**Report by the Select Committee on Trade, Industry, Economic Development, Small Business Development, Tourism, Employment and Labour on the public hearings and responses from the Department of Trade, Industry and Competition on the Performers Protection Amendment Bill [B24D-2016] (Sec76) and the Copyright Amendment Bill [B13D-2017] (Sec76) thereon, dated 25 April 2023.**

The *Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour* (the Committee), having heard oral submissions on the above-mentioned Bills on 21 February, 7 and 14 March 2023 and having received the responses from the Department of Trade, Industry and Competition thereon on 18 April 2023, reports as follows:

**1. Introduction**

As a result of a section 79(1) (Constitution) referral from the President, the two Bills were tagged as Section 76 Bills. From 1-27 January 2023, the Committee placed adverts for public comment in newspapers to advertise for public comment. The closing date for written submissions was 27 January 2023.

The report will attempt to provide an overview of submissions canvassed by interested stakeholders in relation to the two Bills. Further, the report will outline the responses from the *Department of Trade, Industry and Competition* in respect of the issues raised.

* 1. **Legislative Intention of the Bills**

The purpose of the *Performers Protection Amendment Bill [B24D-2016],* is to amend the Performers’ Protection Act, 1967, so as to insert, delete or substitute certain definitions; to provide for performers’ economic rights; to extend moral rights to performers in audiovisual fixations; to provide for the transfer of rights where a performer consents to fixation of a performance; to provide for the protection of rights of producers of sound recordings; to broaden the restrictions on the use of performances; to extend the application of restrictions on the use of performances to audiovisual fixations; to provide for royalties or equitable remuneration to be payable when a performance is sold or rented out; to provide for recordal and reporting of certain acts and to provide for an offence in relation thereto; to extend exceptions from prohibitions to audiovisual fixation and sound recordings and include exceptions provided for in the Copyright Act, 1978.

Further, Bills seeks to provide for the Minister to prescribe compulsory and standard contractual terms as well as guidelines for a performer to grant consent under this Act; to provide for prohibited conduct and exceptions in respect of technological protection measures and copyright management information respectively; to provide for further offences and penalties. In addition to substitute certain expressions; to provide for transitional provisions, and to provide for matters connected therewith.

On the other hand, the purpose of the *Copyright Amendment Bill [B13D-2017],* is to amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for further limitations and exceptions regarding the reproduction of copyright works; to provide for the sharing of royalties in copyright works; to provide for the payment of royalties in respect of literary, musical, artistic and audiovisual works. In addition, it seeks to provide for resale royalty rights; to provide for recordal and reporting of certain acts; to provide for the accreditation of collecting societies; to provide for a mechanism for settlement of disputes.

Further, the Bill seeks to provide for access to copyright works by persons with a disability; to provide for the licensing of orphan works; to strengthen the powers and functions of the Copyright Tribunal; to provide for prohibited conduct in respect of technological protection measures; to provide for prohibited conduct in respect of copyright management information; to provide for protection of digital rights; to provide for certain new offences; and to provide for matters connected therewith.

* 1. **Attendance by Members of the Committee**

The public hearings were attended by the following Members:

Mr. MK Mmoiemang, ANC, Northern Cape;

Mr. M Dangor, ANC, Gauteng;

Ms. ML Mamaregane, ANC, Limpopo;

Ms. L Moshodi, ANC, Free State;

Ms. HS Boshoff, DA, Mpumalanga;

Mr. JJ Londt, DA, Western Cape; and

Mr. T Brauteseth, DA, KwaZulu-Natal.

* 1. **Select Committee Consultation**

Interested parties that responded to the public consultation initiative included members of the public, individual and corporate creators, local and international organisations, academics, as well as industry and professional associations (including public interest organisations). A total of 65 submissions were received. The report is not accounting point by point the views advocated by interested parties through their written and oral submissions. However, all the submissions were duly considered.

The following is a list of all interested parties which made submissions:

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| --- | --- | --- | --- |
| International Federation of Library Associations and Institutions | Mr Dan Nkgadima | Mr Rendra Phalad  University of KwaZulu Natal | Chair of Intellectual Property Law  Stellenbosch University |
| South African Guild of Actors | South African Democratic Teachers Union  (SADTU) | Commercial Producers Association (CPA) and  Association for Communication and Advertising  (Joint submission) | Licensing Executives Society of South Africa |
| Australian Libraries and Archives Copyright Coalition | Dr Dick Kawooya | The Academic and Non-Fiction Authors Association of South Africa | International Federation of Reproduction Rights Organisations (IFRRO) |
| Mr Olebogeng Monoketsi | Education International | Dr. Collence Chisita  Durban University of Technology | Personal Managers Association |
| Ms Denise Nicholson | Creative Commons SA | Independent Producers Organisation (IPO), Independent Black Filmmakers Collective (IBFC) and Animation South Africa (ASA) joint submission | Ms Ilse Assmann |
| Prof Tomas Lipinski | Polyhaven | North West Film Commission | National Association of Broadcasters |
| Committee of Higher Education Libraries of South Africa | Durban University of Technology | Library and Information Association of South Africa (LIASA) | Joint Academic Submission   * University of Witwatersrand * North West University * University of Cape Town * University of Pretoria * University of Venda * Research ICT Africa |
| Wikimedia | South African Institute for Intellectual Property Law | Recording Industry of South Africa and International Federation of the Phonographic Industry | Amandla Omnotho Members |
| International Council on Archives | Prof Owen Dean | BlindSA and Section 27 (joint submission) | ReCreate ZA |
| Ms Kristel Birkholtz | Ms Patricia Ramela-Mothopeng | Publishers Association of South Africa | Amazon |
| Artists Unite | Netflix | Multichoice | National Library of South Africa |
| Google | International Publishers Association (IPA) | Dramatic Artistic and Literary Rights Organisation  (DALRO) | Goodwill Thulani Mbatha |
| Motion Picture Association EMEA | Copyright Coalition of South Africa | Gender Equity Unit  University of Western Cape | Writers Guild of South Africa |
| South African Music Rights Organisation (SAMRO) | CAPASSO | Baker McKenzie |  |
| Ms Mireille Wenger  Minister of Finance and Economic Opportunities  Western Cape Provincial Government | PEN Afrikaans | COSATU |
| E-Media  (E-TV) | Ms Salome Potgieter | Oxford University Press |
| South African National Library and Information Consortium (SANLIC) | Prof Malebakeng Forere | Spotify |

The following interested parties presented orally in a virtual format their case:

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| **21 February 2023** | **7 March 2023** | **14 March 2023** |
| E-TV Media | Anton Mostert Chair of Intellectual Property Law | Joint academics submission   * University of Witwatersrand: * North West University * University of Cape Town * University of Pretoria * University of Venda   Research ICT Africa |
| BlindSA and Section 27 | Motion Picture Association | Kristel Birkholtz-Gaddin |
| Wikimedia | COSATU | Western Cape Provincial Department of Economic Development and Tourism |
| South African Institute for Intellectual Property Law | Publishers Association of South Africa | Multichoice |
| Commercial Producers Association and Association for Communication and Advertising | Licensing Executives Society of South Africa | Copyright Coalition of South African and South Music Rights Organisation (joint submission) |
| Dramatic Artistic and Literary Rights Organisation | South African Guild of Actors | Research ICT Africa |
| Independent Producers Organisation, Independent Black Filmmakers Collective and Animation South Africa | Baker MacKenzie and Associates | Gender Equity Unit- University of Western Cape |
| South African Teachers Democratic Union | Ms D Nicholson | Recording Industry of South African and International Federation and the Phonographic Industry (joint submission) |
| Prof Malebakeng Forere | Prof T Lipinski | Netflix |
| Library and Information Association of South Africa | Prof O Dean | Amazon |
| Artists Unite | CAPASSO | National Association of Broadcasters |
| Prof D Kawooya | Creative Commons |

It was clear from the submissions and presentations made that there are opposing views on the policy that should inform the Bills. The Bills before the Committee proposes a hybrid approach in that it makes provision for specific exceptions and then provides a general fair use exception that will cover instances not specifically foreseen. When considering the varying perspectives, the Committee must keep various constitutional rights in mind, as well as matters related to equity and efficiency policy considerations.

It is necessary that the Bills provide a balance in order to respond to constitutional concerns, and the economic, finance, and social policy outcomes. Messages such as the need to give effect to constitutional rights, economic growth, a need for a friendly investment environment, sustainability, innovation, responsiveness and protecting the livelihoods of performers and artist emerged strongly. Support and promotion of innovation, research and development, transformative goals, encouraging investment and propelling inclusive growth, remain critical policy priorities.

Some submitters strongly raised a concern about a lack of a socio-economic impact assessment in respect of the two Bills It was argued by some of the stakeholders that empirical evidence on the costs and benefits of the Bills is needed to establish the net benefits of the proposed copyright and performers protection rights reforms.

This report attempts to cover the issues raised in the submissions under broad topics or policy themes. The issues raised and proposed amendments canvased by the interested parties’ submissions are integrated within the topics or policy themes. The report is mainly divided into 2 parts: *Part A: Copyright Amendment Bill and Part B: Selected Issues Around Performers ‘Protection Amendment Bill. There is a conclusion to Parts A and B. The last past of the report, Part C, highlights inputs from Parliament’s Constitutional and Legal Services and responses from the Department of Trade, Industry and Competition to issues raised during public hearings.*

**Part A: Copyright Amendment Bill**

1. **Definitions**

Some submitters raised concerns about Section 8A of the Copyright Amendment Bill. It was highlighted that ‘audiovisual works’ is a new definition in the Copyright Amendment Bill, which acts as a replacement definition for ‘cinematograph film’. They argued that it is antithetical to the Copyright Act, which regulates the exclusive rights attaching to works of copyright, to include a section regulating the rights of performers. The rights created by the Performers’ Act, whilst usually relating to works of copyright, are not copyright themselves. It was recorded that to include rights relating to performers in the Copyright Act, is confusing.

It was highlighted that the provision rather belongs in Performers’ Act. Further, it was noted that Section 3A of the Performers’ Protection Amendment Bill regulate similar matters as Section 8A of the Copyright Amendment Bill. It was highlighted that this would result in confusing cross interpretations between Sections 3A of the Performers’ Protection Amendment Bill and 8A of the Copyright Amendment Bill.

The *Anton Mostert Chair of Intellectual Property Law* highlighted that ‘audiovisual work’ means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which either can be perceived reproduced or communicated through a device, and includes a cinematograph film;’’: They argued that the effect of this definition and the use of the term in the Copyright Amendment Bill is to create a new category of work eligible for copyright, with no corresponding change to Section 2 of the Copyright Act, which lists the eligible works. The term as defined is largely synonymous with “cinematograph film” as defined. However, the definition creates a new genus of work of which “cinematograph film” is a species. The term “cinematograph film” as currently used in the Act can now have two possible meanings. The term indicating the equivalent of the new genus must be changed to “audiovisual work” while the one denoting the species must remain unchanged.

It was submitted that the Copyright Amendment Bill as it is presently worded will, when it is operative, have the effect that many of the provisions of the envisaged Act dealing with cinematograph film will have the limited meaning of the species whereas it is probably intended that they should have the wider meaning of the genus. This will be at variance with the apparent intention of the Bill. Further, it was advanced that since “cinematograph film” is presently widely defined in the Copyright Act (and covers everything that is covered by the new definition), it is probably better to stay with the existing terminology and delete this definition or possibly have it indicate that it means “cinematograph film”, in which case no further changes are necessary.

It was highlighted that section 8A suggests that a mandatory royalty must be paid to any performer on an audiovisual work for any use of that audiovisual work. Some of the stakeholders recorded that royalty payment is subject to the Performers’ Act. Currently, the Performers’ Act does not create a mandatory royalty payment scheme. However, the envisaged Act in relation to performers provides that, when concluding the written agreement between the performer and producer, the performer must be paid a royalty or equitable remuneration for any use of the audiovisual work. It was indicated Copyright Bill suggests a right to a royalty, whilst Performers’ Protection Amendment Bill suggests a right to a royalty or equitable remuneration.

Some of the definition will have an effect in relation to the value chain in commissioning and exploiting television series. *eMedia* has highlighted that the proposed amendment to Section 21 of the Copyright Act significantly change the status quo. Currently, a party who commissions and pays for a cinematograph film (which is to be renamed an audiovisual work), owns it. The new Section 21(3)*(b)* as set out in the Copyright Amendment Bill switches this position: the commissioning party only controls those rights necessary for the purpose of the commission. It was submitted that the provision puts the rights of a commissioning party into uncertainty (particularly where budgets of television shows can easily stretch into the tens of millions of Rands), and thus increase the risk of production, with an associated decrease in productions being funded. The likes of Netflix and Amazon Prime indicated that this could dissuade them from commissioning local programming. It was recommended that amendments to section 21 should be removed in their entirety.

Most of the stakeholders support the initiative to bring the broadcasting industry in line with new developments. The initiative to redrafting the definition of “broadcast” that is broad enough to include current broadcast technologies and new broadcast technologies that are utilised by broadcasters to communicate sounds and/or images to the public or parts of it, was welcomed. However, it was recorded that the proposed amendment to “broadcast” contained in the Copyright Amendment Bill and Performers’ Protection Amendment Bill. Bills fails to achieve the broader goals of the Bills in modernising the approach to copyright law generally. Any new definition of “broadcast” should, as far as possible, be future proof.

It was further stated that the definition fails to recognise that broadcasting is increasingly served by over-the-top means (OTT). It is submitted that it is unnecessary to delineate the methods by which sounds and/or images are broadcast in the Bill. Rather, the Bill should state that broadcasting is the communication to the public or parts of it, of sounds and/or images by means of telecommunication. Further, it is suggested that if necessary, an appropriate definition of “telecommunication” can be inserted in the Bills.

The *Anton Mostert Chair of Intellectual Property Law* submitted that there is no recognition of the relationship between the definitions of “broadcast” and that of “programme-carrying signal”. At present, the so-called “up-leg” of a broadcast to a satellite is, for copyright purposes, a broadcast (see the definition of “broadcast” in Section 1(1) of the Copyright Act), while the so-called “down-leg” of a broadcast from a satellite is a programme-carrying signal (see the definition of “programme-carrying signal” in Section 1(1) of the Copyright Act). It was recorded that a programme carrying signal is a distinct category of copyright work. They asked whether, given the fact that paragraph *(b)* of the proposed definition states that a broadcast includes a “transmission, partially or wholly, by satellite”, does this suggest that the definition of “programme-carrying signal” is now redundant, and that programme-carrying signals will no longer be a distinct form of copyright work? They argued that this cannot be the case. It was suggested that the provisions of the Copyright Act relating to programme-carrying signals cannot simply be ignored.

Further, the *Anton Mostert Chair of Intellectual Property Law* highlighted that one of the exclusive rights given to copyright owners by the Berne Convention is the right to broadcast their works or to communicate them to the public, as provided for in Article 11bis. These rights were specifically defined and proved challenging with the transmission of copyright works via the internet. It was submitted that the Copyright Act is currently still based on giving effect to the right of communication (or broadcast) to the public, although it does not do so by explicitly referencing such exclusive right in the broad terms of the Berne Convention. Instead, the Copyright Act provides for specific grants of exclusive rights that would be covered by the more general right of communication to the public. It was further highlighted that the emergence of digital technology, and the on-demand and interactive nature of the internet, have blurred the lines between transmission, publishing, and broadcasting. This led to the expansion of the exclusive right of communication to the public, pursuant to Article 8 of the WIPO Copyright Treaty, so as to include the so-called “making available” right.

The *Anton Mostert Chair of Intellectual Property Law* advanced that the Copyright Amendment Bill proposes to introduce a right of communication to the public and a making available right (Cl 4*(a)*, 6*(a)*, 8(1)*(dA)* and *(dB)* and 10 of the Bill.). Thus, the Copyright Amendment Bill regards the making available right as an exclusive right that is distinct from the right of communication to the public, rather than simply being a particular manner of communication to the public. It is highlighted that it is not clear what the right of communication is intended to cover (given the fact that the right to broadcast is being retained), as distinct from the making available right.

Some of the stakeholders advanced that internationally, under the Rome Convention, broadcasters have exclusive rights for 20 years to authorize rebroadcasting, "fixation" (recording), reproduction, and communication to the public of their broadcasts. However, those related rights to protect broadcasters from piracy have not been updated at the international level since 1961. It was submitted that in 1997, broadcasters began arguing at the World Intellectual Property Organisation for updated protections. Although there has been in-principle agreement that protection against signal theft needs to be updated at international level, so far World Intellectual Property Organisation members have failed to agree on how that should be done and if the definition of broadcasting should remain confined to over the air transmissions or be expanded to include internet transmissions. Some countries, including the European Union, have initiated relevant domestic legislation that have updated these rights to prevent unauthorised retransmission of broadcast programmes on the internet.

In relation to the definition “authorized entity”, some of the stakeholders advised that the finding of the Constitutional Court in relation to 19D of the Copyright Act in *Blind SA v Minister of Trade, Industry and Competition & Others* should be considered.

The *Western Cape Provincial Government* submitted that the wording to the definition “authorized entity” where it refers to “the government”, should refer to “…any sphere of government”. If the intention is to only refer to national government then a definition needs to be inserted. Further a definition that defines nonprofit organisations needs to be inserted, since other intermediaries are non-profit organisations that also need to be registered.

1. **Fair Use” and Fair Dealing**

Some submitters have strongly rejected the replacement of the ‘fair dealing’ doctrine by the introduction of the ‘fair use’ doctrine in the South African copyright law. They advanced that the ‘fair use’ approach has been rejected in UK, Australia, New Zealand and the EU. Some went further by pointing out that the introduction of the ‘fair use’ is strongly supported by certain big technology corporations such as Google, which will be the immediate principal beneficiaries, at the cost of the livelihoods of South African authors and copyright owners. For instance, the *Writers Guild of South Africa*, argue that there exists an overwhelming reality that the envisaged Act on copyright falls short in protecting the authors (and other creators) and owners of copyright works. The uncertainty caused by inter alia the "fair use" doctrine, along with the increased need for court intervention in instances of unauthorised use, will inevitably lead to a costly, and ultimately inefficient copyright system. This argument was shared by all submitters who argued against the introduction of the ‘fair use’ doctrine in the South African copyright law. These submitters further submitted that the new provision of ‘fair use’ is materially different to the USA style of ‘fair use’ doctrine where the copyright provision originated.

