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Portfolio Committee on Trade and Industry

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Dear Sir/Madam

COPYRIGHT AMENDMENT BILL

1. On 3 December 2021, the Portfolio Committee on Trade and Industry ("the Portfolio Committee") called for public submissions on additional amendments, definitions and clauses in the Copyright Amendment Bill ("the Bill"). The new clauses relate to, *inter alia*, broadcasting and broadcasters, and are featured in a separate document circulated by the Portfolio Committee ("the amendment document").

2. In response to the above call, eMedia Investments (Pty) Ltd ("eMedia") is pleased to make the submissions as set out herein. eMedia thanks the Portfolio Committee for the opportunity to comment on the amendment document and requests the opportunity to make oral representations at any public hearings that ensue.

3. eMedia records that the submissions herein are limited to the provisions on which comment has been called for by the Portfolio Committee. These submissions do not deal with other provisions in the Bill that eMedia would want to comment on. In this regard, eMedia still holds many serious concerns about what is set out in the Bill, including but not limited to:

3.1 Mandatory royalty payments to performers on audio-visual works, where such parties may ordinarily receive lump sum payments and which affects the parties freedom to contract;[1]

3.2 Mandatory contractual terms between performers and producers of audio-visual works, which affects the parties freedom to contract;[2]

3.3 Mandatory royalty payments to composers of musical works, where such parties may ordinarily receive lump sum payments and which affects the parties freedom to contract;[3] and

3.4 The creation of criminal offences for failing to report on the broadcast of sound recordings[4].

4. Further, with the Bill having now been retagged as a Section 76 bill, eMedia is of the view that the entire Bill should be resubmitted for public comment. This concern is amplified by the limited nature of the call for comment on the amendment document, in circumstances where the effects of amended definitions and clauses are felt in other clauses of the Bill for which comment is not called. To the extent that there is an opportunity to make further submissions on the Bill in any forum, we expressly reserve our rights to do so.

[1] Section 8A(1) of the Bill.
[2] Section 8A(2)(a) of the Bill.
[3] Section 6A(2) of the Bill.
[4] Section 9A(4)(a) of the Bill.

eMEDIA

5. eMedia has a wide range of interests in broadcasting. Its interest in broadcasting are centred around:

5.1 e.tv, the first private-free-to-air broadcaster in South Africa;

5.2 e.sat.tv (branded eNCA) which supplies television, mobile and online news to various channels, including the 24 hour eNCA channel currently available on channel 403 on DSTV;

5.3 OpenView, operated through Platco Digital, which is a free direct-to-home satellite television platform company providing a multichannel offering to viewers for free;

5.4 eVOD, operated by e.tv, which is an OTT streaming platform, which offers video-on-demand content to users of the app on a free and paid for basis;

5.5 YFM, a radio station that is broadcast on the FM frequency. As such, eMedia has a direct interest in the Bill and the new amendments.

6. eMedia supports the Portfolio Committee's progressive steps towards modernised legislation that will be cognisant of rapid technological developments and advancements in the global intellectual property discourse. eMedia believes that due to the rapid technological developments and the inevitable forces of the fourth industrial revolution, updating the legal framework for broadcasters, in the widest sense, needs to be undertaken in a manner which is as future-proof as possible.

This is particularly so given that the technical infrastructure used to broadcast has changed rapidly over the last two decades, and will likely continue to rapidly change.

7. These technological advancements should undoubtedly influence policy and legislation. However, eMedia believes that new legislation and policy should not have the effect of substantially diminishing the rights of broadcasters in South Africa or diminishing the commercial viability of broadcasting. It is paramount that legislation be drafted which modernises the South African approach to copyright, whilst ensuring that the interests and commercial viability of broadcasting are maintained.

8. Broadcasters are not solely commercial entities. Broadcasters play a vital role in democracy. They function as the eyes and ears of the public, in relation to news and current affairs. Section 16 of the Constitution guarantees the right to freedom of expression. This section not only encompasses the right to free speech, but also the right to receive information or expression.[5] The Constitutional Court has emphasised the important role played by the media in giving effect to the public's rights in terms of section 16 of the Constitution:

> *"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected. ...*[6]

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[5] *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC).

