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kagiso media
A Kagiso Tiso Holdings Company

KAGISO MEDIA'S SUBMISSION ON THE COPYRIGHT AMENDMENT BILL [B13-2017]

07 JULY 2017

1. Introduction

1.1. Kagiso Media (Proprietary) Limited ("Kagiso") is a black controlled company with interests in substantial media assets through its subsidiaries, joint ventures and associates. Kagiso currently operates through the following four segments:

1.1.1. broadcasting;
1.1.2. information;
1.1.3. new media; and
1.1.4. content.

1.2. Kagiso houses the wholly and part owned radio assets of Kagiso Media and media sales house, Mediamark. Its radio assets comprise of East Coast Radio (KZN) and Jacaranda FM (Gauteng, Limpopo, North West and Mpumalanga).

1.3. Kagiso's information division consists of Kagiso Media's information assets. We own Knowledge Factory, an information and insights business that specialises in the use of geospatial and key public domain data to gain in-depth understanding of consumer, market, and industry behaviours and trends. More recently, Kagiso has acquired Juta and Company ("Juta"). Juta is a leading South African provider of educational materials, as well as legal and regulatory information. Juta is a member of the Publishers' Association of South Africa (PASA) and Kagiso supports the detailed submissions relating to the publishing sector that have been submitted by PASA..

1.4. Kagiso's digital division is a wholly owned subsidiary, established in partnership with Microsoft (MSN). It publishes howzit.msn.co.za – South Africa's largest website by audience, owns Mega8 esports and Adjoin- a programmatic advertising company.

1.5. Kagiso also owns and controls Urban Brew Studios, one of the largest independent television studios on the African continent, producing television content for all South African broadcasters. Its business model comprises of a studio facility offering, distribution platforms through a number of television channels, and the creation of various popular South African television programmes.

1.6. Kagiso works with local musicians, composers, songwriters, actors, producers, performers, publishers, designers and artists and, therefore, has an interest in ensuring that the South African copyright law adequately protects all creators and owners of original works.

1.7. Whilst the objects of the Copyright Amendment Bill [B13-2017] ("the Bill") are to be commended, there are a number of issues and concerns which, if not addressed and rectified, could have dire consequences on South African copyright law, the rights of creators and owners of original works and ultimately, the creative economy of South Africa.

1.8. These submissions to the Bill, therefore, deal with what Kagiso believe to be the most pertinent issues and topics contained in the Bill and which Kagiso submit should be re-considered by the Portfolio Committee on Trade and Industry and the Department of Trade and Industry ("the DTI"). Kagiso has attempted, through these submissions, to illustrate the practical effects of the Bill and possible dire consequences which some of the provisions of the Bill may have in their current form, from an industry perspective. Kagiso hopes these examples may assist the Portfolio Committee in understanding industry realities and just how vital a role the copyright laws play.

2. Insertion of Section 2A: Scope of Copyright Protection

2.1. The proposed insertion of Section 2A(3), which states that *"…copyright protection of tables and compilations shall…not extend to their contents…"* is concerning to Kagiso for the following reasons:

2.1.1. A "compilation" can be defined as "*a collection of items, especially pieces of music or writing, taken from different places and put together*";[1] or *"a thing, especially a book or record, compiled from different sources*"[2].

2.1.2. Indeed, by its very definition, a compilation may contain content which is original and should, therefore, be capable of copyright protection.

[1] Oxford Advanced Learners Dictionary, 7th Edition.
[2] Concise Oxford English Dictionary, 11th Edition.

2.1.3. Therefore, to propose that copyright protection cannot extend to the content of tables and compilations would be contrary to the basic principles of copyright law and would create uncertainty as to what is actually protectable.

2.2. KLA, which falls under Kagiso's information division is a market research agency, specializing in market research, qualitative research, quantitative research, and online/digital research (qualitative and quantitative) across Africa, for corporates, public and private organizations and public and private institutions. KLA creates compilations of data and information collected through such research and, although it is acknowledged that any facts that are obtained or learned while conducting such research are not capable of copyright protection, the expression of such information (content) in KLA's reports and insights is, indeed, capable of protection.

2.3. Therefore, the proposed insertion would usurp any right KLA has to the copyright of such content and this, it is submitted, simply cannot be what the legislator has intended.

