

**REPRESENTATIONS BY  
MULTICHOICE AND M-NET ON THE  
COPYRIGHT AMENDMENT BILL  
AND THE  
PERFORMERS' PROTECTION  
AMENDMENT BILL**

## **INTRODUCTION**

- 1 Electronic Media Network Pty Ltd ("M-Net") and MultiChoice Pty Ltd ("MultiChoice") are thankful for the opportunity to submit written comments on the Performers' Protection Amendment Bill<sup>1</sup> ("the PPA Bill") and the Copyright Amendment Bill<sup>2</sup> ("the Copyright Bill"). We would also welcome the opportunity to make oral submissions at any public hearings held.
- 2 As licensed subscription broadcasters, we are investors in and users of a range of works of copyright. The policy and legislative framework governing copyright matters are thus of critical importance to us and the entire broadcasting industry.
- 3 Our over-arching submission is that the two bills should be delinked. The Copyright Bill, as it stands now, despite its commendable objectives is an ill-conceived and poorly drafted piece of legislation which, if promulgated in its current form, will likely lead to legal uncertainty, litigation and, most importantly, the further impoverishment of the very people that it seeks to benefit and protect.
- 4 In contrast to the Copyright Bill, the PPA Bill, while still flawed, only requires amendments in several specific instances. We therefore recommend that the PPA Bill be de-linked from the Copyright Amendment Bill so that it can rapidly progress through Parliament on its own merits. However, the legal and functional issues that still affect the drafting of the PPA Bill must be fully rectified so that it may be finalised by the National Assembly and sent back to the President for assent.

## **WHO WE ARE**

- 5 M-Net and MultiChoice are involved in the production, acquisition, and distribution of local and international content. We are committed to nurturing South African talent and we invest in the production of local television programming and the acquisition of locally produced television channels.

---

<sup>1</sup> B24D - 2016

<sup>2</sup> B13D – 2017

- 6 M-Net and MultiChoice welcome efforts to improve the financial well-being of authors (in the broad copyright sense) and performers (by which we mean actors, singers, musicians, and dancers) in South Africa. It is in the interests of all stakeholders in the entertainment industry, including content producers and broadcasters, that authors and performers remain incentivised to create original copyright works.
- 7 Broadcasters are significant investors in local content creation and the local production industry. Through these investments, public and commercial broadcasters generate thousands of hours of original content annually. This, in turn, has a direct and positive effect on employment. Increasing investment in the film and television industry is vital to the growth of the industry and will have a significant impact on both output and employment. Investors rely on a strong and predictable legislative framework to protect investments made in the production of local content. Copyright policy and legislation cannot only consider the rights and obligations of creators and users of works of copyright without taking into account the implications of any proposal on investment.
- 8 The Bills should reflect an appropriate balance between the rights and obligations of a range of stakeholders – creators of works, the investors/broadcasters who invest in the creation of works, and the public who use and benefit from the works created. Unfortunately, this is not the case in the current version of the Copyright Bill, it is unbalanced and is likely to disincentivise investment and harm those that it seeks to protect.

# **SECTION A – COPYRIGHT AMENDMENT BILL**

## **OVERARCHING COMMENTS ON COPYRIGHT BILL**

9 Our concerns with the Copyright Bill fall into three main categories:

9.1 First, the Bill makes proposals that will have very far-reaching effects in the television production and broadcasting sector without any underlying research having been conducted.

9.2 Secondly, the changes proposed by way of the Bill will disincentivise investment in the television production and broadcasting sector (which is currently a major contributor to the South African economy).

9.3 Thirdly, the Bill seeks to unjustifiably and unnecessarily interfere with contractual freedoms of all parties.

### **No underlying research or acknowledgment of the complexities of television production and broadcasting sector**

10 In explaining the objectives of the Bill, reference has been made to the recommendations of the Farlam Commission. Even though the Farlam Commission was only concerned with music rights, the Bill extends the commission's findings to all forms of copyright. This is inappropriate because the dynamics, scale and complexity of the television production and broadcasting sector differ significantly from the music industry. There has been no review commission established to assess the effectiveness and fairness of copyright protection in the television production and broadcasting industry. Nor has there been a review of standard contracts outside of the music industry, for example in the literary publishing, scientific/educational publishing, journalism, graphic design, and film/television contexts.

11 It is therefore deeply concerning that the Bill makes far-reaching proposals with substantial consequences for the television production and broadcasting sector, with insufficient attention to the complexity or mechanics of it. We strongly caution against making drastic one-size-fits-all changes to the current Act which may not be necessary or appropriate outside the context of the music industry. Due to inadequate Regulatory and Economic Impact Assessment, especially at Provincial level, the Copyright Bill would be better served if it was returned to the Minister so that amendments can be informed by thorough research, analysis and impact assessment for all affected sectors at least equivalent to the process conducted by the Farlam Commission in the context of music rights.

### **Disincentivising investment in television production**

12 M-Net and MultiChoice understand what the Bill seeks to achieve, and the underlying reasons for that objective. However, we are concerned that, as the Bill stands currently, it will undermine the very objectives it has set.

13 The television production and broadcasting industry is a significant contributor to the South African economy and a major funder of creators. Finding ways to increase investment in this industry is therefore vital to the well-being of creators and the broader economy.

14 The 2017 report<sup>3</sup> of the National Film and Video Foundation, stated that the film and television production industry in South Africa contributed R4.4 billion to economic production in the country in the 2016/17 financial year. This direct contribution led to a total rise in economic production of approximately R12.2 billion. The net operational expenditure of the film industry in the four financial years analysed in the study amounted to R17.5 billion.<sup>4</sup> However, these gains and investments

---

<sup>3</sup> Economic Impact Assessment Study Report 2017, National Film and Video Foundation, available at [https://nfvf.co.za/wp-content/uploads/2022/02/Final-NFVF-Economic-Impact-Study-Report\\_21\\_06\\_2017.pdf](https://nfvf.co.za/wp-content/uploads/2022/02/Final-NFVF-Economic-Impact-Study-Report_21_06_2017.pdf)

<sup>4</sup> Pg 4 of the 2017 NFVF Report

suffered a setback due to the COVID-19 pandemic. The 2021 report<sup>5</sup> reflected the film and television production industry shrinking by 59% in 2020/21, declining to R2.9 billion. This COVID-19 impact also resulted in business closures (38%), limiting local content development (28%), and limited training and skills development (28%) opportunities because of the disruptions in production.<sup>6</sup>

- 15 Broadcasters are the largest investors in the local production industry and post the COVID-19 pandemic they need to be incentivised to continue investing and increase the scale of investment. This incentive encouragement, in turn, contributes to economic development, employment, skills development, trade and enterprise development, and broadened economic participation.
- 16 A useful case study to consider in respect of the impact at a provincial/local level of this investment is Survivor South Africa, which filmed its latest season on home ground and boosted the Eastern Cape Economy by R18,417,972.84 over a 40-day period. In that period it created over 65 jobs, of which 28% were female and 68% youth-based. The total value of jobs created was R642,925.00. The show contracted over 24 local suppliers and had a total value of supplier payments at R17,374,174.57. Donations were also made to the Amagqunukhwebe Prudhoe Community Development Trust and Tatshana Junior / Senior Primary School. The total value of donations was R400,873.27. This remarkable achievement was due to an innovative partnership with the Eastern Cape Development Corporation (ECDC) which resulted in job creation, upskilling and a much-needed financial boost to the region and its tourism industry demonstrating how copyright rights combined with economic value can result in social upliftment and economic development.
- 17 However, the replication of the success of such a collaboration requires an enabling legislative framework that incentivises investment and acts as a catalyst for

---

<sup>5</sup> Economic Impact Assessment Study Report July 2021, National Film and Video Foundation, available at [https://www.nfvf.co.za/wp-content/uploads/2022/02/Economic-Impact-of-the=South-African-Film-Industry\\_Report\\_-August-2021.pdf](https://www.nfvf.co.za/wp-content/uploads/2022/02/Economic-Impact-of-the=South-African-Film-Industry_Report_-August-2021.pdf)

<sup>6</sup> Pgs 2 and 19 of the 2021 NFVF Report

collaboration. Therefore, it is in the interests of all stakeholders in the entertainment industry that investors remain incentivised to fund the creation of original copyright works.

### **Interference in the freedom of contract**

18 We are concerned that the Bill substantially erodes all of the parties' flexibility to commercialise their rights, through rigid paternalistic legislation. Of particular concern is the cumulative effect of the Bill's proposals to –

18.1 make it compulsory for certain agreements to be concluded in the prescribed manner and form;<sup>7</sup>

18.2 make certain terms of certain agreements compulsory, by giving the Minister of Trade and Industry ("the Minister") wide, vague and unfettered powers to prescribe compulsory and standard contractual terms to be included in agreements entered into in terms of the Act,<sup>8</sup> and to prescribe royalty rates or tariffs for various forms of use;<sup>9</sup> and

18.3 prevent any person from choosing to renounce a right or protection offered by the Act (regardless of any benefit they may have enjoyed by doing so), by making any contractual term which purports to do so unenforceable.<sup>10</sup>

18.4 Limiting the term of assignment of literary and musical works that are created by South African authors and performers to 25 years, meaning audio-visual works (which nearly always contain scripts and musical scores) would have a de facto commercial lifetime of only 25 years.