[6] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 22

9. Turning to specific aspects of the amendment document, eMedia will make the following submissions on the proposed amendments to clause 1 (section 1), clause 13 (Section 12B), and clause 27 (Section 27) of the Bill under the headings that follow:

9.1 Broadcasting in the 21st century;

9.2 The ephemeral right and its importance to broadcasters;

9.3 Liability in criminal copyright infringement;

9.4 Unlawful delegation to Minister.

BROADCASTING IN THE 21ST CENTURY

10. The Copyright Act 98 of 1978 ("the Act") currently defines a 'broadcast'[7] as:

> *a telecommunication service of transmissions consisting of sounds, images, signs or signals which—*
>
> > *(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*
> > *(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.*

[7] Section 1 of the Act.

11. This definition is, to any person, highly technical. It is also worth noting that this technical definition of what constitutes a broadcast arises from an amendment to the Act in 1997 – at a period of history in which the internet played only a small role in public life and public consumption of copyrighted materials in the form of television shows and movies (cinematograph films) and songs (sound recordings and musical works).

12. The current definition in the Act fits with 20th century broadcasting technology, which used technical telecommunication infrastructure including large emitters and satellites to transmit content (in the form of moving images and or sounds) to the public or sections of it. Broadcasting in the 21st century can still be categorised by most of this definition - content (in the form of moving images and or sounds) is still transmitted to the public or sections of it. However, the technology that is employed to broadcast has since changed. Most importantly, part of the technology that is now used to broadcast content is the internet.

13. eMedia wholeheartedly supports a redrafting of the definition of "broadcast" that is broad enough to include current broadcast technologies and new broadcast technologies that are utilised by broadcasters to communicate sounds and/or images to the public or parts of it. eMedia submits that the proposed amendment to "broadcast" contained in the amendment document fails to achieve this, and further fails to achieve the broader goals of the Bill in modernising the approach to copyright law generally.

14. Further, the current draft definition of "broadcast" is not fit for purpose in a number of respects:

14.1 By excluding transmissions "by wire" from the definition that currently exists in the Performers' Protection Amendment Bill, the definition excludes licensed broadcasters who currently broadcast content by wire in South Africa. Broadcasting by wire is a technological form of broadcasting which followed the proliferation of over-the-air (OTA) broadcasting, and is still used in South Africa today. Further, the amendment to exclude "by wire" is incongruent with other drafting proposed in the amendment document – most notably, in the amendments to Sections 11A and 11B, which include the right to communicate the works mentioned in those sections "to the public by wire or wireless means".

14.2 The definition fails to recognise that broadcasting is increasingly served by over-the-top means (OTT). An OTT service is a service provided by a media provider who offers content to viewers directly via the internet. To the extent that broadcasting is premised on communicating sounds and/or images to the public or parts of it, OTT service providers fit this category. However, they do not do so via the technical means currently defined in the both the Act and the amendment document. To exclude OTT media service providers in the definition of broadcasting (due to the failure of the drafting to recognise that new technical means of delivery currently exist [most notably the internet]) would be a legislative oversight on the part of the Portfolio Committee. This is particularly so when considering that the goal of the Bill is to modernise the approach to copyright. To the extent that the Portfolio Committee intended to exclude OTT providers from the definition of broadcast, we hold the view that this was due to the artificial distinction between OTT ostensibly providing non-linear access to content, as opposed to traditional broadcasters who ostensibly provide linear

access to content. This ignores that many OTT platforms[8] provide access to linear content in the form of live sports and news television.

14.3 The amended definition of 'broadcast' in the amendment document is technically defective. When reading (b) and (c) on their own, the new definition suggests that broadcasting means "transmission, partially or wholly, by satellite", or that broadcasting means "transmission, partially of wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent". Both (b) and (c) fail to describe *what* is being broadcast, and merely describe *how* it is being broadcast. In any event, we submit it is unnecessary to delineate the methods by which sounds and/or images are broadcast in the Bill. Rather, the Bill should state that broadcasting is the communication to the public or parts of it, of sounds and/or images by means of telecommunication. "Telecommunication" is broad enough to include cable, satellite, OTA and OTT transmission of content, and ensures that the Bill achieves its purpose of modernising the approach to copyright law. If necessary, an appropriate definition of "telecommunication" can be inserted in the Bill.

