



28 January 2022

The Honourable Ms Judy Hermans: Chairperson: Portfolio Committee on Trade and Industry

Attention Mr. A Hermans

Parliament of the Republic of South Africa

CAPE TOWN

By email only to [REDACTED]

Dear Ms Hermans

**SUBMISSION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY ON SPECIFIC PROVISIONS OF THE COPYRIGHT AMENDMENT BILL [B13-2017]**

In the first instance we wish to express our deepest condolences for the passing away of Mr Duma Moses Nkosi, a very able and committed Chairperson of the portfolio committee. He will be sorely missed by many of us. May his soul rest in eternal peace.

**1. INTRODUCTION**

The Southern African Music Rights Organisation (SAMRO) is a collecting society in terms of the Copyright Act No. 98 of 1978, it is an organization that administers the copyright of musical works on behalf of its members and members of affiliated societies, more specifically the broadcast and performance of literary and musical works in public in accordance with section 6 of the Copyright Act No. 98 of 1978. It does so by licensing the broadcast and performing rights to music users and collects license fees due on behalf of its members or members belonging to affiliated societies. SAMRO enters into reciprocal agreements with collecting societies around the world permitting SAMRO to *inter alia* serve

as a collection and distribution society thereby administering international copyrighted musical works assigned to affiliated societies when performed in SAMRO's territory, being South Africa, Lesotho, Swaziland and any other jurisdiction or territory in Africa in terms of which SAMRO operates from time to time. The collected royalties are paid over to affiliated societies for the ultimate benefit of their members. Similarly, the affiliated societies serve a reciprocal function for SAMRO when the copyrighted musical works belonging to SAMRO's members are played in other territories in the control of affiliated societies.

SAMRO is a member of the Copyright Coalition of South Africa and we are aware that the CCSA will be making a separate submission to the portfolio committee. The CCSA represents a number of industry organisations and trade associations, which drive investment into SA's creative and education sectors, creating jobs and opportunities for tens of thousands of SA's creatives in the publishing, music, film, animation, and other industries.

## **2. AN OVERVIEW OF THE ISSUES**

In December 2021 the Portfolio Committee on Trade and Industry made a call for stakeholders and interested parties to make submissions in relation to additional definitions and clauses in the Copyright Amendment Bill. In paragraph 3 below we address specific areas of the proposed amendments that have a bearing on the operations of SAMRO as a collecting society. However, prior to doing so, we feel the need to respond briefly to the presentation made by the Department of Trade, Industry and Competition (DTIC) to the portfolio committee in response to the public hearings called by the committee for purposes of addressing the reservations made by the President.

We feel the need to respond to the DTIC presentation because we noted that the direction taken by the committee in its current proposed amendments was largely influenced by the DTIC's presentation (which also appears to have been largely relied upon by the Parliamentary Advisor in her presentation to the committee). We feel that the DTIC's presentation to Parliament was not completely objective; was biased and did not provide the committee with adequate information to enable it to apply its mind regarding this crucial matter. We highlight the specific issues of concern below but wish to first specifically refer to the issue of bias:

- On page 6 of the DTIC's presentation, it is stated that "[t]he Department scrutinised the submissions and obtained the view of a panel of experts set up by the Ministry." It is clear however, from the names of the panel members that, apart from Judge Dennis Davis, the other two panel members are persons who are known to have

vocally defended a position that is viewed by rights-holders and rights-holder organisations as advocating for the extreme limitations of their rights (the so-called “copy-left camp”). The said panel members have, in this regard, publicly aligned themselves with groupings that seek to advance the greater recognition of “users’ rights”, to the detriment of the interests of authors.

- We are concerned that this posture by the department depicts sheer bias. By appointing such panel members, without balancing this out through the appointment of one or two experts who are advocates of authors’ rights, the outcome of the process was already determined. This is because the position of those panel members is known to everyone. Moreover, it is worrying that these are the same persons that the department has heavily relied upon throughout the process of consultations in respect of the Bill, and thus persons who are aligned to the department’s positions on the Bill. On the contrary, both the department and the committee have consistently rejected various attempts by those representing rights-holders to brief them on critical issues that affect rights-holders in relation to the two Bills.
- While Judge Dennis Davis is no doubt an eminent and respected member of the judiciary, we understand his expertise to lie in matters of competition law, tax law and constitutional law, and not necessarily matters relating to copyright law. It would have inspired more confidence to rights-holders and rights-holder groups if a judge or former judge who deals more constantly with copyright law issues was appointed as part of the Panel, e.g. Judge Louis Harms, former Deputy President of the Supreme Court of Appeals, who remains involved in intellectual property matters as Professor Extraordinary for Intellectual Property Law at the University of Pretoria.