19 By way of analogy, if the principles of this Bill were to be applied in the construction industry, it would effectively provide for a single contract, with compulsory terms,

---

<sup>7</sup> See for example clauses 5, 7 and 9 of the Copyright Bill inserting s6A, 7A-F and 8A of the Act

<sup>8</sup> Clause 35(b) of the Copyright Bill inserting s39(cG) of the Act

<sup>9</sup> Clause 35(b) of the Copyright Bill inserting s39(cI) of the Act

<sup>10</sup> Clause 36 of the Copyright Bill inserting s39B of the Act

whenever someone contracted with a builder to build them a house. The homeowner would have to give the builder a share in any rental earned if he let the house. The Minister would dictate the contractual terms, and ownership of the house would vest in the builder, even if the owner paid the builder to build it. The owner would also have to let the builder reside in a room in his house if the owner was not using that room. Each of these rights would be given to every participant in the building process, including the architect, engineers, bricklayers, tilers, plumbers, electricians, plasterers, painters, etc., notwithstanding their role in the project. The legislation would be based on research done on low cost residential housing perhaps, but would be extrapolated to all forms of buildings. The Minister would be given unrestrained powers to determine the contractual terms, including how much each role-player should be paid, but no guidance would be given to the Minister regarding the factors to be considered. Further, none of these players in the construction sector could waive any of these protections, even if they were paid for the work they had done. Clearly, no one would build a house on this basis. The same is true of investment in future television shows and films and is the likely consequence of the Copyright Bill for all creators in the value chain, investment, and the economy as a whole.

## **COMMENTS ON SPECIFIC PROVISIONS OF THE COPYRIGHT BILL**

20 We now turn to comment on specific provisions of the Copyright Bill.

### **Definition of "broadcast"**

21 The Copyright Bill proposes replacing the current definition of 'broadcast' in the Copyright Act.

22 A major flaw is that the new proposed definition reduces the scope of protection offered by the current definition in the Copyright Act, instead of improving the scope of protection.

- 23 The definition has also introduced features of the Beijing Treaty definition such as "partially or wholly" that are unclear.
- 24 It is also not clear if the term "public reception" in the new definition would capture subscription broadcasting services which only broadcast to "*sections of the public*". The current definition of "broadcast" in the Copyright Act refers specifically to "intended for reception by the public or sections of the public".
- 25 It is also not clear if the definition is meant to expand the definition of 'broadcast' to encrypted signals provided on wired platforms such as mobile platforms or online platforms and thereby include such online video distribution services as Netflix or ShowMax within the ambit of being a broadcasting organisation for the purposes of the Copyright Bill?
- 26 The draft White Paper on Audio and Audiovisual Content Services Policy Framework has debated on expanding the traditional scope of broadcasting as defined in the Electronic Communications Act, 2005 to include on demand content services offered over the Internet. There have also been suggestions that the term 'broadcasting' be replaced in its entirety with the new broader concept of audiovisual content services.<sup>11</sup>

27 Due to the current debate at a national policy level in South Africa on the scope of broadcasting still being unclear on whether broadcasting should include internet transmissions, we recommend that the current definition of "broadcast" in the Copyright Act be retained and replace the proposed definition in the PPA Bill. Namely,

"broadcast", when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which—

---

<sup>11</sup> Draft White Paper on Audio and Audiovisual Content Services Policy Framework: A New Vision for South Africa 2020, published by the Minister of Communications, Department of Communications and Digital technologies. Government Gazette, No.43797, Notice No. 1081, 9 October 2020

- (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.'

### **Performer issues: Duplication with PPA Bill (clause 9 of the Copyright Bill)**

- 28 The Copyright Bill confers protection rights on performers (see, in this regard proposed clause 9 of the Copyright Bill proposing new s8A of the Copyright Act) and does so in a manner that overlaps to a very substantial degree with the protections being proposed in the PPA Bill (and indeed those already present in the PPA in its current form).
- 29 We support the broad objectives of the PPA Bill and, in particular, the increased protections of performers. However, the overlap in performers protections will be untenable commercially and will result in confusion, duplication, and litigation.

- 30 Due to the extent of the overlap between the protections that will be afforded to performers whose performances feature in audiovisual works/fixations if the Copyright Bill and the PPA Bill in their current forms are made law, **we propose the deletion of the performers' protection provisions from the Copyright Bill to do away with the duplicated provisions that already exist in the PPA Bill.** Since the PPA is the appropriate statutory instrument to deal with performers rights, they should not be in the Copyright Act.
- 31 Notwithstanding our preferred recommendation that the performer protection provisions should be deleted from the Copyright Bill, we make drafting suggestions below, should the committee decide to retain these provisions.

## Royalty Payments (clauses 5 and 9 of the Copyright Bill)

- 32 M-Net and MultiChoice understand that one of the objectives behind the Bills is to protect the economic interests of authors and performers and we support this objective. It is in the interest of all stakeholders in the entertainment industry that they are fairly compensated. We therefore welcome efforts to address the financial well-being of authors and performers.
- 33 However, it is unclear why the author of a literary work or a performer in an audio-visual work should be entitled to claim a share in a royalty if the copyright in the work has already been assigned (i.e., ownership of the work has been transferred to a new owner). Presumably they would have been compensated at the point that they assigned the work. It is unclear what the legal basis is for the continuing payment, over and above the payment received when copyright was assigned. If the concern is that the creators and performers would not have been compensated or would not have been fairly compensated at the time of the assignment, then other mechanisms are available to address this. Our drafting proposals in paragraphs 81 to 88 below address unfair contractual terms.
- 34 The proposed new s6A(2)(b) refers to a "*share of the royalty received for the execution of any of the acts contemplated in section 6*" and the proposed s8A(1) refers to a "*share in the royalty received by the copyright owner for any of the acts contemplated in section 8*".<sup>12</sup> (our emphasis)
- 35 A royalty is a payment which is received by the owner for the exploitation of his or her work. A copyright owner receives a "royalty" in circumstances where the owner authorises another person to carry out any of the acts contemplated in s6 (applicable

---

<sup>12</sup> Clauses 5 and 9 of the Copyright Bill, inserting sections 6A and 8A of the Act

to literary and audiovisual works respectively) – i.e., a licence fee received by the copyright owner.

36 In this context, it is incongruent and confusing to refer to a "*royalty received for the execution of any of the acts contemplated in section 6*". We therefore propose that the reference in s6A to the "execution" of the work be deleted, and that the section refer to the royalty received for the authorisation of any of the acts contemplated in s6 and s8 if it is not deleted.

37 A further fundamental difficulty with s6A and 8A is that they contemplate a single remuneration model namely, a share of royalties.

38 The proposed royalty provisions might be workable in the context of a literary work such as a book where there is one, or a few, authors of the literary work. However, it is not workable in circumstances where numerous authors of a literary work, such as a script, are involved as a single input to a highly collaborative work such as a film or television series.

39 In practice, there are numerous different ways in which commercial deals can be structured and authors and performers can receive remuneration for their rights, considering the parties' respective objectives and priorities. Amongst other things, the parties could agree –

39.1 that the author will retain ownership of the copyright and license the rights to the broadcaster;

39.2 that the broadcaster will be assigned the right to execute a single act and be licensed none, some, or all of the remaining rights in respect of the work;

39.3 on any number of remuneration models, including a fixed fee, royalty, revenue share, etc.; and

- 39.4 that the rights will be licensed only for particular territories or languages, etc.
- 40 The initial payment for assignment of copyright by the owner to the author / performer will also undoubtedly decrease given the ongoing obligation on the owner to share a percentage of royalties received going forward. Authors / performers may therefore be worse off until royalty payments kick-in (which will not necessarily eventualise, as not every work is successful).
- 41 The Bill does not contemplate that some authors / performers may wish to exchange their right to an ongoing percentage of royalties, in favour of a large up-front lump sum payment, and that it may well be in their interests to agree to such an arrangement. In this way, the leverage which authors have in assignment negotiations may actually be reduced by the Copyright Bill, instead of enhanced.
- 42 We also note, finally, that all of the protections that are afforded in the Bill to authors and performers would also by virtue of our Treaty obligations extend to highly paid international authors and performers (for example, Hollywood stars). That the Bill seeks to protect people who are so obviously able to negotiate their own contractual terms illustrates that the drafters of the Bill have not adequately considered the need for, or the effect of, the proposed legislation.
- 43 This inflexibility could be easily remedied by providing for an alternative between **equitable remuneration or a share of any royalty** received by the owner for the authorisation of any of the relevant acts. This would allow the parties to agree on an appropriate remuneration model, which could be an upfront remuneration payment or an ongoing royalty percentage. The PPA Bill, for example, has already adopted this principle which has also been articulated in the Beijing Treaty language and provides for "*royalties or equitable remuneration in respect of audiovisual works*".

## Reduced flexibility

- 44 Other aspects of the Copyright Bill further reduce the flexibility of the different role players to contract: For example:
- 44.1 s6A(3)(a) provides that the share of royalty "*shall be determined by a written agreement in the prescribed manner and form...*"
  - 44.2 s6A(4) provides that where the author and copyright owner cannot agree on the author's share of the royalty, either party may refer the matter to the Copyright Tribunal for an order determining the author's share of the royalty.<sup>13</sup>
  - 44.3 The proposed amendments to Section 22(3) of the Copyright Act limit the term of assignment of literary and musical works to a period of 25 years from the date of assignment which will unnecessarily limit the opportunity to commercialise audiovisual works (which inevitably contain literary and musical works) to only 25 years.<sup>14</sup>
- 45 M-Net and MultiChoice are concerned that the cumulative effect of these provisions of the Copyright Bill is that the freedom to contract among role-players in the content value-chain will be negatively affected and that some of the new provisions may constitute undue interference in commercial matters.

