

18th April, 2019

Via email

Dear President Ramaphosa

Re: Copyright Amendment Bill

Please allow me to address you on a matter of importance to our country, the creative industry, aligned businesses, and all concerned stakeholders.

I do this from a perspective as a concerned member of the Parliamentary Portfolio Committee, responsible for the scrutiny of proposed legislation. I believe it to be in the interests of the country that you consider the following before you contemplate signing the bill into law.

I sit on the parliamentary committee as joint DA spokesperson for Trade & Industry, and the bill falls within my ambit of responsibility. I have researched the bill thoroughly, consulted with stakeholders, and have formulated the following concerns for your consideration:

1. Incorrect tagging

1.1. The tagging of Copyright Amendment Bill (“CAB”) appears to have been tagged incorrectly as a section 75 bill, whereas it should have been tagged as a section 76 bill. In this regard, the CAB substantially affects two of the areas listed in Schedule 4 of the Constitution, namely cultural matters and trade. In this regard the CAB:

1.1.1. clearly regulates how copyright may be “traded” in sections 6A, 7A, 8A, 39(cG) & (cl), 22(3), 7B-F and 22A; and

1.1.2. provides that indigenous works¹ will become eligible for the payment of royalties.

¹ Defined as a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an

- 1.2. With respect to the reference to indigenous works, please note that the CAB was referred to the National House of Traditional Leaders in terms of section 18(1) of the Traditional Leadership and Governance Framework Act no. 41 of 2003² which seems to confirm that the CAB deals with cultural matters.
- 1.3. You will appreciate that if the bill is assented to after having been tagged incorrectly, it should be set aside as constitutionally invalid.

2. **Misalignment with international law obligations**

- 2.1. It is probable that the CAB, if signed into law, will violate South Africa's international law obligations.
- 2.2. In the recent case of *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51 (the "*Law Society*) Case") Constitutional Court held that:

"All presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations..."

and

"As is the case with any conduct that is believed to be inconsistent with the Constitution or that seems to flout the rule of law, of which legality is an integral part, the President's alleged impermissible exercise of power would ordinarily be open to legal challenge in any court that has jurisdiction."

- 2.3. There appears to be a likelihood that the signing of the CAB into law violates or "undermines" South Africa's international law obligations in terms of *Berne Convention* and the *Agreement on*

indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community.

² This section provides that "any parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed...be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.

Trade-Related Aspects of Intellectual Property Rights and may well violate certain *Bi-lateral Investment Treaties*.

- 2.4. South African Courts have recognised the binding nature of and applied the Berne Convention domestically such as for example in the case of *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* [2016] 4 All SA 623.
- 2.5. The implementation of forms of “fair use” (the creation of exceptions to the enforceability of rights of copyright) in respect of subject matter that is protected by copyright requires a signatory to the Berne Convention to ensure that such exceptions pass what is known as the “three-step test”. The three-step test is set out in Article 9(2) of the Berne Convention as follows: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” Article 13 of TRIPS has extended the test to all exceptions to and limitation of the exclusive rights under copyright.³
- 2.6. It is clear from Article 9(2) of the Berne Convention and Article 13 of TRIPS that exceptions to copyright protection are required to be clearly defined and narrow in scope and reach.
- 2.7. Section 12A of the CAB introduces a broad ‘fair use’ provision, alongside extended general exceptions and new exceptions for educational institutions, libraries, archives, museums, and galleries. Where one of these exceptions applies, a person may perform what would otherwise be a restricted act in respect of a work, without the permission of the copyright owner.
- 2.8. It is of concern that section 12A does not meet the three-step test set out in the Berne Convention for the following reasons:

³ Article 13 of TRIPS provide that ““Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

- 2.8.1. It does not meet step one because the class of “*special cases*” is overbroad: it applies to examples “*such as*” and therefore does not set out a *numerus clausus* to which the exception and limitation purports to apply. Moreover, there is nothing in either the text of the CAB or the explanatory memorandum which sets out why the classes enumerated therein are “*special cases*”.
 - 2.8.2. It is in direct conflict with the normal exploitation of the rights in the works by the authors. It has the direct effect of depriving such owners from enjoying economic value from the rights in question.
 - 2.8.3. The above mentioned deprivation of economic benefits results in unreasonable prejudice to the owners of the rights.
- 2.9. It is of concern that if a decision is made to sign the CAB into law, the decision to do so, and the signing of the CAB into law are likely to be “unconstitutional, unlawful and irrational”; to use the words used in the decision in the *Law Society Case*.