We are accordingly of the view that an objective assessment could not have been achieved with this kind of approach by the DTIC. Our concerns in this regard are reflected in the letters from the Copyright Coalition of South Africa (CCSA) dated 15 November 2021 and 29 November 2021 and addressed to the then-Chairperson of the portfolio committee, Mr Nkosi, which we can again make available upon request.

Regarding specific issues highlighted in the DTIC presentation we make the following observations:

*(a) On page 4 of the DTIC presentation the following is stated: “We are advised that the focus is ... on the constitutionality of the clauses affected by the President’s reservations,*

*not on whether in general the policy choices and trade-offs made in the Bill are appropriate and optimal.” (Emphasis added).*

- While the sentiment is understood, to suggest that the process could not be used to address any instances of “inappropriate” and “less optimal” policy choices, depicts only a concern for malicious compliance rather than what would work to assist the industry to benefit from the copyright system. Moreover, inappropriate and less optimal policy choices could also border on questions of constitutionality. The attitude of the DTIC was therefore, as reflected here, one merely of ticking the box rather than robustly addressing all issues raised.

*(b) On page 9 of the presentation, when providing a background on the use of fair dealing versus the use of fair use, the DTIC observed that “some countries use what is called ‘fair dealing’”, while “some countries use what is called ‘fair use’”.*

- The DTIC created the impression that the ratios between countries using the fair dealing defence and those using the fair use defence, is in par or reasonably comparable. However, the reality is that the ratio is disproportionately dissimilar: While only less than a dozen countries use a fair use system – with several of those using a brand of “fair use” that is very dissimilar to that applicable in the USA – the majority of countries use a fair dealing defence.<sup>1</sup>

- It was important for the DTIC to provide this objective picture because a drastic change from policy requires strong motivation. There should be cogent reasons to motivate why South Africa should leave its tradition of using a fair dealing defence, to join the less-than-a-dozen countries that use a non-uniform fair use system. This is even more so considering the fact that our courts will need to develop fair use jurisprudence “from scratch”, and in so doing will be forced to rely on jurisdictions such as the USA which are not compatible with our system of law – while disregarding a rich jurisprudence from English law and other common-law jurisdictions still using a fair dealing defence.

- In the *Moneyweb* judgment<sup>2</sup> Berger J, recognising the importance of history in our precedence system where certainty is critical, provided the following reasons why he needed to rely on English for an understanding of the meaning of “fair dealing”:

*... I ... 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 intend, for historical reasons, to focus on English authority.*<sup>3</sup>

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<sup>1</sup> For more information on countries using both systems see this link: [The Fair Use/Fair Dealing Handbook \(infojustice.org\)](https://www.infojustice.org/) (accessed 25/01/2022).

<sup>2</sup> *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

<sup>3</sup> *Id* at para 103. Emphasis added.

*(c) On page 12 of the presentation it is indicated that when introducing various changes in the Bill [which were not necessarily consulted on] the portfolio committee was of the view that the changes it introduced “were consistent with the policy framework that information the original Bill.”*

- This could not have been further from reality however, as rights-holders observed the Bill being increasingly transformed into a *de facto* users’ rights law, rather than it being an authors’ rights law, as copyright law generally is. For example, when the Bill was first introduced, Minister Radebe stated that an important reason why the Bill was formulated was to address the plight of musicians and performers “as most of them are dying as paupers”.<sup>4</sup> The expansive limitations and exceptions regime embodied in the Bill does not support this position.

*(d) On pages 13 of the presentation, when presenting on what would need to be considered in evaluating the adequacy of consultation, the DTIC observed, correctly, that this would entail determining the nature and importance of the legislation and the intensity of its impact on the public.*

- While this was correctly assessed, the outcome proposed is not consonant with this approach, as the Bill continues to seek to whittle down the legitimate interests and expectations of rights-holders.

*(e) On page 16 of the presentation it is suggested that, because the fair use defence proposed makes use of four factors to “help determine fairness ... [i]t seems superfluous to expressly spell out that the South African context matters when interpreting the provision.”*

- There is however, no superfluity in this concern. As indicated under paragraph (b) above, the concern is borne out by the need for certainty when dealing with copyright infringement matters. It should be immediately clear what acts constitute infringement and not be left to the courts to determine such on a case-by-case basis, where the courts will need to develop new rules with no precedent in our law (and thus having to rely on American law – a legal system diametrically different from ours in many ways).