2.4. It is, thus, submitted, that the proposed insertion of Section 2A(3) be removed.

3. <u>Amendment of Section 5: Copyright in relation to the state and certain international organizations</u>

3.1. The proposed amendment of Section 5(2), which states that *"Copyright shall be conferred…on every work…which is funded by…the state or an international or local organizations"* and *"...shall be owned by the state or organization in question."* is concerning to Kagiso for the following reasons:

3.1.1. The inclusion of the term "funded by" (which has not been defined) creates uncertainty and is problematic. The amendment would unduly grant ownership of works to the state or an international or local organization in circumstances where, for example, the state or any organization funded the work by 1%, 15% or 75%. Therefore, the ownership of partially funded works would vest, wholly, in the state or an organization notwithstanding the fact that the state or organization did not, in fact, fund the entire creation of the work.

3.1.2. Furthermore, and as the term "funded by" has not been defined or the scope thereof clarified, it could mean that any form of financial incentive provided by the state or an international or local organization would constitute "funded by" (e.g. such as a tax incentive or a rebate) and would, therefore, result in the ownership of the work vesting in the state or any organization.

3.2. Of particular concern is the impact that the proposed amendment will have on the DTI's Trade, Export and Investment Financial Assistance (Incentives), the aim of which is "*To support the local film industry and to contribute towards employment opportunities in South Africa*" as well as the Foreign Film and Television Production and Post-Production Incentive, the South African Film and Television Production and Co-Production Incentive and The South African Emerging Black Filmmakers Incentive (Film Incentives) in terms of which the DTI "*offers a package of incentives to promote the film production and post-production industry*" and, in particular, "*to attract foreign-based film productions to shoot on location in South Africa and conduct post-production activities*"; "*to assist local film producers in the production of local content*"; and "*to assist local emerging black filmmakers to nurture and grow them to take up big productions and thus contribute towards employment creation*". The Incubation Support Programme (ISP) offered by the DTI, in terms of which the DTI seeks to "*strengthen economic development through broadening participation in the economy*", and aims to "*ensure that small, micro and medium enterprises (SMMEs) graduate into the mainstream economy through the support provided by the incubators*" is also likely to be impacted.

3.3. The inclusion of the above proposed amendment would mean that media owners and producers would likely steer clear from these incentive packages (rebate schemes) and support programs, as the copyright in such work would be usurped from them and would vest in the DTI. The question such media owners and producers would ask themselves, in circumstances where the ownership of the copyright in such work is appropriated from them and can be exploited by the DTI in any manner, is "what's in it for me?".

3.4. Therefore, the proposed amendment is likely to deter the local or foreign film industry from partaking in such incentive programmes, thereby thwarting the DTI's aims of employment creation in South Africa.

3.5. Considering this from a practical perspective, one of the primary advantages of these incentive packages is to assist "*local emerging black filmmakers*" in becoming competitive from a costing perspective and by introducing such uncertainty around proprietorship of copyright if media owners exploit these incentive packages, is likely to dissuade the application of the incentive packages. This will, no doubt, result in such "*local emerging black filmmakers*" not being as competitive as the big production houses.

3.6. Of further concern to Kagiso is the proposed amendment of Section 22(1), which states that *"…copyright owned by, vested in or under the custody of the state may not be assigned"*:

3.6.1. This absolute prohibition on the transfer of ownership of state-owned works is, in its view, unjustifiable and merely exacerbates the concerns highlighted above (i.e. that local or foreign film industry are unlikely to partake in the DTI's incentive programmes, thereby thwarting the DTI's aims of employment creation in South Africa.

4. <u>Amendment of Sections 6, 7, and 8: Insertion of "User" and the right to a royalty</u>

4.1. The Bill includes numerous references to the "*user*" of a copyright work. This term has not been defined and, therefore, leads to uncertainty.

4.2. Of particular concern is the fact that the "*user*" is treated, throughout the Bill, as a rights holder, with rights akin to those of the author or owner of a copyright work. It is unclear who the drafters of the Bill consider to be a "*user*" of a copyright work. For example, the user of an artistic work could be a person who auctions such work, the user of a cinematograph film could be a person watching a film on DSTV or Netflix, the user of a computer program could be a person playing a computer game, the user of a literary work could be a person reading a textbook or a novel, the user of a musical work could be a person playing the music on their guitar at home in private, etc.

