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28 January 2022

Chairperson: Portfolio Committee on Trade and Industry
Attention Mr. A Hermans
Parliament of the Republic of South Africa
CAPE TOWN

By email only to: [a](#) [REDACTED]

Dear Portfolio Committee Members,

**CALL FOR PUBLIC SUBMISSIONS AND COMMENTS IN RELATION TO AMENDMENTS TO SPECIFIC CLAUSES
IN THE COPYRIGHT AMENDMENT BILL (B13B-2017) AND THE PERFORMERS PROTECTION AMENDMENT
BILL (B24B-2016) – SUBMISSION BY AMANDLA OMNOTHO**

We thank the Portfolio Committee for the opportunity to present this submission in response to the call for public submissions and comments published on 03 December 2021 on additional definitions and clauses in relation to the Copyright Amendment Bill (“the Bill”).

1. INTRODUCTION

Amandla Omnotho background

Amandla Omnotho is a socio-economic platform founded under Lighthouse Economic Development Institute – NPC, serving many South Africans predominantly in rural and semi-rural areas (townships) of South Africa. The main agenda of Amandla Omnotho is on issues of socio-economy / entrepreneurship. Its founder and leader is a resident contributor on many radio and television station platforms.

He writes and contributes to some journals including newspapers on entrepreneurship, economic development and social issues. He has founded organisations such as African Liberty Movement – a civil rights organisations looking after the interests of black disenfranchised persons. He is an advisor to the late Zulu King, King Goodwill Zwelithini and a contributor to his parliamentary speeches. He advises many traditional leaders and mentor many artists on the business front. Amandla Omnotho has over 100,000 registered entrepreneurs involved across all economic sectors.

We have regrettably not had the adequate time required to be able to sufficiently respond to all the matters and amendments that are contained in the Copyright Amendment Bill (the CAB) and the Performance Protection Amendment Bill (the PPBA) however we wish to ventilate our views despite the limited time frame and wish for a further opportunity to workshop on this matter.

We are engaging with industry practitioners who are assisting our members try and understand the genesis of the Bills and the complexities contained therein this law. We are also inquiring on the rationale behind why we are sitting as a country with pieces of legislation that when legally scrutinized do not appear to be at the best interest of our South African creative industries. We are deeply saddened by the daunting reality that if these Bills are passed in their current form they are likely to disenfranchise our people now and for future generations and we continuously wonder why our legislators would legislate

on behalf of our South African creative industries Bills which are likely to be unconstitutional and fail to deliver on the key objectives of ensuring that the already ailing creative industry has sustainable growth.

Due to the obvious time constraints offered to stakeholders in this consultation, we will limit our comments to key provisions which we have noted and which we as Amandla Omnotho believe would be a deterrent to the much-needed investment in our country. We have also ensured that we make some of the points below in isiZulu in order to ensure that all our stakeholders and our members understand the deep lying issues contained in these Bills.

We will welcome the opportunity to engage further with yourselves in order to partner in ensuring that this ongoing legislative process produces legislation which will improve the livelihoods of South Africans and place our creative industry at a global advantage.

1. ***Over-broad exceptions for educational as well as other purposes***

The Bill creates new copyright exceptions as part of the so-called 'hybrid model of copyright exceptions grounded in fair use'. These new copyright exceptions are more expansive than in most countries in the world, justified only with a simplistic assumption that educational materials are 'too expensive'.

Copyright exceptions that are too broad and rightsholders off from being remunerated for their work. Being under-remunerated, they themselves will still have to carry the cost of works used by the educational system.

Umthetho sivivinyo wenza ukuvumeleka okubanzi ngokweqile mayelana nezemfundo nezinye izinhloso

Umthetho sivivinyo wamalungelo okuqopha uzokwenza ukuvumeleka okusha kwelungelo lokusebenzisa umsebenzi labaqophi/ababhali, lokho kusukela entweni ebizwa ngokuthi 'wuhlelo oluyingxube lokuvumeleka kwelungelo lokuqopha elisekelwe ohlelweni olubizwa 'ukusebenzisa

ngokulungile’ (phecelezi ‘fair use’). Lezi zinto ezintsha ezivumelekile ngokwelungelo lokuqopha zivuleleke kakhulu ukudlula amazwe amaningi emhlabeni, isizathu salokho senziwe salula kakhulu nje ngokuthi kuthiwe ‘izinsiza zokufundisa zibiza kakhulu’.

Njengakwamanye amazwe amaningi eAfrika, ingxenye engamashumi ayisishagalombili (80%) yokushicilela eNingizimu Afrika ileyo eshicilela izinto eziqondene nezemfundo. Okuvumelekile elungelweni lokuqopha okubanzi ngokweqile nokuvuleleke kakhulu kuzokwenza ababhali nabashicileli bangatholi ukuholeleka okufanele noma inzuzo ngemisebenzi yabo. Lokho kuzokwenzeka ekubeni kumele babhekane nezindleko zokukhiqiza imisebenzi yezemfundo.