## Reporting Requirements (Clause 9 of the Copyright Bill)

- 46 As we understand it, proposed s8A(5)(a) of the Copyright Bill requires persons who execute an act contemplated in s8 for commercial purposes to register that act in the prescribed manner and form. A broadcaster would need to register every time they broadcast an audio-visual work. Although it appears that the manner and form of the registration will be contained in the regulations not yet published, it is, in the

---

<sup>13</sup> Clause 5 of the Copyright Bill, inserting s6A of the Act

<sup>14</sup> Clause 25(b) of the Copyright Bill, amending s22(3) of the Act

first instance, unclear where and with whom persons should register their "acts". It is also unclear whether the registration should take place prior to the "acts" being carried out or whether registration after the fact is permitted. These points of clarification are important, in particular given that proposed s8A(6) renders non-compliance an offence with sanctions that are draconian.

- 47 The proposed s8A(5)(b) also requires that any person that executes an act contemplated in s8 must submit a complete, true and accurate report to the performer (and others) in the prescribed manner. Again, the scope of the provision is not clear. However, if the intention is that broadcasters must compile a report for every performer that appears on their television channels setting out how many times that performer's performances appear on those channels, then the provision is again unreasonable and irrational.
- 48 In paragraphs 148 to 165 below we provide extensive detail on why and how these reporting requirements, which are also found in the PPA Bill, are unnecessary unduly burdensome and onerous and why the sanctions imposed for non-compliance with them are unreasonable. We've proposed amendments to the provisions in the context of the PPA Bill. As these reporting requirements and sanctions are already captured in the proposed section s5(1A) and s5(1B) of the PPA Bill (in Clause 4(c)) it raises the question of why it is necessary to duplicate them in the Copyright Bill.

49 Accordingly, we propose the deletion of these provisions in the Copyright Bill and their amendment in the context of the PPA Bill to address unreasonableness and irrationality.

## **Copyright in commissioned works (clause 24 of the Copyright Bill)**

- 50 s21 of the Act deals with ownership of copyright. It currently provides that the person who commissions and pays for the making of, amongst others, an audio-visual work, is the owner of the copyright in that work.
- 51 A person is "commissioned" to make a work when another person specifically requests the creation of a work of copyright, funds its creation and bears all the risk of its potential commercial failure.
- 52 s21 of the Act acknowledges that where an audiovisual work is commissioned (e.g., a television drama commissioned by a broadcaster) it is different from other audiovisual works which are made at the instance, cost, and risk of the producer (e.g., a film made by a studio). A commissioned work is different, and must be treated differently in copyright legislation for the simple reason that the audiovisual work would likely not exist at all were it not for the broadcaster deciding to commission it, pay for it, and assume all the risk.
- 53 When an audiovisual work such as a television drama is commissioned by a broadcaster, the broadcaster appoints and pays an independent production company to deliver a product on its behalf, which the broadcaster can then exploit (e.g., on television networks, internet platforms, and through syndication and programme sales). These multiple opportunities for exploitation are necessary so that the broadcaster can realise a return on its investment.
- 54 The risks in television production are uniquely high:
- 54.1 Budgets are high and the period for a return on investment can be lengthy.
  - 54.2 Productions take a long time to complete – for dramas approximately 6 ½ months from conception to completion – a period of time where costs are

incurred (at the broadcaster's expense) and the broadcaster pays the production company, but the broadcaster does not earn any revenue.

- 54.3 Unlike other kinds of works which may only have one creator, there are multiple creative participants involved in a television production including actors, directors, writers, set designers, editors, etc. All of these participants make different levels of contributions, with some playing a small role, while another's participation can 'make or break' the final product.
- 54.4 The commissioning of television content is just one element of a complex, multi-layered value-chain. Strategies are developed, and budgets and slots for broadcast are decided far in advance along with marketing materials and advertising packages. Further exploitation on other platforms is planned. There is, therefore, a significant impact across the business if a single piece of commissioned content fails to deliver as expected.
- 54.5 Broadcasters invest significantly in marketing the work, at their own cost (and at no cost to the various creative participants involved in the television production), to create awareness of and demand for the work as a whole. The exploitation of the work by the broadcaster creates exposure for the creative participants (at no cost to the participants) and builds the work's brand and reputation.
- 54.6 The environment is extremely competitive with a number of local and international players vying for audience attention. There is no guarantee that the final product commissioned by the broadcaster will be successful. Indeed, many works are not successful at all.
- 55 In South Africa these risks are compounded as, in spite of the recent popularity of some shows, there is a limited demand for local television content internationally,

meaning the initial investment made by the broadcaster must be recouped locally. We are constantly investigating ways to increase production budgets in order to promote local creators, transfer skills, improve technical production standards in line with global standards, and build international demand for local productions. However, we take significant risks and require substantial funds to do so.

- 56 Through the commissioning model, the production company and the various creative participants are completely insulated from these risks. Before the programme is actually broadcast or exploited, everyone involved (the production company, writers, actors, directors, camera operators, make-up artists and set-designers etc.) will have been paid for their efforts. If the programme doesn't find an audience and doesn't generate revenue, the broadcaster alone will bear the financial losses and feel the impact on its business.
- 57 In South Africa, broadcasters usually put up 100% of the investment for the development, production and marketing of a television show – broadcasters take on 100% of the risk and for this reason, own the copyright necessary to exploit the content and realise a return on investment. Broadcasters pay the production companies the agreed price regardless of whether the content is successful or not. By putting up the funding for a production up front and assuming all the risks, broadcasters make possible local productions which may well not have been possible otherwise.
- 58 However, it should be noted that broadcasters do not insist on being the sole funder. Quite the contrary – given the increasing demand for quality high-end television and escalating content budgets, both locally and internationally, broadcasters want and need co-investors in content. Where a producer decides to co-fund a television production with the broadcaster, then the rights are shared. In other cases, a producer may decide to fund the production entirely on their own and will then hold copyright exclusively.

- 59 In summary, the default position in s21 of the Act currently is that copyright vests in the entity which commissions, pays for, and bears all the risk in a film or television production. This correctly reflects the economic reality that the commissioning party bears all the costs and risks associated with both the success and failure of the production, and is therefore entitled to ownership of copyright as a default position (unless the parties agree otherwise, which they are free to do).
- 60 Our courts have found that s21 of the Act strikes a balance between the rights of the *de facto* author i.e., the creator of the work and the statutory author i.e., "*the copyright owner*."<sup>15</sup>
- 61 Clause 24(a) of the Bill proposes an amendment to s21(c) of the Act to change the default position that the person commissioning the audiovisual work is the owner of copyright in that work. We submit that this approach will create legal uncertainty.
- 62 Legislation should provide clarity that, absent an agreement to the contrary, the default copyright owner is the commissioning party. We are concerned that unless this is clear, litigation may arise. Consider the following scenario: A broadcaster decides to commission a television drama and reaches in-principle agreement with a production company in terms of which the broadcaster will put up all funding for the production. No agreement on copyright is reached. The relationship

---

<sup>15</sup> *South African Broadcasting Corporation Soc Ltd v Via Vollenhoven & Appollis Independent CC (Freedom of Expression Institute Amicus Curiae)* 2016 JDR 1622 (GJ), para 27. The Court held as follows:

"The Act strikes a balance between the rights of the *de facto* author ie the creator of the work and the statutory author ie the copyright owner. VIA as creator sold its work to the Applicant for substantial material gain in a commission agreement. This is the *quid pro quo* upon which s 21 of the Act is premised. The parties may contract with each other to vary or exclude the ownership of the copyright vesting in the commissioning party under s 21(1) (e). The Act is therefore not the instrument by which the rights of the film maker are curtailed or excluded. It simply regulates the default rights of the parties absent an agreement to the contrary. Even then it does not *per se* limit freedom of expression as set out below. There is nothing in this arrangement which offends any constitutional value. The film maker thus has a choice in retaining its copyright and thereby exercising the rights of use or exploitation of the work that VIA claims." (paras 33 and 43)

between the parties breaks down and the parties agree to part ways. The broadcaster has funded the production and the producer has been paid, but yet there is no clarity as to who owns the copyright in the material already filmed.

63 In this situation, the Bill's proposal in clause 24(c), is to introduce a new s21(3)(b) into the Act, which provides that the commissioning party will own the copyright in the work for the purpose for which the work was commissioned. Presumably, the production company, as the author, will own the balance of copyright in the work. In practice, however, it will be difficult to determine the purpose of the commissioning in the absence of an agreement, which will lead to confusion, uncertainty, and unnecessary disputes.

64 In light of the need for clarity, we propose that the Bill reverts to the original wording in the current Act:

"21(1)(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4."

65 To the extent that there are concerns that a work is commissioned but never used, we support, in principle (with the limited amendments proposed below) the Bill's new provisions which allow the author to approach the Tribunal where the work is not used.

66 We appreciate that even though a work has been paid for by the commissioning party, it is in the interests of the author to avoid a situation where the work does not "see the light of day".

67 We accordingly propose limited amendments to the new provisions in s21(3) to improve the clarity of the Bill, provide appropriate redress to the author where a work is not used, avoid disputes and prevent the unnecessary strain of the Tribunal's resources, and assist in smooth implementation.

67.1 Our drafting proposals are as follows:

"(1) (a) ...

(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of an audiovisual work or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.

(2) ...

(3) (a) Any agreement reached between the copyright owner and the author may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission.

(b) Where ~~the an agreement contemplated in subsection (1)(c)~~ between the copyright owner and author does not specify who the copyright owner is, ~~limited~~ ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorise any of the acts contemplated in

sections 7, 8 or 9, as may be applicable, shall vest in the person commissioning the work, unless is limited to such rights as may be necessary for the purpose of the commission.