In contrast some submitters such *as Artist Unite, COSATU, ReCreate South Africa,* a *Joint Academic Opinion, Wikimedia South Africa,* just to mention a few, support the introduction of ‘fair use’. The proponents of ‘fair use’ advance that the introduction of Section 12A adds an open, general exception that can authorise the use of a work if that use is “fair” according to a four-part balanced test, which is similar to that specified in many countries using fair use and fair dealing. The exception is “open” to potentially any purpose by inclusion of the words “such as” before the list of exemplary purposes. The openness of the exception permits courts to balance the rights of authors with those of users, as is required by fundamental human rights and as permitted by the so-called “three step test” in international law. This openness makes the exception “future-proof” in that it can apply to uses that would be fair, but that are not immediately conceivable by the legislature. It is advocated that open general exceptions exist in the laws of many countries around the world, including open fair dealing countries like Malaysia, countries following the “fair use” formulation, and countries such as Thailand that use the three step test as an enabling general exception.

It is recommended that proposed Section 12A*(a)*(i) be retained in its current form. However, it was proposed that after the word “research”, the phrase “, including informational analysis” is added. The amended clause would read as follows: ‘(i) Research, including informational analysis, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device [...].’

*ReCreate South Africa*, one of the proponents of “fair use” submitted that in 2023, United States of America (USA) is celebrating its 47th year of “fair use” as codified in its copyright statute. It was advanced that the USA boasts the largest and wealthiest publishing, entertainment, and IT industries in the world. It was argued that “fair use” contributes trillions in dollars to the USA economy as indicated in the CCIA report 2017. Further, in 2023, Israel will celebrate its 17th year and South Korea its 11th year of applying the “fair use” doctrine. Some countries like Malaysia and Singapore call their approach “fair dealing”, but it is in fact the “fair use” approach, with the same 4 criteria/factors. It was also registered that Kenya is advocating for” fair use”, and shifted from “fair dealing”. Further, Nigeria was reported to have passed its Copyright Bill that includes the four “fair use” factors, although it is still referred to as “fair dealing”. However, the proponents of ‘fair dealing’ advocated that that a policy shift from fair dealing to fair use requires strong motivation and adequate stakeholder consultation. There should be cogent reasons to motivate why South Africa should leave its tradition of using a fair dealing defence, to join the less-than-a-dozen countries that use a non-uniform fair use system. This is even more so considering the fact that our courts will need to develop fair use jurisprudence “from scratch”, and in so doing will be forced to rely on jurisdictions such as the USA which are not compatible with our system of law – while disregarding a rich jurisprudence from English law and other common-law jurisdictions still using a fair dealing defence.

The *South African Music Rights Organisation*, one of the advocates for “fair dealing”, supported by other interested parties such as the South African Institute for Intellectual Property Law, advanced that there is a need for certainty when dealing with copyright infringement matters. It should be immediately clear what acts constitute infringement and not be left to the courts to determine such on a case-by-case basis, where the courts will need to develop new rules with no precedent in our law. Further it is advanced that within the South African context, where access to justice is already a serious issue, rights-holders do not have the means to institute litigation in order to confirm their rights and they will have to accept defeat and allow users to exploit their works with no recourse. Rights-holders will be up against large, deep- pocketed tech conglomerates that have a deep interest in an expansive exceptions regime.

Advocates for” fair use” submitted that countries that benefit from” fair use” provisions in their copyright laws can lawfully access, use, re-use or make transformative works from copyrighted works. It is further advanced that ‘fair use’ provisions will increase access to information and provide lawful flexibilities to use, re-use and make original and transformative works, and to exercise our freedom of expression and right to create. Further, various exceptions in the Bill will also enable South Africa to embrace Fourth Revolution (4IR) technologies, such as artificial intelligence (AI), machine learning, 3D printing and applications, robots, the Internet of things, genetic engineering, quantum computing and other technologies and advancements in the digital space.

The USA Copyright Act of 1976 provides an indication of the type of principles considered in determining whether a use of copyright material is “fair”:

* The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
* The nature of the copyrighted work;
* The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
* The effect of the use upon the potential market for or value of the copyrighted work.

It was advanced by the proponents of ‘fair use’ that the objective of “fair use” is not to alter the balance in copyright law between users and rights owners. Rather, it allows for balance to be applied to any number of uses and purposes, based on principles as outlined in the USA Copyright Act of 1976. The copyright regime should not be confined to specific legislated purposes, as outlined under the existing “fair dealing” exceptions.

Again in relation to ‘fair use’*,* the *Dramatic, Artistic and Literary Rights Organisation* advanced that Section 12A, by incorporating the words “for purposes such as” provides for an open, illustrative list of purposes for which a work can be used and be considered ‘fair use’. These words should be removed, as was done in Uganda recently where a USA-style “fair use” four-factor test was introduced verbatim, but without opening the list up by the use of “such as”.

Further, the *Dramatic, Artistic and Literary Rights Organisation* advanced that from a Treaty alignment point of view, if passed into law in this form, the Copyright Bill will not, as it must, be limited to certain special cases of exceptions and limitations from exclusive rights. The Bill will interfere with the normal exploitation of works and will be extremely damaging to, and interfering with, the legitimate interests of authors, creators and their publishers. This would be contrary to the purpose the Bill, and contrary to the demands of international compliance, emphasised the *Dramatic, Artistic and Literary Rights Organisation*.

The advocates of the” fair dealing” submitted that the broadened hybrid “wild” “fair use” in the current Bill is certainly beyond compatibility with the international obligations of South Africa, most notably, the Berne Convention’s three-step test. Further, it is argued that the “fair use” system proposed in South Africa will have no case law precedents. If enacted, the combination of fair use, fair dealing and several specific and often overlapping exceptions and limitations, will result in legal uncertainty about which uses of copyright works require licenses, affecting copyright owners and users alike, and facilitating abuse and infringement.

Most interested parties submitted that the Berne Convention and the TRIPS Agreement provide balancing mechanisms (or legal flexibilities) known as copyright limitations and exceptions. It was advanced that most developed and many developing countries have flexible copyright laws, which include many different limitations and exceptions to enable access to knowledge and support creativity and innovation in the digital space. The Three Step Test incorporated in the Berne Convention and the TRIPS Agreement sets out three factors that exceptions and limitations must comply with:

* Exceptions may be granted in certain special cases; and
* Exceptions must not conflict the normal exploitation of the work concerned;
* Exceptions must not unreasonable prejudice the legitimate rights of the holder concerned.

The advocates of the “fair dealing” advance that any proposed exceptions need to pass all the steps in order to be compliant with the Berne Convention and the TRIPS Agreements. It was advanced that the exceptions introduced by the envisaged Act should be subjected to the Three Step Test. This remains a contentious issue. The advocates of “fair dealing” believe that the proposed exceptions in the current form in the proposed legislation are too wide, and as such posed a risk of not being compliant with the Berne Convention and the TRIPS Agreement. In contrast, the proponents of” fair use” believe that the exceptions are consistent with the Berne Convention and the TRIPS.

Further, there are different perspectives on the constitutionality of the Bills. Again, the proponents of “fair use” believe that the Bills are consistent with the Constitution, whilst the advocates of “fair dealing” strongly hold a different view.

The advocates of “fair dealing” pointed out that there was no study preceding the introduction of the current Bills to subject the envisaged Act to a socio-economic impact assessment, in particular the exception and limitations provisions. Whilst on the another hand, the proponents of the “fair use” doctrine rely on studies conducted in other countries such as UK and New-Zealand to show a beneficial outcome. Whilst advocates of “fair dealing” strongly advances that UK and EU have not yet incorporated “fair use” into law. Proponents of “fair dealing” recorded that there was no in-depth study conducted by the Executive Branch of the State to support the policy and legislation reform in relation to the copyright. Thus Parliament and provincial Legislatures must subject the Copyright Amendment Bill to a regulatory impact assessment/socio-economic impact assessment. Proponents of the ‘fair dealing’ doctrine advances that the proposed exceptions will deter investments, and erode the capacity of the creative industry. In contrast, the advocates of ‘fair use’ argue different, pointing to the success of the USA creative industry.

**Table 1 Material Difference Fair Use and Fair Dealing**

|  |  |
| --- | --- |
| Fair Use | Fair Dealing |
| Use is permitted if is fair, taking into account competing social interest-public interest issues such as the nature of the original work, the amount and importance of the portion of the original work that has been copied, and whether a commercial market for work exist. | The design has prescriptive criteria. Operates by exempting certain works through a statute. It could be seen as inflexible approach. However, regulatory functions outlined in section 13 of the Act by the Minister responsible for the implementation of the copyright law tempers this inflexibility. |

**Adapted from the submissions**

Table 2 illustrates a distinction outlined by Prof Forere in relation with “fair use”, and “fair dealing”. Prof Forere registered that the introduction of “fair use” in the envisaged Act remains a contentious issue. A need to find a middle ground is critical in order to address economic, finance and social priorities. Further to align South Africa with international trade commitments, and needed foreign and domestic investments to tackle South Africa’s grand socio-economic challenges. Thus to respond to the policy outcomes articulated in the National Development Plan-NDP.

**Table 2 illustrates a distinction between ‘fair use’ and ‘fair dealing’.**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **General Fair dealing, Section 12** | **General Fair Use, S12A** | **Specific exceptions to all works, Section 12B** |
| Free uses in “special certain cases” | Research and private study or for personal or private use;  Criticism or review of the work in question and this applies to sound recordings;  Reporting current events, applicable to sound recordings;  Judicial proceedings, also applicable to sound recordings;  Quotations and illustration for teaching purposes provided quotation or illustration is compatible with fair practice and its extent does not exceed the extent justified by the purpose, both quotations and illustrations for teaching purposes exceptions are applicable to sound recordings | Research, personal study and private use, including time shifting and format shifting  Criticism or review  Reporting current events  Scholarship, teaching  and education  Comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche  Preservation of and access to library collections and archives  Ensuring proper performance of public administration | For purposes of reporting current event, any reproduction and broadcasting or communication to the public of any work heard in those events subject to indicate source and name  Judicial proceedings  Any quotation provided it is compatible to fair practice does not exceed the extent justified by the purpose and source name shall be mentioned |
| Criterion for including new uses not currently enumerated | Not necessary as list is closed | Not provided for and it is of utmost importance to have certainty in the law, and also to avoid delegating law making to the courts | Not applicable |
| Criterion for determining whether use is fair | Developed in *Moneyweb* case not provided for in the Act | Spelled out in the proposed amendment Section12A(b) |  |
|  | Criteria open-ended through use of *“include”* and the pronouncement that the “*list of factors not exhaustive”* | Criteria open-ended through the use of *“including but not limited to”* |  |
|  | The factors can vary depending on which free use is being pleaded    i) ‘the nature of the medium in which the works have been  published;  ii) whether the original work has already been published;  iii) the time lapse between the publication of the two works;  iv) the amount (quality and quantity) of the work that has been taken; and  v) the extent of the acknowledgement given to the original work.’ | Factors are generic   1. The nature of the work in question 2. Whether the work taken is substantial in relation to the entire work 3. The nature and purpose of the work which includes whether aa) whether the use is different bb) whether the use is for commercial or non-profit research, library or educational 4. The substitution effect upon potential market vs effect of the use upon the potential market for or value of the copyrighted work |  |

**Submission, Prof Malebakeng Forere, 2023**

Prof Forere emphasised a need for a balanced approach in addressing the narrative of both the advocates of the “fair dealing” and “fair use”. To a certain extent, Prof Forere advances that the” fair use” provision was a copy and paste from the USA Copyright Act. She advances that the proposed modifications are unsettling. She further argued that the proponents of” fair use” are largely comprised of public interest organisations and institutions such as libraries together with businesses whose business model depend on the unrestricted flow of content/ information such as high tech companies such Google. Prof Forere argued that it is common course that public interest organisations treat growth different with private corporates in their business strategies. The advocates of” fair dealing” are largely comprised of mainstream industry players (investors and creative creators). She argues that Parliament is tasked with the responsibility to create a conducive legal environment for businesses to thrive, and on the other hand ensuring that the legal framework respond to the transformative and responsive policy agenda. In a nutshell, Parliament needs to rebalance the interests of the different policy perspectives. The main focus is to forge an inclusive economic growth agenda.

Prof Forere argued that in rebalancing the “fair use” perspective the legislators should in respect of the Copyright Amendment Bill:

* Provide guidance/criteria to courts in introducing new future uses.
* Maintain the United States’ fair use criteria as requested by some of the entities that object to the modified factors in the CAB. Effectively, abandon in particular s12A(b)(iii) (bb) and s12A(b)(iv).

Prof Forere submitted that if Parliament can adhere to above advice it would have minimised the discomfort with “fair use” while taking control of law making process. The advocates of the “fair dealing” stressed that proposed Sections 12A-12D must be subjected to the Three Step Test. In their view the proposed provisions are inconsistent with the Berne Convention and TRIPS Agreement, including the South Africa’s Constitution. The advocates of ‘fair dealing’ emphasised that if a decision is made to introduce the USA-style ‘fair use’, it must be introduced as it is. They contend that the proposed provisions are variant wider than the country of origin.

*Apricity Consulting* advances that:

* Sections 12A, B, C, D –” fair use” provisions and all the exceptions for research, education and libraries including archives respond to fundamental rights. Authors and creators will certainly benefit from fair use to create new works;
* Section 12B(1)(vii) – The removal of the words ‘’official archive’’ allow broadcast archives to preserve live performances in the interest of our heritage;
* Section 19B - Exceptions for computer programs, enabling interoperability which will be very helpful;
* Section 19C – Exceptions for libraries, archives, museums and galleries. The exceptions to enable these entities to digitise its collections for the purpose of safeguarding our heritage are long overdue. The lack of this clause was a barrier to archiving and preserving collections due to it not allowing digitisation, technical conversions, format-shifting, etc.;
* Section 19D – Exceptions for people with disabilities are crucial to enable fair access in alternative formats. The current law excludes people with disabilities, which is simply unconstitutional.
* Section 22A – Exceptions for orphan works – a welcome addition to the envisaged Act as it enables such works to finally be digitised and made accessible to researchers, educators, broadcasters and the general public.

*Apricity Consulting* argued that the provisions are aligned with the Constitution, and consistent with trade related treaties in contrast with the narrative perspective advanced by the advocates of “fair dealing”. This view is strongly canvassed by the South *African Democratic Teachers Union including COSATU, Personal Managers Association, Library and Information Association of South Africa, Wikimedia, Artists Unite, and Gender Equity Unit- University of Western Cape-*just to mention the few. It is largely to a greater extent supported by the *Joint Academics’* substantive contribution in support of the Bills.

The following sections will cover to a certain extent in an integrated way the different perspectives advanced mainly by main industry players (distinction drawn by Prof Forere), which in this report are classified as advocates of ‘fair dealing’ doctrine. Further, the views of the proponents of the ‘fair use’ doctrine will also be sketched.

*South African Institute for Intellectual Property Law* advances that all the exceptions proposed in relation to the Copyright Act, will automatically extend to the exceptions in the Performers’ Protection Act in terms of the new Section 8(2)(f) of the Performers’ Protection Act. The rights of performers need to be considered as they will be affected by the proposed exceptions outline in the envisaged Copyright Act.

1. **Exceptions and Limitations**
2. **Translation**

Some of the interested parties argue for the rejection of Section 12B introduced by the envisaged Copyright Amendment Bill. It is advocated that the provisions amount to an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. The deprivation is substantial and overly broad. Further, the provisions do not comply with the Berne Convention and the Three Step Test.

Those who reject the provision advances that copyright owners will no longer be entitled to profit from an exploitation of a work and maintain that the provision is inconsistent with the South African Constitution. Proponents for the exceptions and limitations in the Copyright Amendment Bill include the South African Teachers Democratic Union, Library and Information Association of South Africa and the Congress of South African Trade Unions (COSATU). Prof Lipinski, a Professor at the School of Information Studies, University of Milwakee- further expressed his appreciation for exceptions for education and academic activities, libraries, museums, galleries and persons with disabilities.

1. **Personal use and adaptation of formats for personal use**

The advocates of fair dealing further argue that the scope of the personal use provisions in section 12B(h) is too wide and there is a missed opportunity to introduce private copying remuneration for authors. It is argued that although private copying is permitted in many other countries, because of the market harm that such provisions can cause, in those countries, private copying is either remunerated by means of a levy system, or the uses permitted are extremely circumscribed. Further, it was submitted that Section 12B(h) is overly broad. It is highlighted that a judicial review of an equivalent provision in the UK quashed that provision and declared it to be unlawful because the evidence that the government had relied on to conclude that the uses permitted by the exception caused minimal harm was inadequate.

Further, the proponents of” fair dealing” advances that the replacement of the existing exceptions in the Sections 12, 16(1), 17, 18, 19A and 19B of the current Copyright Act is not determined by sound policy assessment. It was suggested that Sections 12, 15(4), 16(1), 17, 18, 19A and 19B be retained and to expand on the existing ‘personal use’ exception in Section 12(1)(a) with the wording of new Sections 12A(a)(i), 12B(2)(a) and (b) and 12C(b).

1. **Temporary reproduction and adaptation**

*Google* advocated that the Copyright Act need to be amended to make provision for technological processes such as transient and incidental copies. It was advanced that the provisions are in line with legislation in other jurisdictions in which Google operates. According to Google Section 12C has been prepared in accordance with international best practice, and, as is the case under the European legislation, the proposed section also provides that the temporary act should be an integral and essential part of a technical process.

*Google including the South African Institute for Intellectual Property Law* support the amendment of Section 12C(a) in order to align the Copyright regime with modern technology. However, the *South African Institute for Intellectual Property Law* believes that the provision need to be slightly redrafted so that it is couched in a passive tense. This is because the acts contemplated in this exception are usually executed automatically on a computer and not by a “person”.

The *South African Institute for Intellectual Property Law,* further advances that the format shifting exception in new Section 12(C)(b) is not suited to new Section 12C and its text should be applied to the ‘personal use’ exception as recommended by the Copyright Review Commission.

1. **Reproduction for educational and academic activities**

From the public interest perspective, it advanced by some stakeholders that that although the proposed amendment arguably limits authors' rights in relation to their work, these changes give effect to numerous constitutional rights, including the right to education. It is further submitted that section 12D (1) widens the ambit of the provision and promotes the right of access to information. Further, many libraries and educational institutions in the US, Canada and Europe provide remote access to at least some works via secure computer network.