- Another important factor in this regard is the fact that, because uses that constitute “fair use” have to be determined by the courts on a case-by-case basis, where rights-holders do not have the means to institute litigation in order to confirm their rights, they will have to accept defeat and allow users to use their works with no recourse. In this case the South African context, where access to justice is a serious issue, matters. Rights-holders will be pitied against large, deep-pocketed tech conglomerates that have a deep interest in an expansive exceptions regime. Thus the South African context matters deeply.

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<sup>4</sup> [Cabinet approves Bills | SAnews.](#)

- The suggestion that the four factors forming part of the fair use defence make it to be a more reliable defence than the fair dealing defence has become redundant as it has been overtaken by events. In the *Moneyweb* case<sup>5</sup> the court formulated factors that are relevant to a consideration of fairness within the fair dealing perspective.<sup>6</sup> What is the appeal to forgo this recently-adopted approach in our law, which was done in line with our legal traditions, in favour of incorporating an alien system of “fair use”, which is not part of our legal precedent and which will require the Americanisation of our legal system and will only empower those with deep pockets to enforce their rights through litigation - something which excludes the average rights-holder?

(f) *On pages 17 and 18 what would appear as the master argument of the DTIC is made, namely that because IP rights are property rights, they are subject to limitation in terms of section 36 of the Constitution; and that the “internal limitation clauses” in the Copyright Act, namely exceptions and limitations, cannot be said to constitute arbitrary deprivation of property. Accordingly it is argued that the fair use doctrine, as an exception to copyright, cannot be said to be in contravention of section 25 of the Constitution and even if it was, this would be justifiable as fair use “is used in democratic societies based on similar values to the South African Constitution.”*

- The argument made herein does not however, address the critical issue. The critical issue, in terms of the Constitution and international treaty law, is whether the parameters imposed in terms of section 36 of the Constitution and the three-step test, have, *as a matter of fact* - not on the basis of assumption - been satisfied. This means that more than a mere legal opinion, analysis or expert’s view is required. It is not a question of whether fair use was found to be acceptable in other democratic societies. Rather it is a question of whether, *in the South African context*, fair use can be seen to satisfy the requirements of section 36 of the Constitution and the three-step test. This question cannot be resolved through a one-size-fits-all opinion. The matter has to be tested specifically in the South African context.

#### *Section 36 limitation of rights*

- It is submitted that the regime for the limitation of rights in section 36 is not one to be very easily assumed. It is also not a “say-so” regime; namely that the position is so based on a legal opinion or some other analysis. A contention that certain rights must be limited must satisfy proportionality considerations that justify the limitation. As the Constitutional Court

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<sup>5</sup> *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

<sup>6</sup> See par. 113 of the judgment where Berger J observed: “In my view, the factors relevant to a consideration of fairness within the meaning of section 12(1)(c)(i) include: the nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work. One factor may be more or less important than another, given the context in which publication occurs. The list of factors is not exhaustive.”

has held, “The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”<sup>7</sup> This is required in the present case. As observed, “The justification of greater degrees of interference clearly requires more important or more compelling purposes and more certainty ... in respect of the extent to which the limitation will serve the purpose than lesser degrees of interference.”<sup>8</sup> Section 36(1)(a) of the Constitution requires that the nature of the affected right has to be considered, and this entails the weighing of “colliding rights” and means that “an evaluation has to be made of the importance of the right relative to other rights for the purpose of the proportionality analysis.”<sup>9</sup> We are not aware that such an evaluation has been intently undertaken.

- Further to the above section 36(1)(e) requires that less restrictive ways to achieve the purpose must be used. This means that “when there are two or more suitable ways of furthering the purpose of a limitation effectively, the one that interferes less intensively with the right that is to be limited, must be chosen.”<sup>10</sup> We are not aware that this has been done. For example, rights-holders have requested again and again that the expansive provisions which permit unbridled copying for “personal use” should be subjected to payment of a private copy levy, as is applicable in other progressive jurisdictions – but this has not been heeded. We submit that there has not been an intentional weighing of the rights concerned (the right of economic exploitation of one’s works and the right of access to works) to arrive at the conclusion that authors’ rights need to be curtailed in the manner in which they have. If anything, the decisions taken have been arbitrary.