(c) The author of a work contemplated in subsection (1)(c) may, after a period of seven years from the date of the commission, approach the Tribunal for an order—

(i) where the work is not used by the copyright owner ~~the person who commissioned the work~~ for the purpose ~~commissioned~~ of executing any of the acts contemplated in sections 7, 8 or 9, as may be applicable and the copyright owner has, upon request, refused to license the author to use that work to execute any such acts, licensing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the copyright owner ~~person who commissioned the work~~;  
or

(ii) where the work is used for a the purposes of an act contemplated in sections 7, 8 or 9, as may be applicable, in respect of which the author is the owner of the rights ~~other than that for which it was commissioned,~~ ordering the copyright owner ~~person who commissioned the work~~ to make payment of equitable remuneration or royalties to the author for such other use.

(d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the following:

(i) The nature of the work;

- (ii) the reason why, and period for which, the copyright owner ~~person who commissioned the work~~ did not use the work; ~~and~~
- (iii) the public interest in the exploitation of the work;
- (iv) the purpose for which the work was commissioned; and
- (v) the consideration received by the author for the commissioned work.

- (e) Where the work contemplated in subsection (1)(c) is of a personal nature to the copyright owner, the Tribunal may not licence the author to use that work.
- (f) Any order granted by the Tribunal in terms of subsection (3)(c) shall not be in conflict with a normal exploitation of the work or be unreasonably prejudicial to the legitimate interests of the owner of the copyright."

### **Minister's powers to prescribe compulsory and standard contractual terms (clause 35(b) of the Copyright Bill)**

68 Clause 35(b) of the Bill seeks to amend s39 of the Act, to give the Minister wide powers to prescribe compulsory and standard contractual terms to be included in agreements to be entered into in terms of the Act.<sup>16</sup> This provision would empower the Minister to make regulations that limit the parties' freedom to contract on terms that are mutually acceptable to them.

---

<sup>16</sup> Proposed new s39(cG) of the Act

## Unguided discretionary powers

- 69 The new powers proposed to be given to the Minister in terms of s39(cG) are far-reaching. They involve the Minister in writing contracts for parties. However, no guidance is provided to the Minister about how these powers should be exercised or what purpose is sought to be achieved by their regulation.
- 70 Where the legislature simply grants a wide unguided power to a functionary, it offends against the rule of law and the provisions are liable to be set aside.<sup>17</sup>A delegation of legislative powers will only be considered lawful where a sufficiently rigorous framework has been established to direct the exercise of those powers. Without this guidance, there is a risk that the power may be exercised without due regard for the rights of autonomy, property and free trade that may be affected by the regulation.
- 71 It is no answer to this risk to contend that the Minister will only prescribe terms that adequately protect rights. The Constitutional Court has made it clear that it is impermissible for the legislature to leave the fine balance that is required for the protection of rights to the functionaries alone.<sup>18</sup>

72 In the circumstances, the powers proposed to be given to the Minister in various proposed amendments to the Act are excessively wide, vague and unfettered, and are liable to be struck down as unconstitutional.

73 It would be most regrettable if the Bill's objectives were scuppered by the costs and delays of litigation in this regard. We make proposals in paragraphs 74 to 88 below in an effort to address this concern.

---

<sup>17</sup> *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 70

<sup>18</sup> *Dawood* para 50

## Freedom of contract

- 74 We are concerned that the proposed s39(cG) excessively erodes freedom of contract, namely the freedom to freely and voluntarily undertake contractual obligations.
- 75 The Constitutional Court has held that "*Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. ... These considerations express the constitutional values which must now inform all laws....*"<sup>19</sup>
- 76 Our courts have also emphasised the importance of the sanctity of contract in the context of the Copyright Act.<sup>20</sup>
- 77 By prescribing compulsory standard contractual terms, the Minister would eliminate the parties' autonomy to regulate their commercial arrangements on terms they see fit.
- 78 The Copyright Bill's proposals to allow the Minister to determine contractual terms would have the effect of mandating the Minister to restrict the very essence of property rights, which are protected by s25 of the Constitution.<sup>21</sup>

## Practical considerations

- 79 In addition to the legal concerns highlighted above, there are very practical reasons why it is undesirable to set contractual terms in legislation/regulations.

---

<sup>19</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 57)

<sup>20</sup> *South African Broadcasting Corporation Soc Ltd v Via Vollenhoven & Appollis Independent CC (Freedom of Expression Institute Amicus Curiae)* 2016 JDR 1622 (GJ), paras 42 and 43

<sup>21</sup> Intellectual property rights are property rights (rights in intangible property). At a minimum, property rights include the right to exclude others from the property in question, the right to use or receive income from the property, and the right to transfer the property to others

- 79.1 It reduces the autonomy of rights holders - rights holders are best placed to determine how to manage their rights, whether to commercialise them and, if so, how. Those are commercial decisions of rights holders.
- 79.2 Legislation and regulations cannot keep pace with complex commercial realities - commercial arrangements are becoming incredibly intricate with globalisation and technological development.
- 79.3 The proposed s39(cG) would apply to all media sectors, and yet it stems only from a recommendation made by the Farlam Commission of Inquiry, which was limited to the music industry.

80 It is our submission that it is undesirable and impractical to stipulate contractual terms in legislation, due to the dynamic and complex industries in which copyright is created and used, the inability of the law to keep up with technological development, and the inevitable delays in amending legislation/regulations. Our proposals in paragraphs 81 to 90 below seek to achieve the Bill's objectives in a way which does not give rise to these practical difficulties.

#### Proposed approach to address concerns about unfairness

- 81 We appreciate Parliament's concern that creators are in a weaker bargaining position that may result in unfair contract terms being agreed with publishers or producers.
- 82 However, we believe that the proposed powers to be given to the Minister in terms of s39(cG) are deeply problematic and would therefore, propose the deletion of these provisions.
- 83 To the extent that this provision is retained in the Bill, we would seek to ensure that the provision ultimately enacted is lawful, workable, capable of implementation,

proportional, and not more restrictive than necessary to address the harm it intends to remedy. Ideally, specific instances of harm or unfairness should be identified for the regulations to be prescribed by the Minister to address.

- 84 To the extent that this is sought to be achieved in a more general way, we believe that guidance may be drawn from consumer protection law provisions on unfair contract terms.
- 85 In most jurisdictions, such as Sweden and Germany, general contract law provisions are used to deal with unfair terms in contracts transferring copyright rather than specific provisions in copyright laws. Collective agreements between representatives of creators and publishers or producers are another key tool used to level the playing field.
- 86 In South Africa, the Consumer Protection Act, 68 of 2008 ("CPA") is a useful example of how unfair contract terms are dealt with in South African legislation in order to protect consumers.
- 87 This approach affords protection to vulnerable members of society who do not have the same bargaining power as large suppliers, without seeking to construct the entire contract for the parties.

88 We submit that, rather than giving the Minister wide, vague and unfettered powers to regulate contractual terms - which would be both impractical and susceptible to legal challenge - the Tribunal should be empowered to set aside contractual terms that are manifestly unjust and unreasonable (rendering them null and void). Thus, we propose that s29A of the Act (as proposed to be amended by clause 33 of the Copyright Bill) could include a new s29A(2)(g) that reads as follows:

"(2) The Tribunal may ...

- (g) set aside or vary a copyright assignment or copyright licence agreement, or a term of such an agreement, if that agreement or

term is unfair, unreasonable or unjust. A term will be unreasonable, unfair and/or unjust if-

- (i) it is excessively one-sided in favour of any person, including the author of the work which is the subject of the agreement;
- (ii) the terms of the agreement are so adverse to one party (including the author) as to be inequitable; or
- (iii) the agreement was subject to a term or condition, the fact, nature and effect of which was not drawn to the attention of the party prejudiced thereby in a clear and satisfactory manner prior to entering into the agreement."

#### Minister's power to prescribe royalty rates or tariffs

- 89 For all of the reasons set out in paragraphs 68 to 88 above, we are opposed to the proposal to amend s39 of the Act to empower the Minister to make regulations prescribing royalty rates or tariffs (proposed new s39(cl)).
- 90 Our overarching concern is that the powers proposed to be given to the Minister in this case are too wide and unfettered, laying the Bill open to potential legal challenge. In addition, the proposal makes far-reaching interventions into the parties' contractual autonomy and assumes a one-size-fits-all scenario, without having conducted an exercise similar to that conducted by the Farlam Commission for any media sectors other than music. Indeed, the determination of royalty rates and tariffs goes to the very heart of contractual negotiations, and is particularly complex, nuanced and context-specific.

91 We therefore urge the Committee to delete the proposed s39(c1) and submit that any concerns about fair remuneration are adequately addressed through our proposal in paragraph 88 above and elsewhere in this submission.

92 Any remaining concerns about unequal bargaining power can be addressed through collective negotiation. Our research and experience shows the interests of individuals in the creative industry are best protected by collective negotiation structures, such as industry associations and collecting societies.

93 This ensures that there is relative parity in the negotiation positions of the creator and the investor in the work at the time that the contract is concluded, and that the terms of the contract can be fully explained to the creator at that time. The union/collecting society can therefore protect their constituent creators' interests and represent them in the same way that trade unions protect employees' interests. In this regard, we reiterate our support for the increased regulation of collecting societies envisaged by the Copyright Bill.

#### **Unenforceable contractual terms (clause 36)**

94 Clause 36 of the Bill introduces s39B into the Act. It seeks to render unenforceable contractual terms which (i) restrict the doing of any act which would not, by virtue of the Act, infringe copyright, and (ii) purport to renounce a right or protection afforded by the Act.

