MULTICHOICE GROUP SUBMISSION

COPYRIGHT AND PERFORMERS PROTECTION AMENDMENT BILLS

28 JANUARY 2022

INTRODUCTION

1 Electronic Media Network Pty Ltd ("M-Net") and MultiChoice Pty Ltd ("MultiChoice") thank the Parliamentary Portfolio Committee on Trade and Industry ("Portfolio Committee") for the opportunity to make written submissions on specific clauses of the revised Copyright Amendment Bill [B13B-2017] ("the Copyright Bill"). As licensed subscription broadcasters, we are investors in and users of a range of works of copyright. We are also the authors of our own works (in the form of audiovisual works and broadcasts). The policy and legislative framework governing copyright matters are thus of critical importance to us and the entire broadcasting industry. We support the submission made by the National Association of Broadcasters (NAB) and will in our submission be expanding on some of the issues covered in that submission.

SCOPE OF SUBMISSION

2 The advertisement expressly limited submissions only to the following specific clauses in the Copyright Bill:

2.1 New definitions: "authorized entity"; "broadcast"; and "lawfully acquired".

2.2 Clause 1(i): The definition of "technological protection measure" due to the inclusion of "product" and "design" and the deletion of paragraph (b). The amended definition of "technological protection measure circumvention device or service".

2.3 New clause: Amendments to sections 11A and 11B: Making the new exclusive rights of "communication to the public", "making available" and "distribution" applicable to published editions and computer programmes.

2.4 Clause 13: Section 12A(d): New paragraph (d) making the four factors in paragraph (b) applicable to exceptions in sections 12B, 12C, 12D, 19B and 19C. Section 12B(1)(c) and new 12B(2) providing for new

provisions related to ephemeral rights. Section 12B(3)(b) providing for the factors related to the exception for personal copies to not apply to any other exception that permits a copy to be made. Sections 12C(2) and 12D(1)(b), (c) and (d): Adding the wording of the three step test as additional factors against which the exceptions must be tested.

2.5 Clause 20: Section 19C(4): The words "commercial purpose" are deleted as it is duplicating subsection (1), however removing only those words provides a different meaning to the wording of subsection (4); Section 19D(3) and (4)(b) incorporating treaty wording in respect of importing or exporting accessible format copies.

2.6 Clause 27: Section 27(5A), (5B) and (5C): New subsection (5A) and (5C), and amended subsection (5B) providing for offences in respect of digital rights, technological protection measures, and copyright management information.

2.7 Clause 33: Section 39(2): New subsection (2) requiring the Minister to make regulations providing for processes and formalities related to the authorization or recognition of an "authorized entity".

3 We wish to put it on record, as we did in our previous submission, that restricting comment on specific clauses in the Copyright Bill in a piecemeal fashion rather than dealing with the two Bills holistically, places limitations on the public consultation process, causing it to fall short of the standard required by the Constitution. The result will be copyright legislation which fails to provide a coherent and economically sustainable framework that will allow for the continued investment in, and exploitation of, copyright works as well as the protection of South African creatives.

4 A key example of the flaw in this approach is the document circulated by the Portfolio Committee which had (a) text in blue font on which comment was invited, and (b) text in green font, which was described *as* "*wording that resulted from the previous call for comments, are not material in nature and on which the call for comments have accordingly closed*".

5 However, some of the green text introduces new and material provisions on which the public have not been consulted. For example, in several places it is proposed that the term "*including to*" be inserted. Although this text is in green, and is claimed to not be a material change, in this case it is not true as the proposed amendment widens the provision, such that it is no longer a closed list, and therefore, is definitely a material change which demands to be commented on. Similarly, there has been no attempt to invite and engage with comment on clause 39 in the Copyright Amendment Bill despite numerous concerns having previously been raised about the powers being allocated to the Minister to make regulations on compulsory and standard contractual terms and prescribing royalty rates or tariffs.

6 The Copyright Bill for the first time also introduces a new definition of "broadcast". This is a material amendment as it considerably changes the scope of the term "broadcast", wherever it is used in the Copyright Act, to include encrypted broadcasting on mobile and online platforms (the current definition is limited to over the air transmissions. This is being done without any consideration or consultation on each of the provisions which is affected by the expansion of the term "broadcast". No consideration or debate by the Portfolio Committee has addressed the consequences of such a change to those provisions in the Copyright Act or the unintended consequences that may result. In prior submissions made, when consultation was permitted on definitions in the Performers' Protection Amendment Bill [B24B-2016] ("PPA Bill") by the previous Portfolio Committee, broadcasters submitted that the proposed definition was not appropriate and should be aligned with the current definition of broadcast in the Copyright Act, 1978. We will deal at greater length on this issue in our submission below.