#### *Applying the three-step test*

- Compliance with the three-step test also cannot be said to have been achieved simply on a “say-so” basis. There is no evidence that in introducing the various expansive limitations and exceptions in the Bill care was taken - apart from merely receiving a legal opinion – that the three-step test was complied with in respect of each of the exceptions introduced. In a WTO Dispute Resolution Panel decision<sup>11</sup> that took place in the year 2000, which invoked the three-step test contemplated in article 13 of the TRIPs Agreement, the Panel found that “[t]he three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied”, so that “[f]ailure to comply with any of the three conditions results in the article 13 exception being disallowed. ...”<sup>12</sup> In this matter the Panel found that the tenor of article 13 of the TRIPs Agreement “discloses that

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<sup>7</sup> *S v Bhulwana; S v Gwadiiso* 1996 1 SA 388 (CC) para 18.

<sup>8</sup> Rautenbach IM, “Proportionality and the Limitation Clauses of the South African Bill of Rights” *PER / PELJ* 2014(17) 6, at 2250.

<sup>9</sup> *Id* at 2254.

<sup>10</sup> *Id* at 2257

<sup>11</sup> WTO Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000: VIII, p. 3769.

<sup>12</sup> WTO Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000: VIII, p. 3769, at para 6.97.

it was not intended to provide for exceptions or limitations *except for those of a limited nature*. ...<sup>13</sup>

- Without a specific social and economic cost-benefit analysis having been conducted in respect of each of the new exceptions being introduced, then it cannot be concluded, simply on the basis of legal analysis or legal opinion, that those new exceptions satisfy the requirements of the three-step test. In this regard it is important to note that it is possible, purely on the basis of legal analysis, to conclude that the introduction of new limitations and exceptions would be justifiable, while an economic cost-benefit analysis may find otherwise. Thus a PwC study conducted in 2016 to analyse the 2012-2013 Australian Law Reform Commission (ALRC) recommendation to introduce a fair use exception in Australian copyright law found that although the ALRC, based purely on legal analysis, had concluded that the introduction of a fair use exception in Australian copyright law would be justifiable, an economic cost-benefit analysis proved otherwise.<sup>14</sup>

*(g) On pages 19, 20 and 21 the presentation suggests that the difference between fair use and fair dealing is “mundane” and that fair use has the advantage of having a four-part test, which fair dealing does not have.*

- This of course is not correct. While, in respect of fair use, there is generally no certainty as to whether a use is fair or not, prior to approaching the courts for certainty, fair dealing exceptions are known beforehand. Furthermore, as indicated above under paragraph (e), the court has now formulated the factors to be used when determining whether a use complies with the requirements of fair dealing. Thus there is no need to adopt a completely foreign doctrine when our own law has a doctrine that can be applied and which is based on a rich history of precedence.

- On page 21 of the presentation it is acknowledged that the factors formulated by the *Moneyweb* court with respect to fair dealing “are similar” to the four factors being introduced in respect of fair use - *yet the department still shows a preference for fair use*. There is no other explanation for such a stance except bias and a determination at all costs to introduce fair use in our law. If fair dealing, as interpreted by the *Moneyweb* case, can do what fair use can purportedly do, then why insist on resorting to fair use – a foreign law doctrine with no precedent in our law?

*(h) On page 22 of the presentation reliance is placed on the ALRC report to support the position that fair use complies with the three-step test*

- The department should have advised the committee that the ALRC report not only

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<sup>13</sup> Ibid. Emphasis added.

<sup>14</sup> See PwC Report, “Understanding the costs and benefits of introducing a ‘fair use’ exception” 2016, available at [Submission 133 - Attachment: Understanding the costs and benefits of introducing a 'fair use' exception - Copyright Agency | Viscopy with APRA AMCOS, Foxtel, News Corp Australia, PPCA, Screenrights - Intellectual Property Arrangements - Public inquiry.](#)



recommended that fair use should be adopted, but also recommended that, as an alternative to adopting fair use, the legislature should adopt a new fair dealing provision with more flexibilities.<sup>15</sup> The committee should also have been made aware of other reports, like the PwC report referred to above<sup>16</sup> which pointed out that an economic cost-benefit analysis gave a different outcome than the legal analysis contained in the ALRC report.<sup>17</sup> The department should also have made the committee aware that the ALRC report has hitherto, not been implemented in Australia and Australia still has a fair dealing exception in its law – not a fair use exception.