95 We are concerned that the provisions are loosely-framed and, read literally, have far-reaching consequences which are presumably not intended. For example, the grant of any licence agreement will have the effect that the copyright proprietor will "renounce" the exclusive rights conferred on that proprietor in terms of the Act. It is presumably not the intention of the drafters that all licence agreements should now be rendered unenforceable.

96 Presumably, what was intended is that particular rights afforded to protect authors, now sought to be introduced into the Act, should not be capable of being renounced. However, as the proposed s39B currently stands, authors and owners of copyright works will be restricted from commercialising their rights optimally on terms appropriate for them, even if the contract would have better protected their interests.

97 In order to help make the proposed s39B more workable and equitable, we propose that it be amended to –

97.1 provide that a contractual term will be unenforceable only if the Tribunal makes a finding that the term unfairly renounces a right or protection; and

97.2 allow the parties to renounce a right or protection in circumstances where they have received equitable remuneration for doing so.

98 We submit that these amendments would help to achieve the Bill's objectives without unduly restricting the parties' freedom of contract, and would limit uncertainty.

99 We propose that s39B be deleted and replaced with new s29A(2)(h) to read as follows:

"29A(2) The Tribunal may ...

(h) declare unenforceable a term of a contract which unfairly prevents or restricts the doing of any act which by virtue of this Act would not infringe copyright or which serves to renounce a right or protection afforded by this Act in circumstances where the party that enjoys the protection has not been adequately

compensated for the benefit to the other contracting party of that renunciation."

### **Technology Protections Measures (TPMs)**

- 100 Technological protection measures are a critical tool used by broadcasters and other copyright holders in the protection of copyright works against piracy.
- 101 In line with the WCT and the WPPT obligations, the Copyright Bill (by way of clause 31) inserts s28O into the Act on prohibited conduct in respect of TPMs. This provision is supported by M-Net and MultiChoice.
- 102 However, M-Net and MultiChoice are concerned about the current drafting of s28P (which deals with exceptions to s28O). As presently formulated, s28P permits broad-scale circumvention of TPMs and effectively renders s28O for the protection of TPMs in the Copyright Bill nugatory. It becomes impossible to enforce TPMs because the infringer will simply claim ownership of the device or trading of circumvention devices are for fair use reasons.
- 103 The exception in s28P is so broad that it ultimately harms the general effectiveness of the TPM to prevent copying of works. This is because once a "hack" to TPMs has been developed to allow legitimate access in terms of the exceptions permitted by the Bill, it can also thereafter be used to make unauthorised copies which are not permitted by the Bill.
- 104 This is a specific area where the "fair use" or "fair dealing" exceptions approach of the old analogue world does not align well with digital devices and services. The harm to the rights holder in the digital world is far greater due to the ease of reproduction, the high quality of the copy made and the ability to distribute the copy globally than the harm caused by the same action in the analogue world.

- 105 The "one size fits all approach" of s28P also entirely overlooks that a legitimate and reasonable right to circumvent a TPM in respect of say for example a cinematograph film offered on DVD or Blu Ray may not necessarily be legitimate or reasonable in the context of a cinematograph film provided via broadcasts or programme-carrying signals and stored on a set top box decoder (STB) hard drive. This is because circumvention of "copy controls" TPM on the STB hard drive would secure access not only to content to which the user may have a reasonable public interest right to access in terms of the Copyright Bill, but also expose content to which they do not have a right to access. For example, the hard drive of the DStv Explora stores both exclusive broadcasted content and rental movies.
- 106 s28P(2) also contemplates a situation where a person may face difficulty in the circumvention of the TPMs on their own as permitted by s28P(1) and creates an opportunity for them to request the copyright owner for assistance in circumventing the TPMs to perform the permitted act in s28P(1) and, if the copyright owner refused their request or failed to respond in a reasonable time, engage the services of a third party to assist them to circumvent the TPMs.
- 107 Effectively, the provisions of s28P(2) enable persons who wish to circumvent a TPM to take the law into their own hands.

108 To avoid general harm to the effectiveness of TPMs, the only circumstance in which a technological protection measure circumvention device should be permitted to be used is:

108.1 for law enforcement purposes by an authorised state investigative, protective or intelligence agency in accordance with applicable laws;

108.2 where the owner of the technological protection measure has consented to that use;

108.3	where ordered by a court or the Tribunal after the owner has refused access;
108.4	where a person authorised by government in terms of s19D for the benefit of persons with disabilities; and
108.5	where a person authorised by government in terms of s19C for libraries, archives, museums and galleries.

109 In s19D in the Copyright Bill there has been an attempt to put in place a government managed regime to authorize persons to make copies for persons with disabilities without first obtaining the permission of the owner of the works. A similar provision should be considered for s19C. Where government has authorised a person in terms of s19D and s19C there should also be a requirement to keep records of such circumvention of TPMs for inspection as may be prescribed in regulation. There should also be kept a record of a reasonable attempt being made to obtain a copy without TPM from the owner of the works.

**Internet Piracy**

110 Curiously, an area not addressed in the Copyright Bill is the global threat to the copyright industry and to the development of e-commerce on the Internet posed by Internet piracy. The specific problems in dealing with internet piracy require legislative attention to ensure that the rights of copyright owners are protected against the acts of Internet pirates.

111 Piracy entails the unauthorised access, use and reproduction of another's work.

112 There are several types of online cyber-piracy, for example -

112.1 live Internet streaming of unauthorised content without downloading the illegal content;

- 112.2 live broadcast, via IPTV, of unauthorised content without downloading the illegal content;
- 112.3 delayed Internet streaming of unauthorised content without downloading the illegal content;
- 112.4 downloading of copied broadcasts (movies, series, documentaries or sport); and
- 112.5 copying and distribution of movies and TV series;

which content is, in most instances, acquired through unauthorised access to the broadcast signals of legitimate licensed broadcasting service providers.

113 Different websites use the above types of online cyber-piracy, including –

- 113.1 streaming sites, which allow people to view unauthorised content on demand. These websites may stream directly or provide links to content hosted on other websites;
- 113.2 cyberlocker sites, which offer fast, convenient and anonymous storing and distribution of content which can be downloaded or streamed;
- 113.3 peer-to-peer sharing networks which allow the sharing of files among peers. Most peer-to-peer sharing networks are set up to ensure that files downloaded by individuals are also uploaded onto the site, so that any downloading of content by a member automatically results in the distribution of that content to others;
- 113.4 linking websites, which collate thousands of links to pirated content often stored on external cyberlockers; and torrent websites which make use of BitTorrent technology to enable speedy distribution of large files (such as pirated movies and music) over the Internet.

- 114 The multitude of services and different technologies, e.g. live streaming, employed by pirates are such that our 1978 copyright legislation doesn't explicitly reference all of these specific technologies. Another aspect to consider is that, as the main factor of a sport event is that it is broadcast "live," the damage is suffered immediately upon the illegal streaming commencing and current takedown processes in the Electronic Communications and Transactions Act, 2002 ("the ECT Act") do not address this harm as they do not explicitly offer immediate relief from harm.
- 115 The harms, risks and costs of piracy, including the significant loss of revenue to lawful broadcasters, are evident from the case of eBotswana, in which the High Court ordered Sentech to pay damages for its failure to take reasonable steps necessary to prevent pirate viewing of the SABC 1, 2 and 3 signal carried on the Vivid platform.<sup>22</sup>
- 116 It should be noted that piracy also harms national government objectives, including the -
- 116.1 investment environment – investors are reluctant to invest in countries if they cannot earn a decent return because of unlawful competition from pirates who have no costs;
  - 116.2 creative environment – piracy impairs the development of indigenous content production and job creation in the sector;
  - 116.3 rule of law – pirates are usually not licensed and are broadcasting or distributing content that has not been authorised or may be illegal (e.g., adult content) for distribution in that country;
  - 116.4 government revenue – pirates don't pay taxes, which can amount in some cases to millions of dollars. That's money that could be used by

---

<sup>22</sup> eBotswana (Pty) Ltd v Sentech (Pty) Ltd 2013 (6) SA 327 (GSJ)

government for schools, housing, health care or even encouraging further growth in the communications sector; and

- 116.5 growth of the local sector – broadcasters, independent producers and sports rights owners in developing countries are harmed the most by piracy as they don't have the economies of scale of international broadcasters or distributors and are heavily reliant on revenue generated by the legitimate sale and exploitation of their intellectual property rights. Piracy ultimately harms everyone in the value chain, including authors, artists and performers.

### Legislative Framework

117 Due to amendments made to the ECT Act, which came into effect in 2021, we are now faced with the reality that anti-piracy measures have "fallen through the cracks".

118 M-Net and MultiChoice propose that the Copyright Act should be amended to include provisions for a streamlined and fast-track process for removal, takedown and site blocking by ISPs upon notification by verified rights holders without the need to approach the court, as the process to obtain an interdict can be costly and time consuming and may well end up being too little too late in the majority of cases. The "trusted notifier" programmes that the Motion Picture Association, other rights holder bodies and various domain name registries have implemented could form a working precedent for this.<sup>23</sup> YouTube's Content ID system is another model that could be considered, in terms of an automated process which allows verified copyright owners to remove material, rather than rely solely on YouTube to do so.<sup>24</sup>

119 We appreciate that there may be concerns stemming from the rights to free speech and access to information for site blocking imposed without judicial supervision. However, ISPs already frequently take down offending content without court orders

---

<sup>23</sup> One Year Later: Trusted Notifier Program Proves Effective, Motion Picture Association, 6 March 2017

<sup>24</sup> YouTube Support: How Content ID works

under the notice and take down provisions of the ECT Act. In addition, to mitigate abuse of the system, it could be required that those submitting site blocking requests can do so only after having been vetted and accredited as part of a formalised and regulated notifier system, with indemnities and penalties for abuse or for submitting site blocking requests for non-infringing sites.