However, another view advances that the provisions are broad and need to be narrowed down. The *International Publishers Association* argued that the provision as it stands completely curtails the market of educational and academic publishing by granting users the ability to reproduce and make available entire works without permission from copyright owners. It is recommended that the exception set out in section 12D should be restricted to reproduction of small excerpts of certain works and that copies of said small excerpts are only distributed to students in a given classroom, if and when licenses are not available and against appropriate remuneration for copyright owners. The *Dramatic, Artistic and Literary Rights Organisation* offered that the relationship between Section 12A and section 12D must be clarified. Copying not permitted under Section 12D should be deemed also unfair under Section 12A. Further, copying permitted subject to the unavailability of a license under Section 12D should also constrain copying under Section 12A. It is advanced that the provision be amended and reworded to provide legal certainty and introduction of exceptions when reproduction is justifiable and in compliance with South Africa’s treaty obligations. The entire Section 12D should be redrafted such that it is subject to copyright principles (in particular the Three-Step Test), licencing and does not unduly prejudice rights owners. It is advocated that the provision would have unintended consequences to the South African publishing industry. Proponents for this provision include the Gender Equity Unit of the University of the Western Cape, Ms Denise Nicholson, representing her organisation Scholarly Horizons, COSATU and Creative Commons.

1. **Libraries, archives, museums and galleries**

Again, the” fair dealing” advocates argue that the provisions in new Section 19C are poorly drafted in that it provides for exceptions for actions that are not restricted by copyright, and the exceptions are overbroad. It is argued that the provisions should ensure that libraries and other cultural institutions lend lawfully acquired copies of books only, instead of enabling libraries to lend copies made through the use of exceptions. Libraries and cultural institutions play an important role in supporting and stimulating authorship. It is advocated that the provisions should be qualified to avoid abuse. Priority should be assigned to libraries, archives and museums, which possessed public character. Galleries should be excluded as they do not carry a public character.

It is argued that the provisions which are acquiring and promoting books must be included in their cultural mission. It was advanced by some stakeholders that libraries and archives already benefit from exceptions to the right of reproduction in the Copyright Regulations, 1978, which can and should be updated by Ministerial regulations. Further, it is advanced that the entire Section 19C must be rejected. Stakeholders representing libraries and archives such as the Library and Information Association of South Africa and COSATU were fully in support of this provision.

1. **Artistic works in public places**

The *South African Institute for Intellectual Property Law* and other interested parties advocating for the “fair dealing” perspective advanced that the amendments to Section 15(1) of the Copyright Act allow unlimited re-use of artistic works in public places as compared with Section 15(3) of the Copyright Act, which already deals with the subject. It is advanced that Section 15(1) of the Act as introduced by Clause 16 of the Bill should be rejected.

1. **Computer software and computer interface specification**

The advocates of the “fair dealing” advanced that the new Section 2A(1)(b) excludes “computer software interface specifications” from copyright protection. It is argued that this may arbitrary exclude the protection of such works. Further, copying and translation of “computer software interface specifications” without authorisation is unconstitutional. This includes matters covered in Section 19B (2) -(4) of the Act.

*Google* advances that Article 6 of the European Union Software Directive (2009/24/EC) (EU Software Directive) is similar to Section 19B (2). Further, Section 19B (1) is also similar to article 5(3) of the EU Software Directive. It is argued that both exceptions are narrowly tailored to allow for very specific actions necessary for the advancement of technology. Further, it is advanced that Reverse engineering exceptions are widespread and are present in many copyright frameworks. Such exemptions are critical for enabling competition in the supply of parts or the inputs to standard technology that need to interface with other components.

1. **Persons with a disability**

All the interested parties support and promote provisions that will provide exceptions for people with disabilities. The interested parties argue that the move would allow people with disabilities to have fair access in alternative formats. Already, the Constitutional Court has made a finding of unconstitutionality against the Copyright Act for not having appropriate suitable exception.

The *South African Institute for Intellectual Property Law* including the *Joint Academic Opinion* and other interested parties have advanced for the amendment of Section 19D to adhere to the narrative articulated in the judgement outlined in *Blind SA v Minister of Trade, Industry and Competition and others.* Parliament was also cited as one of the respondents.

The *Joint Academic Opinion* advocated that in order to avoid further litigation on the grounds of unfair disability discrimination, that the scope of Section 19D need to be extended to persons with disabilities across the spectrum. The Constitutional Court, in Blind SA, understood its mandate as limited to visual disabilities on the basis that the affidavits and evidence before it related to the discrimination experienced by people with visual and print disabilities. By law, courts are limited in their interpretation to the case and issues presented by parties to the suit before them. Hence the Court crafted Section 13A which only addressed people with visual and print disabilities. However, the purport of the Copyright Bill is to address all forms of disabilities, therefore Section 19D should be drafted more broadly. It is advanced that South Africa’s Copyright regime should adhere to the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”).

The *Joint Academic Opinion advanced* that the Court did not read-in section 19D(1) as an interim remedy and instead crafted its own interim remedy, Section 13A, that applied with immediate effect. The Court held that “immediate redress” was required to rectify the unconstitutionality of the Copyright Act. The Court recognised that further delays would exacerbate the unfair discrimination experienced by people with visual and print disabilities, and that the appropriate remedy was one that “avoids the need for government authorisation”. The *Joint Academic Opinion* recommended to delete the phrase “as may be prescribed and” from section 19D (1). Further, suggested how the amended clause should read: Section 19D(1) ‘‘Any person who serves persons with disabilities, including an authorised entity [...]”.

Further, the *Joint Academic Opinion* advanced thatSection 19D(2)(a) restricts the scope of its application to those activities that are a result of the operation of Section 19D (1). This means that persons with disabilities are permitted to only use accessible format copies made under Section 19D (1). Since Section 19D (1) relates to persons serving persons with disabilities and authorised entities only, this excludes the possibility of a blind person already having lawful access to a work (say, through an e-library) and converting it to an accessible format on their own; or already having lawful access to a work that is in an accessible format and needing to lawfully share such copies, say for educational purposes. This creates limitations on the actual practice of making and sharing accessible format works within the disability community and runs the risk of perpetuating further unfair discrimination. The lawfulness of sharing and using accessible format copies is already covered by the definition of copyright infringement under Section 23(2) of the Act as well as the internal limitations of Section 19D (2) as relating solely to facilitating access for persons with disabilities.

The *South African Institute for Intellectual Property* Law has advised that Parliament should adopt the formulation order by the Constitutional Court in relation to Section 19D. Further, Parliament is urged to accelerate the procedures necessary for South Africa to accede to the Marrakesh Treaty. This point was also amplified by Professor Forere and some of the interested parties.

*Google* advanced that the inclusion of an "authorized entity" expands the category of persons that may make an accessible format copy for the benefit of a person with a disability. Although, this may further limit the rights afforded to copyright owners, Google submitted that this limitation is defensible since it gives effect to numerous constitutional rights, including the right to equality, education and access to information.

The *Anton Mostert Chair of Intellectual Property Law* made a cautionary proposition that the *Intellectual Property Law Amendment Act 2013* has not, and should never, be brought into operation as it fundamentally distorts the legal principles in the statutes it seeks to amend. All references and allusions in the Bill to the *Intellectual Property Law Amendment Act 2013* should be eradicated.

1. **Parallel imports**

The *South African Institute for Intellectual Property Law* submitted that Section 28 of the Act as introduced by Clause 30 of the Bill is in conflict with Section 23(2) of the Act, which sets the standard for determining copyright infringement by importation. It was suggested that Section that Section 28 of the Act as introduced by Clause 30 of the Bill must be rejected. The *International Publishers Association* and some of the interested parties recorded that the *Parallel imports concept* must be forbidden to ensure the integrity of the right of distribution. The “exhaustion regime”, which sets out the rules for parallel imports of copyrighted works into South Africa, is of key importance to ensure that South African authors and publishers retain control over the commercial conditions under which their works are distributed in the country.

1. **Statutory licences for reproduction and translation**

In relation to the new Schedule 2 to the Act, which sets the conditions for statutory licences for reproduction and translation, the *South African Institute for Intellectual Property Law* advanced that this provision must be rejected including the amendment of Section 22(3) of the Act as introduced by Clause 25 of the Copyright Bill. It was further recorded that the obligations set by the provision might be inconsistent with the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights and the South African Constitution.

1. **Orphan Works**

It is advanced by other interested parties that the new Section 22A of the Act as introduced by Clause 26 and the definition of “orphan works” by Clause 1(i) of the Copyright Bill should be rejected. *Baker and McKenzie Incorporated* argues that the obligations imposed by the provision on the licensees of orphan works are unjustifiably onerous for producers and content distributors who wish to licence the copyright in a work whose author cannot be identified or is identified, but cannot be located. Moreover, what may be considered to be "reasonable" steps by the Commission is not certain and leaves much open to the Commission's opinion. It is submitted that the process set out in section 22A be amended to allow for orphan works to be used where the potential licensee has taken reasonably possible steps to locate the author of the work.

It is also advanced by other interested parties that the provision will create costly compliance costs. Further, the provision makes a mistaken application to the “resale royalty”, and it will threaten the existence of the auction and trade in second hand goods.

*Composers Authors and Publishers Association* submitted that the orphan works regime should not apply in respect of musical works. It is further submitted that for the music industry the process of seeking a licence for unidentifiable rightsholders is thus one that is fairly within control. The process contemplated in the Bill would frustrate, rather than assist the industry’s endeavours in this regard. In view of this it is recommended that the music industry should be exempted from the orphan works regime contemplated in the Bill.

In contrast, other interested parties such as *Apricity Consulting* advanced that the provision should be accepted as it enables such works to finally be digitised. The orphan work will be made accessible to researchers, educators, broadcasters and the general public.

1. **Technological Protection Measures and Copy Right Management Information**

It was highlighted during the public hearings that the digital economy remains central in the government’s efforts to build an inclusive growth and society. Public hearing inputs underscored the need for South Africa to have a legal and regulatory framework that will reflect the way people use and create copyright material.

It was highlighted that there has been an ongoing discussion in South Africa regarding the flexibility of the existing copyright regime, including the merits of introducing fair use, to support innovation in a rapidly changing technological environment.

Most of the interested parties recorded a need to review the legal framework and make it as future-proof as possible. However, some registered that new legislation and policy should not have the effect of substantially diminishing the rights of broadcasters and copyright owners in South Africa or diminishing the commercial viability of broadcasting, or the commissioning and creation of copyrighted works (such as television series and films).

The proponents of “fair dealing” advanced that the provisions that deal with technological Protection Measures (TPMs) do not comply with the treaties.

The advocates of “fair dealing” advanced that TPMs are inadequate to provide for effective legal protections for works made available in the online environment, where most content distribution takes place nowadays. Further, overly broad exceptions and limitations to exclusive rights of copyright would further reduce the ability of rightholders to take effective action against infringers. It is also highlighted that new provisions, which intend to protect the TPMs in both the Copyright Amendment Bill and the Performers Protection Amendment Bill do not meet the requirements of the Beijing Treaty, WIPO Copyright Treaty, 1996, and the WIPO Performance and Phonograms Treaty, 1996.

*MultiChoice* advanced that in order 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:

* for law enforcement purposes by an authorised state investigative, protective or intelligence agency in accordance with applicable laws;
* where the owner of the technological protection measure has consented to that use;
* where ordered by a court or the Tribunal after the owner has refused access;
* where a person authorised by government in terms of s19D for the benefit of persons with disabilities; and
* where a person authorised by government in terms of s19C for libraries, archives, museums and galleries.

The proponents of the “fair use” doctrine welcome some of the exceptions dealing with TPMs. However, they highlighted that that section 28P (2) be deleted as it replicates the requirement of authorisation by the copyright owner that renders accessible format shifting near impossible. It was submitted that this requirement was considered by the Constitutional Court as the key obstacle to accessible format shifting and the basis for the unfair discrimination ruling. Further, it was recorded that the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (“Marrakesh VIP Treaty”) requires that where contracting parties decide to provide protection against circumvention of technological protection measures (“TPMs”) in their laws, this protection must not prevent accessible format shifting in any way, whether in the law or in its effect. The proponents of “fair use” further submitted that an exception to facilitate circumvention of TPMs for people with disabilities is common practice, reflected in the EU Infosoc Directive as well as the regulations implementing the US Digital Millennium Copyright Act (“DMCA”) by the US Library of Congress.

Further, the Joint *Academic Opinion* indicated that Sections 27(5B) and 28O be replaced by civil liability provisions. Section 27(5B) criminalises the use, provision, and possession of technologies on the basis that these technologies could be used to circumvent technical protection measures and then infringe copyright. The WIPO Copyright Treaty states that countries “shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors […] and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.” The WCT does not require criminal penalties and permits circumvention for uses authorised by exceptions and limitations.

It was further submitted by the *Joint Academic Opinion* that the wording of Section 28P (1) is too narrow to achieve its objective. They propose a minor amendment to rectify this. It was highlighted that technological protection measures can prevent people with disabilities, learners and artists from engaging in lawful uses of works permitted by the Act.

The *Joint Academic Opinion* indicated that Section 27(5B) seeks to impose criminal liability for engaging in uses that Parliament expressly authorises subject to certain exceptions. Section 28P (1) is intended to permit these lawful uses, however its language refers only to exceptions. But not every lawful use is in the form of an exception. Sections 12C and 12D are not labelled as exceptions and may be better termed limitations. The memorandum to the Bill, preamble to the Bill and Section 19D(2) refer to both limitations and exceptions. Lawful uses include those permitted by regulation and statutory licences such as those in Schedule 2. To avoid a lack of clarity whether a lawful use is technically an exception or not, all lawful uses should be included.

The *South African Institute for Intellectual Property Law* as one of the advocates of “fair dealing” has advanced that the provisions relating to the recognition of the TPMs including their related exceptions as well as their definitions, in new Section 28(P) in the Copyright Act as introduced by Clauses 31 and 1 of the Copyright Amendment Bill are not compliant with the relevant international treaties. Further, new Sections 8F and H of the Performers ‘Protection Act as introduced by Clause 7 of the Performers ‘Protection Amendment Bill are also not compliant with the relevant international treaties. It was further advanced that the new Section 28S of the Copyright Act introduced by Clause 31 of the Copyright Amendment Bill including Section 8G of the Performers’ Protection Act as introduced by Clause 7 of the Performers’ Protection Amendment Bill should be rejected.

The advocates of the “fair use” have suggested that innovative digital activities are more likely to develop in countries with fair use provisions as compared to fair dealing provisions. The proponents of “fair dealing” hold a different view.

1. **Absence of Effective legal remedies to combat online copyright infringement**

Some of the stakeholders advanced that the Copyright Amendment Bill does not have effective remedies that would help right holders to combat piracy and other infringement in the online environment. *MultiChoice* canvassed for a provision in the Copyright Amendment Bill that serves to criminalise the making 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 –*

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

Also, a new provision was proposed; as a new Section 27(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."

Including a new Section 27(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."

*Artist Unite* has strongly advocated that everyone must have access to creative works through fair use, which opens the doors of learning and culture, but which prevents piracy.

1. **Ephemeral right**

It was advocated that the ephemeral right is a right accorded to broadcasters in most jurisdictions. It is recognised in international treaties to which South Africa is party, including the Rome Convention. It is advanced that incidental broadcasting without prior authorisation occurs. Jurisdictions have long seen fit to grant broadcasters an exception in copyright legislation to ensure that broadcasters are not penalised when incidentally broadcasting works which are the subject of copyright.

Some of the interested parties submitted that the ephemeral right as contained in Section 12B(1)(c) of the Copyright Amendment Bill should remain as is, subject to the following amendments: Section 12B(1)(c) should be amended to remove the obligation to delete any broadcast that includes ephemeral works after six months. The current drafting only allows a broadcaster to retain a broadcast after six months if the broadcast is of “an exceptional documentary nature”.

It is proposed that the obligation to delete the broadcast after six months should be deleted. Alternatively, a broadcaster should be entitled to store the broadcast indefinitely, and only use that portion of the broadcast featuring the ephemeral work where such use is compatible with fair use in the Copyright Amendment Bill.

Further, it was submitted that any rebroadcast of a broadcast which features a reproduction of an ephemeral work should not be subject to the consent of the owner. It is often the case that owners cannot be identified or contacted.

1. **Ownership of Copyright in Commissioned Works**

*National Association of Broadcasters including South African Institute for Intellectual Property Law with the support of other* advocates of the ‘fair dealing’ advanced that section 21 of the Copyright Act allowed the party who commissioned a work to be the owner of the copyright in the work. However, the proposed provisions in the envisaged Act, section 21(1)(c) provide that the ownership of any copyright subsisting in a work will be governed by written agreement between the parties. This written agreement is subject to subsection (3) where it may limit the ownership of copyright in a work so that the exclusive right to do or to authorise any of the acts contemplated in sections 7 (relating to artistic works), section 8 (relating to cinematograph films) or section 9 (relating to sound recordings), be limited to the purpose of that commission. It is submitted that the proposed amendment of section 21(1)(c) be removed. These interested parties advanced that section 21 of the Copyright Act be maintained.

1. **Qualification of the new distribution right by exhaustion, and regulation authorising or prohibiting the distribution of the of any work**

The *South African Institute for Intellectual Property Law* advances that if the current Copyright Act is to be amended by introducing the exclusive right of distribution, the correlating right of exhaustion need to be introduced as well. It was suggested that there is a need to change Sections 6(eC), 7(dC), 9(g), 11A(d) and 11B(dC) to read along the lines of “distributing the original or a copy of the work to the public that has not previously put into circulation in the Republic by or with the consent of the copyright owner”. The *South African Institute for Intellectual Property Law f*urther stressed that Section 12B (6) should be rejected as it advances a material mistake which is conflict with Article 6(2) of the WIPO Copyright Treaty, 1996.

1. **Contractual Freedom, New Regime for royalty entitlements designed for authors of literary, musical and visual artistic works including performers whose performances are fixed in audio-visual works**

Most of the interested parties advocating for ‘fair dealing’ have advocated that Section 39B should be rejected as the provision would create legal uncertainty including proposed provision 1(i)- “open licence”. It was advocated that Section 39B restrains contractual freedom, which is essential for creative industries to function. It was advanced that the proposed provision undermined the long-standing principle in international law of copyright owners’ exclusive rights to authorize the use of their works under the conditions they determine freely. Further, it was emphasised that section 6A, which outlines that contractual terms including royalties will be subject to regulation is ill-advised, as it ignores the specific models of remuneration in publishing, which are by nature diverse, and should be subject to free negotiation between the parties.