7 In our view, the decision by this Portfolio Committee to, once again, not invite comment on all aspects of both Bills will continue to perpetuate the procedural defect caused by the previous Portfolio Committee's process. Due to the time constraints in preparing this submission on the back of the festive season and the procedural defects mentioned above, our ability to meaningfully consider and comment on the proposed amendments has been limited.

8 Nevertheless, we have endeavoured to comment constructively within the Portfolio Committee's constraints. We urge the Committee to fully consider our comments with a view to developing workable and effective legislation that is conducive to growth and investment.

DEFINITION OF BROADCASTING

9 The Portfolio Committee proposes replacing the current definition of ‘broadcast’ in the Copyright Act with the following definition of "broadcast" in the Copyright Bill:

> *"'broadcast' means—*
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> *(a) transmission, partially or wholly, by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;*
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> *(b) transmission, partially or wholly, by satellite; or*
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> *(c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent*;".

10 The above definition of "broadcast" has been transposed from the PPA Bill which, in turn, had imperfectly copied the definition of "broadcasting" from the Beijing Treaty on Audiovisual Performances, 2012 (the Beijing Treaty). In the Beijing Treaty "broadcasting" means *"the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent".*

11 The definition of broadcast in the Copyright Bill and PPA Bill has introduced features to the Beijing Treaty definition such as "partially or wholly" that are unclear as to what they contemplate. The Beijing Treaty defines the transmission by wireless means to constitute broadcasting, and then simply confirms that

transmission by satellite is also broadcasting. The definition of "broadcast" in the Copyright Bill and the PPA Bill separates transmission by satellite from the previous definition of broadcasting in (a) the result being that all transmissions by satellite are considered to be broadcasting irrespective of the nature of the services. Clearly, this is not the intention, and (b) should have been limited to the *"public reception of sounds or of images or of images and sounds or of the representations thereof"* as is the case for transmissions by wireless means in (a). It is also not clear if "public reception" in (a) would capture subscription broadcasting services which only broadcast to "sections of the public". The current definition of "broadcast" in the Copyright Act refers specifically to "*intended for reception by the public or sections of the public".*

12 It is also not clear what is meant by "(c) *transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;".* The Beijing Treaty uses the term "broadcasting organisation" which is found in (c), but no such term exists in the Copyright Act which currently uses the term "broadcaster" which is defined in the Act as meaning *"a person who undertakes a broadcast"*. It is also not clear if (c) is meant to expand the definition of "broadcast" to encrypted signals provided on wired platforms, such as mobile platforms or online platforms, and thereby include such online video distribution services as Netflix or ShowMax within the ambit of being a broadcasting organisation for the purposes of the Copyright Bill, or if the term encrypted signals is limited to wireless transmissions. If it is meant to be wireless transmission only it is not clear from the drafting that this is the intention.

13 Internationally, under the Rome Convention, broadcasters have exclusive rights for 20 years to authorize rebroadcasting, "fixation" (recording), reproduction and communication to the public of their broadcasts. However, those related rights to protect broadcasters from piracy have not been updated at the international level since 1961. In 1997, broadcasters began arguing at the World Intellectual Property Organisation (WIPO) for updated protections. Although there has been agreement in-principle that protection against signal theft needs to be updated at international level, so far WIPO members have failed to agree on how that should

be done and whether the definition of broadcasting should remain confined to over the air transmissions or be expanded to include internet transmissions. Some countries, including the European Union, have initiated relevant domestic legislation that have updated these rights to prevent unauthorised retransmission of broadcast programmes on the internet.