4.3. The Bill proposes the addition of the following proviso in Sections 6, 7 and 8: "*…notwithstanding the transfer of copyright in [a literary or musical work] [an artistic work] [a cinematograph film or an audiovisual fixation], by the user, performer, owner, producer, or author, the user, performer, owner, producer or author of such work shall have the right to claim an equal portion of the royalty payable for the use of [such copyright work] [the copyright work] [the copyright film or fixation]".*

4.4. The proposed amendment of Sections 6, 7 and 8 by the inclusion of the word "user" and the above "royalty proviso" is concerning to Kagiso for the following reasons:

4.4.1. Given the very broad interpretation of the word "user" as detailed above, it is difficult to understand on what basis users can claim an equal portion of the royalty for the use of copyright protected works and why users are treated on equal footing as copyright owners or authors. In fact, surely it is a user of copyright work who is supposed to pay the royalty to the owner or author and not claim the royalty in an equal portion with the owner or author?

4.4.2. It is unclear from whom each of the listed parties is to claim a portion of the royalty. For example, if the author of a work is entitled to claim a portion of the royalty from the user, but the user is also entitled to claim a portion of the royalty, from whom would the user claim his/her portion? Additionally, as it is proposed that all of the aforementioned parties share in the royalty, the author's (who, ultimately, is the party who should be benefiting from such right) right would be diluted.

4.4.3. Furthermore, it is unclear what acts would constitute the "*use of [such copyright work] [the copyright work] [the copyright film or fixation]".* Based on the current interpretation of the Bill, any use, whether it constitutes an act of infringement or an act of fair use or fair dealing, would constitute use and would, therefore, trigger the "royalty proviso".

4.4.4. The proposed amendments also state that the "royalty proviso" will apply notwithstanding the transfer of copyright by the user, performer or owner. However, it is only the owner of a work who can transfer copyright. Moreover, this would mean that any of the aforementioned parties could transfer the copyright in such works and still be able to share in the royalties generated through the use of the works notwithstanding the fact that they may no longer have any interest in and to the works or the use thereof.

4.5. From a practical perspective, the proposed amendments to these Sections will have dire consequences on the creative industry as a whole.

4.6. Urban Brew Studios (which falls under Kagiso's media portfolio) make any and all kinds of television content, all the way from concept to broadcast. As the copyright owner (and generally, also the author) of such works, Urban Brew Studio's share in the royalty, through the use of such works, would be diluted by it having to share the royalty with all of the performers (i.e. all of the actors in the television show) in circumstances where the performers would have already been remunerated for their performance, with the producers in circumstances where the producers, who were commissioned by Urban Brew Studios, have already been paid, or the users, which could be anyone watching the television show. This would clearly disincentivize Urban Brew Studios from creating any new works since it would result in a dilution of Urban Brew Studios' share from the use of the work.

4.7. Reel African (which falls under Kagiso's content portfolio) provides video-on-demand content to the Africa diaspora overseas. Arguably, the proposed "royalty proviso" would mean that the users of the streaming service provided by Reel African would be entitled to claim an equal portion of the royalty through the use of Reel African's services. In fact, it would also mean that Reel African themselves would be entitled to claim an equal portion of the royalty through the provision of its video-on-demand services. The users of such video-on-demand services pay a subscription fee to the content provider, who in turn pays the licence fees for the content to the relevant copyright owner(s). Therefore, it simply would not make sense for either of these parties to be entitled to a portion of the royalties.

4.8. Dumisa (which falls under Kagiso's television channel portfolio) is a spiritual commercial television channel, broadcast on the DSTV bouquet. The channel is a voice for the traditional gospel churches and broadcasts, *inter alia*, church preaching, events, conferences, ministries and choirs. Arguably, the proposed "royalty proviso" would mean that each member of the choir featured on the channel would be entitled to claim an equal portion of the royalty through the broadcast of the choir on the channel. It would also mean that any person featuring in the broadcast of the church preaching, events, conferences and ministries would be entitled to a portion of the royalties – even those in the congregation who could, arguably, be deemed to be users.