120 M-Net and Multichoice propose that the Copyright Act be amended to include provisions for a streamlined and fast-track process for removal, takedown and site blocking by ISPs upon notification by verified rights holders. We propose the insertion of the following provision as a new s28U in the Copyright Bill:

*"An Internet Service Provider shall implement automated takedown forms that allow verified owners of copyright works the ability to remove infringing live streaming data immediately."*

121 In addition to the ISPs, search engine operators should also be included within the scope of site blocking provisions in the Copyright Bill to allow for de-indexing of websites. This will mitigate the concern that even though an ISP may have blocked access to pirate material, it may still be possible for a user to circumvent the block by relying on Virtual Private Network (VPN) technology. If the material is de-indexed from search engines, it will be harder to find. For example, in Australia there are provisions that require de-indexing of infringing websites in s115A(2) of their Copyright Act.<sup>25</sup>

122 The Copyright Bill should also allow copyright owners to approach a court with competent jurisdiction for an order compelling ISPs to block illegal streaming websites ("block order").

---

<sup>25</sup> s115A Copyright Act – infringement outside Australia, Dundas Lawyers, 9 July 2020

123 This remedy serves as a preventative measure that ameliorates the damage caused by piracy particularly when used as a pre-emptive measure to block illegal streaming of a live broadcast. This empowers copyright owners, who have reasonable grounds to believe that their rights may be infringed, to prevent an infringement of their rights rather than only being entitled to remedies and relief after their rights have been infringed.

124 Put differently, the civil remedy of a block order prevents the economic damage caused by piracy particularly in circumstances, such as live streaming, where a delay in blocking an illegal streaming website or the takedown of infringing content would result in irreparable damage to copyright owners.

125 To bolster the protection of copyright owners' rights, we submit that the following provision be inserted in Bill as a new s24(1D) of the Copyright Act (under the heading (Infringement action by copyright owner):

*"Without derogating from the generality of subsection (1), the High Court, may, upon application by a copyright owner who has reasonable grounds to believe that their copyright is or may be infringed by a person situated in or outside the Republic of South Africa, grant an order which it deems appropriate including the following relief–*

- (a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or facilitating activity or disable that person's access to its service for the infringing purpose;*
- (b) a person hosting or making available an online location, service or facility situated in or outside the Republic of South Africa which is used to infringe copyright or which enables or facilitates the infringement of copyright, to*

*disable access to such online location, service or facility as replaced, amended or moved from time to time; and/or*

- (c) *an internet service provider<sup>26</sup> to prevent or impede the use of its service to access an online location, service or facility situated in or outside the Republic of South Africa that is used to infringe copyright as replaced, amended or moved from time to time."*

#### Additional Proposals on anti-piracy

126 An increasingly popular piracy model involves the selling of an "Android TV Box" or "dongles" (or similar device). This is a device that contains "content aggregator" or search software. The software searches for and gives access to pirate dongle receivers, the Internet Protocol (IP) address of pirate servers where control words to pay TV channels are aggregated. Further, in some instances the software could also search for "free" (which is almost inevitably pirated) films and series available on the Internet, and then makes the links to these websites available to the user of the android box – thus allowing the user the convenience of simply clicking on the link and watching the relevant film (through streaming) on their television sets. No infringing copies of the films are made in the process and no reproduction occurs either.

127 These actions would not fall under the current prohibition of circumvention of TPMs. M-Net and MultiChoice therefore propose that this conduct be dealt with by way of a provision in the Copyright Bill that serves to criminalise the making

---

<sup>26</sup> By Internet Service Provider we mean a "service provider" as defined in s70 of the ECT Act as meaning "any person providing information system services". "Information system services" is defined in s1 of the ECT Act as "includes the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service"

and selling of equipment and software used for purposes of signal piracy. The following provision be inserted in Bill as a new s27(4A):

*"Any person who -*

- (a) distributes, sells, offers to sell, makes, causes to be made, or has in his or her possession, any machine, equipment or contrivance; or*
- (b) creates, causes to be created, distributes, sells, offers to sell or has in his possession any software, shall be guilty of an offence."*

128 M-Net and MultiChoice also propose that the Copyright Bill deal more effectively with the proprietors of websites that infringe, or aid and abet infringement, of copyright by making works available for download by members of the public. There are an enormous number of websites which allow end-users to download and exchange content via peer-to-peer and torrent systems, or to directly stream a full range of movies and television series, as well as live broadcasts of sport and news. Traditional intellectual property and copyright law has, to date, not been sufficiently flexible or rapid enough to assist rights holders to protect their content against this online threat. The Copyright Bill suffers similar shortcomings. For example, when a film is streamed from a website to an end-user, no infringing copies of the work are made and no reproduction of the content occurs. The provisions of the Copyright Bill do not adequately combat this conduct.

129 M-Net and MultiChoice therefore propose an amendment to the Copyright Bill that will effectively criminalise the making available (on a website or an app) of copyright content for downloading or streaming by members of the public. The following provision be inserted in Bill as a new s27(4B):

*"Any person who, without the consent of the owner, distributes in public for commercial purposes, by way of rental, lease, hire, loan or similar arrangement*

*or who makes available for download from, or viewing from, a website or other publicly accessible electronic storage medium copies of a work in which copyright subsists shall be guilty of an offence."*

130 In addition, we recommend the introduction of a new criminal provision dealing with digital sharing. As the name implies, digital sharing involves two or more members of the public reproducing each other's content (often by copying the content onto a central database made available to a number of people but even simply by way of a memory stick or other storage device). Infringers will usually download libraries of content, books, music, games or anything that can be stored digitally. It will be copied multiple times to others (usually using storage devices) using computers including mobile devices. Some use business resources like servers and fast internet lines in obtaining and redistributing copyrighted works.

131 The infringers do not generate revenue for themselves through this conduct, but obviously do not pay for the content to which they are given access. The owners, authors and performers who enjoy rights in the content "shared" in this fashion, suffer substantial financial harm through these lost revenues.

132 M-Net and Multichoice recommend that this provision be inserted in Bill as a new s27(4C) as follows:

*"Any person who, without the authority of the owner of the copyright:*

*(a) distributes an infringing work for any purpose to such an extent that the owner of the copyright in that work is prejudicially affected, or*

*(b) stores more than five different infringing works on an electronic storage device;*  
*shall be guilty of an offence."*

## **Transitional provisions**

133 We note that the Bill does not contain any transitional provisions to allow for phased implementation.

134 We are concerned that the Bill makes far-reaching changes to the copyright regime, which will require time to implement. For example, businesses such as ours which rely heavily on copyright works will need to update their internal business systems and processes, and put in place measures to comply with the detailed compliance regime contemplated in the Bill.

135 We accordingly propose that the Bill come into operation 24 months after its passage to allow parties to regulate their future contracts accordingly.

## **Concluding comments on Copyright Bill**

136 As we hope our submission makes clear, M-Net and MultiChoice support, in principle, the initiative to protect the economic interests of authors and performers and to ensure that all stakeholders are fairly compensated.

137 Our concern relates to the way in which the Bill seeks to achieve this.

138 Currently, the Bill proposes - without having done any research or impact study in the television sector - the Minister writing contracts for private parties and determining royalty rates, limiting performers to royalties without the alternative of equitable remuneration, limiting how long a party can assign its copyright for to 25 years, and duplicating provisions which are better placed in the Performers Bill.

139 Rather than achieving its laudable objectives, the Bill will disincentivise investment, reduce flexibility, create duplication and confusion, and invite legal challenges.

140 We submit that the Bill should be substantially reworked to achieve its objectives in a more fair and flexible way without unduly restricting the freedoms of all the parties concerned. All players in the value chain would be better off with appropriate anti-piracy provisions. We have made drafting proposals which we believe can achieve this.

## **SECTION B – PERFORMERS’ PROTECTION AMENDMENT BILL**

### **Introductory comments on the PPA Bill**

141 As indicated above, unlike the Copyright Bill, which is fundamentally flawed and should go back to the drawing board, the PPA Bill is broadly in line with the applicable treaties and could, subject to some important but manageable amendments which we propose below, proceed through the legislative process more quickly to achieve the PPA's objectives.

142 Our main submissions concern three sections of the PPA Bill, namely:

142.1 the registration and reporting obligations contained in proposed s5(1A) of the PPA (clause 4(c));

142.2 the provisions of proposed s5(5) of the PPA (clause 4(g)), which deals with a broadcaster's obligations to make payments to a performer where payment has already been made to a producer; and

142.3 proposed s8D(3) of the PPA (clause 6), which confers wide powers on the Minister of Trade and Industry ("the Minister") to regulate the contractual arrangements of private parties.

143 Before we deal with these sections, we raise three issues concerning the definitions.

## Definitions

- 144 The definition of "producer" is unclear. It includes reference to the person that "*takes the initiative and has the responsibility for the first fixation*". It is quite conceivable that the person who takes the first initiative for the first fixation and the person who has responsibility for the fixation will be different people. If that be the case, it is not clear who would be considered the producer. It is also unclear why a person that simply "takes the initiative" to arrange a fixation (which may involve no more than suggesting that a fixation be made) should be considered the producer of that fixation. In our view, the words "*the initiative and has the*" should be deleted from the definition so that the producer is defined, clearly, as "the person who takes responsibility for the first fixation".
- 145 Secondly, the definitions of "copyright management information", "technologically protected work", "technological protection measure" and "technological protection" cross-refer to definitions in the Copyright Act. This is undesirable because the Copyright Bill may in fact not be passed or may be amended in time. It is also unnecessary. These definitions from the Copyright Bill should be repeated in the PPA (rather than simply cross-referring to those definitions).
- 146 Thirdly the definition of "performer" is over-broad and includes incidental participants who should not necessarily have the same statutory rights as principal members of a cast.