- The department should also have advised the committee that the ALRC report was not the only Australian study to address the issue of fair use and to recommend it. There were several other studies, and in 2015 the Australian government commissioned the Productivity Commission to conduct a twelve month public inquiry into Australia's intellectual property system.<sup>18</sup> The report of this Commission was submitted in 2016. Recommendation 6.1 of the Productivity Commission report was that government needed to implement the recommendation of the ALRC with regard to introducing a fair use exception in Australian copyright law. In response, the Australian government *noted* the recommendation and indicated that it was going to further consult on the matter.<sup>19</sup> In this case the Australian government has noted the gravity of the matter and the need for further consultation – an approach and interest lacking in our case. In not presenting this complete picture to the committee, the department did not therefore act completely transparently.

- In a quest for transparency the department should also have made the committee aware of the studies conducted in the United Kingdom to consider the viability of replacing the fair dealing defence with a general fair use defence, and which all found that it would not be viable to do so. The outcome of these studies were published in 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.<sup>20</sup>

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<sup>15</sup> See pp 24 – 25 of the ALRC Report, available at [final report alrc 122 2nd december 2013 .pdf](#).

<sup>16</sup> PwC Report, "Understanding the costs and benefits of introducing a 'fair use' exception" 2016, available at [Submission 133 - Attachment: Understanding the costs and benefits of introducing a 'fair use' exception - Copyright Agency | Viscopy with APRA AMCOS, Foxtel, News Corp Australia, PPCA, Screenrights - Intellectual Property Arrangements - Public inquiry](#).

<sup>17</sup> We note in this regard that a group of respondents aligned to the American University Washington College of Law, including Prof. Sean Flynn, who has been vocal in advocating for the introduction of the fair use exception in Copyright Amendment Bill process, have sought to discredit the PwC report. We find however, that there is no weight to their counter-arguments against the PwC report. See the response here: [TITLE OF YOUR ARTICLE \(infojustice.org\)](#).

<sup>18</sup> See [Intellectual Property Arrangements - Productivity Commission \(pc.gov.au\)](#).

<sup>19</sup> Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements, August 2017, at 7, available at [intellectual-property-government-response.pdf \(pc.gov.au\)](#).

<sup>20</sup> *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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf).

- 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”.<sup>21</sup>

*(i) On page 26 of the presentation the DTIC concludes that there is no serious basis for concern if South Africa were to “set out copyright exceptions”*

- This assertion is unfortunate and misguided, in that rights-holders have not indicated that they are opposed to copyright exceptions being introduced into South African copyright law – since limitations and exceptions are indeed a part of copyright law. However, the contention of rights-holders has been that the introduction of expansive limitations and exceptions, which erode the rights of authors, without first conducting a social and economic impact assessment of the costs and benefits of doing so, in respect of each new exception, is unwarranted; it is an intrusion into constitutionally-protected rights; does not satisfy the requirements of section 36 of the Constitution nor does it satisfy the requirements of the three-step test.

*(j) On page 34 the presentation refers to the comment of Prof. Sean Flynn, one of the most vocal proponents of the current expansive limitations and exceptions regime in South African copyright law, that the international three-step test is “extremely sensitive to context” and allows for context-specific adaptation of limitations and exceptions.*

- Having observed this the department uses it to advocate for the rights of consumers – and does not say anything about the rights of authors – the musicians who the amendments were meant to help to prevent them from dying as paupers, as advised in explaining the proposed amendments. Indeed we agree that the three-step test is “extremely sensitive” to context – which is why a social and economic impact assessment needs to be conducted to determine how rights-holders would be affected by introducing the proposed expansive limitations and exceptions regime. The department seems to be only concerned with how consumers / users would be affected by not having the exceptions.

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<sup>21</sup> *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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf).

### 3. RESPONSE TO SPECIFIC PROPOSED AMENDMENTS

Below we respond to the proposed amendments, with specific focus on areas that have a bearing on the operations of SAMRO as a collecting society:

#### *3.1 Clause 1 - Definition of “accessible format copy”*

We acknowledge that it has been indicated that this definition is no longer subject to further comment. However, we note that the proposed amendment in respect of this definition (in green text), is explained in a footnote as seeking “to align the definition as close as possible to the definition in the Marrakesh Treaty”. However, this could not be further from the reality. As advised in the advisory opinion of one of the technical experts appointed by the committee in 2018,<sup>22</sup> the definition of “accessible format copy” in the Bill is diametrically opposed to the definition in the Marrakesh Treaty. This has not changed by the insertion of the phrase “including to” in the definition and the definition has not thereby been made to be more conformed to the definition in the Marrakesh Treaty. As indicated in Baloyi’s advisory opinion, the definition of “accessible format copy” in the Bill is inconsistent with the definition in the Marrakesh Treaty in the following manner:

- (i) It extends the application of the proposed exception to all works (thus including musical works), rather than certain literary works only, as contemplated in the Marrakesh Treaty, which seeks to address the “book famine” phenomenon; and
- (ii) It not only limits the application of the exception to certain “beneficiary persons”, as contemplated in the Treaty, but extends this to all “persons with a disability”, as further defined in the Bill.