14 In South Africa, government is also engaged in a debate about the scope of broadcasting in the modern environment. The draft White Paper on Audio and Audiovisual Content Services Policy Framework has debated on expanding the traditional scope of broadcasting, as defined in the Electronic Communications Act, 2005, to include on demand content services offered over the Internet. There have also been suggestions that the term "broadcasting" should be replaced in its entirety with the new broader concept of audiovisual content services.[1]

15 Due to the current debate at a national policy level in South Africa on the scope of broadcasting still being unclear on whether broadcasting should include internet transmissions and the fact that there has been inadequate time to consider the implications of substantively amending the definition of "broadcast" - which is a material change to the Copyright Bill - we recommend that the current definition of "broadcast" in the Copyright Act (a) be retained in the Copyright Act and (b) replace the proposed definition in the PPA Bill. For the avoidance of doubt, the following definition of "broadcast", which is currently in the Copyright Act, and which we propose be used in both the Copyright Act and the PPA Bill, is as follows:

> *"broadcast", when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which—*
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> *(a) takes place by means of electro-magnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and*

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[1] Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published by the Minister of Communications, Department of Communications and Digital technologies. Government Gazette, No.43797, Notice No. 1081, 9 October 2020

(b) is intended for reception by the public or sections of the public,

and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly."

16 Our proposal to replace the definition of "broadcast" in the PPA Bill with the existing definition of "broadcast" in the current Copyright Act would both ensure consistency between the two bills and address the defects in the current PPA Bill definition of the term.

17 Should the Portfolio Committee wish to amend the definition of "copyright" in the future, it should do so only after a thorough and meaningful consultation which fully considers the implications of the change having regard to the provisions in the legislation where the term is used.

TECHNOLOGY PROTECTION MEASURES

18 M-Net and MultiChoice previously made extensive submissions to the Portfolio Committee on Technology Protection Measures (TPMs).

18.1 In our last submission to the Portfolio Committee we highlighted that TPMs using both "access control" and "copy control" technologies are a critical tool used by broadcasters and other copyright holders in the protection of copyright works against piracy.

18.2 We noted that although we had previously argued for the definition of TPMs in the Copyright Bill to be broadened to include both types of TPMs, ultimately the Portfolio Committee had decided to not broaden the definition. We speculated in our previous submission that this decision was possibly because the Cybercrime Bill was being dealt with by another Parliamentary Portfolio Committee at the same time, or because circumvention of an "access control" TPM is never permitted except in very limited circumstances (a principle that would have been undermined by the exceptions in respect of TPMs permitted by section 28P of the Copyright Bill).

18.3 We then brought it to the attention of the Portfolio Committee that we no longer called for the definition of TPMs to be broadened to include "access control" as those earlier submissions had been overtaken by events. The Minister of Communications and Digital Technologies had published a draft White Paper on Audio and Audiovisual Content Services that noted that the Copyright Bill and the PPA Bill "*have not addressed signal piracy and their definition of Technology Protection measures do not extend to broadcasting technology protection measures*."[2] Accordingly, the draft White Paper "*proposes that legislative and regulatory mechanisms to strengthen protection against signal piracy must be introduced in the Electronic Communications and Transactions Act…*"[3]

19 It is concerning that the Portfolio Committee has reversed its previous decision to exclude "access control" from the ambit of TPMs, with no explanation why its view has now changed (especially since broadcasters were no longer calling for its inclusion.

20 Previously, the definition of TPMs in the Bill specifically excluded "access control" by virtue of *"(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;".* The published amendment to clause 1 in the Copyright Bill now reads *"'technological protection measure' means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation is designed to prevent or restrict the infringement of copyright in a work;".*

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2 Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published by the Minister of Communications, Department of Communications and Digital technologies. Government Gazette, No.43797, Notice No. 1081, 9 October 2020, para 5.6.8

3 Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published by the Minister of Communications, Department of Communications and Digital technologies. Government Gazette, No.43797, Notice No. 1081, 9 October 2020, Para 5.6.9

21 This is a material change that brings "access control" TPMs within the ambit of the proposed section 28O in the Copyright Bill.

22 We support section 28O as it will assist broadcasters to deal with broadcast signal piracy. However, section 28O(3) of the Copyright Bill uses the standard of *"with the specific intention of inciting"* that other person to unlawfully circumvent a technological protection measure. This is a high and subjective standard and will be difficult to prove.[4]

23 Despite our support for section 28O, we have serious concerns that the protection of TPMs provided under section 28O will be undermined by the broad exceptions permitted for circumvention of TPMs in section 28P of the Copyright Bill.