THE EPHEMERAL RIGHT

15. The ephemeral right is a right accorded to broadcasters in most jurisdictions.[9] It is recognised in international treaties to which South Africa is party, including the Rome Convention.[10]

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[8] Such as MultiChoice's DStv Now.
[9] Section 31, *Copyright, Designs and Patents Act 1988* (UK); Section 112, *Title 17 of the United States Code: Copyright Law of the United States.*
[10] Article 15(1)(c) of the Rome Convention.

16. The right itself is meant to cure a very simple issue faced by broadcasters when broadcasting events. During such broadcasts, without any knowledge or intent on the part of the broadcaster, works which are the subject of copyright may be broadcast incidentally and without the prior authorisation of the copyright owner/controller to broadcast such works. This incidental broadcasting without prior authorisation occurs in myriad ways illustrated in a few examples below:

16.1 When broadcasting a live sports event, a stadium in which a sports event is being played may play recorded music to the spectators sitting in the stadium. The microphones placed by the broadcaster in the stadium would record and broadcast the music being played in the stadium. In this example, the sound recording and the musical and literary work embodied in the sound recording would be broadcast without the consent of the copyright owner or controller of the work.

16.2 When broadcasting a political rally, a politician giving a speech may include a poem by a famous poet in their speech. The poem would be broadcast by the broadcaster. In this example, the literary work would be broadcast without the consent of the copyright owner or controller of the work.

16.3 When broadcasting a live news event, artworks may appear in the background of a live crossing in many forms: as branding, as logos, and / or as advertising. The artworks would be broadcast by the broadcaster during the live crossing. In this example, the artistic works would be included in a television broadcast without the consent of the copyright owner or controller to do so.

17. The examples above highlight the manner in which works are *incidentally* broadcast by broadcasters on a day-to-day basis. The works themselves are not the subject

matter of the broadcaster, nor does the broadcaster have prior knowledge that the works are going to be broadcast by it. However, in light of the vital role that broadcasters play in the dissemination of information (thereby giving effect to the right to impart and receive information[11]), jurisdictions have long seen fit to grant broadcasters an exception in copyright legislation to ensure that broadcasters are not penalised when incidentally broadcasting works which are the subject of copyright. This exception is a valuable public good which balances competing interests:

17.1 It allows broadcasters to carry on the business of broadcasting without fear of infringing copyright due to the incidental inclusion of copyrighted works;

17.2 It protects the interests of copyright holders by only allowing the exception in limited circumstances: firstly, only broadcasters are entitled to use the exception and, secondly, the inclusion of copyrighted material must be incidental – i.e., not the focus or import of the broadcast. The limitation on the copyright holder's interest is minor and does not impede the copyright holder's ability to exploit its exclusive rights in the ordinary course of business or otherwise.

18. The Act currently includes the ephemeral exception at Section 12(5)(a) and (b). This exception was maintained, nearly word for word, in the Bill (prior to the amendment document) at Section 12B(1)(c). The only difference between the Act and the unamended Bill is that the ephemeral exception in the Bill extends the exception to include cinematograph films.

[11] In the South African context as enshrined in section 16 of the Constitution.

19. The amendment document proposes that the current exception in the Bill be deleted and replaced with a significantly more complicated exception, replete with onerous reporting obligations, the apparent creation of a new collecting society that is *sui generis* in any jurisdiction, and a severe limitation on the types of works which are subject to the exception.