4.9. As a result of the proposed amendments to Sections 6, 7 and 8, South African companies may consider a strategy of creating works (or contract with creators to create works) outside of South Africa, so as to avoid this nonsensical "royalty proviso" and the erosion and dilution of their rights resulting from the split roles of the aforementioned parties and their ability benefit from the use of works in circumstances which are simply not appropriate. This would, ultimately, defeat the object of the Bill. Moreover, this Bill would thus have an unintended consequence of creating an environment to dissuade investment and economic development in South Africa.

4.10. It is, thus, submitted, that the proposed amendments to Sections 6, 7 and 8 relating to the "royalty proviso" be reconsidered and revised appropriately.

5. <u>Substitution of Section 9A: Royalties (in respect of Sound Recordings)</u>

5.1. The proposed changes to Section 9A(1)(aA) envisage that the broadcasting, transmission or communication to the public of sound recordings cannot take place unless prior notice is submitted and permission obtained from *"the copyright user, performer, owner, producers, author, collecting society or indigenous community, community trust or National Trust, as the case may be"*.

5.2. The practice as it currently stands is that the collecting societies like SAMRO (the South African Music Rights Association) and SAMPRA (the South African Music Performance Rights Associations) collect royalties on behalf of copyright owners whose works have been broadcast, transmitted or communicated to the public (for example, through a radio station such as those housed by Kagiso).

5.3. The proposed substitution of Section 9A(1)(aA) by the inclusion of the "prior permission" requirements is concerning to Kagiso for the following reasons:

5.3.1. The procedure laid out in the Bill is lengthy and cumbersome and is simply not practical. For example, it would be impossible for radio stations to obtain prior approval in the manner envisaged in the Bill in circumstances where listeners request songs to be played, live on air.

5.3.2. Moreover, it is unclear whether one would need to send the notice and obtain approval to all of the abovementioned parties or one or some of them. Additionally, the use of the term *"copyright user"* is unfitting as the user of a sound recording could be any person playing music on their mobile device, in their car or in their homes for personal entertainment purposes. It simply does not make sense that a notice would need to be sent to the user.

5.4. Whilst Kagiso is of the view that the current practice or process of royalty collection is not without its own flaws and concerns, rather than seeking to create an entirely new system or process which is simply impractical, measures should be put in place to improve and streamline the existing process.

5.5. If the proposed Section 9A(1)(aA) is to remain, this will likely result in a diminution in the commercial use of sound recordings (since broadcasters would be less inclined to have to go through the trouble of seeking prior permission from several parties) and a possible increase in the piracy of sound recordings.

5.6. The proposed substitution of Section 9(2)(a) states that *"The user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust…who receives payment of a royalty shall share such royalty with any performer whose performance is featured on the sound recording….provided that the royalty payable for the use of a sound recording shall be divided equally between the copyright user, performer, owner, producer, author, collecting society or indigenous community, community trust or National Trust on the one hand and performer on the other hand or between the recording company, user, performer, owner, producer, author, collecting society or indigenous community, community trust or National Trust "*.

5.7. The proposed substitution of Section 9(2)(a) is concerning to Kagiso for the following reasons:

5.7.1. There is simply no basis or justification for a user, producer, collecting society, indigenous community, community trust or National Trust to receive share in the royalty payable to the performer. The royalties payable for the use of sound recordings should be split between the copyright owner and the performer(s).

5.8. By allowing the proposed substitution of Section 9(2)(a), the copyright owner and the performer's rights to a royalty would be diluted, thereby defeating the object of the Bill.

5.9. It is, thus, submitted, that the proposed Section 9A(1)(aA) and substitution of Section 9(2)(a) be reconsidered and revised appropriately.

6. <u>Insertion of Section 9B: Resale of Royalty Right</u>

6.1. The proposed insertion of Section 9B(1), which states that *"The author of an artistic work shall enjoy an inalienable right to receive royalties on the commercial resale of his or her work subsequent to the first transfer by the user of that work"* and the proposed insertion of Section 9B(2), which further states that the royalties "*shall be payable at the rate prescribed"* is concerning to Kagiso for the following reasons:

6.1.1. The definition of an artistic work is broad enough to include, for example, logos. It is common practice for companies to commission a designer to create a logo and in terms of the Bill, the designer of the logo will be entitled to receive royalties for the use of the logo in circumstances where (1) the designer has already been compensated for the work created and (2) the designer has no commercial interest in the use of the logo (as his or her interest came to an end when the job of designing the logo and being paid for same was done).

