 2012. But this should not disregard the fact that the PPA is also concerned with performances in respect of sound recordings (and not about the protection of sound recordings *per se*).
- Accordingly we propose a revision of the definition of “communication to the public” in the following manner:

‘*Communication to the public*’ —

- (a) *in respect of the performance of an audiovisual work, means the transmission to the public by any medium, other than by broadcasting of an unfixed performance or of a performance fixed in an audiovisual fixation including making a*



performance fixed in an audiovisual fixation audible or visible, or audible and visible to the public; and

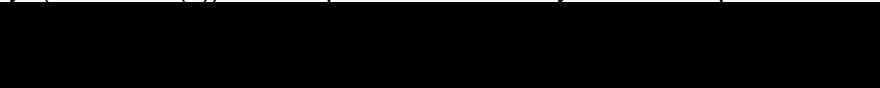
(b) in respect of the performance of a sound recording, means the transmission to the public by any medium, other than by broadcasting, of sounds of a performance.'

(3) Definition of “producer”

The definition of “producer” should add “or the entity which” after the phrase “the person who”, to align fully with the definition used in the WPPT and seeing that generally producers are corporate entities (record companies) rather than natural persons.

(4) A poorly understood regime for remuneration rights

Throughout the PPAB there is a lumping of what would be exclusive rights (i.e. rights requiring the prior authorisation of the rights-holder) and remuneration rights (i.e. rights only requiring that payment must be made for usage but which do not prohibit the usage itself). Currently in respect of performances the “needle-time rights” system contemplated in section 5(1)(b) of the PPA is an example of a remuneration rights system. The provisions in clauses 2, 3 and 4 (in particular the proposed section 3(4)(g) in clause 2; the proposed section 5(1)(a)(vi) in clause 4; the proposed revision of section 5(1)(b) in clause 4; and the proposed amendment to section 5(4)(a) in clause 4) all need to be revisited to make a clear distinction between exclusive rights and equitable remuneration rights. The use of the phrase in those sections “against payment of royalties or equitable remuneration” is problematic in that it will not create certainty as to the system contemplated and will spawn disputes. It will not be clear at which state royalties, requiring prior authorisation for usages based on exclusive rights, will be payable, and at which a system of equitable remuneration is contemplated. Both the Rome Convention (article 12), the WPPT (article 15) and the Beijing Treaty (article 11(2)) make provision for a system of equitable



remuneration in respect of fixed performances. However the Beijing Treaty also provides for the possibility of the use of exclusive rights instead of a system of equitable remuneration (right of authorisation v right to equitable remuneration).

The legislation cannot create a “royalties or equitable remuneration” regime, as it will create uncertainty. In respect of performances embodied in sound recordings, it is clear from the provisions of the Rome Convention and the WPPT that the system has to be that of equitable remuneration. In respect of performances embodied in audiovisual works it can either be a royalties system or an equitable remuneration system. The Act must be clear as to which system will apply and not use an “either or” provision, to prevent potential disputes. It is critical to do this to also create certainty as to the continuation of the current needle-time rights system.

3.1.6 A further note on the three-step test

While a lot has been said in relation to the issues arising from the expansive exceptions regime that the bills introduce at the core of this is the requirement to ensure that the imposition of exceptions and limitations adhere to the three-step test. International treaty law does not prohibit the introduction of exceptions and limitations to copyright. However they require that this must be done in adherence to the three-step test.

An assertion that proposed exceptions and limitations satisfy the requirements of the three-step test cannot be made easily. It is important that it is demonstrate that, in respect of *each* of the exceptions being introduced, such exception (1) is a limited special case; (2) does not conflict with the normal use of the work by the rights-holder, and (3) would not prejudice the legitimate expectations of the rights-holder.

We contend that unless a proper social and economic impact assessment has been conducted in respect of each of the proposed exceptions and limitations, involving and



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.