147 We recommend the definition of "performer" be amended as follows:

"an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise viewed in context, performs literary, musical or artistic works as contemplated in the Copyright Act, but does not include extras, ancillary participants or incidental participants."

## Reporting requirements - Proposed s5(1A) of the PPA (Clause 4(c))

148 As we understand it, proposed new s5(1A)(a) and (c) of the PPA requires M-Net and MultiChoice, in the first instance, to register every reproduction and broadcast of a fixed performance carried out by them. Although it appears that the manner and form of the registration will be contained in the regulations not yet published, it is, in the first instance, unclear where and with whom M-Net and MultiChoice should register their intentions. This clarification is important, in particular given that proposed s5(1B) renders non-compliance an offence with sanctions that are draconian in the extreme.

149 More importantly, however, the provisions are unduly burdensome and onerous for broadcasters of audiovisual fixations and firms that exploit audiovisual fixations for commercial gain (such as the SABC, Netflix, YouTube, Amazon and the like). Further, the sanctions imposed for non-compliance with these provisions are manifestly unreasonable. We note the following in this regard. Although we deal only with MultiChoice it should be understood that the firms to which we have referred above will be in a similar position.

149.1 MultiChoice broadcasts approximately 150 audiovisual channels currently. These include channels that include mostly local content (SABC and Mzansi Magic for example) and channels that include mostly foreign content (such as the BBC and Disney channels). All of this content falls within the definition of an audiovisual fixation in the PPA Bill.

149.2 Most channels are broadcast 24 hours per day, every day. Advertisements, which are also audiovisual fixations, are flighted on every channel. Some channels carry more advertisements than others.

149.3 Each month, MultiChoice broadcasts approximately 108000 hours of audiovisual fixations (films, television series, documentaries, advertisements etc.) on its audiovisual channels. When due regard is had

to the advertisements that will form part of any broadcast, it is reasonable to assume that the average broadcast hour will involve the broadcast of about 10 audiovisual fixations (we exclude the reproductions of each fixation that will form part of the broadcast).

149.4 Every audiovisual fixation will include fixations of performances by numerous performers. MultiChoice estimates that every hour of television broadcast by it of an audiovisual fixation (including advertisements) will involve at least 50 performances by actors, actresses and musicians (spread across the 10 audiovisual fixations broadcast every broadcast hour).

150 It will be evident from what is said above that MultiChoice will, if the PPA Bill is passed, be required to register more than 5 million broadcasts of individual performances every month. This task is so vast as to render the requirement to do so (on pain of severe punishment) clearly unreasonable.

151 In addition to its broadcasts, MultiChoice makes available audiovisual fixations of performances on its on-demand platforms, ShowMax and DStv Now. There are, on average 30 million "play events" (downloads by users) every month. Every one of these play events will involve the making available to the public of numerous performances (because every play event involves numerous actors and actresses) and each performance by each actor and actress may therefore have to be registered in its own right. At the very least every performance on every audiovisual fixation made available on the on-demand platforms would have to be registered as being available. This is, in itself, another unduly burdensome undertaking.

152 In addition to these registrations are the separate registrations (for the same broadcasts) which will now apparently be required under the proposed new s8A(5) of the Copyright Bill.

- 153 It follows that, if these registration provisions are made law, the department or firm charged with administering the registrations will likely be receiving several million registrations every month from MultiChoice alone.
- 154 MultiChoice often does not know what content is going to be included on the channels that it broadcasts. For example, the content of the SABC channels that it broadcasts is determined by the SABC. The same is true of most other "pre-packaged" international channels that are broadcast by MultiChoice. Requiring MultiChoice to ascertain in advance the details of every performance forming part of every film or TV series (fixation) included on its channels is simply unreasonable. MultiChoice simply does not know who performs in every fixation that it broadcasts and has no means of ascertaining these details.
- 155 The same applies in respect of advertisements flighted on these channels. While MultiChoice generally knows what advertisements are flighted, it will not have sufficient information regarding that advertisement (for example, who owns the copyright in it, who performs in it etc.) to comply with the registration requirements.
- 156 Although the burden on M-Net (as a channel producer) will be less than that of MultiChoice, it too will have to register every fixated performance that is screened on its channels, including advertisements. In this regard, the production of a channel necessarily involves the reproduction of fixated performances. We point out that other channel producers will be in a similar position and will also be required to register their reproductions of several hundred fixated performances every day.
- 157 In addition to the channel producers, the advertising houses that produce the advertisements will have to register the reproduction of those advertisements (which include fixated performances). In this regard, in order to supply the advertisement to the channel or MultiChoice in a usable form, the advertising house will have to reproduce that advertisement and in so doing will reproduce a fixed performance of every actor or actress that appears in the advertisement.

158 This means that for every registration submitted by MultiChoice, there will be at least two (but probably more) registrations by other firms in the broadcast supply chain that reproduce fixed performances as part of the process leading to a broadcast. Thus, every month, there will be several million registrations (applied for by firms other than MultiChoice) of "acts" carried out in respect of audiovisual fixations that are ultimately broadcast on MultiChoice's channels (alone).

159 In sum, the sheer volume of registrations which will be brought about by proposed s5(1A) of the PPA appears not to have been properly appreciated by the drafters of the Bill. MultiChoice obviously cannot be expected to register every broadcast or reproduction of a fixated performance that forms part of its broadcasts, and will simply not be able to do so. It is unreasonable and irrational to expect it to do so. Aside from the burden on MultiChoice and M-Net, the administrative burden on the Department of Trade & Industry (if that is the institution where registrations are to take place) is one which it is simply not equipped to handle.

160 The provisions of s5(1A) are also unnecessary because every performer that appears in a broadcast will have an agreement with the owner of copyright in the audiovisual work that will set out the royalties to which that performer is entitled. The same applies to a performer who has consented to the fixation of his or her performance under the proposed new s3A of the PPA. The performer can also call on the owner or producer to provide a statement of account. We submit, for these reasons alone, that the proposed new section is so unduly burdensome that it will never pass constitutional muster. It is irrational, unnecessary, and wholly unreasonable. There are, however, further difficulties.

160.1 First, it appears from the wording "*a person who for commercial purposes intends to*" that the drafters of the Bill contemplate that MultiChoice should register its "acts" in advance of the "acts" occurring. This is impossible for the reasons already given. But, in addition, we note that if it is envisaged that the Department of Trade and Industry should be required to consider those applications for registration in any detail, then one can anticipate

that the registration process will come to a standstill, and with it, MultiChoice's business. That, needless to say, will have catastrophic consequences for the performers that the PPA Bill seeks to protect.

160.2 Secondly, we note that if it is intended that registration of the "acts" can take place after the "acts" have taken place, then it is unclear what time period is permitted for these registrations. Importantly, we note, the PPA Bill makes the non-registration of "acts" a criminal offence. Clarity is therefore required as to the period within which registration is required.

161 The second part of proposed s5(1A) requires that any person that executes an act contemplated in the section (including reproduction and broadcast of audiovisual fixations) for commercial purposes must submit a complete, true and accurate report to the performer (and others) in the prescribed manner for the purpose of calculating the royalties due and payable by that person.

162 The scope of the provision is not clear. However, if what will be required is that M-Net and MultiChoice compile a report for every performer that appears on the television channels that it broadcasts setting out how many times that performer's performances on those channels, then the provision is again unreasonable and irrational. s5(1A) appears to contemplate that a separate report be sent to every performer whose performance is included in the broadcast. This means that that M-Net and MultiChoice will have to generate in the order of 5 million separate reports every month for every performer whose performances are broadcast on MultiChoice's channels. This is unreasonable. It is also unnecessary for the reasons we have already explained – the performers should, if necessary, seek recourse against the firm with whom they have a contract in respect of that performance. A further difficulty is that M-Net and MultiChoice are often unaware of the names of the actors that appear on the shows that it broadcasts because they have no contractual relationship with them (the contract is between performer and production house or channel provider). It cannot therefore be incumbent upon M-Net and MultiChoice to submit a report to a performer with whom it has no contractual

relationship whatsoever and whose identity is unknown. It is simply impossible for it to do so.

163 Finally, we note that the reports are not limited to local performers. Aside from the difficulties associated with ascertaining contact details for non-local performers, it seems to us unlikely that the drafters of the Bill had in mind that international performers receive a report from MultiChoice detailing the fact that their performances were broadcast on MultiChoice's bouquet in a particular month and that they are due to receive a royalty from MultiChoice. But this will be the effect of the provision. In addition, we note, that it will not be possible, without breaching South Africa's international obligations, to legislate that only local performers receive these reports.

164 M-Net and MultiChoice support the principle that performers must receive equitable remuneration in respect of their works. To this end, we respectfully propose that for ease of administration the section be revised to instead require an annual report of usage of the works and that such report be made available within a reasonable time after request from the performer, producer, copyright owner, the indigenous community or collecting society as the case may be. This section will be reinforced by the agreements provided for in clause 6, as the agreements will also address payments of royalties or equitable remuneration.

165 Our drafting suggestions are as follows

*"5(1A) A person who for commercial purposes intends to:*

*(a) broadcast...*

*(b)...*

*(c)...*

*(d)...*

(e)...