*National Association of Broadcasters, South African Institute for Intellectual Property Law* including some of the interested parties that are strongly opposed to passing of the Envisaged Acts as proposed argue that Sections 6A, 7A and 8A would create legal uncertainty. It advanced that their conceptualisation as a “one size fit all” option for fail remuneration in respect of copyright works, based on the existing Section 9A that governs ‘needletime’ royalties for certain uses of sound recordings.

*National Association of Broadcasters* advanced that given the importance of the protections granted to performers in the Performers’ Protection Amendment Bill any matters pertaining to performers and the rights of performers should be removed from the Copyright Amendment Bill. The duplication of performer protections in both the Copyright Amendment Bill and the Performers Protection Amendment Bill may lead to problems with the interpretation of the legislation and could result in difficulties in implementation.

The *National Association of Broadcasters* submitted that it supports the increased protection of performers. However, the provisions allowing a performer to a share in royalties / equitable remuneration are already provided for in the PPAB. It is advanced that provisions that cover performers must be appropriate covered in in the performers’ legislation rather than in copyright legislation.

The *South African Institute for Intellectual Property Law* further advances that the proposed Sections 7A and 8A are exacerbated by the contract override provision outlined in Section 39B, which makes agreement that depart from them unenforceable.

Some of the interested parties such as the *South African Institute for Intellectual Property Law advocates* and *Motion Picture Association* and the *Writers Guild of South Africa* advised for the rejection of the proposed Sections 6A, 7A and 8A of the Copyright Act introduced by Clauses 5, 7 and 9 of the Copyright Amendment Bill. The same stakeholders also, argued for the rejection of the Sections 5(4) and (5) of the Performers’ Protection Act introduced by Clauses 4(f) and (g) of the Performers’ Protection Amendment Bill. Further, it is advanced that the new Section 9A(1) (aA) of the Copyright Act introduced by Clause 11 Copyright Amendment Bill and Section5(1A) of the Performers’ Protection Act introduced by Clause 4(c) of the Performers’ Protection Amendment Bill, must be rejected.

It was highlighted that Sections 6A and 8A contemplate a single remuneration model namely, a share of royalties, which presented a material difficulty. It was suggested that 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.

Some of the interested parties indicated that the Bills (including Performers Protection Amendment Bill) propose 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. It was submitted that Performers Protection Amendment 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 audio-visual works".

In relation to Section 5(1A) of the Performers’ Protection Act introduced by Clause 4(c) of the Performers’ Protection Amendment Bill, *National Association of Broadcasters* with the supports of South African registered broadcasters argues that the registration and reporting obligations outlined in the provision are extremely onerous, and are simply not practical, particularly if a broadcaster has multiple channels, as it is likely that millions of performances would have to be registered and reported by the broadcaster. Whilst the intention may be to ensure that there is due compensation to the parties concerned, this is already addressed between parties on a contractual basis at the production level. Further, the provisions may result in a significant decline in investment in the sector. In addition, *Motion Picture Association* argues that Section 5(1A) of the Performers’ Protection Act imposes heavy financial and administrative burdens, for example by obliging the user to register the act in advance and by including all performers, including extras, in the scope of the mandatory obligation in the case of the Performers’ Protection Act.

*Spotify SA* argues that the envisaged Acts should be adjusted to preserve contractual freedom and the fair balance of rights and interests envisioned under Berne’s international framework. For example, we recommend making sections CAB 8A (1) and 9A (1) “subject to an agreement to the contrary,” similar to the current language in 6A.

Prof Forere argues that the provisions could have negative repercussions especially to young and unknown artists. It is advanced that the provision must be relaxed to allow for choice of remuneration in section 8A. The value chain in the film industry is complex and the investment that goes in the production is massive yet certain sections such as ownership on commissioned works in the film industry are unusual and can be a deterrent.

In contrast, Google advances that Sections 6,7 and 8 the proposed amendments to all of these sections expand the rights of copyright owners of literary, musical, artistic and audiovisual works to include communication (and authorising communication) of these works to the public by wire or wireless means, including the internet. Further, Google supported by other interested parties that support the adoption of the envisaged Acts, argues that the proposed sections appear to reasonably and justifiably balance the interests of copyright owners and the public at large, taking into account the proposed fair use provisions in section 12A. Google, further advocates that Section 9A advance the rights of creatives to be paid for their content. At a micro level, this amendment will assist in growing the creative industry, thereby ultimately stimulating the economy.

1. **25-year Reversion Right Proposed for Authors of Literary and Musical works and Transfer of Performers’ exclusive Right**

Interested parties, which are against the enactment of the Bills in their current form submitted that 25-year limitation was initially intended to benefit musicians and composers, and not authors of other forms of work such as literary or dramatic work.The *Motion Picture Association and South African Institute for Intellectual Property Law* and other interested parties argue that the 2011 Copyright Review Commission Report recommended that the Copyright Act should contain a right of reversion to the authors of musical works, like the reversion provision in the USA Copyright Act.

It is advanced that the proposed changes to Section 22 limit the assignment of the script to 25 years. This cannot be varied by agreement between the parties by virtue of the Section 39B of the Bill, which if enacted will prevent any party from agreeing to vary any right set out in the Copyright Act.

Further it advocated that the changes will result in a situation where a copyright owner and every author and performer that contributed to the creation of the copyright work will have rights on paper, but no work that can be commercialised, and therefore no income after the elapse of the 25-year period.

The W*riters Guild of South Africa* advanced that although reversion rights do exist in other countries, they are vastly different to those proposed by CAB. Both US and EU laws provide for reversion rights in certain instances. However, where such rights are provided, audiovisual works are either wholly excluded or adequate safeguards and conditions are put in place to mitigate the impact of the reversion. Unlike these countries, CAB does not provide any suitable exclusions or safeguards to the proposed reversion rights – which may be in contravention of international treaties.

The interested parties against the enactment of the Bills advocate that the provisions constitute an arbitrary deprivation of property as the copyright owner to whom the works have been assigned, will be deprived of the rights in the works altogether when the 25-year time limit expires. The reversion of rights in literary and musical works and sound recordings will also negatively impact producers and content distributors in respect of the assignments they secure from authors and performers, as they will be unable to enforce any rights in these works after the expiry of 25 years. The interested parties which are against the adoption of the Bills, advocate for the rejection of Section 22(3) of the Copyright as introduced by Clause 25(b) of the Copyright Amendment Bill including Section 3A(3)(c) of the Performers’ Protection Act) introduced by Clause 3 Performers’ Protection Amendment Bill.

1. **Resale Royalty Right**

The *South African Institute for Intellectual Property Law* advances for the rejection of Sections 7B, 7C, 7D, 7E, 7F and 22A(10) including definitions of “art market professional’ and “visual artistic work”, which are introduced by Clauses 7,26, and 1(b) and (l) of the Copyright Amendment Bill. It is advanced that the resale royalty right is a separate right that is dependent on the existence of a right of copyright. Further, the proposed amendments contain several omissions that will create uncertainty and impact the market for second-hand goods.

1. **Powers of the Executive-responsible for administering the envisaged Acts and regulatory issues**

*MultiChoice* including other Broadcasters in South Africa advanced that Clause 35(b) of the Bill, which seeks to amend Section 39 of the Act, gives 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. In addition, Section 8D of the Performers’ Protection Act will also expand the scope of the Minister’s regulatory powers to prescribe compulsory and standard contractual terms to be included in agreements to be entered into in terms of the Act. These provisions would empower the Minister to make regulations that limit the parties’ freedom to contract on terms that are mutually acceptable to them. It is argued that the provisions 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. Nor is it possible that a prescribed set of standard contractual terms could adequately cater for all possible scenarios.

*South African Institute for Intellectual Property Law* advances that the ministerial prescription of contract terms may conflict with or override industry driven solutions between copyright owners, authors and performers, that have already been negotiated to establish equitable frameworks for rights management and remuneration benchmarks.

Further, it is proposed 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. It is suggested that the Tribunal should be empowered to set aside contractual terms that are manifestly unjust and unreasonable (rendering them null and void).

The Broadcasters reject the proposal to amend Section 39 of the Act to empower the Minister to make regulations prescribing royalty rates or tariffs (proposed new Section 39(cI)). In addition, it is proposed that a minimum consultation period of 60 days for any regulations prescribed under the Act is necessary. They further propose that any regulations prescribed should be informed by a thorough consultation on the underlying policy and practical considerations and a comprehensive socio-economic impact assessment.

It is argued by the Broadcasters that in order to help make the proposed Section 39B more workable and equitable, the proposed amendment should: 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 allow the parties to renounce a right or protection in circumstances where they have received equitable remuneration for doing so.

*Artist Unite* advocated that many artists continue to die without proper recognition and without ever having received fair remuneration. The collecting societies are not working in the interests of their members and royalties are not reaching the people to whom they are owed. The organisation called for new copyright regime that will ensure that:

* Fair Royalties to be paid for all musicians, composers and other creators of musical and associated artistic works and to all performers who appear in creative works;
* Artists who have signed away their rights to their work in the past when contracts were not regulated, need protection in the present and future;
* There must be a right to fair royalties for all future use of our works, or works where we appear;
* Creatives must have access to the diverse culture of the country to inspire new work.

Broadcasters operating in South Africa advanced that the role for the Commission, in particular insofar as to strength regulation of collecting societies is concerned, is critical. However, some of the powers proposed to be given to the Commission are excessive and intrusive in a copyright regime. It was highlighted that Section 28Q creates an additional layer of regulation which will require significant resources which may not be available. It was advocated that the new Section 28Q, read with Section 187 of the Companies Act, contemplates a level of monitoring, oversight, regulation, and investigation which will be counter-productive and will not benefit any of the persons intended to be protected by the Copyright Amendment Bill.

*MultiChoice* and other Broadcasters in South Africa oppose the Commission's proposed enforcement function contemplated in the new Section 28Q of the Act or the proposal that the Commission should deal with "any other matter referred to the Commission by any person, Tribunal or any other regulatory authority". Further, it advanced that Section 29H(c), which empowers the Tribunal to impose a fine under Section 175 of the Companies Act is not sound. The Tribunal is not the appropriate forum to impose such fines. More generally, it is unclear what the rationale is for empowering the Tribunal to make an order for an administrative fine.

Some of the interested parties advanced that that turnover-based fines are not appropriate in the context of copyright infringement, such as piracy, because the offenders often do not infringe piracy for payment (e.g., file sharing websites do not do so in consideration for payment, and therefore do not have a "turnover" on which to base or cap fines, rendering the penalties academic for such offenders, thereby defeating the object of the legislation.

From a public or community interest point of view, Thulani Goodwill Mbatha, argued strongly that economic transformation must put emphasis on the Creative Economic Empowerment. Mr Mbatha advanced that the envisaged Acts must empower governance of the copyright and arts performance regime to redress past injustices experienced by many artists in South Africa since the 1960s under apartheid laws that govern copyright and performance rights. Most companies from production houses, publishers, advertising agencies, broadcasters have deliberately plagiarised and infringed rights a vulnerable group in the creative industry, emphasised Thulani Goodwill Mbatha.

1. **Intellectual Property Laws Amendment Act, 2013**

It was submitted by other interested stakeholders that the Intellectual Property Laws Amendment Act, 2013 (IPLAA) has made several changes to the Copyright Act and the Performers’ Protection Act, however the IPLAA since it was passed 9 years are go has not come into force. It was advanced that the IPLAA is one of the inhibitions to the amendment of the Copyright Act and the Performers’ Protection Act. Again there is a need to consider the provisions outlined in the Protection, Development and Management of Indigenous Knowledge Act 6 of 2019.

It was argued that if IPLAA is repealed the transitional provisions in the in Clause 39 of the Copyright Amendment Bill and Clause 10 of the Performers’ Protection Amendment Bill including the definition of “performer” by cross-referencing the Copyright Act in respect of the traditional works, will be superfluous, and affected definitions and sections can be renumbered by reference to the publications of the consolidated existing Acts, and this point was also emphasised by *Anton Mostert Chair of Intellectual Property Law.* Some of the interested parties that Parliament should consider repealing IPLAA.

1. **Enhance the Collective Rights Management Landscape**

It was highlighted by some of the stakeholders that creative industry market is characterised by imbalance of power between, on one hand, the creators, and, on the other, those powerful commercial entities which are the main users. *Artist Unite including Thulani Goodwill Mbatha* sharply raised imbalance of power. It was recorded that rightsholders are faced with a challenge to manage the power of the intermediaries that attempt to control rights, dictate the terms of access to the cultural marketplace, and retain a disproportionate share of the revenues from the use of creations. Some of the stakeholders pointed that the fight for fair remuneration for creators is ultimately a fight for fair treatment by the “intermediaries”.

The inputs by interested parties recognised the scope of collective societies as it evolves through time, and the emergence of technological platforms will further influence their role in the creative economy. The *Joint Academic Opinion* and other interested parties submitted that the provisions regulating collecting societies bring South Africa in line with international practice and should be retained as is. At present, there is no comprehensive legislation governing the activities of the collecting societies on behalf of their members. It was recorded that the current regulations only cover the music industry. It was highlighted that Sections 22B-22F as outlined in the Bill gives effect to judicial and executive recommendations to ensure that authors, composers, performers, and copyright owners remain in charge of, and actively control, the collective management of their copyright and related rights, and consequently actually receive fair remuneration for their creative work. Most of the stakeholders supports the accreditation and regulation of Collection Management Organisations (CMO’s) provided for in the envisaged Act. Interested parties argued that the provisions would help to implement many of the recommendations made by the 2011 Copyright Review Commission.

Some of the interested parties believe the envisaged Act will improve management of CMOs, and further improve accountability and provide level of innovation to improve management of licenses fees. Further, it was raised that transparency, administration of the rights remains a critical issue in the cultural and creative industry.

Most of the stakeholders welcome the powers of the Copyright Tribunal. It is seen as a governance structure that will improve dispute resolution mechanism. The views about self-regulation versus more regulation of CMOs remains an issue.

1. **Disproportionality of new criminal sanctions**

The *Anton Mostert Chair of Intellectual Property Law* advances that the fines imposed on juristic persons are draconian, bearing in mind that they are minimum penalties. It is advocated that a balance needs to be maintained. Further, it is highlighted that the measures are open to constitutional challenge. *South African Institute of Intellectual Property Law* also advances that the minimum sentence on judicial persons in new Sections 8A (6), 9A (4), 22C (4) including Section 27(6) and (9) (increases the penalties for criminal infringements) are disproportionate in their impact as to place them beyond the limits of what is reasonable to achieve their purpose to ensuring more transparent reporting on commercial uses. Most of the interested parties highlighted a need to consider the provisions.

It is recorded that the proceeds of penalties would be paid to the State not to the performer concerned. Further, it is advanced that excessive fines could cripple companies and have a negative effect to future commercialisation opportunities, and reduce the offender’s funds available to pay the performers their remuneration entitlements.

It was advanced by some stakeholders that the penalties would increase risk exposure of the investors intending to finance high cost quality production in South Africa. It is contended that the legitimate and licensed commercial use made of audiovisualworks and sound recordings may potential incur criminal liability, if any of the copy right owners or licensed users were to fail to report accurately and timeously on each act of commercialisation to every single performer (that includes ‘extras’ in a film and television production).

1. **Tribunal**

It was submitted that a determination should be made whether the provisions of substituted Section 29 and new Section 29A-29H of the Copyright Act that establishes the Tribunal comply with Section 3 of the Superior Courts Act 10 of 2023. The provision requires that all bills providing for the establishment of tribunal to be submitted to the Minister of Justice for prior consultation.

Further, it was recorded that the existing powers of the Tribunal are repealed by Clause 34 of the Copyright Amendment Bill, and are not expressly itemised in new Section 29A introduced by Clause 33 of the Copyright Amendment Bill. It was submitted that this may be a material oversight. It was suggested that Clauses 32,33 and 34 of the Copyright Amendment Bill must be rejected.

Other stakeholders have supported the establishment of the Tribunal. Including some of the functional powers such a structure is empowered with. It is advocated that in cases where disputes are recorded, then an independent body such as a Copyright Tribunal might be appointed and empowered to facilitate and establish the merits of such an act as a mediator, utilising this and other legislation to either establish whether Fair Use under exceptional and permitted circumstances may be granted or whether it is denied and therefore the standard equitable exchange model between rights user and copyright holder would need to be followed.

Section 29H(c) empowers the Tribunal to impose a fine under Section 175 of the Companies Act. *MultiChoice* recorded that Tribunal is not the appropriate forum to impose such fines. More generally, it is unclear what the rationale is for empowering the Tribunal to make an order for an administrative fine. Further, it was submitted that turnover-based fines are not appropriate in the context of copyright infringement, such as piracy, because the offenders often do not infringe piracy for payment (e.g., file sharing websites do not do so in consideration for payment, and therefore do not have a "turnover" on which to base or cap fines, rendering the penalties academic for such offenders, thereby defeating the object of the legislation.

**Part B: Selected Issues Around Performers’ Protection Amendment Bill**

Some of the interested parties argued that believes that new legislation and policy should not have the effect of substantially diminishing the rights of broadcasters and copyright owners in South Africa or diminishing the commercial viability of broadcasting, or the commissioning and creation of copyrighted works (such as television series and films).

1. **Definitions**

It is submitted that until the Draft White Paper process has been finalised, the current definition of “broadcast” in the Performers’ Protection Act, 1967 should be retained in the envisaged Act. Further, it is advanced that the definitions of “performer” and “producer”, are vague, and should be reframed to ensure that there is clarity for the creative industry, emphasised, the *National Association of Broadcasters.* Further, it is advocated that a distinction need to be made between a performer for purposes of the statutory rights and obligations, and incidental participants (such as extras) who would not, in context of literary, musical or artistic works, be considered a performer or “member of the cast”. It was stated that the distinction is especially crucial as only performers have a statutory right to receive a royalty or equitable remuneration.

*MultiChoice* covered the definition of "broadcast" proposing that the definition must be replace with current definition of "broadcast" in the Copyright Act, 1978. Namely, "broadcast," when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs, or signals which -

* takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and
* 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;"

It was proposed that in order to ensure legal certainty in relation to the performer (definition), it is proposed that: "an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise, viewed in context, performs literary works, musical works, artistic works, dramatic works or traditional works as contemplated in the Copyright Act, but does not include extras, ancillary participants or incidental participants."

Further, it was submitted that the definition of broadcast in the Performers’ Protection Amendment Bill is not in line with international treaties such as WIPO Performance and Phonograms Treaty,1996 because it refers to “transmission … by wire or wireless means”. However, in international treaty law broadcasts always entail “wireless” transmission. It was proposed that the provision need to be amended.