20. eMedia submits that the current drafting of Section 12B(1)(b) of the amendment document is not fit for purpose in that:

20.1 The wording of Section 12B(1)(b) limits the types of works that are subject to the exception to (i) "a performer's performance or work" … (ii) "that is performed live". This defeats many of the objectives of the ephemeral right, as there are many other works which are subject to an exclusive broadcast right, which may be incidentally broadcast by a broadcaster. Examples of this include: a sound recording being played in a stadium, a poem being read in a speech, or an advert being displayed in the background of a live broadcast. Not only are these works not covered by the new drafting, they cannot be 'performed' in the manner in which the word is used in the drafting. In addition, the limitation in (i) suggests that the exception can only be applied if the work in question is owned or controlled by the performer performing the work. In most cases[12] performers do not own the works they perform. There appears no policy basis on which to limit the ephemeral right to just those limited performances where a performer is the owner of the work being performed.

[12] For example, songwriters often assign their musical and literary works to publishers, and so do not 'own' their own works. In addition, performers (such as recording artists and singers) often perform works they do not own or have not authored.

20.2 Section 12B(1)(b)(i) refers to a right that does not exist in relation to any works in the Act or the Bill – the right to communicate performances to the public *by telecommunication*. Telecommunication is distinct from broadcasting and the use of this word in the context of a broadcasters' exception is undesirable. Further, to suggest that a broadcaster should be 'authorised' to exercise this right connotes the existence of a right that is distinct from broadcasting or publicly performing. To this end, it suggests the creation of a new collective management organisation to administer licensing this authorisation – an untenable position considering the different works in issue, and the very nature of the ephemeral right. To make the ephemeral right conditional on this authorisation defeats the very purpose of the exception in the first place; if a broadcaster could obtain such authorisation, the exception would not be required. The exception should exist without such a limitation in order to be of any value.

20.3 Section 12B(1)(b)(iii) and (iv) are ostensibly repetitions of one another. Subsection (iii) refers to a right that does not exist in the Act or the Bill – the right to synchronize. This is a word commonly used in the recorded music and publishing industries, and refers to those instances where a party wishes to use a sound recording and a musical and literary work in conjunction with a moving picture – i.e., the party wishes to 'synchronise' those works with a cinematograph film. Even though the word is common parlance in the industry worldwide, the Act does not refer to the word, nor is it defined. Rather, the right to synchronise is understood to be an amalgam of the reproduction right, and the adaptation right. The use of 'synchronise' in the draft is undesirable due to its ambiguity. Further, the limitations set out in (iii) and (iv) are inappropriately inserted as conditions that are required to be met in order to rely on the exception. This is unnecessary to the extent that any use as set out in the limitations in (iii) and (iv)

would fall out of the ephemeral exception in any event. In this regard, the exception does not allow for this use, and as such a broadcaster would infringe copyright if it performed the acts set out in (iii) and (iv).

20.4 Section 12B(1)(b)(v) to (vii) all impose new onerous reporting obligations on broadcasters in relation to any stored broadcasts which may feature incidental works of others which are subject to the current ephemeral right. The reporting obligations ignore the very nature and purpose of the ephemeral right in the first place. Numerous works may be reproduced incidentally in any one broadcast. The exception recognises that this use is both incidental, and that the exception is a public good which enables broadcasters to broadcast events without concern of infringing copyright or needing to engage in any onerous administration in relation to those works which may be incidentally reproduced. The proposed amendments turn the entire premise of the ephemeral right on its head: broadcasters can only rely on the exception in the new draft if they keep records of the works that are subject to the exception, keep such records up to date, make such records available on request within 24 hours, and secure consent of the owner of the works if they wish to store the reproduction. These obligations diminish the value of the ephemeral right to naught. The administrative burden on broadcasters will be immense. In fact, in certain circumstances such as having to locate owners of works where the work may be unidentifiable, the administrative burden will be impossible to meet. To the extent that this impacts on the ability of a broadcaster to broadcast events (including free-to-air broadcasters like e.tv, and public broadcasters like the SABC), this will substantially impact on the right of the public to receive information (as a part of the public's constitutional right to freedom of expression).

