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By email @parliament.gov.za

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Dear

Copyright Alliance Response to the Copyright Amendment Bill[1] ("the Bill")

We, as the Copyright Alliance, write in our capacity as an organised collective of stakeholders in the creative sector with a keen and vested interest in the developments in the South African copyright industries and legislative framework.

The Copyright Alliance is comprised of the Southern African Music Rights Organisation (**SAMRO**), the Composers, Authors and Publishers Association (**CAPASSO**), the Dramatic, Artistic and Literary Rights Organisation (**DALRO**), the Recording Industry of South Africa (**RiSA**), the South African Music Performance Rights Association (**SAMPRA**), the Musicians Association of South Africa (**MASA**) and the Music Publishers Association of South Africa (**MPA SA**)[2].

The purpose of this letter is to offer our collective support to the Committee as it embarks on an important process that will undoubtedly shape our cultural and creative industries going forward.

The Copyright Alliance commends and welcomes the intention of the Department of Trade and Industry to modernise our copyright regime. It is also our belief that it is imperative that the objectives of the current Bill are safeguarded to ensure that the Bill does not lend itself to unintended consequences at the expense of those it seeks to protect.

[1] B13, 2017

[2] Each of these organisations will also be submitting formal representations in their own capacities to the Portfolio Committee

I. Proposal to engage with Porfolio Committee in a workshop

Having indicated the above, there are provisions in the Bill which, if not brought to the Committee's attention and rectified, will effectively nullify the intentions of the DTI and will perpetuate the scourge of South African creators, being among the most vulnerable and under-compensated in our society.

As active practitioners in the industries directly affected by the Bill, and representing authors, composers, performers and their respective representatives, the Copyright Alliance hereby would like to extend an offer to the Portfolio Committee for an opportunity to demonstrate at a special event how copyright underlies the basis of the music and literary industries and what the needs of creators and industry are for a revision of the Copyright Act[3].

II. Extension users' "rights" at the expense of creators' rights (*Users as copyrightholders*)

As it currently stands, the language used in the Bill has the effect of legitimising the so called "value gap" between users of creative content and those who actually invest in and create said content. The delicate balance of copyright – which seeks to find a fair balance between the right to reward the author for creating a work and the societal imperative to allow a user to access the work – would be disrupted by the bill through the introduction of far reaching user-centric exceptions which leave local creators of copyright works vulnerable.

A clear example of how this balance would be disrupted is the introduction by the Bill of the concept of users of copyright-protected content enjoying the ability to transfer the copyright in, and to share in royalties generated by, such content[4]. This would not only seriously erode the basis of copyright as a principle, but would also effectively dilute the royalties payable to the creators of the content.

This far-reaching concept of the user as a primary rights-holder is evident throughout the Bill. Another example, in the proposed Section 9B(1) dealing with the proposed artist resale right, it is stated that this right would apply "subsequent to the first transfer by the *user* of that work." This is clearly incorrect and the reference is to the *author* of the work. Compare this to Article 1 of the EU Resale Right Directive of 2001, which defines the resale right in a manner similar to the proposed Section 12B but makes it clear that the right applies "subsequent to

[3] 98 of 1978

[4] For example see Sections 4,5 6 and 8 of the Bill

the first transfer of the work by the author". This is indeed how the right is understood internationally.

Finally, we strongly argue that the far-reaching general education use exemption in section 9 of the Bill (introducing a new section 13B) is not justified and shall serve to disincentivise the publication of works. The current licensing regime allows educational institutions to pay a photocopying licence to enable libraries to photocopy from prescribed textbooks and articles on behalf of students in all their subjects for a year; such licence amount to less than the price of one text book per student. This licensing regime is reasonable and maintains the delicate balance between author and user that copyright law strives to achieve.

The proposed section, which takes away the right of publishers to be remunerated for such photocopies is thus over-reaching, unfair and unreasonable. It simply upsets the balance that the current fair dealing provisions strike between the interests of copyright owners on the one hand and the public interest and the interests of the users on the other.