6.1.2. Furthermore, as the royalty rate will be prescribed, there does not appear to be any leeway for the artist (author) to negotiate a more favourable rate. This goes against the object of the Bill.

6.2. Furthermore, the proposed Section 9B(3) states that "*The user, performer, owner, producer or author of an artistic work shall be entitled to receive a resale royalty…"*. This is concerning to Kagiso as it is unclear who the "user" or "performer" or "producer" of an artistic work could be and why they should be entitled to receive a resale royalty. It is also unclear as to why the owner of an artistic work would be entitled to a resale royalty. If anyone is to receive such a royalty, it should be the author of the artistic work only (as envisaged in the proposed Section 9B(1)).

6.3. It is, thus, submitted, that the proposed Section 9B be reconsidered and revised appropriately.

7. Amendment of Section 12: General exceptions from protection of literary and musical works (the introduction of "Fair Use")

7.1. The proposed amendment of Section 12 to provide that "*fair use…for the following purposes, does not infringe copyright in that work*" is concerning to Kagiso as "Fair use" is not a principle known in South African law and, therefore, the inclusion of this "untested" principle will be conducive to litigation (which goes against the object of the Bill) as infringers of copyright are likely to abuse these provisions by claiming that their unauthorised use of a copyright protected work falls within "fair use".

7.2. It is, thus, submitted, that the proposed amendment of Section 12 be reconsidered and revised appropriately.

8. <u>Insertion of Section 12A: General exceptions from copyright protection</u>

8.1. The proposed insertion of Section 12A, lists a plethora of exceptions to copyright protection and appears to apply to all types of works protectable to copyright. The proposed Section 12A is concerning to Kagiso for the following reasons.

8.1.1. The Bill seeks to treat all types of works as the same and extends the exceptions to all types of works, in circumstances where they are either not appropriate or simply cannot apply due to the nature of the work

8.1.2. In particular, the proposed insertion of Section 12A(c), relating to the exception of ephemeral copies (which is dealt with in Section 12(5) of the current Act) now extends this exception from literary and musical works to all types of works. This is in circumstances where the current ephemeral copy exception is already being abused in various industries where, for example, broadcasters are simply not destroying such reproductions of works within the stipulated 6-month period. One can only imagine how this exception will be abused when used in relation to sound recordings or cinematograph films.

8.2. It is, thus, submitted, that the proposed insertion of Section 12A be reconsidered and revised appropriately.

9. <u>Insertion of Section 13B: Reproduction for educational and academic activities</u>

9.1. The proposed insertion of Section 13B is concerning to Kagiso for the following reasons:

9.1.1. This section seeks to allow reproductions of all types of works by "a*ny persons*" without prior consent or authorisation from the copyright owner for educational and academic activities as long as "*the copying does not exceed the extent justified by the purpose"*. The impact that such a provision would have on the South African publishing industry is unfathomable as the proposed section is clearly open to abuse.

9.1.2. For example, there is no limitation on who may make reproductions, there is no clarity on how or when copying would exceed the extent justified by the purposes and there is no indication of where one would draw the line as to what constitutes educational and academic activities.

9.1.3. Furthermore, proposed Section 13B(6) states the copying of a whole textbook (not for commercial purposes) is allowed "*where authorized copies if the same edition…are not for sale in the country or cannot be obtained at a price reasonably related to that normally charged in the country for comparable works".* No clarity is provided on when a price may be deemed to be reasonable and such a vague provision is, therefore, certainly open to abusive copying.

9.1.4. Additionally, and even if the non-commercial copying of textbooks is allowed, as contemplated in the Bill, the detrimental impact on the publishing industry and copyright owners and/or authors would be the same as if commercial copying were allowed – ultimately, such a provision would disincentivize publishers from publishing new works, which will in turn stifle education, as learners would only have access to old or outdated editions of textbooks.

9.2. Juta, which forms part of Kagiso's information division, is a leading South African provider of educational publications. Juta supports and works with higher education institutes to produce textbooks specifically for South African learners. Furthermore, publishers such as Juta add to the value of authors' works, such as textbooks, and invest in distribution networks (both for physical stock and electronic products) and infrastructure that facilitates the accessibility of such works to students. Therefore, by allowing learners and higher education institutions (or any person, for that matter) the freedom to mass-copy whole textbooks will certainly render Juta less inclined to publish new textbooks, in circumstances where any persons could simply mass-copy Juta's existing textbooks and use same (regardless of whether or not it is on a commercial scale) without compensating Juta.