21. In addition to the concerns set out above, the amendment document further amends the ephemeral right in Clause 12B(2). This clause provides that the ephemeral exception in 12B(1)(b) will not apply where "a license is available from a collection society to make the fixation or reproduction of the performer's performance, work or sound recording". This is peculiar. At face value, it could mean that broadcasters will not be entitled to rely on the exception if a collection society is in the business of issuing licenses for the fixation, reproduction or performer's performance. No such collecting society exists in the world. This drafting only creates confusion. Users of works require certainty over whether they are entitled to rely on an exception. To place reliance on an exception which, on the face of it, appears to be made subject to a license with a collection society, is undesirable. Why then would someone seek a license from a collection society if they can simply rely on the exception?

22. eMedia submits that the amendments to the ephemeral right are not fit for purpose, and should not be adopted into the wording of the Bill. Rather, eMedia submits that the ephemeral right as contained in Section 12B(1)(c) of the unamended Bill should remain as is, subject to the following amendments:

    22.1 Section 12B(1)(c) should be amended to remove the obligation to delete any broadcast that includes ephemeral works after six months. The current drafting only allows a broadcaster to retain a broadcast after six months if the broadcast is of "an exceptional documentary nature". Whether a broadcast meets this standard at the point at which the broadcast is meant to be deleted is a vague question. In the case of a news broadcaster, whether a news broadcast is of "exceptional documentary nature" may only come to be known sometime after a period of six months has passed. For example, a news broadcaster may

broadcast a speech of a sitting president at a rally. During the speech, a recorded song might play in the background, which would trigger the broadcaster's reliance on the ephemeral right to broadcast the event without infringing on the rightsholder's copyright in the song. According to the current draft in the Bill, this broadcast would have to be deleted within six months unless it was of "exceptional documentary nature". The speech itself might be innocuous – however, if it transpires that, three years after the speech, the president lied about a matter of national importance, that broadcast would suddenly be of "exceptional documentary nature". The only problem is that this broadcast would have had to have been deleted under the current drafting in the Bill. Further, the obligation to delete broadcasts after 6 months ignores that a broadcaster's archive includes the national history of a country, through reporting on news events on a daily basis. These broadcasts, when maintained as a large asset of daily news broadcasts, become an archival asset that is of public importance. No one broadcast might be of "exceptional documentary nature"; but, when collated as a whole, would document the day-to-day news of a nation. On this basis, we submit that the obligation to delete the broadcast after six months should be deleted. Alternatively, a broadcaster should be entitled to store the broadcast indefinitely, and only use that portion of the broadcast featuring the ephemeral work where such use is compatible with fair use in the Bill.

22.2 Further, eMedia submits that any rebroadcast of a broadcast which features a reproduction of an ephemeral work should not be subject to the consent of the owner. As set out above in our submissions relating to the onerous obligations to notify owners of the use of their works, it is not often the case that owners are identifiable or contactable. This obligation denudes the ephemeral right of its

value. Rather, considering that the Bill now includes a broad fair use provision, eMedia submits that any rebroadcast or further use of a broadcast featuring an ephemeral work should be permitted subject to such use being compatible with fair use in the Bill.

LIABILITY IN COPYRIGHT INFRINGEMENT

23. The Act, like the Bill, creates offences that arise where consent from "the owner" is not obtained when exercising certain rights that attach to works. The offences created by the Act do not impose strict liability – rather, the infringer must act with actual knowledge that the act being performed by the infringer is conducted without the "owners" consent.[13]

24. Frequently, owners of works do not control the works. The works may, for instance, be controlled by licensees. On a strict reading of the aforementioned provisions, users of works will be required to obtain permission from owners of copyright in works in order to avoid criminal infringement, which may present a challenge to the commercial reality in a given situation.

25. The proposed amendments to clause 27 suffer the same drafting error by including permission from an owner as a prerequisite to avoid criminal infringement. As mentioned above, the owner may not be the party that has the authority to permit use of a work.

[13] Section 27(1) of the Act.

26. Whilst we accept that there is an interpretation tha the reference to "owner" in the Act connoted that even when a licensee, and not an owner, grants consent, it does so on the authority of the owner, the ramifications for violating this section are serious. Accordingly, clearer drafting ought to be provided here.