*MultiChoice,* further suggested the amendment of the definition of "performer" to read as follows: "performer' means 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"

Some of the stakeholders advised that the definition of "producer" should be amended to read: "producer means the person who takes responsibility for the first fixation of a sound recording or an audiovisual fixation" to align fully with the definition used in the WIPO Performance and Phonograms Treaty, 1996 and seeing that generally producers are corporate entities (record companies) rather than natural persons.

In an attempt to clarify the issue of definition “fixation”, “audiovisual fixation” and “sound recording “in the Performers’ Protection Amendment Bill, the *Anton Mostert Chair of Intellectual Property Law* advanced thatthe definitions are central to the application of the Principal Act, namely, “fixation”, “audiovisual fixation”, and “sound recording” (introduced by the Performers Protection Amendment Bill). Given the fact that the purpose of the Principal Act is to protect the rights of performers, the recording of a performance and exploitation of such recording should be one of the main areas of concern that the Act would seek to address. It is suggested that this concern is not consistently dealt with by the Performers Protection Amendment Act (and, also not by the Principal Act, as it currently exists). It was submitted then that one would expect that most provisions would seek to protect performers’ rights in relation to the exploitation of any form of recording, unless there was a specific reason for distinguishing between an exclusively aural recording and an audiovisual recording. Thus, most provisions should simply refer to a “fixation” of a performance, which should be the umbrella term for any type of recording, be it an exclusively aural recording or an audiovisual recording. In other words, if necessary, there are two subcategories of fixation, namely, a sound recording and audiovisual fixation. It was highlighted that it is unclear why the existing definition of “fixation” has been deleted, rather than simply amended, if desirable, by the addition of the following words “which can be perceived, reproduced or communicated by any means”. Further, it was recorded that it is not clear if a distinction between sound recordings and audiovisual recordings is at all necessary.

It was recommended that the definition of “audiovisual fixation” should be simplified to read as follows: “means the visual fixation of images, by whatever means, whether or not accompanied by sounds”. *Anton Mostert Chair of Intellectual Property Law* insisted that consideration should be given to whether the particular statutory provisions are intended to apply to fixations (that is, the recordings) generally, or specifically to sound recordings or audiovisual fixations. Further proposed that the phrase “or by the representations thereof” in the proposed definition seems a bit odd.

With regard to the definition “communication to the public of a performance”, it was highlighted that the definition could simply be in respect of a fixation, which would then cover both an audiovisual fixation and a sound recording. The *Anton Mostert Chair of Intellectual Property Law* proposed that the definition can be amended to read as follows: “means the communication to the public, including the making available, by any medium, other than by broadcasting, of an unfixed performance or the fixation of a performance that members of the public may access at a place and time of their choosing, and ‘communicate to the public a performance’ shall have the corresponding meaning”. It was further highlighted that if this right of communication to the public is envisioned to be a technology-neutral right covering any manner in which the public may access the protected performance, the inclusion of the words “that members of the public may access at a place and time of their choosing” must necessarily be included in the definition in order to include interactive forms of communication made possible through technology such as the Internet. Also the *South African Institute for Intellectual Property Law* have also highlighted that the definition should be rejected.

Some of the stakeholders argued that the Performers’ Protection Amendment Bill is not concerned with sound recordings. Sound recordings are protected under the Copyright Act and a provision about communication to the public in respect of sound recordings is provided for in the Copyright Amendment Bill (clause 10 of the Bill). It was advanced that it is wrong to limit the scope of performance in this regard. It is understood that the amendments seek to introduce provisions relating to the Beijing Treaty on Audiovisual Performances of 2012. But this should not disregard the fact that the Performers’ Protection Amendment Bill is also concerned with performances in respect of sound recordings (and not about the protection of sound recordings per se).

With regard to definitions of "copyright management information", "technologically protected work", "technological protection measure" and "technological protection measure circumvention device", *MultiChoice* advanced that clause 1(e) and (l) be amended to repeat the corresponding definitions in the Copyright Act instead of the respective clauses cross referring to the definitions in the Copyright Act. i.e. Each term should be defined in the Performers’ Protection Amendment Bill.

1. **Promotion of Performers’ moral and economic rights**

The *Anton Mostert Chair of Intellectual Property Law* advanced that the proposed Section 3(2) assumes that a performer may have transferred its rights in terms of the Principal Act, and, on the basis of that assumption, seeks to ensure that the performer at least has some moral rights, as well as a reversionary right. It was submitted that the Bill appears to weaken the position of performers. Currently, the accepted view is that the rights granted to performers under the Principal Act cannot be transferred (more correctly, assigned) as the Act makes no provision for the rights granted to be transferred. It was suggested that in order to enhance the rights of performers would be to maintain the principle that the rights afforded by the envisaged Act cannot be transferred by performers.

The *Anton Mostert Chair of Intellectual Property Law* including the *South African Institute for Intellectual Property Law* have argued that there is a need to distinguish performers’ right from copyright. It was submitted that the moral rights in copyright law are considered to be akin to common-law personality rights protecting honour or reputation. At present, such personal rights can only be enforced by the author of the copyright work, and will, thus, terminate on the death or termination of the author.

It was suggested by the *South African Institute for Intellectual Property Law* and the *Anton Mostert Chair of Intellectual Property Law raised concerns that the proposed new Section 3(2) creates confusion.* It was advocated that copyright and performers’ rights issues should not be confused, or try to oversimplify the relationship between the two concepts.

In relation to the proposed new Section 3B, some of the interested parties highlighted that guidance should be provided as to whether the term “producer” is considered to be the same as the “author” (or even the “owner”) under the Copyright Act, or whether there may be a distinction between the two concepts. Some of the stakeholder urged that a way should be found to avoid too much fragmentation of rights.

The *Anton Mostert Chair of Intellectual Property Law* submitted that Section 9A provides that any performer whose performance is featured on a sound recording is entitled to a share of the royalty in relation to the playing of the sound recording (Section 9A(2)(a)). The Collecting Societies Regulations provide that a collecting society who represents both the performers and the copyright owners must distribute the royalties on an equal basis between such rights holders (Regulation 8(5)(b)). It was suggested that if producers — as a distinct category of rights holders — are also to be given rights, the entire Principal Act needs to be reconsidered to ensure that in all relevant cases the provisions cater for both the rights of the performer and producer. Thus, the interrelation between the producers, copyright owner and performer needs to be clarified.

It was submitted that Section (3) of the Performers’ Protection Amendment Bill, which clarifies performers’ attribution rights, should be amended to reflect the industry standards for the music sector. Spotify SA advanced that Performers’ Protection Amendment Bill and Copyright Amendment Bill makes no distinction based on the creative contributions in a work, whether to differentiate between featured and session musicians, or even for *de minimis* contributions. *Spotify SA* recognise that the provision permits omission of attribution “where the omission is dictated by the manner of the use of the performance,”. It stated that the obligation should attach only where a user has received the relevant attribution information from the licensor, or else should require only good faith, commercially reasonable efforts. It is recorded that such an adjustment would be in keeping with the approaches of other markets, including the United States.

With regard to the proposed Sections 5(1)(a)(i) to (iv), and 5(1)(b), some of the stakeholders advanced that the provisions may be simplified by merely referring to “fixations”. Further, in relation to the proposed subsection (2), it is argued that it is not clear why the performer (and producer) should not be deemed to have also consented to the rebroadcasting of the relevant performance. It was suggested that the Bill should really serve as a type of standard-form contract, and serve to reduce the transaction costs. It was registered that the provisions will unnecessarily increase transaction costs. Further, it was heralded that the provision should rather provide for a reasonable royalty to be paid for any further broadcasts, in the absence of an agreement relating to further broadcasts.

Some of the stakeholders argued that the provisions 3(4)(g) in clause 2; the proposed section 5(1)(a)(vi) in clause 4; the proposed revision of section 5(1)(b) in clause 4; and the proposed amendment to section 5(4)(a) in clause 4 presented a poor regime of remuneration rights. As such all need to be revisited to make a clear distinction between exclusive rights and equitable remuneration rights.

Further, the interested parties argued that the use of the phrase in those sections “against payment of royalties or equitable remuneration” is problematic in that it will not create certainty as to the system contemplated and will spawn disputes. It is further advanced that it will not be clear at which state would royalties, requiring prior authorization for usages based on exclusive rights, will be payable, and at which a system of equitable remuneration is contemplated.

It was advanced that both the Rome Convention (article 12), the WIPO Performances and Phonograms Treaty, 1996 (article 15), and the Beijing Treaty (Article 11(2)) make provision for a system of equitable remuneration in respect of fixed performances. However, the Beijing Treaty also provides for the possibility of the use of exclusive rights instead of a system of equitable remuneration (right of authorization vs right to equitable remuneration). It was submitted that envisaged Act must be clear as to which system will apply and not use an “either-or” provision, to prevent potential disputes. It is critical to do this to also create certainty as to the continuation of the current needle-time rights system.

Some of the interested parties argued for the rejection of the new Sections 5(1)(a)(i) to (iv), (1)(b)(iv) to (ii), (1A), (2), (4) and (5) as introduced by Clause 5(b). In terms of *registration requirements*, some of the stakeholders suggested that Section 5(1A) (a) and (c) should be amended to read: "A person who for commercial purposes intends to -(a) broadcast or communicate to the public an unfixed performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording; …(c) make a reproduction of a fixation of a performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording; …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."

Further, some of the interested stakeholders advanced that Section 8(2)(f) should be deleted. The argument was that the provision cannot apply to the performance. It was also stressed that copyright is regulated by the Copyright Act, and is a distinct right. Issues of fair-dealing in the fixation should be left to be dealt with in terms of the Copyright Act, otherwise it may result in possible confusion.

In relation to the Section 8(3)(a), some of the interested parties advanced that that the provision is not clear, and it should be amended. It was advanced that archiving should not affect any of the moral or economic interests at issue. In fact, archiving should not be limited to material of an “exceptional documentary character” as it would lead to uncertainty as to what would qualify under such right.

1. **Penalties for non-compliance with registration requirements**

The *National Association of Broadcasters* has argued that the registration and reporting obligations in terms of Section 5(1A) are extremely onerous, and are simply not practical, particularly if a broadcaster has multiple channels, as it is likely that millions of performances would have to be registered and reported by the broadcaster. It is further advocated that whist the intention may be to ensure that there is due compensation to the parties concerned, this is already addressed between parties on a contractual basis at the production level. The provisions may negatively impact investment in the cultural and creative industry, emphasised the National Association of Broadcasters. It was then suggested that the provision should read as follows: “A person who for commercial purposes intends to: Broadcasts...

… must prepare 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, in the prescribed manner, within a reasonable time after having received a request for such, for the purpose of, amongst others, calculating the royalties or equitable remuneration due and payable by that person.”

Some of the stakeholders argued for theamendment of Section 5(1B)(a) to read as follows: "(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." Further, suggested that Section 5(1B) (b), (c), and (d) to be deleted. It was advanced that that the penalties are excessive, the registration and reporting duties are burdensome and this section could have a stifling effect on the creative industries.

Further, in terms of penalties for non-compliance with registration requirements that need to be instituted, *MultiChoice*, advised that Section 5(1B)(a) need to be amended to read as follows: "(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. “In addition, it was suggested that Section 5(1B) (b), (c), and (d) need to be deleted.

1. **Avoidance of double payment to a performer for the same act**

*MultiChoice proposed that* Section 5(5) need to be amended to read as follows: "(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 copyright subsisting in the sound recording, in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978)."'

1. **Minister’s regulatory powers and compulsory contractual terms**

Some of the stakeholders particular the broadcasters submitted that they strongly support the principle that contracting parties must negotiate in good faith and that the written agreements must clearly provide adequate protection of the rights of the respective contracting parties. It was advanced that the provision that empowers the Minister with overly broad powers will restrict a party’s freedom to contract. It was further advocated that 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. Further, it was highlighted that concerns were raised in relation Section 39 of the Copyright Amendment Bill, which will result in parties being unlikely to enter into agreements as they cannot negotiate independent contractual terms. The resultant will have a negative impact on creators in the value chain.

It was then suggested thatSection 8D should be amended to read as follows: "(3) Without specifying the content of the 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 to the performer must be paid; (d) the period of the agreement; (e) a dispute resolution mechanism.; and (f) that both parties sign the agreement". Further, it was also suggested that Section 3A(3)(a) in clause 3 to read as follows: “The written agreement contemplated in sub-section 2 must at least address the list of contractual terms as may be prescribed."

1. **Three-step test**

As highlighted throughout the report, the advocates of the “fair dealing” doctrine have stressed that the core of the policy narrative is the need to ensure that the imposition of exceptions and limitations adhere to the “Three-Step Test”. Further, it is emphasised that international treaty law does not prohibit the introduction of exceptions and limitations to copyright, they require that this must be done in adherence to the three-step test.

Further, it was submitted that socio-economic impact assessment should be conducted in respect of each of the proposed exceptions and limitations, involving and engaging the affected rights-holders, to ensure that proposed exceptions and limitations satisfy the requirements of the three-step test before the Bills are finalised and signed into law. Most of the advocates of “fair use” doctrine hold a different perspective. Their arguments have been recorded elsewhere in detail in this this report.

1. **Technology Protection Measures**

Some of the stakeholders have argued that despite the amended and improved wording proposed in the definition of “Technological Protection Measures” and “Technological Protection Measures Circumvention Device or Service”, these are still not enough to render the Bill Treaty compliant in line the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, 1996, and the Beijing Treaty.

Further, some of the interested parties as recorded in part A of the report, have advocated that new Sections 8E, 8F, 8G and 8H, identical to proposed Sections 28O, 28P, 28R and 28S of the Copyright Amendment Bill. It was advanced that any issues pertaining to the proposed sections of the Copyright Amendment Bill will apply accordingly. These clauses are highly problematic as they encourage parties who are interested to manufacture and deploy circumvention tactics and devices to base their operations in South Africa. It was submitted that all the provisions relating to TPMs need to be re-assessed to provide adequate and effective legal protections against the act of circumvention of TPM devices as required in the relevant treaties.

Most of the stakeholders have advocated that an introduction of a new enforcement remedy that would assist rights holders and protect consumers in South Africa against online infringements and piracy should be crafted. Including provision that will counterfeiting activities is required.

1. **Conclusion to Part A & B**

The stakeholders emphasised the need for the reform of the copyright and performers’ protection legal framework.It was highlighted that South Africa’s copyright and performers’ protection legislation Regime need to have an ability to withstand the digital age. The public hearings strongly demonstrated that there are different perspectives that influenced legislative framework of the *Copyright and Performers’ Protection Regime*. Policy considerations such as equity, responsiveness and efficiency (costs and benefits) need to be taken into account in framing legislation for Copyright and Performers’ Protection Rights. The transformative agenda influenced by inclusive sustainable mission need to be mapped taking into account the needs of the creators. A balancing act is needed to pull the different perspectives in an equilibrium. At the heart of the policy debate is the mission to realise an inclusive and sustainable economic development agenda.

**Part C:**

**INPUTS FROM PARLIAMENT’S CONSTITUTIONAL AND LEGAL SERVICES AND RESPONSES FROM THE DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION TO ISSUES RAISED DURING PUBLIC HEARINGS**

**Inputs from Parliament’s Constitutional and Legal Services**

Senior Parliamentary Legal Advisor, Adv van der Merwe, representing Parliaments Constitutional and Legal Services (CLSO) provided inputs on the issues raised during public hearings. The inputs focussed on issues of constitutionality; compliance with parliamentary processes; compliance with legal drafting principles and whether the words of the bills give effect to the policy decided by the Committee. In response to issues raised during public hearings, the CLSO highlighted the following:

|  |  |
| --- | --- |
| **Public comments** | **CLSO responses** |
| **Constitutionality**  Arbitrary deprivation of property | In respect of all concerns related to arbitrary deprivation, that Section 25 of the Constitution does not create a positive right to property – only a right to not be arbitrarily deprived and that deprivation must be in terms of a law of general application. They argued that the two Bills are laws of general application and that any deprivation that results of the proposed Bills is not arbitrary. Copyright has always been subject to exceptions. If that was not the case, Copyright would limit various the POSITIVE rights contained in our own Constitution such as the right to the right to equality (s9); to human dignity (S10); to freedom of expression (s16); to a cultural life (S30); and to education (S29). In *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002)* the court indicated a number of factors that must be considered to determine if deprivation is arbitrary:   * Purpose of the law and deprivation: The purpose of the exceptions in the remitted Bills is to balance the above rights with the already established right in Copyright and to align copyright with the digital era and promote multilateral development, which includes advancing constitutional values and human rights. These purposes are aligned to international developments; * Extent of deprivation and persons affected: The exceptions are subject to a general four-factor test in clause 12A*(b)* and listed exceptions are subject to specific limits. The exceptions are thus not open ended; * Nature of property: Intellectual property is not land, nor corporeal (thus does not require “a more compelling purpose” as for land).   Considering the above, Parliament’s Constitutional and Legal Services Office is of the view that the exceptions and limitations in the Bills will pass Constitutional muster. |
| **Section 79(1) process and consultations**  That the National Assembly unjustifiably limited its 79(1) process  Concerns raised that some submissions were not taken into account | Part 8 of the Joint Rules of Parliament deal with the procedures for remitted bills- the Bill is referred to a Committee who must consider the reservations and report on it. Joint Rule 203(2) states that a Committee must “ confine itself to the President’s reservations”  Where submissions to the Portfolio Committee went broader than the reservations (Sections 12A, 12B, 12C, 12D, 19B and 19C and compliance with treaties), the Committee was accordingly advised to limit consideration to the reservations of the President. The Portfolio Committee could not consider the whole of the two bills and start “afresh” as proposed by some stakeholders. The only reason the Select Committee in the National Council of Provinces was able to start “afresh” was due to the change in classification of the bills from Section 75 to Section 76, it now required to follow a Section 76 process and can only do so by considering the whole of the Bill in accordance with the Section 76 process.  Content advisors, researchers, CLSO and the Department of Trade, Industry and Competition went through every submission presented to its various committees and commented thereon. Committees in both Houses have considered every submission that was submitted, presented or commented on. No obligation on a Committee to accept that was is stated or suggested in every submission- the only obligation is to give meaningful opportunities to the public to participate and take measures to ensure that people have the ability to take advantage of the opportunities provided. |
| Definitions  “broadcast”  “authorized entity” | Parliament’s Constitutional and Legal Services confirmed that this definition has been contentious in the Portfolio Committee as well.  Responded that when comparing the definition in the Bill with the Constitutional Court’s read in, it seems that paragraphs *(a)* and *(b)* of the definition do cover everything. For clarity, they suggest the following amendments to paragraph *(b)*:  “*(b)* an entity, including a government institution or non-profit organization, that provides education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis as one of its primary activities or institutional obligations;’’ |
| Litigation as a concern | Parliament’s Constitutional and Legal Services cautioned that a fear of litigation should not hinder the processing of legislation. If a section is found to be unconstitutional, that section only will be struck off the statute book – not the whole Act. Furthermore, “fair dealing” has had its fair share of litigation. Reported cases dealing with “fair dealing” in copyright, in one online legal programme exceeded 1000. In a well-known textbook – Burchell on Intellectual Property law, 21 cases dealing with the fair dealing doctrine was discussed. Parliament’s Constitutional and Legal Services further disagreed that courts were not given sufficient guidelines on how to deal with the “fair use” doctrine. They highlighted clause 15, section 12A*(a)*, which gives a number of examples of what constitutes fair use; clause 15, Section 12A*(b)*, which sets out 4 clear factors that a court must take into account when determining if use was fair; clause 15, sections 12B to 12D, clause 21, sections 19B, Clause 22, Section 19C and D, which all set out very specific rules that apply to each exception. They also advised that using judgments from other countries is accepted in South African courts and thus there are many cases for courts to be guided by: “For more than three hundred years the South African judiciary has, "with a minimum of fuss - and mostly without specific mention that they were doing so - adopted a comparative law approach" with regard to foreign precedent” (Rautenbach, “The South African Constitutional Court's Use Of Foreign Precedent In Matters Of Religion: Without Fear Or Favour?” in PER / PELJ 2015(18)5.) |
| Non-compliance with Berne Convention, international treaties and TRIPS Agreement Three-step test | Parliament’s Constitutional and Legal Services indicated that when considering a number of international sources (no South African judgment exists to give guidance), the Bills do comply with the Three Step test:   * The Max Planck Institute indicated that the three steps must be considered as a whole when assessing exceptions and that the step related to “certain specific cases does not prevent legislatures from introducing for instance fair use, as long as the scope thereof is reasonably foreseeable (fair use is not more or less foreseeable than fair dealing); * Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 (1969) 8 ILM 679, indicates that the subsequent practice of states in applying a treaty can be used to indicate how the states have interpreted the treaty and thus give content to treaty obligations; and * The Australian Law Reform Commission considered this Article 31 of the Vienna Convention and concluded: “The ALRC considers that fair use is consistent with the three-step test. This conclusion is based on an analysis of the history of the test, an analysis of the words of the test itself, and on the absence of any challenge to the US and other countries that have introduced fair use or extended fair dealing exceptions.”   Parliament’s Constitutional and Legal Services does not support the inclusion of the test *verbatim* in text of the Bills as the three step test was never intended for inclusion in legislation as a restrictive measure, but rather as a guide to governments when making laws. If included in law, it is as a preamble. |
| Section 19D | Advised that section 19D must provide for all works and all persons with a disability, in order to comply with the Constitution. They recommended amendments to the Copyright Amendment Bill to align section 19D and 28P with the Constitutional’s Court’s decision, which is captured below the table. |
| Technological Protection Measures and Copyright Management Information | Parliament’s Constitutional and Legal Services Office expressed the view that the Bills do comply with the Beijing and WIPO Copyright Treaties. They highlighted the World Intellectual Property Organisation’s statement on exceptions and limitations: “Limitations and exceptions to copyright and related rights vary from country to country due to particular social, economic and historical conditions. International treaties acknowledge this diversity by providing general conditions for the application of limitations and exceptions, leaving national legislators to decide if a particular limitation or exception is to be applied and, if it is the case, to determine its exact scope.” |
| Offences | It was confirmed that all the offences require authorisation only – not that it must directly be granted by the owner. Further all offences are tempered by the requirement that the person should have had actual knowledge that the act is infringing. In this regard the propose an amendment to section 27(5B)*(a)*(ii) and (iii), as (ii) taken out of the context of (iii) is allowed by section 28P and can thus not constitute an offence:  “(5B) *(a)* makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if such person—  (i) knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure; or  (ii) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure; **[or**  **(iii) knows that the service contemplated in subparagraph (ii),]** which they know will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;” |
| 25 years reversion right | The CLSO advised that the reversion right will only apply prospective - There is thus no deprivation. Section 22 of the Constitution allows that “(t)he practice of a trade, occupation or profession may be regulated by law.” This is accordingly how the trade / occupation related to music and literary will work going forward. i.e. any person that enters into an agreement after the Amendment Act becomes operational, for assignment of copyright in a literary or musical work, will know that said assignment ends after twenty-five years and the copyright will revert to the author. |
| Ministers regulatory powers and compulsory contract terms | The CLSO indicated that there is no Chapter 2 “right to freedom to contract” in the Constitution. Section 22 of the Constitution provides: “Freedom of trade, occupation and profession.—Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.” They advised that even if argued that these contracts underpin the practicing of a trade (etc.), the constitution still allows that to be regulated by law. Parliament’s Constitutional and Legal Services pointed out that many contracts have prescribed formalities and terms, for example a surety agreement and the sale of immovable property. They also reminded the Committee that the Farlam Commission’s – CRC report indicated that “the dti is urged to draw up standard contracts between performers and record companies that are fair to both sides and that parties to such agreements are encouraged to use. See Chapter 10, paragraph 10.12.5” |

**CLSO Proposed amendments**

Considering the BlindSA vs Minister of Trade, Industry and Competition Constitutional Court judgement, the CLSO proposed the following amendments to the Copyright Amendment Bill to align section 19D and 28P with the Constitutional’s Court’s decision:

“**‘authorized entity’ means—**

*(a)* … *(no changes)*

*(b)* an entity, including a government institution or non-profit organization that provides education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis as one of its primary activities or institutional obligations;’’;

**General exceptions regarding protection of copyright work for persons with disability**

**19D.** (1) **[Any]** An authorized entity, or any person as may be prescribed and who serves persons with disabilities**~~[, including an authorized entity,]~~** may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

*(a)* ….; *(b)……; (c)….. (no changes)*

(2) *(a)* …. *(b) ….*. *(no changes)*

(3) A person with a disability, or someone acting on their behalf, including an authorized entity, may make an accessible format copy of a work for the personal use of the person with a disability or otherwise may assist the person with a disability to make and use accessible format copies where the person with a disability has lawful access to that work or a copy of that work.

~~(3)~~ (4) *(a)* A person with a disability or a person who serves persons with disabilities, including an authorized entity, may, without the authorization of the copyright owner export to, or import from, another country any legal copy of an accessible format copy of a work [referred to in subsection (1),] for distribution, or to make it available to persons with a disability, as long as such activity is undertaken on a non-profit basis by that person.

*(b)* … *(no changes)*

~~(4)~~ (5) The exception created by this section is subject to the obligation of indicating the source and the name of the author, if it appears on the work, on any accessible format copy.’’.

**Exceptions in respect of technological protection measures**

**28P.** (1) *… (no changes)*

“**[(2)]** (Delete in full)

~~(3)~~ (2) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure **[in terms of subsection (2)*(b)*]**shall maintain a complete record of the particulars of the—”

In responding to inputs raised during public hearings, the CLSO proposed the following amendments to the Copyright Amendment Bill:

* **clauses 5 (S6A) and 7 (7A)**

“(1) For the purposes of this section, ‘royalty’ means the gross profit made on the exploitation of a literary work or musical work by a copyright owner, who is not the author of the work, or a person who has been authorized by the author, as copyright owner, to do any of the acts contemplated in section 6 / 7.”

* **Clause 24, section 21(3)**

“(3)(b) Where the agreement contemplated in subsection (1)(c) 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 authorize any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to such rights as may be necessary for the purpose of the commission, with the remainder of rights vesting in the author.”

* **Offences – clause 29, section 27 (3):**
* (5B)*(a)*(ii) taken out of the context of (iii) is allowed by section 28P (i.e. MUST read the two together always).

(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

*(a)* makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if such person—

(i) knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure; or

(ii) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure; **[or**

**(iii)** **knows that the service contemplated in subparagraph (ii)]**, which they know will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;”