We are highlighting this to emphasise our disagreement with the statement made that the inclusion of the phrase “including to” in the definition will ensure that the definition is more aligned to the definition in the Marrakesh Treaty. Musical works in all forms of usages will be included in this new exception, which is not what the Marrakesh Treaty was concerned with. We are aware of the submission made to and well-received by the committee in which it was argued that South Africa is not bound to strictly adhere to the regime contemplated in the Marrakesh Treaty and that it may, in fact, introduce additional exceptions other than those contemplated in the Treaty. While we are not in disagreement with this, this is not the issue for consideration. The issue for consideration is the determination of whether, in introducing additional limitations and exceptions, this was done in conformity with other international treaty requirements, as contemplated in the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty, including the requirement in respect of applying the “three-step test”. As Baloyi has observed, “[i]ndeed article 12 of the Marrakesh Agreement makes it possible ... to

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<sup>22</sup> The advisory opinion of Adv. J. Joel Baloyi, available here: [Baloyi.pdf \(legalbrief.co.za\)](#).

introduce other limitations and exceptions ... for the benefit of the beneficiary persons ... However the treaty provides that such additional limitations and exceptions must be 'in conformity with ... international rights and obligations'. This entails strictly applying the three-step test when introducing any new limitations and exceptions.

As those advocating for the safeguarding of the rights of authors and copyright owners have argued throughout the consultation process relating to this Bill, it can never be assumed, without conducting an actual economic and social impact assessment, that the introduction of a new limitation and exception complies with the three-step test. It is for this reason that authors' rights organisations and practitioners have been consistently calling for this, to no avail. As highlighted in the Australian PWC study referred to above, a conclusion of compliance with the three-step test without first conducting a social and economic impact assessment would merely be based on a legal analysis (which can be contested) and not on an economic cost-benefit analysis. We conclude therefore by asserting that the definition of "accessible format copy" in the Bill is not consistent with the similar definition in the Marrakesh Treaty, despite what has been stated.

### *3.2 Clause 20 - amendment to section 19(D) of the Bill*

It is submitted that the insertion of the expression "authorized entity" in this section does not cure the defect of the section, in that, by keeping the phrase, "any person that serves persons with disability, including an authorized entity" (s 19D(1)), the facilitation of access to accessible format copies is not limited to authorized entities, as contemplated in the Marrakesh Agreement, but also includes other persons serving persons with disability. This defeats the purpose of having authorized entities to facilitate access to copies by beneficiaries and in fact removes the incentive to seek authorisation and / or recognition by government as an authorized entity – if any other person, even though not an authorized entity, may also provide those services.

In the Marrakesh Agreement it is entities recognised as "authorized entities" that may facilitate access to works by beneficiary persons, i.e. it is authorized entities that serve beneficiary persons (art. 2(c) of the Marrakesh Treaty). By including persons or entities other than "authorized entities" among entities that may facilitate the access to works by beneficiary persons, the Bill is not aligning with the Marrakesh Agreement and is following its worrying trend of incorporating adverse provisions for authors and rights-holders by introducing expansive limitations and exceptions. We therefore recommend that the section be amended by limiting the provisions of section 19D(1) to authorized entities.

### *3.3 Clause 1 – Definition of "Broadcast"*

The amended Bill seeks to amend the definition of "broadcast" in the Copyright Act by aligning it with that in the Performers Protection Amendment Bill, which in turns seeks to align with the

definition provided for in the WIPO Performances and Phonograms Treaty (WPPT). Amending the definition of “broadcast” in the Copyright Act in this manner is apt in that the definition in the Copyright Act was based on the traditional description of broadcasting services, as understood within the regulations of the International Telecommunications Union (ITU), where a broadcasting service is defined in terms of transmissions using Hertzian waves. It is therefore appropriate to have similar definitions of broadcast in the two legislations, as is the case currently, but it is proposed that the definition be revised slightly as follows, to align with current jurisprudence in this regard and to capture the full essence of what is contemplated