24 Whilst there might be a case to be made for exceptions and limitations with regard to "copy control" TPMs applied on individual copyright works, there is almost never a justified exception to circumvent "access control" TPMs. This is because such a circumvention would expose the entire archive, library, broadcast signal or streaming channel protected by the "access control" TPM, not just an individual copyright work, which would unreasonably prejudice the legitimate interests of content owners. Therefore, section 28P as currently drafted is a gross overreach that falls foul of Treaty obligations in that it undermines the obligation of adequate legal protection by not being narrowly crafted and restricted to special cases.[5]

25 We note that s28P(1)(a) in the Copyright Bill has been amended by the insertion of the words "or prescribed" which is clearly referring to the regulations prescribed by s39(cH) in the Copyright Bill (which deals with prescribing permitted acts for circumvention of TPMs), and the cross reference has now been

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[4] The same observation can be made about s8E(3) of the PPA Bill and s27(5A), which inserts the words *"which they know to be infringing copyright in the work".*

[5] It should be noted that Article 10 of the WIPO Copyright Treaty (WCT) and Article 16 of the WIPO Performance and Phonograms Treaty (WPPT), confine the acts "permitted by law" to any limitations of or exceptions to rights provided for in the treaties to certain special cases which do not conflict with the normal exploitation of the works and do not unreasonably prejudice the legitimate interests of the owner of the works.

corrected to refer to section 28P and not section 28B. Section39(cH) specifically notes that such circumvention should only be contemplated after considering the following factors:

> *"(i) The availability for use of works protected by copyright;*
>
> *(ii) the availability for use of works for non-profit archival and educational purposes;*
>
> *(iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or*
>
> *(iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;"*

26 We would suggest that other factors be added to the list in s39(cH) for prescribing regulations, namely-

26.1 the availability for use of works for the benefit of persons with disabilities;

26.2 the existence of any licensing agreements between rightsholders and public libraries and archiving institutions;

26.3 any copying opportunities that are in practice being built into copy protection measures for fair use or fair dealing;

26.4 how digital licences use innovative solutions to deal with exceptions;

26.5 any voluntary technical measures to facilitate exceptions and limitations to the rights of content owners that have been taken; or

26.6 other steps taken by government to ensure access which would negate the need for exceptions to the general prohibition against circumvention of TPMs.

27 The drafting of section 39(cH), unlike the broad exceptions in section 28P, reflects a more nuanced approach that is narrowly crafted and restricted to

certain conduct which is aligned with Treaty obligations for TPMs. Accordingly, by virtue of the material change to the definition of TPMs in the Copyright Bill we propose that section 28P(1)(a) be amended so that it only permits the circumvention of TPMs in accordance with regulations prescribed in terms of section 39(cH). Our proposal is that the Committee amend section 28P(1)(a) as follows:

> "28P. (1) (a) An act permitted in terms of any ~~exception provided for in, or~~ **regulation** prescribed under, ~~this Act~~ **section 39(cH);** or"

28 Section 19D(1) in the Copyright Bill already permits a person, or an authorised entity, to make an accessible format copy without the authorisation of the copyright owner. This will, presumably, be one of the exceptions where circumvention of TPMs will be dealt with in the regulations contemplated in s39(cH). Accordingly, the steps contemplated in s28P(2) would not apply to section 19D, which deals with persons with disabilities. Accordingly, we propose the following amendment to section 28P(2):

> "**Subject to section 19D,** ~~A~~ **a** person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—"

29 Section 28P(2)(a) also requires the person wishing to circumvent a TPM to perform a permitted act to apply to the copyright owner for assistance. It then provides that if that request is refused by the copyright owner or the copyright owner has failed to respond within a reasonable time the person may then engage the services of any other person to assist with the circumvention of the TPM.

30 This proposal fails to take into account that there may have been reasonable grounds, on the part of the copyright owner for refusing or failing to respond. These need to be considered before simply empowering a person to take the radical step of circumventing a TPM that may result in damages to the effectiveness of the TPM or the value of the copyright works protected by the TPM.

31 It is submitted that where there has been a refusal or lack of response the matter should rather first be considered by the Tribunal to determine if the request is permitted and reasonable. Accordingly, we propose that the following amendments be made to section 28P(2)(b):

> "if the copyright owner has refused such person's request or has failed to respond to it within a reasonable time, **such person may approach the Tribunal for an order** to **either compel the copyright owner to enable such person to circumvent the technological protection measure or** engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.

32 Our drafting proposals on section 28P above should apply *mutatis mutandis* (with the necessary changes) to the similar provisions contemplated in the PPA Bill namely, section 8F (to the extent that it is necessary to duplicate section 28P in section 8F of the PPA Bill).

EPHEMERAL RIGHTS

33 Section 12(5) of the Copyright Act deals with ephemeral rights. It provides:

> "(a) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work.
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> (b) Any reproduction of a work made under paragraph (a) may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work."