10. Amendment of Section 21: Ownership of Copyright

10.1. The proposed amendment of Section 21(c) states the "…*ownership of any copyright subsisting in [a commissioned] work shall be governed by contract…"* and that "…*in the absence of a valid contract, ownership shall vest in the person commissioning the work* *and the author of the work shall have a licence to exercise any right…exclusively…”*. This “exclusive licence proviso” is concerning to Kagiso for the following reasons:

10.1.1. Although, where the making of a cinematograph film has been commissioned, there is usually a contract in place governing the ownership of the copyright in such work, there may be instances where small or incidental works are created (such as a jingle for an advertisement for television) where a contract is not warranted. The severity of the “exclusive licence proviso”, however, simply adds more red-tape in that content producers would need to ensure that contracts are in place for every single small or incidental matter, failing which a licence akin to an exclusive licence would be granted to the author of such work – thereby allowing the author to exploit the work as he or she pleases.

10.1.2. Furthermore, in almost all situations where a person is commissioned to create a work, such persons (the author) usually does not have any interest to commercialize or use the work which they were commissioned to create, yet they would be granted rights wider than those that would generally be granted to a licence of such work.

10.1.3. Additionally, and from a practical perspective, the reality of introducing this red-tape would likely result in commissioners of the relevant works simply recycling the use of old content producers as opposed to diversifying its content creators (thereby creating more employment opportunities), as they would likely already have contracts in place with the old content producers and there would, therefore, be no concern with the possibility of an exclusive licence being granted to the author.

10.2. It is, thus, submitted, that the proposed exclusive licence proviso” to Section 21(c) be removed.

11. Amendment of Section 22: Assignments

11.1. The issues and concerns with the proposed amendment of Section 22(1) have already been addressed in paragraph 3.6 above.

11.2. The proposed amendment to Section 22(3) which states the "…*assignment of copyright shall be valid for a period of 25 years…"* is concerning to Kagiso, for the following reasons:

11.2.1. Although not expressly stated in the Bill, one would assume that this limitation on the validity of assignments of copyright would be to ensure that the author of the assigned work be given a "second chance" to re-negotiate the terms of the assignment.

11.2.2. However, the practical difficulties caused by this proposed amendment are far-reaching and, simply, unfair.

11.2.3. It is also unclear as to what will happen after the expiration of the 25 year period and whether the copyright in the work could be assigned again and, if so, whether the subsequent assignment would be limited to the 25 year period.

11.3. Practically speaking, if Kagiso commissions the making of a work for a particular purpose and the author, who has no interest whatsoever in the commercialization of the work, assigns the copyright to Kagiso, therefore, the proposed amendment seems to suggest that Kagiso would need to track down the author in 25 years to re-negotiate the assignment of the copyright, notwithstanding the fact that the author was already compensated for the work in which he or she has no interest in.

11.4. In the result, producers would likely purchase works from abroad (i.e. works not created in South Africa or by South Africans) to overcome this absurd limitation. This would clearly disincentivize local musicians, composers, songwriters, actors, producers, performers, publishers, designers and artists from creating any new works since no one would be inclined to purchase such works in circumstances where (1) they may have been commissioned to create such works and therefore have already been compensated, (2) they would, in the meantime, also be entitled to share royalties for the use of the work as contemplated in the Bill and (3) they will have an opportunity in 25 years to re-negotiate the assignment.

11.5. It is, thus, submitted, that the proposed amendment to Section 22(3) regarding the 25-year limitation on the validity of assignments be removed.

12. Insertion of Chapter 1A: Collecting Societies

12.1. Whilst provisions seeking the accreditation of entities as collecting societies is to be welcomed, it is submitted that there are huge pitfalls which already exist with the administration of royalties by existing collecting societies, and these warrant addressing in the Bill.

12.2. For example, broadcasters are currently paying royalties to collecting societies, yet these royalties are not flowing through to the artists themselves. The excuse by the collecting societies is that a distribution plan has not been approved by the CIPC Registrar. However, there is simply no accountability and in fact, it is the broadcasters who are seen by artists and the public as being non-compliant with payment of royalties.

