REPUBLIC OF SOUTH AFRICA

**COPYRIGHT AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 40121 of 5 July 2016)*

*(The English text is the offıcial text of the Bill.)*

(MINISTER OF TRADE AND INDUSTRY)

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# GENERAL EXPLANATORY NOTE:

**[ ]** Words in bold type in square brackets indicateomissionsfromexistingenactments.

Words underlined with a solid line indicate insertions inexistingenactments.

**BILL**

# To amendthe Copyright Act, 1978, so as to define certain words and expressions; to allow for the reproduction of copyrightwork; to provide for the protection of copyright in artistic work; to provide for the accreditation and registration of Collecting Societies; to provide for the procedure for settlement of royalties disputes; to allow fair use of copyright work; to provide for access to copyrightworks by persons with disabilities; to provide for the protection of ownership of orphan works; to provide for the establishment of the Intellectual Property Tribunal; to provide for the appointment of members of the Intellectual Property Tribunal; to provide for the powers and functions of the Intellectual Property 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 management of digital rights; toprovide for certain new offences; and to provide for matters connectedtherewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

# Amendment of section 1 of Act 98 of 1978, as amended by section 1 of Act 56 of 1980, section 1 of Act 66 of 1983, section 1 of Act 52 of 1984, section 1 of Act 13 of1988,section1ofAct125of1992,section50ofAct38of1997,section1ofAct9of2002, section 224 of Act 71 of 2008 and section 3 of Act 28 of 2013

**1.** Section 1 of the Copyright Act, 1978 (hereinafter referred to as ‘‘the principal Act’’), is herebyamended—

*(a)* by the insertion before the definition of ‘‘adaptation’’ of the following definition:

‘‘ **‘accessible format copy’** means a copy of a work in an alternative mannerorformwhichgivesapersonwithadisabilityaccesstotheworkand which permits such person to have access as feasibly and comfortably as a person withoutdisability;’’;

*(b)* by the insertion after the definition of ‘‘artistic work’’ ofthefollowingdefinition:

‘‘**‘audiovisualwork’**means 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 cinematographic film;’’;

Drafting note: Consequential amendments iro removing the phrase “cinematographic film” from the Act and Bill done in clause 37, and wherever it appears in the Bill

*(c)* by the insertion after the definition of ‘‘collecting society’’ of the following definition:

‘‘ **‘commercial’** means the obtaining of direct economic advantage or financial gain in connection with a business or trade;’’;

*(d)* bytheinsertionafterthedefinitionof‘‘communityprotocol’’ofthefollowing definition:

‘‘ **‘Companies Act’** means the Companies Act, 2008 (Act No. 71 of 2008);’’;

*(e)* bytheinsertionafterthedefinitionof‘‘copyright’’ofthefollowingdefinition:

‘‘ **‘copyright management information’** means informationattached to or embodied in a copy of a work that—

*(a)* identifies the work and its author or copyright owner;or

*(b)* identifies or indicates some or all of the terms and conditions for usingtheworkorindicatesthattheuseoftheworkissubjecttoterms and conditions;’’;

*(f)* by the insertion after the definition of ‘‘National Trust’’ of the following definitions:

‘‘ **‘openlicence’** means a royalty-free, non-exclusive, perpetual, irrevocable copyright licence granting the public permission to do an act for which the permission of the owner of copyright, or the author, is required;

**‘orphan work’** means a work in which copyright subsists andtheownerof a rightinthatwork—

*(a)* cannot be identified;or

*(b)* is identified,but cannot be located;’’;

*(g)* by the insertion after the definition of ‘‘performance’’ of the following definitions:

‘‘ **‘performer’** has the meaning ascribed to it in section 1 of the Performers’ Protection Act, 1967 (Act No. 11of1967);

**‘person with a disability’** means a person who has a physical, intellectual, neurological, or sensory impairment and requires an accessible format copy in order to access and use a work;’’;

*(h)* bytheinsertionafterthedefinitionof‘‘soundrecording’’ofthefollowingdefinitions:

‘‘ **‘technologically protected work’** means a work that is protected by a technological protection measure;

# ‘technological protection measure’—

*(a)* means any process, treatment, mechanism, technology, device,system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work; and

*(b)* does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work fornon-infringingpurposes;

**‘technological protection measure circumvention device’** means a deviceprimarilydesigned,producedoradaptedforpurposesofenabling or facilitating the circumvention of a technological protection measure;’’;and

*(i)* bytheinsertionafterthedefinitionof‘‘traditionalwork’’ofthefollowingdefinition:

‘‘ **‘Tribunal’** means the Intellectual Property Tribunal established by section 29;’’.