III. Automatic usurpation of copyright where composers and authors are commissioned or funded to create musical or literary works

Section 5(2) of the Act, provides that the copyright in works made by or under the direction or control of the State or an international organisation, shall, if such works are eligible for copyright, belong to the state or such international organisation.

The proposed amendments add funding as a cause for vesting the first ownership of copyright under this Section, not even stating the quantity of funding needed to trigger this vesting. Furthermore, this benefit is extended to not only the State and international organisations which were up to now required to be defined by regulation, but all "international organisations" and also "local organisations".

The real impact of the proposed amendments to this section is not that copyright in works funded by the state, international organisations or local organisations shall belong to such parties, but that this copyright exception will now be widened to include the work of composers and authors who earn a living through the royalties earned on *musical* and *literary* works commissioned by, amongst others, television broadcasters.

Section 21(1)(c) of the current Copyright Act provides that if a person commissions the making of certain works (e.g. photograph, the painting or drawing of a portrait, cinematograph film and sound recording), "and pays or agrees to pay for it in money or

money's worth", and the work is made in pursuance of such a commission, then the copyright in the work shall belong to the person commissioning the work.

Currently on the basis of this section, if the SABC funds the making of a film or sound recording, it owns the copyright in such film or sound recording. **It, however, does not own the copyright in the underlying literary and musical works, because these works are specifically excluded from the list of works that can be commissioned in this manner.**

The effect of the amendment to section 5(2) however would be that it would no longer be a requirement that, with regards to literary and musical works, copyright in such works can only be transferred through a proper, written assignment.

This will have a very dire effect on the livelihoods of rights-holders (the very authors that this Bill seeks to protect), who produce works for commercial use by the commiossioning party and are reliant on the royalty income derived from these works.

Further to the above, while the proposed amendments to section 21(1)(c) appear, on face value, to favour authors, the proposed amendment to section 5(2) will do away with any semblance of benefit accruing to authors as a result of the amendments to section 21(1)(c). This is because, as highlighted above, many authors, composers and film producers depend on state funding (e.g. through the SABC, the IDC, the NFVF) to create their works. In this regard section 5(2)(1) will not only nullify the exemption of musical and literary works from the application of section 21(1)(c). It will also affect the ability of all owners of copyright works from earning income from the exploitation of these works, where the works are created through State funding.

As a practical example, it will, in the case of musical works, preclude authors and composers from the *automatic right* to receive royalties for the broadcast of their music by the SABC and other broadcasters[5] (in respect of *performing rights* royalties payable by SAMRO and *mechanical rights* royalties payable by CAPASSO). In the case of films whose making was funded by the IDC or NFVF (such as the famous *Tsotsi* and *Yesterday* films), the producers shall not have any copyright ownership in such films and will thus find it difficult to obtain further investment funding from private parties, and would have difficulties promoting the film and getting distribution deals.

[5] Where the phrase "local organisations" is to be interpreted to mean any local organisation, including broadcasting organisations.

Further to the foregoing, and very importantly – it needs to be observed that the proposed amendment to section 5(2) **directly** contradicts the provisions of the *Intellectual Property Rights From Publicly-Financed Research and Development Act* (Act No. 51 of 2008) (the *"PFRD Act"*), which has extensive provisions about intellectual propery ownership in such situations. More specifically, the *PFRD* Act provides that the state-funded institution owns the intellectual property developed from such funding, unless it does not wish to do so.

Related to this, the *PFRD Act* also deal with research that is party funded by the State and a private party. The chilling effect of the proposed amendments to section 5(2) is that, with one stroke, the amendment will undo the well-functioning public-private partnerhip that exists in terms of the *PFRD Act.* Conversely, it would not be good policy to have two regimes dealing with the same matter, with the one regime permitting private ownership of the intellectual property developed through State funding, and the other prohibiting it. It is accordingly proposed that the proposed amendments to section 5(2) should be removed in their entirety.

The Copyright Alliance urges that the proposed amendments be set aside and for ownership of and access to the literary or musical work so funded to be dealt with by contract.