3. **Delegation of powers to the Minister**

- 3.1. Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) delegate legislative authority to the Minister such as for example the Minister being permitted to make key decisions regarding the deprivation of copyright (6A(7)(b)).
- 3.2. The actions that are delegated to the Minister under the CAB (including the obligation to “develop draft regulations setting out the process to give effect to the application of [the relevant sections of the CAB] to a work [that was assigned before the Amendment Act came into effect]” are likely to constitute an unlawful delegation, since they empower the Minister to determine the rights and obligations of persons who concluded assignment agreements in the past. The Minister is tasked with determining both the substantive and procedural aspects of those rights. The delegation is particularly concerning because it allows

the Minister not only to alter rights and obligations prospectively, but to do so retrospectively.

- 3.3. If assented to, the above mentioned provisions are likely to be constitutionally invalid.

4. **Inadequate public consultation on section 12A**

- 4.1. Although there were extensive submissions made by the public in respect of the draft CAB, there was inadequate public consultation on section 12A specifically – the new fair use exception. Following the public hearings in respect of the CAB, substantial amendments were made to various sections of the CAB, but these amendments were not open for public comment before the final version of the CAB was published. One such provision is the new section 12A(1)(a).

- 4.2. The version of section 12A(1)(a) released for public comment read as follows: “In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work...” The final version of section 12A(1)(a) however, reads as follows:

“In addition to uses specifically authorized, fair use in respect of a work, for purposes such as the following, does not infringe copyright in that work:...”

- 4.3. It is clear that whilst the original text provided for a closed list of purposes for which a work could be used and which use would *not amount to an infringement of the rights of the copyright owner (fair use)*, the final version of the CAB provides for an open ended fair use mechanism. The purposes set out in section 12A(a)(i)-(vii) are no longer the only purposes for which a work may be used under the provision – this list is now only illustrative of the sorts of purposes that may be taken to constitute “*fair use*”.
- 4.4. To the best of my knowledge, no social and economic impact study was performed with respect to the actual impact that the significant widening of the scope of the new approach to fair use will have on the creative industry in South Africa and specifically the creation of content by South African authors.

4.5. Public participation is an important prerequisite for legislation to be constitutionally valid and as a result of the way that this significant amendment to section 12A was “forced” through the legislative process this section stands to be set aside if assented to.

5. **Extensive public outcry against the CAB**

It was evident from the extensive submissions made to the Portfolio Committee that there is a very wide group of interested parties and industry role players that is opposed to the CAB and that have taken actively part in presenting their concerns to the Portfolio Committee. The true extent of the “outcry” against the CAB is evident not only from the extensive submissions made during the legislative process, but also from public actions such as the march that took place earlier this week in Cape Town by Capetonian musicians (the very people the bill proclaims to protect).

I am concerned that while the intent of the CAB may well be honourable, there is a lack of understanding or at the very least, an inadequate understanding, of the actual social and economic impact that the implementation of the CAB will have on those very creatives that it is intended to protect, sectors of industry reliant on copyright for their continued existence and South Africa’s readiness to take full advantage of the fourth industrial revolution.

6. **The fourth industrial revolution**

It is of concern that the direction the CAB is pushing the protection of copyright in in South Africa does not appear to be aligned with a focus on embracing the fourth industrial revolution. In an article that appeared in the Forbes online publication on 13 August 2018, entitled “The 4th Industrial Revolution Is Here - Are You Ready?”, the author (Marr) writes that: *“The Fourth Industrial Revolution describes the exponential changes to the way we live, work and relate to one another due to the adoption of cyber-physical systems, the Internet of Things and the Internet of Systems. As we implement smart technologies in our factories and workplaces, connected machines will interact, visualize the entire production chain and make decisions autonomously. This revolution is expected to impact all disciplines, industries, and economies. “*

- 6.1.** It is essential to appreciate that (i) the building blocks of the fourth industrial revolution is software / computer programs and (ii) the most important form of protection for software (computer programs) in South Africa is copyright (this is a specific species of works protected in the Copyright Act). If the South African government does not ensure that South Africa's copyright laws are aligned with international treaty obligations and specifically provide adequate protection to the owners of these rights, the creation of new software, the investment in the development of new software and South Africa as a destination for the creation of this category of works will all suffer. An unintended consequence of the CAB may accordingly well be the creation of a barrier to South Africa being able to not only adopt, but play an active part in embracing the fourth industrial revolution.
- 6.2.** It is advisable to ensure that the Presidential Commission on the Fourth Industrial Revolution has an appropriate opportunity to consider the potential impact of the CAB on South Africa's readiness to take advantage of the opportunities presented by the digital industrial revolution.
- 6.3.** Accordingly, there is an opportunity for the Presidency to consider the not insignificant risks posed by the CAB to creatives and the creative industries and to force the sponsors of the CAB to consider with much greater circumspection and care the impact that the CAB in its current form will have on South Africa's creatives, creative industries and readiness to play an active participating role in the fourth industrial revolution.

I trust you find the above to be of assistance, in your consideration, prior to any assent to the CAB.

Yours faithfully

Ghaleb Cachalia, MP

DA Deputy shadow minister, Trade & Industry.