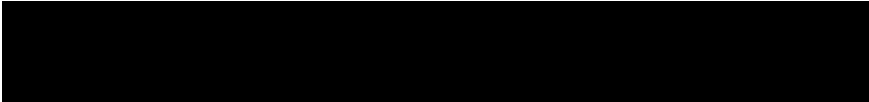
3.2 PART B – ADDITIONAL CONSTITUTIONAL ISSUES

Above we referred to the *Liquor Bill* case³⁵ 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.³⁶ Speaking about the need to have effective legislation Bennion has observed:

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

³⁶ 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*. ...³⁷

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*³⁸ 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”.³⁹ 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”.⁴⁰

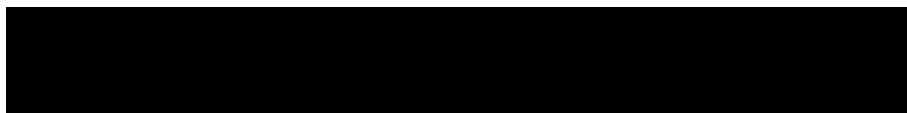
In light of the above, Parliament should be zealous to ensure all that is required to ensure widely-accepted effective laws is given attention to. In the past twenty years or so it would appear that the intellectual property law domain has suffered from a lack of trust and adequate collaboration between 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.

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

³⁸ [2006] ZACC 11 at para 115.

³⁹ Emphasis added.

⁴⁰ See note 14 above.



In light of the foregoing the industry's plea that the un-consulted addition of the phrase "such as" in the fair use exception needs to be given opportunity for consultation, need to be taken seriously. Also the call for the conducting of social and economic impact assessments in relation to the various exceptions must be given attention to.

Another critical area that a broader consideration of the constitutionality of the CAB will bring to light is the possible impact of the amendment to section 5 of the CA (clause 3 of the Bill) is likely to have on the music and audiovisual industries. The proposed amendment adds a "local organization as may be prescribed" as one of the entities in respect of which works made by or under the control or direction of, would be eligible for copyright protection. The original section limited this to the state or a prescribed international organization. Although the requirement of funding as part of the considerations for the conferment of copyright in a work which formed part of earlier versions of the CAB have since been removed, after submissions from the industry highlighting the problem with this, the retention of the phrase "or such ... local organization as may be prescribed" remains of great concern and apprehension to composers of musical works and independent producers of audiovisual works.

It is clear that the expression "as may be prescribed" with regard to international organisations which formed part of the original provisions seeks to link such international organisations to the state – in other words, it is intended to refer to those international organisations that are, in one way or another related to *state actors*, namely, the so-called *international governmental organisations*. It was therefore understandable that such organisations would be included within the section.

There is a problem however with the inclusion of "local organizations" which will be prescribe, because the apprehension that rights-holders have had with regard to the South African Broadcasting Organization (SABC) – or any other local organisation for that matter



– being prescribed under this section is being relived. Composers and audiovisual producers are constantly commissioned by the SABC to compose works for productions and to produce programmes. With the extension of the ambit of section 5 to prescribed local organisations if the SABC is so prescribed, such composers and producers would no longer be able to own the copyright in works commissioned by the SABC.⁴¹ This will affect the livelihood of those composers and producers as they will only receive an upfront payment and not be able to benefit from royalties and downstream usages of their works. We advise therefore that this proposed amendment be removed and that the original provision be retained.

3.3 PART C – OTHER PROBLEMATIC AREAS

Lastly, it is important to observe that, in finalising the two bills prior to sending them to the President, we would advise that a final consideration of the structural scheme of the bills and their correlation should be done. This includes ensuring that the definitions used are adequate and appropriate; ensuring that copyright and neighbouring rights concepts are adequately reflected (e.g. the issue about creating a clear remuneration right in the PPAB); that there is a clear rationale for all new provisions; that there is an alignment between the CAB and the PPAB etc.

One example of where there is no alignment between the CAB and the PPAB relates to the proposed introduction of the “first-sale” or “exhaustion” doctrine in the CAB in the proposed section 12B6, as discussed above. It is intriguing that while the CAB is seeking

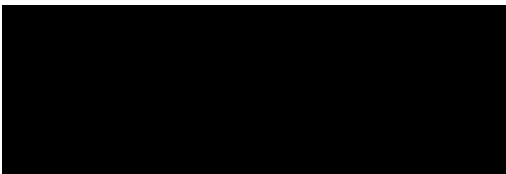
⁴¹See in this regard *Biotech Laboratories (Pty) Ltd v Beecham Group Ltd and Another* 2002 (4) SA 249 (SCA). The court held in this case (see paras 18 – 20) that the phrase “under the direction” of the state (and thus of the international or local organisation) requires the state to initiate the making of the work and to “prescribe the manner and means to be employed” in doing so; while the phrase “under the control of” requires that the work is *made* under the control of the state, and not merely that the state had the power to approve or disapprove of the work. Since copyright in works so made will belong to the state or the prescribed organisation concerned, this means that composers and producers commissioned by the SABC or any such local organisation will not own copyright in the commissioned works.

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)⁴² 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

⁴² 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.