***“‘broadcast’ means the transmission by wireless means, partially or wholly, intended for reception by the public or sections of the public, of sounds or images or of sound and images or the representations thereof; and includes —***

***(a) transmission, partially or wholly, by satellite; or***

***(b) 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 above proposed revised definition will have this effect:

- (i) It aligns the definition with the established jurisprudence in our law relating to this matter, especially in respect of the usage of the phrase “intended for reception by the public or sections of the public”, which has assumed a particular legal meaning; and
- (ii) It captures the essence of the traditional understanding of a broadcasting service while also making the definition relevant for current times.

It is proposed that the Performers Protection Act be amended also to capture the above definition, to ensure uniformity. Lastly we wish to note that the Bill must make it explicit that the current definition of broadcast in the Copyright Act is being repealed and replaced by the new definition.

#### *3.4 Clause 13, section 12B(1)(b) – Ephemeral use exception*

This amendment seeks to amend the ephemeral use exceptions in the Copyright Act by introducing a regime similar to that applicable in Canadian copyright law. This is welcome, as rights-holder groups have called for a review of the ephemeral use provisions. In particular the amendment seeks to limit the period within which a broadcaster may reproduce performances, sound recordings and other works for purposes of making a broadcast / doing communication to the public, without requiring authorisation from the rights-holder, to a period not exceeding thirty days – as contrasted with the current arrangement where such use is permitted for a period of up to six months. However, the following highlights instances where the amendment should be distinguished from the position applicable in the Canadian regime, or where it has not fully captured that position:

- (i) In subparagraph (i) of section 12B(1)(b) the condition for permitting ephemeral uses is that the broadcaster must be authorised “to communicate the performer’s performance, work or sound recording to the public by telecommunication”. However this is because the Canadian Copyright Act does not have a right of broadcasting a work or performance and instead has a right of communicating the work or performance by telecommunication. However, since this exception is applicable to broadcasters and the South African Copyright Act has both a right of broadcasting a work or performance, and a right of communicating the work to the public (as introduced in the Bill), the ambit of section 12B(1)(b)(i) should be extended to include broadcasts. Thus subparagraph (i) should read as follows:

“is authorized to **broadcast or** communicate the performer’s performance, work or sound recording to the public” (with the phrase “by telecommunication” being removed as it is not used in our law).

- (ii) In subparagraph (vi) the expression “which authorization *may* be subject to the payment of applicable royalties” (emphasis added) is used at the end of the paragraph. However, in the equivalent provision in the Canadian Copyright (s 30(8)(5)) the word “must” is instead used. It is recommended that the word “may” must be replaced with the word “must”, in order to give assurance that rights-holders will in fact receive payment of royalties and that this will not be left to negotiations, where the broadcaster, being the party with stronger bargaining power, may also insist that the need to pay royalties has to be removed, by contractual arrangement.
- (iii) For the avoidance of doubt, a provision similar to that in section 30.8(5) of the Canadian Copyright Act, must be included. This section provides the following: “Where the copyright owner authorizes the fixation or reproduction to be retained after the thirty days, the [broadcaster] must pay any applicable royalty.”

### *3.5 Clause 27 – new subsection (5A) of section 27*

The proposed subsection (5A) under section 27 of the Act seeks to add the newly-introduced restricted acts of communicating a work to the public and making the work available to the public among the acts that are considered to be infringing acts under section 27 of the Copyright Act and for which criminal sanctions are imposed. While this is laudable, it is greatly concerning that subsection (5A) would only consider such acts as constituting copyright infringement if they are carried out “without the authority of the owner of the copyright *and for commercial purposes*” (emphasis added).

This is extremely problematic as infringement of copyright should not be dependent on whether or not a use is for commercial purposes. Whether a use is for commercial purposes or not the copyright owner has the exclusive right to authorise the usage of the work. As Slomowitz AJ observed in the *Video Parktown North* case, the essence of copyright as a right of ownership is that the copyright owner has an exclusive right “to do what [he]j pleases” with the subject-matter of the copyright.<sup>23</sup> Whether for commercial or non-commercial purposes, nobody has a right to exploit another’s copyright work without their authorisation. We therefore submit that the phrase “and for commercial purposes” must be removed.

### *3.6 Clause 13 – section 12A(d) – extension of fair use principles to other exceptions*

Paragraph (d) of section 12A in clause 13 of the Bill introduces this provision:

“The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use, determined by the factors contemplated in paragraph (b).”