IV. Introduction of the US doctrine of Fair Use without holistic consideration of the case-law imperatives of that doctrine

The "fair use" defence to a claim for copyright infringement, being of United States origin, is not compatible with South African legal history (which is, in this regard, based on English law). The use of specific cases to indicate what constitutes "fair dealing" or "fair use" in the Bill is also incompatible with the use of the fair use defence in United States law, where it is seen as a *general criterion* employed at the discretion of the judge and "not limited to certain purposes of the allegedly infringing act", unlike fair dealing.[6] Furthermore, the fair use defence has been criticized for "providing flexibility at the expense of certainty."[7]

In the *Moneyweb* judgment the court cautioned against an arbitrary reliance on foreign law, warning that "each jurisdiction has its own history and, in many cases, is bound or influenced by statutory precepts." On this basis the court resolved, "for historical reasons, to focus on English authority."[8] This accords with the observations made in the Hargreaves Report, where it was argued that introducing 'fair use' in the United Kingdom would bring "massive legal uncertainty because of [fair use's] roots in American law; an American style

[6] See Brenncke M 'Is "fair use" an option for U.K. copyright legislation?' 2007 Heft 71 at 5.
[7] Burrell R "Reining In Copyright Law: Is Fair Use the Answer?" 2001 I.P.Q. (4) 364 – 365.
[8] *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at para 103.

proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods".[9] Also in Australia, a position was adopted that extended the flexibility of the fair dealing provisions by creating new exceptions such as parody, satire and a limited private use exception (through the 2006 Copyright Amendment Act) while rejecting a general fair use defence.

In the *Moneyweb* judgment our courts have, for the first time, clarified the question as to the factors that are relevant for the consideration of fairness within the scope of section 12(1)(c)(i) of the Copyright Act (namely, fair dealing for the purpose of reporting current events in a newspaper, magazine or similar periodical). There is no reason why these factors cannot be adapted for other cases of fair dealing. In this case the court came up with a list of five factors, which is not exhaustive.

V. Widening of the "Value Gap"

Throughout the world, there is currently a concerted effort from creative industries to highlight just how much value is lost to multinational corporations such as YouTube which provide little or no benefit to the actual content creators (the so called "value gap"). The effect of some of the language in the Bill as it currently stands tragically does not alleviate this for local creators but rather exacerbates matters by affording multinational corporations "user rights" to content that should be exclusively belong to the creators of those rights. Forcing creators to share royalties with the very same multinational users that are unfairly benefiting from unlicensed usage of creative content is tantamount to legitimizing piracy.

VI. Local Content

In respect of local content, it is imperative that the Minister of Trade and Industry's duty be peremptory rather than elective. As such the language should be amended to read as follows:

"the Minister of Trade and Industry **shall** from time to time make regulations in consultation with the Minister responsible for communication and the relevant industry stakeholders prescribing the quota ratios for local music and visual content for television and radio broadcasting;

[9] The Hargreaves Report "Digital Opportunity: A Review of Intellectual Property and Growth" 2011, at 44 para 5.13.

The above are systemic challenges posed by the Bill. There are, in addition, more detailed challenges. We humbly request that the Committee affords the authors and composers, and the industries that work with them, an opportunity to partake in the shaping of their industry meaningfully, by strongly considering the content of the comments that will be submitted.

Again, the Copyright Alliance would like to extend its availability to the Committee should it so desire.

Yours Faithfully,

The Copyright Alliance

(SAMRO | CAPASSO | MASA | DALRO | RiSA | MPA SA | SAMPRA)

The Copyright Alliance would like to thank the following organisations and scholars who have expressed their support for the Copyright Alliance and its efforts:

South African Institute of Intellectual Property Law (SAIIPL)

Publishers Association of South Africa

Adams & Adams

Kisch IP

Art. 4(1)(b)

Art. 4(1)(b) (Art. 4(1)(b) **Centre for IP Law; University of Pretoria)**

Art. 4(1)(b)

Art. 4(1)(b)

Art. 4(1)(b)