12.3. Therefore, it is proposed that the Bill define and stipulate more clearly what processes are to be put in place by collecting societies to ensure that the payment of royalties to artists is expedited and accounted for. It is submitted that collecting societies only be allowed to retain royalties for a certain period of time before such funds are paid to the artists.

12.4. Furthermore, the administration fees of collecting societies should be reviewed and/or prescribed so as to avoid abuse by collecting societies in charging exorbitant and unjustified administration fees.

13. Insertion of Section 29A: Functions of Tribunal

13.1. The proposed Section 29A(2) states that "*The Tribunal may adjudicate any application or referral made to it in terms of…any other relevant legislation…"* and that it may "*review any decision of…adjudicate any application or referral made to it by…any regulatory authority… if it relates to intellectual property rights"* and further that it may "*settle disputes relating to the payment of royalties".*

13.2. This proposed section is concerning to Kagiso, as there are already Commissions and Tribunals in place which deal with intellectual property rights disputes, such as the Registrar of Trade Marks, Designs, Patents and Companies. Therefore, it is superfluous for a Tribunal to be set up to address the same matters that these Commissions and Tribunals already deal with.

13.3. Furthermore, it is submitted that the Tribunal should deal only with matters relating to copyright. In this regard, it should be made clear whether the Tribunal will be empowered to hear matters already currently under dispute in other forums. It is submitted that it should not.

14. Amendment of Section 39: Regulations

14.1. The proposed amendment to Section 39 includes the proposed insertion of Section 39(b)(cL), such that the Minister of Trade and Industry ("the Minister") is to be empowered to make regulations "*in consultation with the Minister responsible for communication, to prescribe "the local music content for television and radio broadcasting*". Kagiso has a number of serious constitutional, statutory and regulatory concerns with the proposed Section 39(b)(cL).

14.2. Constitutional Concerns:

14.2.1. The first serious concern is that this is *ultra vires* the Minister's powers because it is an unconstitutional usurpation of the powers and duties of a Chapter 9 Institution as provided for in the Constitution of the Republic of South Africa, 1996 ("the Constitution").

14.2.2. As the Minister is no doubt aware, Section 192 of the Constitution requires that "[*n]ational legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society*." In this regard:

14.2.2.1. Section 192 of the Constitution is contained in Chapter 9 of the Constitution which means that the independent authority to regulate broadcasting is a Chapter 9 body, that is, a state institution supporting constitutional democracy;

14.2.2.2. the Independent Communications Authority of South Africa ("ICASA") has been established as the independent authority to regulate broadcasting in terms of the ICASA Act, 2000 ("the ICASA Act"); and

14.2.2.3. Section 181(4) of the Constitution specifically prohibits any person or organ of state (such as a Minister or Ministry) from interfering with a chapter 9 body;

14.2.3. Regulating broadcasting content, whether by prohibitions or mandatory content rules, falls squarely within the remit of the Constitutionally-mandated broadcasting regulator, ICASA, and no person or organ of state may interfere with ICASA's role in this regard.

14.2.4. ICASA has been, as is required of a Chapter 9 body, established as an independent body and is "subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice" – section 3(3) of the ICASA. Consequently, it would be entirely unconstitutional for the Minister (whether or not he or she consults with another Minister such as the Minister for communication) to be making regulations prescribing content rules for broadcasters. This would be an *ultra vires* and illegal usurpation of the broadcasting regulatory function of ICASA as provided for in section 192 of the Constitution.

14.2.5. That this cannot be countenanced in respect of a Chapter 9 body under our law has been confirmed by the Constitutional Court in *New National party v Government of the Republic of South Africa* 1999 (4) BCL 489 (CC) and confirmed in *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR (833) (CC). At paragraph [99] of the New National Party case, Langa DP (as he was then) set out the principles of "administrative independence" that a Chapter 9 body enjoys. Writing for the court on this issue he said that it "*implies that there will be no control over those matters directly connected with the functions which the Commission* [referring to the IEC] *has to perform under the Constitution and the Act*" [referring to the IEC Act]. The Constitutional Court's support for this position was confirmed in the Langeberg Municipality case at paragraph [29][3].