While not derogating from our consistent objection to introducing a fair use defence in South African copyright law (considering that we, together with the majority of countries in the world, have a fair dealing provision that can be adapted to changing circumstances), we are of the view that making the fair use provisions apply to other exceptions, as proposed here, is plainly wrong. Each exception must stand on its own legs. The only condition in international copyright law in this regard is that the exception must satisfy the requirements of the three-step test.

In the United States of America, where the fair use defence originates, fair use is dealt with under section 107 of the US Copyright Act, 1976. However, apart from fair use, other exceptions, which are not connected to fair use, exist. Thus section 108 is concerned with exceptions relating to libraries and archives and section 109 is concerned with the “first-sale” doctrine. Other exceptions, distinct from the fair use exception, are dealt with in sections 110 to 112. Even under the current South African Copyright Act, fair dealing is provided for only in section 12(1) of the Copyright Act. The rest of the subsections in section 12, up to subsection 13; and the other exceptions provided for in sections 13 until 19B, deal with other exceptions separate from the fair dealing exception. Each exception has to stand on its own legs and be justified on its own, based on the three-step test. We thus suggest that the proposed section 12A(d) is not appropriate and should thus be removed from the Act.

### *3.7 Clause 13 – new section 12C(2) – subjecting the temporary reproduction and adaptation exception to the three-step test*

After rights-holders had raised this issue for a protracted period, the committee has now

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<sup>23</sup> *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others* [1986] 1 All SA 1 (T), at 7.

sought to introduce a three-step provision in relation to the temporary reproduction and adaptation exception. As indicated previously, this exception mimics article 5 of the EU 2001 Copyright Directive,<sup>24</sup> (although the EU Directive is only concerned with temporary reproductions, not adaptations). However, the section did not subject the exception to the three-step test, as done under the EU Directive (art. (5) of the Directive). The committee has now attempted to do so under the new section 12(C)(2) and this is commendable. However, the phrasing of the wording in relation to the three-step test is not strictly in line with the formulation of the three-step test in the EU Directive and in the Berne Convention, particular by limiting the application of the three-step cases to the exceptions proposed, rather than *applying* the stipulated exceptions to “certain special cases”, as contemplated in the EU Directive (the Berne Convention refers to *permitting* the exceptions in certain special cases,<sup>25</sup> and the TRIPS Agreement refers to *confining* the exceptions to certain special cases<sup>26</sup>).

In view of this, we recommend, to ensure alignment with what was contemplated when introducing this exception in the EU Directive, the following revision of paragraph (2):

(2) **The making of** transient or incidental copies or adaptations of a work contemplated in subsection (1), may—

(a) **only be done in certain special cases;**

(b) **that do** not conflict with the normal exploitation of the copyright work; and

(c) **do** not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.”

#### **4. CONCLUSION**

The Copyright Amendment Bill and its sister legislation, the Performers Protection Amendment Bill, have been in the making for a considerably lengthy period. We suggest this lengthy period was, to a great extent, self-inflicted on the part of government, as it arose from an unwillingness to openly and transparently hear the positions of all affected parties. In the current instance government has clearly displayed a bias with regard to its willingness to engage, warming up to the “users’ camp” while giving a cold shoulder to the rights-holder side. It is greatly regrettable that up to this point, we do not have a Bill that has overwhelming support from the affected stakeholders. The Bill is still far from immunity from a Constitutional challenge, due to lingering issues that have not been resolved through the piece-meal approach followed so far. It is unfortunate that it seems that yet another “half-baked” legislation is going to be forced upon stakeholders. This only means that, if passed to law in its current form, the Bill will be intensely contested through court processes. This calls for a bold stance

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<sup>24</sup> Information Society Directive 2001/29/EC.

<sup>25</sup> Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, 1886 (1971 Paris Text) (Berne Convention).

<sup>26</sup> Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property, 1995 (TRIPs Agreement).



on the part of Parliament to engage robustly on the Bill without showing a predetermined alignment with a particular camp.

Despite the various iterations of the Bill, its flaws, arising from inconsistencies, at times incoherence, haphazard application of international treaty law provisions, at times conflicting principles and other similar maladies, remain glaring. It is our hope that those can be ironed out before the Bill is finalised. As indicated earlier, we remain keen and available to offer our services and expertise, together with our partners within the Copyright Coalition of South Africa, to assist the committee in tackling this mammoth task.