(f) ...

(g)...

(h)...

*must prepare and submit a complete true and accurate annual report of such usage and must make the relevant parts of such report available to the performer, producer, copyright owner, the indigenous community or collecting society as the case may be, within a reasonable time after having received a request for such".*

#### Fines - Proposed s5(1B) of the PPA Bill (Clause 4(c))

166 It is, in the first instance, unclear why failing to submit a report should be a criminal offence. The wrong (if a wrong has been committed) is a civil one relating to the payment by one person of money to another. It is not a matter that should be dealt with as a crime.

167 Secondly, the "minimum fines" provided for in s5(1B) are draconian in the extreme and unreasonable. We note that the fines are orders of magnitude bigger than the fines provided for in s9 of the PPA (currently), despite the fact that the offences for which the s9 fines are imposed are far more serious. In addition, the amount of money involved in any contravention (or even a number of contraventions) is likely to be entirely out of proportion to the very substantial financial fine and imprisonment contained in this proposed section.

168 Beyond the Act, we note that even in respect of cartel conduct prohibited under the Competition Act, 1998, the maximum fine that may be imposed upon a company is 10% of its turnover. This is, however, the minimum fine which would be imposed in terms of the PPA Bill (if made law). In other words, if M-Net and MultiChoice omit

one performance from the 108000 hours of content that it broadcasts every month, it is to be fined at least 10% of its turnover for that single infraction.

169 The provisions are extreme and draconian and out of proportion to any possible harm that may result from non-compliance. They are, therefore, also irrational and unreasonable. It also bears mention that, while exceptions are provided for in proposed s5(1B)(d), the requirement that the offending party show "*substantial and compelling circumstances*" that justify the imposition of a lesser sentence sets the bar so high that it effectively renders s5(1B)(d) academic in almost all cases.

170 For all these reasons, we submit that the provisions of s5(1B) are unlikely to pass constitutional muster.

171 The amount of the fine should be proportionate to the severity of the act which is penalised. Given that this is a reporting requirement, we propose that a maximum fine of R100,000 is appropriate. We further suggest that the proposed section prescribing the amount of the fine be redrafted to rather defer the determination of the fine to the Copyright Tribunal, and that each case will then be assessed on its own merits.

172 M-Net and MultiChoice therefore make the following drafting suggestions for the proposed section 5(1B):

*"Any person who intentionally fails to submit a report as contemplated in subsection (1A) without good cause shown, shall be liable to pay a fine not exceeding R100,000 to be determined by the Copyright Tribunal."*

#### Proposed s5(5) of the PPA Bill (Clause 4(g))

173 In its current form, s5(5) serves to avoid the double payment of royalties (under the Copyright Act and the PPA bill) to performers whose performances form part of a sound recording. Thus, for example, if a performance is fixed as a sound recording

and the owner of the copyright in the sound recording licences that recording to a broadcaster and receives a royalty from the broadcaster under the licence, the owner of the copyright in the sound recording is required under s9A of the Copyright Act to share the royalty with the performer.

174 The performer could also, however, claim a royalty directly from the broadcaster in terms of s5(1)(b) of the PPA Act or, where the performer authorised the fixation of his or her work (and thus effectively transferred his or her right to receive royalties for that performance to the producer in terms of s5(4) of the PPA), the performer may claim a share of the royalties paid by the broadcaster to the producer in terms of s5(4) of the PPA. s5(5) provides, however, that where a payment is made by the broadcaster to the producer and, in turn by the producer to the performer, in terms of s5(4), the performer cannot also claim a royalty from the owner of the copyright in terms of s9A of the Copyright Act.

175 It is clear that the objective of s5(5) is to prevent the performer claiming multiple royalties, under different statutory instruments, for the same "act" carried out in relation to his or her fixed performance. Thus, where the performer has received a royalty from the producer of the fixation for, say, the broadcast of his performance, the performer should (clearly) not also be able to claim a royalty from the broadcaster for the broadcast of the same performance.

176 The amendments to the wording of s5(5) of the Act that are proposed in the Bill may not achieve the objective of avoiding double payments to a performer for the same act carried out in respect of his or her performance. As currently framed, proposed s5(5) reads:

*"(5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits, sells, commercially rents out, distributes or causes communication of the performance to pay a royalty or equitable remuneration, whichever is applicable, to the performer or owner of copyright subsisting in that audiovisual fixation or sound recording, in terms of sections 8A and 9A of the Copyright Act."*

177 It is in the first instance ambiguous to speak of the owner of copyright in an audiovisual fixation because it is not clear whether the drafters of the Bill intended to refer to the producer of the audiovisual fixation or the owner of copyright in an audiovisual work. We assume the latter, given that s8A of the Copyright Act, as proposed to be amended, now allows a performer to share in the royalties received by the owner.

178 Beyond the terminology, however, in line with the principle of avoiding double payment, it should also be made clear that the payment by a broadcaster of a royalty to the producer of the fixed performance, who is obligated to share that royalty with the performer, excuses the broadcaster from paying another royalty directly to the performer.

179 To give effect to our submissions, and assuming that the performer protections in s8A of the Copyright, which we have proposed in paragraph 30 above be deleted, are to be retained, we propose that s5(5) be amended to read:

*"(5) Any payment made to a producer in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits, sells, commercially rents out, distributes or causes communication of the performance to pay a royalty or equitable remuneration, whichever is applicable, to:*

*(i) the performer in terms of section 5(1)(b) above or in terms of section 8A of the Copyright Act, 1978 (Act No. 98 of 1978) in respect of the same act; and*

*(ii) the owner of any copyright subsisting in the sound recording, in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978)."*

## Compulsory Contractual terms - Proposed s8D of the PPA Bill (Clause 6)

180 The Constitutional Court has held that where the legislature grants functionaries broad discretionary powers, it is required to delineate how those power are to be exercised. The legislature must therefore identify the guidelines for the exercise of the power in the relevant statute.<sup>27</sup>

181 The Court has also found that the duty to provide guidance for the exercise of a discretion is located in the Bill of Rights:

*"[T]he constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised."*<sup>28</sup>

182 Where the legislature simply grants a wide unguided power to a functionary, it offends against the rule of law and the provisions are liable to be set aside.<sup>29</sup>

183 If the Bill is enacted, the Minister must enact regulations prescribing compulsory contractual terms that are to be included in a performer's agreement with a broadcaster, producer or user of a performance. The detail of what the regulations must prescribe is set out in s8D.

184 These new powers given to the Minister eviscerate the parties' freedom to contract. On this basis alone, they will not, in our submission, survive a constitutional attack.

185 The provisions also involve the Minister in writing contracts for parties and setting royalty rates and tariffs. However, no guidance is provided to the Minister about how these powers should be exercised or what purpose is sought to be achieved by their regulation. Without this guidance, there is a risk that the power may be exercised

---

<sup>27</sup> *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 54

<sup>28</sup> *Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 25

<sup>29</sup> *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 70

without due regard for the rights of autonomy, property and free trade that may be affected by the regulation.

186 It is no answer to this risk to contend that the Minister will only prescribe terms that adequately protect rights. The Constitutional Court has made it clear that it is impermissible for the legislature to leave the fine balance that is required for the protection of rights to the functionaries alone.<sup>30</sup>

187 In the circumstances, these powers are too broadly framed and are liable to be struck down as unconstitutional. Whilst it may not be the intention of the legislature, the current wording may be interpreted to mean that the Minister must prescribe the content of the compulsory and standard contractual terms. We propose that the role of the Minister should rather be to guide on some of the specific items to be included in agreements concluded pursuant to the PPA Bill once enacted. In order to ensure legal certainty, we propose that the provision be redrafted as follows:

*"8D(3) Without specifying the content of agreements or terms, the Minister may make regulations prescribing a list of contractual terms to be included in agreements to be entered into in terms of this Act. Such list may include:*

- (a) the rights and obligations of the parties; performer and the producer, broadcaster or user;*
- (b) the royalties or equitable remuneration payable to the performer agreed on, as the case may be, including the timeframe for payment;*
- (c) the method and period within which any royalty or equitable remuneration payable to the performer must be paid;*
- (d) the period of the agreement;*

---

<sup>30</sup> Dawood para 50

*(e) a dispute resolution mechanism; and*

*(f) that both parties sign the agreement."*

188 Following on from the recommendation in the preceding paragraph, M-Net and MultiChoice further recommend that s3A(3)(a) in clause 3 be revised to read:

*"The written agreement contemplated in sub-section 2 must at least address the list of contractual terms as may be prescribed."*

### **Concluding comments on the Performers Bill**

189 Our key concern is that the Performers Bill adopts extremely onerous provisions to achieve its objectives, in circumstances where the objective could be achieved more effectively without infringing on the rights and flexibility of private parties. In particular:

189.1 Instead of onerous and unnecessary reporting obligations (which will require millions of registrations which the Department is not equipped to administer), a requirement to make an annual report of usage of the works available within a reasonable time would achieve the same objective more effectively, in a less burdensome way.

189.2 Likewise, instead of the Minister writing contracts for private parties, the Minister could prescribe a list of contractual terms to be dealt with in the agreement to be reached by the parties.

190 We have proposed amendments to the Performers Bill which, if implemented, could enable the Performers Bill to proceed without undue delay.

## **CONCLUSION**

191 M-Net and MultiChoice are thankful for the opportunity to comment on the Bills. We reiterate our support for the objectives of the two Bills.

192 We trust that our submissions will assist in the development of legislation which is lawful, workable and capable of implementation in the television production and broadcasting sector. Our drafting proposals, which are intended to achieve this objective, are summarised in Annexure A.