# Insertion of section 2A in Act 98 of 1978

**2.** The following section is hereby inserted in the principal Act aftersection2:

# ‘‘Scope of copyright protection

**2A.** (1) Copyright protection subsists in expressions and not—

*(a)* in ideas, procedures, methods of operation or mathematical concepts;or

*(b)* in the case of computer programs, in interfacespecifications.

(2) A table or compilation which, by reason of the selection orarrangement of its content, constitutesan original work,shall be protected as such by copyright.

(3) The copyright protection of a table or compilation contemplated in subsection (2) does not extend to its content.

(4) No protectionshall—

*(a)* extend to anexpression—

(i)inextricably merged with an idea such that the idea can be expressedintelligiblyonlyinoneoralimitednumberofways; or

(ii) whentheparticularexpressionis required by law; or

*(b)* subsistin—

(i) officialtextsofalegislative,administrativeorlegalnatureorin official translations of thosetexts;or

(ii) speeches of a political nature, in speeches delivered in the course of legal proceedings or in news of the day that are mere itemsofpressinformation:Providedthatthemakerofthespeeches referred to in this subparagraph shall have the exclusive right of making a collection of the speeches in question.’’.

# Amendment of section 5 of Act 98 of 1978, as amended by section 5 of Act 52 of 1984and section 5 of Act 125of1992

**3.** Section5oftheprincipalActisherebyamendedbythesubstitutionforsubsection(2) of the followingsubsection:

‘‘(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by or under the direction or control of the state or **[such]** aninternational **[organizations as may beprescribed]** or localorganisations.’’.

**Policy**: Funded by: The intention is not to own Copyright on things that are indirectly funded. Unless there are instances where the state will fund a work, but not have direct control etc, this phrase can be deleted. The phrase can also be reworded “funded by and under the direction…” but that means that works made under the direction of the state and funded by a donor organisation, will not be included. Unless there are instances where the state will fund a work, but not have direct control, deletion of “funded by” is recommended. 2017.10.18: Committee discussion: delete “funded by” as the dti is confirming they are withdrawing this amendment

**Policy concern:** Organisations - to remove “prescribed” opens this up to any organisation. Likewise the inclusion of local organisations includes all South African organisations and the consequences may be broader than intended. Need confirmation if local organisations should still be included. (section 21(2) may require a consequential amendment).

# Amendment of section 6 of Act 98 of 1978, as amended by section 3 of Act 56 of 1980and section 6 of Act 125of1992

**4.** Section 6 of the principal Act is herebyamended—

*(a)* by the insertion after paragraph *(e)* of the followingparagraph:

‘‘*(e*A*)* communicating the work by wire or wireless means to the public, so thatanymemberofthepublic may access the work from a place and at a time chosen by that person;’’;and

*(b)* by the substitution for paragraph *(g)* of the followingparagraph:

‘‘*(g)* doing, in relation to an adaptation of the work, any of the acts specified**[inrelationtothework]**inparagraphs*(a)*to**[*(e)*]***(e*A*)*inclusive.’’.

**Insertion of section 6A in Act 98 of 1978**

**5.** The following section is hereby inserted in the principal Act after section 6:

‘‘**Royalties regarding literary or musical works**

**6A.** An author who transfers copyright in a literary or musical work to another person, shall have the right to claim half of the royalty payable to that other person for the use of such copyright work.’’.

Drafting note: In stead of a proviso added to section 6, it is recommended that the example of section 9A be followed iro literary and musical works – the same applies to the clauses below that introduced provisos.