**Responses from the Department of Trade, Industry and Competition to issues raised during public hearings**

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| **COPYRIGHT AMENDMENT BILL** | |
| **Definitions** | |
| **Public Comment** | **DTIC response** |
| * The proposed amendment to the definition of “broadcast” in the Bills is vague and could create uncertainty for the creative sector, (NAB). * Until the Draft White Paper process has been finalised, and the necessary legislative amendments have been effected, the current definition of “broadcast” in the Copyright Act, 1978 should be retained. -NAB * There is no recognition of the relationship between the definitions of “broadcast” and that of “programme-carrying signals (Anton Mostert), Prof Owen Dean, Anton Mostert * The new definition reduces the scope of 'broadcast' and the protection afforded under copyright law. (Multi Choice) * The current definition of “broadcast” in the Bills is not fit for purpose in several respects.- (eMedia) * The definition of "broadcast" in the Copyright Bill and PPA Bill has also introduced features of the Beijing Treaty definition such as "partially or wholly" that are unclear. | * The definition of broadcast was deliberated and consideration was made to the white paper process underway for the Electronic Communications Act of 2005 and the international treaty processes where discussions on broadcasting are still on-going. There were concerns noted with unintended consequences of the proposed changes. * There was a discussion on the alignment to the international treaties and implications on wire and wireless means of broadcasting. * The current definition in the Bill was retained and it was recommended that when future policy direction changes, the definition can be considered. * The definition as it stands intended to incorporate the programme carrying signal particularly the transmission by satellite. If that is unclear, it can be reviewed. * It is recommended to retain the definition in the Act. |
| * The definition of broadcast was deliberated and consideration was made to the white paper process underway for the Electronic Communications Act of 2005 and the international treaty processes where discussions on broadcasting are still on-going. There were concerns noted with unintended consequences of the proposed changes. * There was a discussion on the alignment to the international treaties and implications on wire and wireless means of broadcasting. * The current definition in the Bill was retained and it was recommended that when future policy direction changes, the definition can be considered. * The definition as it stands intended to incorporate the programme carrying signal particularly the transmission by satellite. If that is unclear, it can be reviewed. * It is recommended to retain the definition in the Act. | * The definition of accessible format copy was aligned to the language in the treaty. It is widened on the form of disability to include other forms of disabilities. * The definition of beneficiary person has been widened to address all forms of disabilities in line with the Constitution. This is to ensure no discrimination. * It is recommended that the definitions be retained as they are in the Bill. * The uniformity of international rights is noted. The Bill provides more rights in line with the Constitution. In our reading, the Marrakesh treaty is not that explicit on national treatment. It gives the national governments the guidance on ensuring support through legal systems and practice, economic situation, social and cultural needs, to persons with disability and ensuring availability of accessible format copies as well as other rights. |
| * A further opportunity which was overlooked is that CAB was the opportunity to provide clarity on who is viewed as a “producer” by adding a definition for this term. -Writers Guild of South Africa * The definition of “producer” should add “or the entity which” after the phrase “the person who”, to align fully with the definition used in the WPPT and seeing that generally producers are corporate entities (record companies) rather than natural persons. -Copyright Coalition SA * Although the Copyright Act does in fact define “dramatic work”, and CAB does seek to introduce a definition for “audiovisual work,” there lacks an appropriate and clear distinction between these works. It may be misconstrued that dramatic work would fall under audiovisual work, at least to some extent, and as such it is imperative to note that although all audiovisual work may be dramatic work, not all dramatic work is necessarily audiovisual work. Furthermore, the flawed inclusion of “dramatic work” under the definition of “literary work” as it currently stands in the Copyright Act is also an outdated approach which does not accurately depict the complexity of such works.- Writers Guild of South Africa | * The definition of producer was raised and deliberated before. It is provided in the Performers’ Protection Amendment Bill. * On the entity related to the definition of producer, in legal terms person can include natural or juristic person. * It is recommended the definition of dramatic work can be reviewed. The proposed definition is as follows: “**dramatic work**” means any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise and any compilation of dramatic works. * The definition in the current Act is as follows: **“dramatic work”** includes a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented, but does not include a cinematograph film as distinct from a scenario or script for a cinematograph film. |
| * The definition of “authorized entity” refers to “the government”. If the intention is to refer to all three spheres of government then it is submitted that the wording can be improved by referring to “…any sphere of government”. If the intention is to only refer to national government then a definition needs to be inserted. -MEC Wengner, WC * The definition of “authorized entity” refers to “non-profit organization”. It is submitted that a definition needs to be inserted referring to the legislation in terms of which non-profit organizations are registered. -MEC Wengner, WC * This definition of ‘audiovisual work’ is identical in effect to the current definition of ‘cinematograph film’. The term is simply nothing more than a synonym for ‘cinematograph film’ as defined in the Act. The current definition of 'cinematograph film' has a very broad meaning and has been interpreted by the court.-Professor Own Dean * The term as defined is largely synonymous with “cinematograph film” as defined. However, the definition creates a new genus of work of which “cinematograph film” is a species. The term “cinematograph film” as currently used in the Act can now have two possible meanings. it is probably better to stay with the existing terminology and delete this definition or possibly have it indicate that it means “cinematograph film”, in which case no further changes are necessary. -Professor Owen Dean * The effect of this definition and the use of the term in the Bill is to create a new category of work eligible for copyright, with no corresponding change to section 2 of the Copyright Act, which lists the eligible works. The term as defined is largely synonymous with “cinematograph film” as defined. However, the definition creates a new genus of work of which “cinematograph film” is a species. The term “cinematograph film” as currently used in the Act can now have two possible meanings. The term indicating the equivalent of the new genus must be changed to “audiovisual work” while the one denoting the species must remain unchanged.-Anton Mostert Chair of IP * The use of audiovisual works as opposed to cinematograph as a work eligible for copyright does not have a rationale because it is derived from the performers treaty and not copyright.-SAIIPL | * The definition of authorized entity is aligned to the Marrakesh treaty. It does not categorise spheres of government. * The definition does not distinguish forms of NGOs, aligned to the treaty. * The definition of audiovisual works has been drafted in a manner that includes the cinematograph film. The audiovisual works was considered in order to take into account the treaty language. The view is that the term commonly utilized now is audiovisual works. An example of use is in the US copyright Act. |
| * The definitions of ‘technological protection measure’ and ‘technological protection measure circumvention device’ are incorporated by reference from the Copyright Act, and PASA suggests a loose-standing set of definitions in the PPAB.-PASA, SAIIPL * The definitions of “technological protection measure” and “technological protection measure circumvention device and service” are not compatible with the WPPT’s requirement to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures”.-PASA * The definition of visual artistic works and resale royalty rights to be recast in a new chapter.-SAIIPL * Definition of Commission be provided for.-Professor Owen Dean, MultiChoice * Clause 1(k)-This provision provides for the insertion of a definition for “technological protection measure circumvention device or service”. The last line in this proposed definition – “protection measure;” – needs to be underlined in its entirety to indicate the insertion.-MEC Wengner, WC | * The definitions are in both Bills. * The definitions were deliberated in the PC and the definitions provide adequate legal protection and effective legal remedies. The implications of adding stronger TPMs was found to have serious negative implications on areas such as competition and consumer protection. * The definition of artistic visual works and resale royalty rights comment is noted. The reference to section 37 of the Berne Convention in the RRR can be reviewed to amend the section. * The Commission is defined in the Intellectual Property Laws Amendment Act. The transitional provision provides clarity on the definition of the Commission. * The drafting suggestion is noted. |
| * Since this Bill intends to bring the copyright law into the 21st century, it is important to define common words in the digital space, such as ‘data’, ‘digital’, ‘digital rights’, digitisation’, ‘digital curation’ and ‘digital or e-licences’ and ‘(digital) preservation’. –Creative Commons * Wire and wireless are not defined in the CAB in sections 6A, 7A, 8A. It is noted in the Memorandum on the Objects of the Copyright Amendment Bill, that the proposed amendment to section 9 of the CAB provides for the distribution of a sound recording to the public “by wire or wireless means, including internet access”.- * The definition of open licences, but are concerned that this is not sufficiently specific about what the acts that may be undertaken are-International Federation of Library Associations and Institutions * The definition of orphan works be extended to include works in which related rights subsist also, in order to avoid a situation where copyrights can be cleared, but that related rights are still an issue.-International Federation of Library Associations and Institutions | * The comments are noted. The wording is commonly used and aspects of it can be found in the dictionary. They do not have to be defined in the legislation. * Some of the terms are not in the Bill, such as digital curation, e-licences, digitization and will not be advisable to define them without specific reference in the Bill. * Wire and wireless is treaty language. They are not defined in the Treaty, but used to distinguish such platforms as the internet or online access. * The definitions of open license and orphan works clarifies what they mean. |
| **Local Organisation** | |
| **Public Comment** | **DTIC response** |
| * Local organisation provision in section 22 be withdrawn. Giving arbitrary powers to Minister.-SAIIPL * This proposed amendment should be rejected by the NCOP as it is open to potential abuse and does not appear to serve any other purpose. -Independent Producers Organisation (IPO), the Independent Black Filmmakers Collective (IBFC) and Animation SA (ASA) | * The copyright vested in local organization will operate similarly to the state and international organization that were already in the Copyright Act. * There is copyright that can be generated by a local organization and not infringe copyright of an author. |
| **Sections 6A, 7A and 8A** | |
| **Public Comment** | **DTIC response** |
| * The way in which the new statutory royalty entitlements under Sections 6A – 8A were conceptualized and hastily drafted by the National Assembly’ Portfolio Committee introduces so much legal uncertainty on how royalty rates could be determined, payable and shared, that it would likely not provide substantial practical benefits for the intended beneficiaries. -Independent Producers Organisation (IPO), the Independent Black Filmmakers Collective (IBFC) and Animation SA (ASA) * Section 6A – 8A of the Copyright Amendment Bill. If the provisions are to be proceeded with, the advertising industry should be excluded from its operation. -Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA) * The proposed Sections 6A, 7A and 8A of the Copyright Act be rejected by the NCOP Select Committee, or at least that the restrictive sections of CAB be amended to cater for contractual freedom through the introduction of the proposed phrase where relevant.-Writers Guild of SA * The fundamental difficulty with sections 6A and 8A of the Copyright Act and section 3A of the Performers' Bill are that they contemplate a single remuneration model across all forms of copyright works, namely the payment of a percentage of royalties.-Multichoice, Baker and McKenzie, Spotify, | * The royalty regime is in the copyright Act although limited in scope (sound recordings, performers), the royalty sharing, the language, assignments, contracts are in those provisions, this was not arbitrary but included to create more certainty and strengthen provisions for the copyright based industries. * The provisions in section 6A, 7A and 8A provide a royalty regime. These provisions will provide more protection for authors and copyright owners as they aim to create an enabling environment. * The legislation provides a framework but contracting parties have the freedom to arrange how they make arrangements. The recommendation to exclude a sector is noted. * The contractual provisions in the royalties are meant to assist authors and other rightholders with guidelines on how to approach their rights in the contracting. * ***The remuneration model is noted. It is recommended that the amendment be effected by including equitable remuneration or royalties in section 8A to take into account other modes of remuneration.*** |
| * The Copyright Bill accordingly eliminates the parties' ability to contract on mutually beneficial terms by narrowly referring to a "share of the royalty". The proposed new s6A and 8A are accordingly so narrow and inflexible that they are unworkable. Concerned that it will be extremely difficult to implement and extremely disruptive to contracting workflows and schedules.-Multichoice * Suggests that Section 8A be struck from the CAB. The point remains: section 8A of the CAB should be removed, and performers’ rights left to be regulated by the Performers’ Act.-eMedia * 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". They 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.-MultiChoice | * The current Copyright Act has the ‘share of royalties’ and agreement. * The royalty provisions should be viewed as measures to create clarity on the royalty regime and not an imposition on contractual freedom. They will create an enabling environment and level the playing field. * The decision to include the performers in the copyright was to create a link between the two bills and to ensure a stronger protection for performers. * The Copyright Act is linked to the performers and the royalty provisions were in the Act as far back as 2002. The definition of performance was incorporated in 1992. * Related rights” refer to the category of rights granted to performers, phonogram producers and broadcasters. In some countries, such as the United States of America and the United Kingdom, these rights are simply incorporated under copyright. * Other countries, such as Germany and France, protect these rights under the separate category called “neighbouring rights.” * In South Africa, related rights are incorporated under copyright and protected under the Copyright Act 98 of 1978 and the Performers Protection Act 11 of 1976. * On the word execution in section 6A, authorization is already in the provision. The execution or carrying out of certain actions refers to actions to be taken. The words are sufficient as they are. * **It is recommended that section 8A be retained in the Copyright Amendment Bill.** |
| * For this reason, firmly support the work of creation by artists even as they have moved on with their lives from it, they should be compensated where needed retrospectively to recognise their dignity, ensure equity and enable justice.-Gender Equity Unit- University of Western Cape | * The royalties that are retrospective in nature were in the Bill. They were raised as part of the reservations by the President on the basis of their Constitutionality. * The retrospective sections in 6A, 7A, 8A were removed from the Bill. |
| In section 6A, 'Author' is the incorrect term to use in this context. It should be substituted by a term that is correct in law'. There are a number of circumstances in which the author of work does not hold (and never has held) rights of copyright in a work and is thus not in a position to grant any authority as envisaged. In general, the author, as such is not in a position to grant any rights. It is only when he is at the same time the copyright owner that he has this power to do so. It is accordingly wrong and misleading to suggest that he has any such power simply by reason of being the author of a work. It must be appreciated that the author of a work and the copyright owner/ right holder are two different concepts and must not be confused with one another. The terms are by no means synonymous. The word should be substituted by the term 'copyright holder'. All references in the section to 'author' should be similarly substituted. -Professor Owen Dean | • It is agreed that the author and the copyright owner are not synonymous terms.  • There are instances where the author is the copyright owner. And instances where the author is only an author and not a copyright owner.  • The copyright owner is the one who can exploit the rights provided economically by section 6A or the work.  • For this provision, the author when he/she is the copyright owner, is not the one who authorizes but a person doing such acts on behalf of the author who is also copyright owner.  • The clause and other similar ones (S7A) in our view are clear.  • However, it is recommended the wording can be amended to make this distinction clearer. |
| **Rights of distribution and rental** | |
| **Public comment** | **DTIC response** |
| * Comments made in regard to the revised Section 6 of the Act above on the question of the distribution on the original version of the work. Those comments apply equally to the rental of the original version. This version is covered by the normal principles of the law relating to ownership of physical property and is not a copyright issue.-Prof Owen Dean * Comment includes section 7, 8 * it should immediately be noted that “original” is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic. Is the issue not that it is the unauthorised disclosure of the “original” that   is sought to be prohibited? Third, in relation to  paragraph (d), it is not clear how, factually, an  “original” published edition could be distributed  (as there should presumably only be one such  item). “Distribution” suggests that there are  multiple copies of something.-Anton Mostert | * The comments are noted. * The provisions related to digital rights are derived from the international treaties. The text was used to ensure alignment with the treaties. An example below is from the WCT.   Wipo Copyright Treaty (WCT)   * Agreed statement concerning Articles 6 and 7: As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects. * Article 6 -Right of Distribution * (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. |
| **Reporting requirements (Sections 8A and 9A)** | |
| **Public comment** | **DTIC response** |
| * The requirement of registration and reporting of all commercial uses of every work would be, if enacted, administratively burdensome and unworkable, and imposes unnecessarily excessive penalties for non-compliance. –Amazon * To compound the potential negative impacts of Section 8A, it also seeks to criminalize the non-reporting of all commercial uses that may be made of audiovisual works, including television commercials. Section 8A(5) purports to introduce a mandatory reporting obligation that would require of all users of audiovisual works, including copyright owners and their licensees, to register each act of commercialization and to submit a ‘complete, true and accurate report’ to each performer that may appear in an audiovisual work, even to every ‘extra’ or background performer appearing.-Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA) * Further, the registration and reporting requirements in the CAB or PPAB are too prescriptive, and presume an ongoing administrative relationship that may not be appropriate for the specific use or creative work.-Spotify | * The non- reporting is a serious issue that has impacted on many performers whose works is played on radio or television or any medium for commercial purposes without any compensation. There are series played repeatedly on television and actors have indicated that they are not paid for those works. * *The CRC found: music usage information (music log sheets)- It was noted that music log sheets are kept mainly by broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able accurately to distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties. For essential music users, the CRC believes that the legislation should be amended to make it compulsory for them to retain music usage information records* * The reporting requirements are necessary to provide certainty on payments of royalties for commercial usage. * The reporting provisions have a rationale and they address the challenges with royalties. This impacts the music and audiovisual sector. * The reporting and recordal of commercial uses was introduced to address the policy gap of lack of royalty payments and no mechanism to ensure the use of works of performances for commercial purposes are addressed. |
| **Section 12A- Fair use** | |
| **Public comment** | **DTIC response** |
| * Clause 15 (Relating to Section 12A)- Suggest that, in the bullet points listing potential purposes covered, that the following be included as a point a(viii) and a(ix): • repair and the sharing of repair information • provision of access to orphan works.-International Federation of Library Associations and Institutions * Recommend that: (i) the over-broad fair use doctrine is revised, (ii) that the words “such as” are struck, (iii) that the provision be narrowed down to the words not in the US law.-Dalro * An aggravating factor regarding the fair use provision introduced under section 12A in the CAB is the fact the words “such as” in the phrase “for purposes such as the following” were inserted by the previous Portfolio Committee at-the-last-minute, at the instigation of the proponents of the fair use exception, without affording stakeholders the opportunity to debate the matter.-Copyright Coalition of South Africa * The expression “such as” must be removed, as it extends the application of this already open-ended exception to an undeterminable remit of uses, instead of being restricted to certain special cases only.-International Publishers Association (IPA), Dalro * The 4th factor is incompatible with the three-step test, as it conditions the concept of normal exploitation of the work to an artificial substitution effect. –IPA * Provide guidance/criteria to courts in introducing new future uses. Maintain the United States’ fair use criteria as requested by some of the entities that object to the modified factors in the CAB. Effectively, abandon in particular s12A(b)(iii)(bb) and s12A(b)(iv). –Prof Forere | * Because of ‘such as’ repair and the sharing of repair information does not have to be added to the list. Several stakeholders raised concern with the longer list of examples in fair use exception citing that they are more than the US examples. It is recommended the existing purposes can be retained as are. * The expression ‘such as’ was subject to public consultation. It contributes to the fair use to be future proof. It is not necessary to make a lengthy list of examples, as ‘such as’ covers many activities. * South African judges have already been applying the four factor U.S. fair use test in their fair dealing jurisprudence. * The fair use has factors that guides in terms of what constitutes fair usage. This point is made regarding the fair use criteria.   Subsection (b) in section 12A   * (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to— * (i) the nature of the work in question; * (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;   (iii) the purpose and character of the use, including whether—   * (aa) such use serves a purpose different from that of the work   affected; and  (bb) it is of a commercial nature or for non-profit research, library or  educational purposes; and   * (iv) the substitution effect of the act upon the potential market for the work in question. * It is recommended that section 12A(b) (iv) be removed or reference to ‘substitution’ be deleted. In the US is factor 4, ‘(4) the effect of the use upon the potential market for or value of the copyrighted work.’ * Section 12A was reopened for further deliberations. The four factors and purposes of fair use were discussed in the parliamentary consultative processes. |
| **Socio-economic impact assessment** | |
| **Public comment** | **DTIC response** |
| * A material procedural oversight during the development of the Copyright Amendment Bill is the absence of a meaningful economic impact assessment that should have informed the drafting of the Bill.- MEC Wengner * Widespread public consultation process and a proper economic impact assessment be conducted to assess for the first time the impact of the amendments on the various copyright sectors.-Dalro * Lack of a proper Socio-Economic Impact Assessment System (SEIAS)-Copyright Coalition, MEC Wengner, PASA * Stakeholders have raised a concern that the fair use was not assessed, analysed or impact assessment conducted on it. | * The Department conducted a regulatory impact assessment study finalised in 2014. The study was not published to the public. The requirement for legislation is not a regulatory impact assessment study. The study mentions fair use and other issues considered in the Bill. * The Socio Economic Impact Assessment System was developed by the Department of Performance and Monitoring and Evaluation in the Presidency. This one is the legislative requirement. * In February 2015, Cabinet approved the SEIAS in line with the Medium Term Strategic Framework (MTSF) to improve policy development and create a more efficient and robust legislation and regulations. Cabinet adopted a resolution on the establishment of the SEIAS Unit in the Presidency to facilitate and provide guidance to national departments on the application of SEIAS to the design of policies, legislation and regulations. * According to Cabinet Resolution, all policies, bills and regulations were to be subjected to SEIAS, to assess their impacts and contribution to the National Development Plan priorities before their approval. The CAB was subjected to a SEIAS. * The department conducted various studies that informed the Bill, the Copyright Review Commission report is one of such studies. * The Bill evolved and was informed by various stages of public participation and some provisions were amended, this means the study would have to be conducted each time there are new recommendations. |
| **25 years reversion right** | |
| **Public comment** | **DTIC response** |
| * This provision to be added to the current provisions relating to the formalities of assignments, simply states that every assignment of copyright in a literary or musical work shall only be valid for 25 years, and not potentially the current 50 years after the death of the author. –PASA * An unwaivable 25-year limitation on assignment terms of literary and musical works would mean that a producer can only guarantee the risk-free commercialization of a film for that period, which is half the time currently allowed in terms of the Act (50 years) and about a third of the time afforded under US and UK law (75 and 70 years respectively). -Independent Producers Organisation (IPO), the Independent Black Filmmakers Collective (IBFC) and Animation SA (ASA) * The Copyright Amendment Bill proposes an unwaivable 25-year limitation on all assignments of rights in literary and musical works that would pose great challenges to a producer’s ability to secure rights clearances and consolidate all rights in an audiovisual work. Consolidation of rights in the producer is a fundamental requirement in the film and television industries. –Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA) * The prevention of certain authors and performers from licensing or assigning their rights for longer than 25 years, which would reduce incentives for producers to invest in content in the territory, likely reduce the worth of content if there are conflicting interests of multiple parties, and require the needless renewal of many transfers, even when all parties are satisfied with the original deal struck. -Amazon * The proposed 25 year reversion clause will allow actors an opportunity to address exploitative contracts they may have entered in the past, so the abuse does not continue into the FUTURE. -SAGA | * The reversion period is 25 years informed by the Copyright Review Commission (CRC) report. The period of reversion is informed by a study. In the US it is 35 years, in view of the fact that the period of copyright protection in the US is much longer than in South Africa (i.e 70 years). * The 25 years reversionary right is informed by the Copyright Review Commission report recommendations. This right is not unique to SA. Some countries have the reversionary rights. * The reversion clause can be expanded more in the Regulations. * The parties can renegotiate their agreements. * “The CRC believes that the Copyright Act must be amended to provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights. Such an amendment will help relieve the plight of composers whose works still earn large sums of money, which are going to the assignees of the composers’ rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken. Page 5 of the CRC Report”. |
| **Compulsory and standard contractual terms** | |