2. *A new ‘fair use’ defence to copyright infringement coupled with general and specific copyright exceptions leading to intensive litigation or unwilling agreement*

The Bill changes fair dealing exceptions in the current Copyright Act (1978) into general exceptions no longer qualified by the principles of ‘fairness’. It adds new special exceptions and a new statutory defence against infringement called ‘fair use’. This defence is claimed to be based on an equivalent provision in US law, but is actually much wider than that, for example, the Bill does not import mandatory statutory damages, a key factor that balances out ‘fair use’ with the interests of copyright holders in the US.

The broad exceptions by which copyright works can be used by others without permission and without remuneration, mean that authors and rightsholders will be cut off from the economic benefits of new ‘transformative’ ways of propagating their works, allowing others to benefit instead.

In important cases, there will be litigation between rightsholders and users who may believe that copying will be allowed for broad uses and will be for free. The litigation costs will have to be borne not only by rightsholders but also by the very educational institutions that the exception is meant to benefit.

Authors and other copyright owners who do not want to start this kind of litigation against infringers who claim ‘fair use’ may end up having to unwillingly acquiesce to unauthorised uses of their works.

Ukuzivikela ohlelweni lo 'kusebenzisa ngokulungile' ekuxhashazweni kwelungelo lokuqopha okuhambisana nokuvumeleka okubanzi ngokweqile kudala ukungena ezinkantolo nokungavumelani okukhulu

Umthetho sivivinyo welungelo lokuqopha uguqula lokho okuvumelekile kokusebenzisana okukhona kumthetho osebenzayo njengamanje (Copyright Act of 1978) wenza okuvumelekile kube banzi ngokweqile okwenza imigomo enobulungiswa ingabibikho. Lapha sibona kwengezwa lokho okuvumelekile okubanzi ngokweqile ngenhloso yokuvikela laba abaxhaphaza imisebenzi yokuqopha ebizwa ngoku 'sebenzisa ngokulungile' (phecelezi 'fair use'). Lokh'ukuvikela kuthiwa kusekelwe emthethweni waseMelika (United States), kodwa lomthetho sivivinyo ubanzi kakhulu kunalokho, isibonelo, awusifaki isinxephezelo esiphokelekile ngamademeshe (phecelezi 'mandatory statutory damages'); okuyiyonanto eyenza kuqondakale noma kubengconywa ukusetshenziswa kohlelo lo 'kusebenzisa ngokulungile' kubhekelele abanikazi belungelo lokuqopha eMelika.

Lezizinto ezivumelekile nezibanzi zokusebenzisa amalungelo abaqophi zingasetshenziswa abanye abaningi ngaphandle kwemvume nangaphandle kokukhokhela abanikazi okungabaqophi; lokhu okuchaza ukuthi ababhali nabashicileli bayakhishwa ekuzuzeni emnothweni wezwe naseku sabalaliseni imisebenzi yabo, okwenza kuzuze abanye.

Kuleyo misebenzi ebalulekile, kuzoba nokuxabana okuningi okuyisana ezinkantolo Phakathi kwabashicileli namakhasimende abo okungenzeka bakholwe ukuthi ukukopisha imisebenzi yabanye ngenhloso yezemfundo kuvumelekile ngaphandle kokukhokha. Izindleko zezinkantolo kuyomele zikhokhwe hhayi kuphela ngabashicileli kepha nazo izikhungo zezemfundo zona lezi lomthetho ovumelelayo odalelwe ukusiza zona.

Ababhali nabanye abangabanikazi bokuqoshiwe abangafisi ukuya ezinkantolo ukulwa nalabo abaxhaphaza imisebenzi yabo besebenzisa lokhu okuthiwa u 'ukusebenzisa ngokulungile' kungenzeka bagcine begeze izandla ngokusetshenziswa kwemisebenzi yabo okungavumelekile.

2. *Regulatory Over-reach*

The Minister for the Department of Trade and Industry will be able to prescribe minimum standards for commercial contracts. This will create a rigid and inflexible system that interferes with freedom of contract between authors and publishers, musicians and recording companies, etc, taking bargaining power away from creatives and interfering with the healthy competitive commercial environment for the best creatives.

Umthetho-nqubo ofinyelela-kweqe

Ungqongqoshe woMnyango wezoHwebo neziMboni unikwa mandla okubeka amazinga ezivumelwano zokudayiselana (phecelezi 'commercial contracts') amancane afanele. Lokhu kuzodala kusebenza ngokuvumelana kubelukhuni kungapeteki njengoba futhi kugxambukela enkululekweni yokwenza izivumelwano phakathi kwababhali nabashicileli, abaculi nezinkampani zokuqopha, njalonjalo, okuthatha amandla okuxoxisana kubenzi bomsebenzi okuphinde kugxambukele esimweni esihle sokuqhudelana nokuthengiselana kwamaciko angcono.