Policy: the portion for royalty to be confirmed – should it be equal? Does “equal” mean 50%, even if the new copyright owner might be jointly owned by more than one person.

Policy concern: The proviso that is now reworded here as section 6A did not provide for a minimum percentage that the author receives even where copyright is not transferred or iro an agreement at the outset.

**Amendment of section 7 of Act 98 of 1978, as amended by section 4 of Act 56 of 1980and section 7 of Act 125 of 1992**

**6.**Section 7 of the principal Act isherebyamended—

*(a)* by the insertion after paragraph *(d)* of the followingparagraph:

‘‘*(d*A*)*communicating the work by wire or wireless means to the public, so thatanymemberofthepublicmayaccesstheworkfromaplaceandatatimechosen by that person;’’;and

*(b)* by the substitution for paragraph *(f)* of the followingparagraph:

‘‘*(f)* doing, in relation to an adaptation of the work, any of the acts specified **[in relation to the work]**in paragraphs *(a)* to **[*(d)*]** *(d*A*)*inclusive.’’.

Drafting note / Policy: A clause has been included to make this also applicable to section 11. Consideration to be given iro whether this should not also apply to sections 9, 10, 11A and 11B – i.e. clauses to be included iro each type of work?

**Insertion of section 7A in Act 98 of 1978**

**7.** The following sectionsare hereby inserted in the principal Act after section 7:

‘‘**Royalties regarding artistic works**

# 7A. An author who transfers copyright in an artistic work to another person, shall have the right to claim half of the royalty payable to that other person for the use of such copyright work.’’

Drafting note: In stead of a proviso added to section 7, it is recommended that the example of section 9A be followed iro artistic works – the same applies to the other clauses that introduced provisos.

**Policy**: the portion for royalty to be confirmed – should it be equal? Does “equal” mean 50%, even if the new copyright owner might be jointly owned by more than one person.

**Policy concern**: The proviso that is now reworded here as section 6A did not provide for a minimum percentage that the author receives even where copyright is not transferred.

**Resale royaltyright regarding artistic works**

Drafting note: These sections are moved here from section 9 as we now provide for royalties iro artistic works here.

**7B.** (1) The author of an artistic work in which copyright subsists must be paid royaltiesonthecommercialresaleofhisorherwork.

(2) *(a)* Royalties in respect of artistic works shall be payable at the rate prescribed by the Minister after consultation with the Minister responsible for arts andculture.

*(b)* The Minister must, before prescribing the rate referred to in paragraph*(a)*,publishtherateproposedinthe*Gazette*andcallfor written comments by any interested party to be provided within 30 days after publication.

(3) The author of an artistic work shall be entitled to receive a resale royalty if—

*(a)* at the time when the resaleisconcluded—

(i) the author is a South African citizen or is resident in the Republic;and

(ii) the term of validity of the resale royalty right has notexpired;

*(b)* inthecaseofadeceasedauthor,thedeceasedwasatthetimeofdeath a South African citizen or was resident in theRepublic;

*(c)* the resale or any part of the transaction takes place in the Republic or in any country contemplated in Article 1 of the Berne Conventionfor the Protection of Literary and ArtisticWorks;and

*(d)* the resale of the work is recognisable after the commencement of section 9 of the Copyright Amendment Act,2017.

(4) A resale royalty right applies whether or not theauthorwas the first owner of any copyright in thework

Drafting note: The RRR should not apply to artistic work such as architectural and engineering drawings, circuit layouts, commercial logos, and icons for applications. Require a term or a list (if a term is not possible), to exclude these works from artistic work for purposes of RRR

# Proof of author

**7C.** (1) Where a mark or name purporting to identify a person as the authorofanartisticworkappearsonsuchwork,that personis, in the absence of evidence to the contrary, presumed to be the author of such work.

(2) If an artistic work—

*(a)* is a work of more than one author, the presumption in subsection (1) applies to each co-author of suchartisticwork; or

*(b)* includes indigenous cultural expressions or knowledge the relevant indigenous communityisentitledtoanequitableshareintheresale royaltypayable.