34 This general exception is known as "ephemeral rights", because it allows for temporary use of literary or musical works without the permission of the copyright owner under the limited circumstances specified in section 12(5) of the Copyright Act (in line with Art 11*bis*(3) of the Berne Convention).

35 Ephemeral rights are important in the broadcasting context, particularly in the context of a live sports broadcast, where it would usually be impossible for the broadcasting to obtain the relevant clearances ahead of the live broadcast. For example, if during a live televised sporting event a song plays over the stadium's loudspeaker system, it would be impossible for the broadcaster to clear the rights before the live broadcast.

36 The exception is already narrowly tailored:

36.1 It applies only to the (a) reproduction (b) of a literary or musical work (c) by a broadcaster.

36.2 The reproduction must be intended exclusively for lawful broadcasts of the broadcaster.

36.3 The reproduction must be destroyed within six months.[6]

36.4 It has no bearing on the payment of performance royalties. It is limited to the synchronization of the work (e.g., a song) to the moving images on screen comprising the broadcast.

37 We are aware that certain parties have argued to the Portfolio Committee that section 12(5) of the Copyright Act has negatively affected the ability of rights-holders to earn broadcast mechanical royalties because broadcasters allegedly argue that they are exempt from paying royalties. This is an exaggerated concern, because the use of ephemeral rights is restricted to the narrow circumstances specified in section 12(5) of the Copyright Act.

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6 We have not listed the specific provisos in section 12(5) of the Copyright Act

38 Section 12(5) of the Copyright Act is reproduced and amended in the new section 12B. Section 12B(1)(c) proposes to amend the ephemeral rights provision in several key respects.

39 The section no longer clearly refers to copyright in a work. Section 12B(1)(c) refers to the fixation or reproduction by a broadcaster of "a performer's performance or work". It should refer clearly to a copyright work.

40 Section 12B(1)(c) proposes limiting the section to additional restrictive provisos:

40.1 The broadcaster must be authorised to communicate the performer's performance, work or sound recording to the public by telecommunication. [7]

40.1.1 First, the word "telecommunication" is confusing in this context and unnecessary in circumstances where the section is limited to the broadcast of a work.

40.1.2 Second, the requirement for prior authorisation defeats the purpose of ephemeral rights.

40.2 It is limited to a broadcaster making the fixation or the reproduction itself, for its own broadcasts.[8] This excludes the possibility of a third party supplier making the fixation or the reproduction on behalf of the broadcaster, for broadcast by the broadcaster. This could be easily remedied by inserting the words "or a third party appointed by the broadcaster to do so on its behalf" in section 12B(1)I(i).

40.3 It reduces the period within which the broadcaster must destroy the fixation or reproduction from six months to thirty days.[9] We submit that six months is a reasonable period and in line with major markets internationally. For example, the USA likewise requires the copy to be

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7 Proposed s12B(1)(c)(i) in clause 13 of the Bill
8 Proposed s12B(1)(c)(ii) in clause 13 of the Bill
9 Proposed s12B(1)(c)(vi) in clause 13 of the Bill

destroyed within six months from the date the of first transmission to the public.[10] We therefore do not support the reduction to 30 days.

41 These provisos in section 12B(1)(b) are unduly restrictive and could hamper a broadcaster's ability to broadcast live events in particular.

42 Section 12B(1)(v) requires the broadcaster to record the dates of the making and destruction of all fixations and reproductions and any other prescribed information about the fixation or reproduction and make the record available to owners of copyright in the works, sound recordings or performer's performances, or their representatives, within 24 hours after receiving such a request. This is an extremely onerous provision, requiring a broadcaster (which may broadcast thousands of hours of audiovisual content per year) to keep granular records, resulting in an onerous administrative burden and cost on the broadcaster. Nor is it appropriate or reasonable to require broadcasters to make their entire records available to persons who request it within 24 hours.

43 We submit that the existing ephemeral rights provisions in section 12(5) of the Copyright Act are appropriate and should remain as is. To the extent that the proposals in section 12B(1) are adopted, they should be clarified and some of the provisos relaxed, to address our concerns in paragraph 39 to 42 above.

CONCLUSION

44 We thank the Portfolio Committee once again for the opportunity to make written submissions on the Copyright Bill. We trust that our representations will assist the Portfolio Committee in determining the appropriate approach to the Copyright Bill and the PPA Bill.

[10] 17 USC 112