| **Public comment** | **DTIC response** |
| * Reject all provisions of contract regulations-SAIIPL * The proposed Sections 6A, 7A and 8A of the Copyright Act be rejected by the NCOP Select Committee, or at least that the restrictive sections of CAB be amended to cater for contractual freedom-Writers Guild of SA * The Minister of Trade and Industry is empowered to set compulsory and standard contractual terms to be included in private agreements between parties, including between “the method and period within which any royalty or equitable remuneration must be paid by the relevant producer, broadcaster or user, to the performer” –Spotify * Unfair contract terms and unenforceable contract terms (currently dealt with in the proposed s39(cG) and 39B of the Act respectively) should rather be dealt with by the Tribunal.-MultiChoice * Overall comments were made about freedom to contract and powers of the Minister to interfere in private contracts. i.e * Minister's powers to prescribe compulsory and standard contractual terms (clause 35(b) of the Copyright Bill). * Unenforceable contract provision to be removed.-SAIIPL * 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).-MultiChoice | * *“the dti should develop a standardised template for contracts between performers and recording companies that will deal with all the above-mentioned loopholes and should encourage performers and recording companies to use this contract.”* CRC Recommendation. * This recommendation was focusing on the music industry, however, through developments in the industry, practices, consultations and studies, it was found that unfair contracts cuts across in the creative sector hence the standard contract provisions were developed. * The powers of the Minister are meant to create an enabling environment. The Minister will not interfere in private contracts but will create a framework to guide contracting parties when they carry out contracts. * The provisions on unenforceable contracts are aimed at ensuring adherence to the Act. Where the rights provided in the Act are violated, the contract becomes unenforceable. This is additional protection provided. * The policy objective applies to sections 6A, 7A, 8A and the regulations on the contractual terms. * The Tribunal will play an important role in terms of disputes that arise from the agreements. * There is example of government globally that set the framework in copyright contracts to address challenges in contractual issues. |
| **Contractual terms** | |
| **Public comment** | **DTIC response** |
| * Prescribing royalty rates or tariffs for various forms of use, particularly Resale Royalty Rights. SAIIPL * Section 39(Cl) be reworded to specify Minister will set royalty rates for resale royalty rights.-SAIIPL | * The royalty rates are not legislated. There has been challenges with the setting of the rates and these have resulted in court intervention before. * The Resale Royalty Rights is a specific type of royalty involving virtual artistic works. Governments are allowed to determine matters of collections and amounts how they regulate this form of right in terms of the Berne Convention (Article 14’ter. * It is recommended the provision in section 39 (Cl) can be focused on the resale royalty rights and the royalty for other uses be left amongst contractual parties to determine. It is recommended that section 39(Cl) be amended**.** |
| **Commissioned works – Section 21** | |
| **Public comment** | **DTIC response** |
| * The proposed changes will likely result in legal uncertainty on key issues relating to the commissioning of works that do not currently exist in the Copyright Act, and we submit that these proposed changes should be rejected by the NCOP. -Association for Communication & Advertising (ACA) and Commercial Producers Association (CPA) * The proposed amendments to section 21 should be removed in their entirety.-e Media * The inclusion of a requirement to enter into an agreement for commissioned works and the potential limitation thereof could create confusion for parties in respect of such agreements and such limitations. The NAB therefore opposes the proposed amendment of section 21(1)(c) and recommends keeping section 21 as it is currently in the Copyright Act.-NAB * The value chain in the film industry is complex and the investment that goes in the production is massive yet certain sections such as ownership on commissioned works in the film industry are unusual and can be a deterrent. -Prof Forere | * The challenges arise where work is commissioned. One of the challenges is where the copyright owner who commissioned the work, utilizes the work for purposes other than that which was commissioned for or where he fails to utilize the work at all and the work lies dormant. Section 21 of the Act must be amended to give the author of the copyright the right to apply before the Tribunal for a license to use the work where the person who commissioned the work has not exploited the work within a reasonable time and where he is using the work for purposes other than what is commissioned for. * The commissioned works provisions were informed by challenges with the practices on these works. * The Commissioned works was deliberated extensively in the PC at the time. Measures were added for more protection and certainty in different scenarios wherein the author did not have recourse before. |
| **Section 12B-D** | |
| **Public comment** | **DTIC response** |
| * Concerns were raised regarding section 12B(6), regarding its alignment to the Wipo Copyright Treaty, the alignment with the current provision in the Act in section 23(2), conditions of distribution versus importation. It was recommended that the expression “or outside the Republic” be deleted from the provision.-International Publishers Association (IPA), PASA, Amandla Omnotho, SAIIPL * Section 12C -This section should be reviewed to (i) apply only to temporary copies and not adaptations, given that adaptation is a copyright law concept that goes beyond the formatting of a text for example. –IPA, SAIIPL * The format shifting in section 12C(b) is suitable for personal use as recommended by the CRC.-SAIIPL * Section 12B, sub-section 3, is unclear and seemingly empties the right of adaptation, by giving a blank permission to produce adaptations, without any requirements or conditions of use. It should be deleted. –International Publishers Association (IPA) * Section 12B(1)(c) should be amended to remove the obligation to delete any broadcast that includes ephemeral works after six months. The current drafting only allows a broadcaster to retain a broadcast after six months if the broadcast is of “an exceptional documentary nature”. Whether a broadcast meets this standard at the point at which the broadcast is meant to be deleted is a vague question. –e Media * It is therefore submitted that proposed section 12B needs to be reassessed.-MEC Wengner * Personal Use - The scope of the personal use provisions in section 12B(h) is too wide and there is a missed opportunity to introduce private copying remuneration for authors. -the International Federation of Reproduction Rights Organisations. * Section 12B(1)(a) sets out an exception for quotation, which is unduly broad. In respect of sound recordings, there is no need for a quotation exception. -RISA * Reject section 12B on translations as it violates three step test and Berne Convention-SAIIPL * We submit that the NCOP should reject sections 12B – 12D-Copyright Coalition * Sections 12C and 12D are not labelled as exceptions and may be better termed   limitations.-Joint academic opinion   * It is not clear what constitutes a reasonable price or reasonable terms and conditions. These provisions can be interpreted very broadly and abused.-MEC Wengner | * TRIPS article 6 allows exhaustion of rights and for the country to choose which system of exhaustion which then determines how the parallel import will work. The term exhaustion refers to the principle in IP law to the principle that a right holder cannot prevent the further distribution or resale of the goods after consenting to the first sale also known as the first sale doctrine. Once the good has been put on the market by or with the consent of the right holder further circulation cannot be controlled. Parallel imports refer to the original products sold by the right holder or with his consent in another market and then imported through a channel “parallel” to that authorized by the right holder. Parallel imports are not counterfeit or pirated goods and they do not infringe Intellectual Property Rights in the country of Origin. * Parallel importation would allow distributors and booksellers to choose from a range of world markets as opposed to the South African market, which could lead to a more equitable pricing structure. Parallel importation would open access to cheaper copyright works abroad. A relative lack of competition in the marketplace is an important factor. The lack of competition is evident from price of the books. National copyright legislation should therefore follow the rule of international exhaustion rather than the rule of national exhaustion. * It is recommended that section 12B(6) be reviewed and possibly removed to ensure better clarity. Section 23(2) to be reviewed to ensure policy objective is addressed. * The personal use provisions were reviewed. The private copy levy is a system that was raised. In other countries implementing it, there are challenges with its application. More work and research is needed to look into it. * It is recommended that the adaptation in section 12C can be reviewed, in line with the EU Directive and the UK copyright law. Adaptation in section 12C can be recommended for removal. * Sections 12C and 12D are general exceptions and are labelled as such. * The ephemeral right was deliberated and it was found that the timelines in South Africa are in accordance with best practice. It was resolved to retain the draft Bill in its current form on the subsection. * The quotation exception was considered in the parliamentary process. It includes all works. Control measures were incorporated in the quotation exception to tighten it. |
| **Freedom of Panorama- Section 15** | |
| **Public comment** | **DTIC response** |
| * The adoption of Freedom of Panorama, as outlined in section 14 (ii) which amendments section 15 of the original act, will allow South Africans to freely celebrate our recent history. It will allow the people to share photographs of public monuments and works of art over the internet to celebrate our struggle against apartheid.-Wikipedia, Poly Haven * Delete section 15(1) as it allows unlimited use of re-uses of artistic works in public places. The one in the Act is not repealed-SAIIPL | * The section 15(1) substitutes the section in the current Act. The section 15 (1) does not have to be repealed. * General exceptions from protection of artistic works:   **The Act**   * (1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or   Transmission.  **CAB**  16. Section 15 of the principal Act is hereby amended **by the substitution** for subsection (1) of the following subsection:  ‘‘(1) (a) The copyright in an artistic work shall not be infringed by its [inclusion] use in [a cinematograph film or a television broadcast or transmission in a diffusion service] another work, if—  (i) such [inclusion] use is merely by way of background, or incidental, to the principal matters represented in [the film, broadcast or transmission] that other work; or  (ii) the artistic work so used, is situated in a public place.  (b) The copyright in an artistic work shall not be infringed by the issue to the public of copies, or the communication to the public of anything, whose making was by virtue of this subsection not an infringement of the copyright.’’. |
| **Section 19C** | |
| **Public comment** | **DTIC response** |
| * Some words are not mentioned at all, such as ‘digitisation’ or ‘digital curation’, which are missing from Section 19C.-Creative Commons * 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. –MultiChoice * Recommend that this exception be expanded to cater for the temporary downloads of work and recordings for use in the educational and academic sectors.-Google * Proposed section 19C(3) provides for a library, archive, museum and gallery to provide “temporary access” to a copyright work to a user or another library. It is not clear from this what is meant by “access”.-MEC Wenger | * The comment is noted. Introducing the downloads of works and recordings in an environment of concerns of free use and exploitation of rights may open the Bill to challenges. * The words recommended are not in the Bill. Section 19C is comprehensive and provides for the exceptions for libraries, museums and archives and how they can be applied. Issues of technology are embedded in some of the provisions. * The words digital, format shifting are used in section 19C addressing issues of the digital content. * The government managed regime in section 19C is not applicable in terms of the library provisions. |
| **Section 19D** | |
| **Public comment** | **DTIC response** |
| * Section 19D as a whole -We propose, to avoid further litigation on the grounds of unfair disability discrimination that the scope of s 19D remains extended to persons with disabilities across the spectrum. –Joint academic opinion, BlindSA * The first sentence of s 19D(1) was interpreted by the Court to require regulations for its operationalisation. Delete the phrase “as may be prescribed and” from s 19D(1). -Joint Academic Opinion * Section 19D(2)(a) restricts the scope of its application to those activities that are a result of the operation of s 19D(1). This means that persons with disabilities are permitted to only use accessible format copies made under s 19D(1). Delete the phrase “as a result of an activity under subsection (1)”. * We propose that s 28P(2) be deleted as it replicates the requirement of authorisation by the copyright owner that renders accessible format shifting near impossible. –Joint Academic Opinion, Recreate * Minor amendments to be effected to s 19D(2)(a) and 19D(3) to ensure that these provisions do not unintentionally prevent the making and sharing of accessible format copies between Blind SA and the people whom we serve-BlindSA | * The recommendations supported for further consideration. * It is recommended that the policy on all works, all forms of disabilities be retained. * The prescribed in the Bill is different to the court judgment, the copyright Act had to be effective immediately to activate the rights and subjecting it to regulations was going to delay the rights. In the Bill, it is important recommended that the prescribed in the Bill is retained. * The recommendation to delete section 28P(2) is supported. * Reference to sub section 1 in section 19D(3) is recommended to be removed as it restrict the rights provided in the provision and not in the spirit of the court judgement. Also, other minor amendments to ease the provision can be considered. |
| **Orphan works** | |
| **Public comment** | **DTIC response** |
| * The obligations imposed by this section on the licensees of orphan works are unjustifiably onerous for producers and content distributors who wish to licence the copyright in a work whose author cannot be identified or is identified, but cannot be located.-Baker and McKenzie Incorporated * The use of most orphan works would be covered under Section 12A, except in some circumstances, where Section 22A may apply. Section 22A is a lengthy and expensive process so would probably not be applied as much as fair use.-Library and Information Association of South Africa (LIASA) * Section 22A is impractical and fails to provide a practical way of dealing with orphan works, especially anonymous works. -Durban University of Technology * A further weakness is the proposal to oblige the payment of licences with no guarantee that the money will be paid out. As has been shown through research into potentially orphan works in the United Kingdom, in the vast majority of cases the immediate reaction of creators of works previously considered as being orphan was in fact happiness at having their expression shared, and not a desire to claim money. A far preferable approach would be to avoid the moral hazard that such a fund can create, and rather give a confirmed rightholder, once identified, the right to stop any use of orphan works (outside of those permitted under exceptions), and then negotiate.-International Federation of Library Associations and Institutions * The statutory licence for orphan works does not apply to resale royalty rights.-SAIIPL | * This is an important procedure that will enable works to be located. It is used in countries such as the UK. The provisions are comprehensive in sections 116A-116D. * The resale royalty rights comment to be reviewed. |
| **Penalties and sanctions** | |
| **Public comment** | **DTIC response** |
| * The penalties for failing to register or omitting to submit a report, set out in section 8A(5) of the CAB, are excessive (up to a minimum of 10% of annual turnover). It is unclear why such onerous penalties are needed for failing to fulfil what are essentially administrative requirements. - NAB * The requirement of registration and reporting of all commercial uses of every work would be, if enacted, administratively burdensome and unworkable, and imposes unnecessarily excessive penalties for non-compliance. –Amazon * Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures. This requires that ss 27(5B) and 28O be deleted from the Bill and replaced by a provision deeming circumvention and trafficking in anti-circumvention devices to be an infringement of copyright. -Joint Academic opinion * In sub-section (5C)(b) of Section 27 of the CAB, the offence for exploiting works where management information attached to those works has been modified or removed, must, like sub-section (5A), only constitute an offence where the infringing party knows that it is infringing copyright. In this regard, broadcasters often receive content from third parties and may not have direct knowledge about whether they are infringing copyright or not.-Etv eMedia * The provisions in the exception clause, Section 28P(2), are problematic, in that it legitimises uses of measures by means of circumvention devices simply by notice to the copyright owner.-PASA | * It is recommended that section 28P(2) be deleted. * The PC was concerned that the issue of reporting has impacted the payment of royalties and this had serious consequences for the performers. It was for this reason; strong penalties were imposed. These provisions were deliberated at length given their significance. * In international discussions on copyright related matters, the intellectual property legislative regime of South Africa has been questioned in terms of the strong legal measures to deal with infringements related to the digital environment. * The view is that the matters are serious such that the penalties should be stronger. The criminal penalties will send a message that deters these infringements. This aspect can be reviewed. |
| **Intellectual Property Laws Amendment Act** | |
| **Public comment** | **DTIC response** |
| * This section (and point 3.36 of the Memorandum to the Bill) refers to the impractical ‘Intellectual Property Laws Amendment Act 28 of 2013’ (IPLA Act) (not yet operational after 10 years!). There is a more practical and appropriate piece of legislation which is outside copyright law. It is the “sui generis” ‘Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019’, that addresses IK and TK but conflicts with the IPLA Act. -Denise Nicholson * This comment applies to references to IPLAA throughout the Bill and assumptions made in certain places that it is in operation, and includes in particular to the numbering of some of the new sections sought to be introduced into the Copyright Act by the Bill. This will lead to considerable confusion and is editorially irrational and unsound. –Professor Owen Dean. * The repeal of IPLAA will have implications for the copyright and perfomers’ protection amendment bills transitional provisions. -SAIIPL | * The comments are noted. * IPLAA is an Act of Parliament in the statute books. It has to be referenced in the law. |
| **Other amendments** | |
| **Public comment** | **DTIC response** |
| * Should the Committee be steadfast in the need to introduce the Fair Use doctrine into South African law, there would be even more of a need for the introduction of the Statutory Damages-Capasso * Insert a sub-section that states: 2A (3) (a) Copyright extends only to the products of a natural person’s skill, effort and creativity. -Research ICT Africa (RIA) * Propose that a minimum consultation period of 60 days for any regulations prescribed under the Act is necessary. We further propose that any regulations prescribed should be informed by a thorough consultation on the underlying policy and practical considerations and a comprehensive socio-economic impact assessment.-Multichoice * Oppose the Commission's proposed enforcement function contemplated in the new s28Q of the Act or the proposal that the Commission should deal with "any other matter referred to the Commission by any person, Tribunal or any other regulatory authority". * Section 22C(3)(c) provides that a collecting society may “only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic.”-Dalro * It is submitted that this section introduces reciprocity requirements that are at odds with the national treatment and minimum rights principles embodied in the TRIPs Agreement and the Berne Convention.-Dalro | * Minimum consultation term is 30 days, if extended to 45 days. The regulations involve public participation. * The AI recommendation is noted and shed light on the role of technology in copyright however this is a new amendment that have not been consulted upon. It will be considered for further discussions and future amendments. * The comment about statutory damages is noted. It is an area that can be reviewed further before placing in a legislation. * On the reciprocity, the collecting societies as a point of departure must make a finding and a determination that the rights under it administration are enjoying protection usually through a treaty such as WPPT. Once that has been determined, a collecting society must then find out if the rights of its members (under the administration) are indeed consumed in the jurisdiction in question (e.g US). If such rights are indeed consumed then it therefore expedient and/or desirable for a collecting society to enter into a reciprocal agreements to ensure that the citizens (right holders from the two jurisdictions are equalled in terms of receiving royalty) receive royalty from the usages. Secondly, the treaty itself creates obligations for all contracting members and when that is taken down to the level of operations in the collecting societies, it basically translates to reciprocal arrangements. * Collecting societies are not forced to conclude reciprocal agreements, they only do so when it is expedient and/or desirable to do so with a treaty supporting the protection of the rights under administration. |
| * Propose that the law of succession should apply to the performers rights, where the next of kin is/are not prejudiced from getting royalties/ remuneration/merits upon the death of the creator.-Mr Vusumuzi Moyakhe, NW film Commission * s29H(c) empowers the Tribunal to impose a fine under s175 of the Companies Act. The Tribunal is not the appropriate forum to impose such fines. More generally, it is unclear what the rationale is for empowering the Tribunal to make an order for an administrative fine. If reparation in the form of a monetary award is required, it must take the form of a damages award made in favour of the successful party before the Tribunal (the copyright owner, author, licensee etc.). The State has no interest in the disputes that will be heard by the Tribunal, and there is no justification for it benefitting from them.-MultiChoice * The NCOP to determine whether the Tribunal provisions of 29A to 29H comply with section 3 of the Superior Courts Act of 2013.-SAIIPP * We submit that a turnover-based fine is not appropriate in the context of intellectual property rights penalties. This should also be borne in mind in the context of fines under s27(6) of the Act, as proposed to be amended by clause 29(b) of the Bill. * 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. * Absence of effective legal remedies to combat online infringement remains a material oversight in the Bill, i.e website-blocking remedy.-SAIIPL | * Tribunals can impose fines. The Tribunal can make orders that benefit the parties not only government. There are Tribunals currently that carry similar functions. * Turnover based fines can be imposed on juristic persons. This will not be unique to the Act and intellectual property. * There is a Copyright Tribunal currently with limited jurisdiction. In terms of adjusting and strengthening the powers of the Tribunal, the necessary legislation will be applied. |
| * 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 and selling of equipment and software used for purposes of signal piracy. * 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). * In addition, we recommend the introduction of a new criminal provision dealing with digital sharing. -MultiChoice * Unpublished works’ copyright term – this is not an important issue at this stage, so we are not too concerned that it hasn’t been included. However, we believe that research should be done to investigate applying the copyright term to unpublished works sometime in the future-LIASA * Resale royalty right is not a copyright, recommend a separate chapter in Bill.-SAIIPL * The words by ‘art market professional’ be added after 7B(1)(a)-SAIIPL * Clause 10*(b)-*This provision provides for It is submitted that proposed paragraph (f) should end in a semi colon, not a full stop. The insertion of three proposed paragraphs – (f), (g) and (h) in section 9 of the Act. –MEC Wengner | * The proposed amendments have not been part of the Bill and will require a separate process and further review. They are noted. * Comment on unpublished works and future work is noted. * The drafting suggestion is noted for consideration. |
| **PERFORMERS PROTECTION AMENDMENT BILL** | |
| **Definitions** | |
| **Public comment** | **DTIC response** |
| * The definition of “broadcast” in respect of the CAB. and reiterate that the Draft White Paper process has been finalised, the current definition of “broadcast” in the Performers’ Protection Act, 1967 should be retained in the PPAB.-NAB, MultiChoice * In respect of the definitions of “performer” and “producer”, the NAB submits that these definitions are vague, and should be reframed to ensure that there is clarity for the creative industry. * Amend the definition of "producer" to read as follows: "producer means the person who takes responsibility for the first fixation of a sound recording or an audiovisual fixation“-MultiChoice * Amend the definition of "performer" to read as follows: "'performer' means 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“-MultiChoice * The definition of performer is broad. The NAB respectfully submits that a distinction must be made between a performer for purposes of the statutory rights and obligations, and incidental participants (such as extras) who would not, in context of literary, musical or artistic works, be considered a performer or “member of the cast”. This distinction is especially crucial as only performers have a statutory right to receive a royalty or equitable remuneration.-NAB | * The definition was deliberated in parliament. The various policy considerations around it were noted. It is recommended the current definition in the Act be retained. * The language in the definition of performer and producer is in line with the language of the treaty. * The definition proposal to address the extras, is not necessary because extras are not entitled to royalties. The treaty definition does not include the extras. However, the recommendation to clarify in the law can be considered as proposed. |
| **Reversionary clause** | |
| **Public comments** | **DTIC response** |
| * The bill needs to be explicit as to what happens to rights of performers have transferred to the owner of the recording after 25 years. do those rights revert back to the performer or what really becomes of those rights after the expiry period?-Mr Vusumuzi Moyakhe, North West Film Commission * Propose that the law of succession should apply to the performers rights, where the next of kin is/are not prejudiced from getting royalties/ remuneration/merits upon the death of the creator-Mr Vusumzi Moyakhe, North West Film Commission | * The objective is for the rights to revert back to the performer after 25 years. * The law of succession comment is noted. |
| **Clause 2, 3, 4 and 5** | |
| **Public comments** | **DTIC response** |
| * Throughout the PPAB there is a lumping of what would be exclusive rights (i.e. rights requiring the prior authorization of the rights-holder) and remuneration rights (i.e. rights only requiring that payment must be made for usage but which do not prohibit the usage itself). Currently in respect of performances, the “needle-time rights” system contemplated in section 5(1)(b) of the PPA is an example of a remuneration rights system. The provisions in clauses 2, 3, and 4 (in particular the proposed section 3(4)(g) in clause 2; the proposed section 5(1)(a)(vi) in clause 4; the proposed revision of section 5(1)(b) in clause 4; and the proposed amendment to section 5(4)(a) in clause 4) all need to be revisited to make a clear distinction between exclusive rights and equitable remuneration rights. –Copyright Coalition SA. * The legislation cannot create a “royalties or equitable remuneration” regime, as it will create uncertainty. In respect of performances embodied in sound recordings, it is clear from the provisions of the Rome Convention and the WPPT that the system has to be that of equitable remuneration. In respect of performances embodied in audio-visual works, it can either be a royalties system or an equitable remuneration system.-Copyright Coalition SA | * The structure of the Bill is aligned to the Performers’ Protection Act. * The remuneration structure in the PPAB was amended and aligned to the treaties during the parliamentary process. |
| * Reject the definition of communication to the public in 1(d)   + New section in 3(4) in clause 2   + New section 5(1)(a)(i), 1(b)(iv) to (vii), 1A, 2, 4 and 5 in clause 4   + New section 8(2)(f) in clause 5(a)   + Amendment of section 8(3) (a) by clause 5(b), because they are in some places incorrect or in conflict with the WPPT and the Beijing treaty. * Section 8F and 8H not compliant with the treaties and not provide adequate legal protection-SAIIPL | * The comments are noted. * Section 3(4) provides exclusive rights for performers. The other clauses provide for other rights and exceptions. It is unclear why they are recommended to be rejected. |

***Report to be considered.***