27. In sub-section (5C)(b), the offence for exploiting works where management information attached to those works has been modified or removed, must, like sub-section (5A), only constitute an offence where the infringing party *knows* that it is infringing copyright. In this regard, broadcasters often receive content from third parties and may not have direct knowledge about whether they are infringing copyright or not. To the extent that sub-section (5C)(b) imposes strict liability, this must be addressed.

28. The proposed amendment to sub-section (5A) of section 27 introduces an additional leg to criminal infringement – the infringement must have been performed for commercial purposes. Frequently, infringement occurs where a work is used for personal use, or to allow other parties to access copyright without authority, but for non-commercial purposes. For example, a person might unlawfully copy an episode of *Scandal* (a soap opera produced and distributed by e.tv) and make this copy available on a peer-to-peer torrent aggregator, which would allow any person access to the copy of the episode for free and without any payment to the person who made the copy available. There is no commercial significance to this act, and it would therefore fall outside of the current criminal sanction drafted in sub-section (5A). In the light of this, this amendment is not fit for purpose, and the wording relating to "commercial purposes" should be removed.

UNLAWFUL DELEGATION TO MINISTER

29. The Portfolio Committee has acknowledged that the delegations of power to the Minister to determine regulations relating to the reassignment of certain works after a period of time as contained in the Bill, are unlawful. To this end, the amendment document notes that the delegations of authority to the Minister have been removed in sections 5, 7 and 9 of the Bill. eMedia supports the removal of these sections.

30. This being said, eMedia is concerned that the Minister still holds wide, vague and unfettered powers to, in terms of Section 33 of the Bill:

30.1 prescribe compulsory contractual terms; and

30.2 prescribe royalty rates or tariffs.

31. In *Executive Council, Western Cape Legislature*[14], the Constitutional Court held that detailed provisions are often required for the purposes of implementing laws, and Parliament is permitted to delegate subordinate regulatory authority to other bodies for this purpose. However, the Court held that there is a difference between delegating authority to make subordinate legislation within the framework of a statute, and assigning plenary legislative power to another body. The assignment of plenary legislative power to another body is not permissible.

32. The principles first articulated in *Executive Council* have now been applied by the Constitutional Court in a series of decisions in different contexts.[15] The key question that emerges from these decisions is that it is necessary to consider whether section 33 of the Bill:

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[14] *Executive Council, Western Cape Legislature* and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) ("*Executive Council, Western Cape Legislature*").

[15] See, for example, most recently: *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC).

32.1 delegates authority to the Minister to make regulations "within the framework of" the Bill – in which case it is constitutionally permissible; or

32.2 purports to assign plenary legislative power to the Minister – in which case it is not.

33. Section 33 prescribes no framework for the Minister to exercise their rights to create regulations. Rather, it is merely baldly stated that the Minister must make regulations "prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act" and "prescribing royalty rates or tariffs for various forms of use".

34. This patently purports to assign plenary legislative power to the Minister, and it is on this basis that the President referred parts of the Bill back to Parliament for reconsideration. eMedia submits that section 33 must be revisited by the Portfolio Committee, and the concerns set out above must be adequately remedied, prior to the Bill being resubmitted to Parliament.

CONCLUSION

35. In summary, eMedia believes that the current amendments proposed in the amendment document should not be made in their current form as:

35.1 The new definition of broadcaster fails to consider new technologies used to broadcast content.

35.2 The new ephemeral right is not fit for purpose, and will substantially deprive broadcasters of their ability to broadcast news and other live events.

35.3 The introduction of strict liability for criminal copyright infringement introduces an unattainable and commercially unviable standard of conduct on broadcasters.

35.4 The delegation of power to the Minister to make regulations amounts to an unlawful delegation of plenary legislative power, and should be removed on this basis.

36. eMedia thanks the Portfolio Committee for the opportunity to make submissions. To the extent that the Portfolio Committee welcomes any drafting suggestions on the Bill, eMedia would appreciate the opportunity to make such suggestions. Finally, as indicated above, eMedia would like to participate in any public hearings that take place on matters pertaining to the amendment document and the Bill.

eMedia Investments

28 January 2022