3. *Royalties as remuneration, discouraging other forms of remuneration*

The Bill is intended to give creatives a better share in the income from their works but will do this by ministerial declaration of royalty rates. This mechanism will have a major impact on distribution decisions, for instance being more selective and placing less emphasis on other forms of standard remuneration, such as advances, simply because of the nature of the risk taken in publishing. The Bill apparently assumes – mistakenly – that every production and/or publication is a commercial success.

Izibonelelo (phecelezi 'royalties') uma ziba umholo, kuvimbela ezinye izinhlobo zokuhola

Umthetho sivivinyo uhlose ukunika amaciko ingxenye engcono ezimalini ezingenayo emisebenzini yawo kodwa kuzokwenzeka lokho ngokuthi kube nesimemezelo sikangqongqoshe (phecelezi 'ministerial declaration of royalties') sezinga lezibonelelo. Lendlela uma ilandelwa iyoba nomthelela omkhulu ezinqumweni zokushicilela, uma singabeka nje, kungaba nokukhetha kungabe kusanakisiswa ezinye

izindlela zokuhola, njengokuthola imali kungakashicilelwa (phecelezi 'advance payment'), ngenxa yohlobo lobungozi obuthathwa abashicileli. Umthetho sivivinyo ngephutha

4. *Parallel imports*

The Bill allows so-called parallel imports – meaning if books are available overseas at a price lower than in South Africa, the books may be imported from there. This is perhaps intended as a pro-consumer exception, but will hit the book trade very hard. We support the President's plans to make South Africa a reading, however, the reality is that South Africa is not a reading nation yet and harming booksellers in this way is highly detrimental and ill-advised for the structure of the book trade.

Ukuhambisana kokungeniswayo ngohwebo ("Parallel Imports")

Umthetho sivivinyo uvumela lokhu okubizwa ngokuthi 'ukuhambisana kokungeniswayo ngohwebo' (phecelezi 'parallel imports') – okuchaza ukuthi uma izincwadi zitholakala phesheya kwezilwandle ngenani eliphansi kunaseNingizimu Afrika, lezozincwadi zingangeniswa ezweni noma zithengwe phesheya. Mhlawumbe lokhu kuhloswe ngakho ukuthi abathengi bezincwadi baboneleleke, kodwa kuzolimaza ukuhwebelana ngezincwadi kanzima. Siya vumelana noMongameli ezinhlelweni zakhe zokwenza iNingizimu Afrika isizwe esifundayo, kodwa okwamanje iqiniso lithi iNingizimu Afrika ayikabi isizwe esifunda izincwadi ezingeni eliphezulu; ngakho lokhu kuzolimaza abadayisa bezincwadi. Ngalendlela lokhu kuyingozi enkulu futhi akusiso isaluleko esihle esimweni sokuhweba ngezincwadi.

CONCLUSION

Sekushiwo konke lokhu okungaphezulu nokunye okuningi okungashiwo mayelana nalomthetho sivivinyo, kubalulekile ukuthi ababhali nabashicileli bezincwadi, nabaqambi bamaculo bawazi amalungelo abo okuqopha futhi bawavikele. Siyayinxenxa iPhalamende ukuthi livuleke ithuba lokubonisana nePhalamende noHulumeni mayelana nezinqumo ezithathwe ababhali nabashicileli ngalomthetho sivivinyo njengo uMongameli anqaba ukuwusayinda wawubuyisela ePhalamende ukuthi ubuyekeze.

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It is clear that a lot more work needs to be done in order to improve the Bills so that they fit for the purpose they were set out to achieve. During the limited time that we've had to engage on these Bills and all these suggested or proposed amendments the complexities of this law are quite apparent.

We understand the challenges faced by the Portfolio Committee to have to dissect this technical and complex piece of legislation. We therefore call upon the PC to set up a task team which will consist of experts from industry with expertise in economics for the creative industries; legal experts who can interpret legislation constitutional law experts as well as experts who are able to draft legislation to align it with international treaties.

Amandla Omnotho remains active in our communities all over the country and would use every opportunity it has at its disposal to ensure that our stakeholders, some of which do not always have access to information are able to understand and appreciate the changes that are taking place and which will ultimately have an effect on their livelihoods now and for future generations. We require that the portfolio committee urges that further research both economically and from a legal sound basis be conducted to ensure that the provisions made into the Bills are appropriate for the different sectors in the creative industries and that they provide for legal certainty and foster an environment for investment.

Now more than ever we require legislators to make sure that our South African creative content is protected against digital expropriation and that's our creatives are adequately compensated and not exploited as has been in the past. We cannot afford to repeat history of exploitation in South Africa

Yours sincerely,

Gugulethu G. Xaba

Signature

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On behalf of:

- Amandla Omnotho Members (The Artists and Writers in particular)

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- African Liberty Movement – Secretariat
- Advisory role to Amakhosi aseNdlunkulu

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