14.3. Statutory Concerns:

14.3.1. The second serious concern is that this is *ultra vires* the Minister's powers because it is an illegal and *ultra vires* usurpation of a statutory power given to

[3] Note that provisions in the two cases dealing with an error in the published text of the *New National Party* case have been left out and the corrected wording used above.

ICASA in terms of the ICASA and Electronic Communications Act, 2005 ("the ECA")

14.3.2. As the Minister is no doubt aware, section 3(4) of the ICASA Act, provides that ICASA "*must function without any political… interference*".

14.3.3. Section 4(1)(a) of the ICASA Act requires that ICASA "*must exercise the powers and performed the duties conferred and imposed upon it by this act, the underlying statutes and any other applicable law*".

14.3.4. The definition of "underlying statutes" in Section 1 of the ICASA Act includes the ECA.

14.3.5. Section 61 of the ECA is a crucially important provision that is directly relevant to the Bill. It empowers ICASA to prescribe regulations:

14.3.5.1. imposing conditions regarding, inter alia, local television content – Section 61(3) of the ECA. In this regard, it is critical to note that the term "local television content" is defined in Section 61(2)(a) of the ECA; and

14.3.5.2. imposing conditions on sound broadcasters specifying a minimum percentage of "musical works which qualify as South African music – Section 61(4) of the ECA. In this regard, it is critical to note that the term "South African music" is defined in Section 61(2)(c) of the ECA.

14.3.6. It is clear that both the ICASA Act and the ECA intended that ICASA, acting alone, would be responsible for prescribing regulations on local content for both sound and television services as is required, in any event, by Section 192 of the Constitution as discussed above.

14.3.7. Neither the ICASA Act nor the ECA empowers the Ministry of Trade and Industry to be involved in any way, with the prescribing of local content.

14.3.8. Consequently, Kagiso is of the view that the proposed Section 39(b)(cL) as introduced by the Bill will fly in the face of existing statutory provisions relating to the prescribing of local content requirements and will, of necessity, establish an undesirable conflict of laws, as between statutes.

14.3.9. In any event Kagiso wishes to take issue with the wording of proposed Section 39(b)(cL) itself. The paragraph purports to empower the Minister of Trade and Industry to prescribe "the local music content for television and radio broadcasting". This is, in and of itself an obvious legal nonsense. In this regard:

14.3.9.1. television broadcasters do not and have never had to comply with South African music local content requirements. Only sound broadcasting services have had to do so;

14.3.9.2. television broadcasters have had to comply with local television content requirements which include definitions of local television content and requirements in respect of genres, formats and repeat factors;

14.3.9.3. on its face, proposed Section 39(b)(cL) would appear to empower the Minister of Trade and Industry only to prescribe music content regulations; and

14.3.9.4. in any event, as has been set out above, such an empowering provision would be *ultra vires* the powers of ICASA in terms of the Constitution, the ICASA Act and the ECA.

14.4. Regulatory Concerns:

14.4.1. For decades, ICASA (and before it, its forerunner authority the Independent Broadcasting Authority) has been prescribing local content regulations for the television and sound broadcasting sectors in accordance with the provisions of the ICASA Act and the ECA (and its forerunner statute the Independent Broadcasting Authority Act, 1993).

14.4.2. In doing so, ICASA has never required the approval of any Minister, including the Minister of Communications or Trade and Industry.

14.4.3. However, as is required in terms of section 4(5) of the ECA, ICASA does provide the Minister responsible for Communications, with a copy of any proposed regulations not less than 30 days prior to making same.

14.4.4. The latest local content regulations prescribed by ICASA are:

14.4.4.1. the South African Music Content Regulations contained in Notice No. 344 published in Government Gazette No. 39844 dated 23 March 2016; and

14.4.4.2. the South African Television Content Regulations contained in Notice No. 345 published in Government Gazette No. 39844 dated 23 March 2016.

14.4.5. It goes without saying that nothing in the above-mentioned regulations makes provision for any role, now or in the future, for the Minister of Trade and Industry in prescribing local content regulations.

15. <u>Conclusion</u>

15.1. Kagiso thanks the Portfolio Committee on Trade and Industry and the DTI for the opportunity of making these written submissions on the Bill and requests an opportunity to make oral representations, should a hearing be held.

Yours faithfully

END