# Duration of resale royalty right

**7D.** (1) The resale royalty right of an author of an artistic work expires at the end of the period of 50 years calculatedfromtheendofthecalendaryear—

*(a)* inwhichtheauthorconcerned died;or

*(b)* in the case of more than one author, in which the last of the known authors died.

(2) In the caseof anartisticworkcreatedbyanunknownauthor—

*(a)* theresaleroyaltyright in that workexpiresattheendoftheperiodof50yearscalculatedfrom theendofthecalendaryearinwhichtheworkwasfirstmadeavailable to the public; or

*(b)* where the identity of the author becomes known at a later stage, the resale royalty rightof that author expires in accordance with the period contemplated in subsection (1).

# Transmission of resale royalty right

**7E.** (1) Aresaleroyaltyrightmaynot be alienated, save for transmission onthedeathofthe holder of the rightby testamentary disposition;or by operationoflaw.

(2) In the case of a bequest of an artistic work by an author who did not transfer copyright in that work in his or her lifetime, the bequest must be read as including the resale royaltyright.

(3) If resale royalties are recovered by a collecting society or an indigenous community after the death of a holder of a resale royalty right, those resale royalties must be treated as part of the estate of the deceased holder.

# (4) A resale royalty right may not be assigned or waived and any assignment or waiver of a resale royalty right is uneforceable.’’.

# Substitution of section 8 of Act 98 of 1978, as amended by section 5 of Act 56 of 1980,section6ofAct52of1984,section1ofAct61of1989andsection8ofAct125of 1992

**8.** The following section is hereby substituted for section 8 of the principal Act:

‘‘**Natureofcopyrightin[cinematographfilms]audiovisualworks**

**8.** (1) Copyrightin**[acinematographfilm]**anaudiovisualworkvests the exclusive right to do or to authorize the doing of any of the following acts in theRepublic:

*(a)* Reproducing the **[film]**workin any manner or form, including making a stillphotographtherefrom;

*(b)* causingthe**[film]**work,insofarasitconsistsofimages,tobeseen inpublic,or,insofarasitconsistsofsounds,tobeheardinpublic;

*(c)* broadcasting the **[film]**work;

*(d)* causing the **[film]**workto be transmitted in a diffusion service, unless such service transmits a lawful televisionbroadcast,includingthe **[film]**work, and is operated by the original broadcaster;

*(d*A*)* communicating the work by wire or wireless meansto the public, so thatanymemberofthepublicmayaccessthework fromaplaceandatatimechosen by thatperson;

*(e)* making an adaptation of the **[film]**work;

*(f)* doing, in relation to an adaptation of the **[film]**work, any of the acts specified in relation to the **[film]**workin paragraphs *(a)* to **[*(d)*]** *(d*A*)*inclusive;

*(g)* letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the **[film]**work.’’.

**Insertion of section 8A in Act 98 of 1978**

**9.** The following section is hereby inserted in the principal Act after section 8:

‘‘**Royalties regarding audiovisual works**

**8A.** An author who transfers copyright in an audiovisual work to another person, shall have the right to claim half of the royalty payable to that other person for the use of such audiovisual work.’’.

Drafting note: Instead of a proviso added to section 8, it is recommended that the example of section 9A be followed iro audiovisual works – the same applies to the other clauses that introduced provisos.

**Policy**: the portion for royalty to be confirmed – should it be equal? Does “equal” mean 50%, even if the new copyright owner might be jointly owned by more than one person.

**Policy concern**: The proviso that is now reworded here as section 6A did not provide for a minimum percentage that the author receives even where copyright is not transferred or iro an agreement at the outset.

# Amendment of section 9 of Act 98 of 1978, as substituted by section 2 of Act 9 of 2002

# 10. Section 9 of the principal Act is hereby amended by the substitutionforparagraph of the followingparagraph:

‘‘*(e)* communicating the sound recording by wire or wireless meansto the public, sothat any member of the public may access the sound recording from a place and at a time chosen bythatperson.’’.

# Substitution of section 9A of Act 98 of 1978, as inserted by section 3 of Act 9 of 2002

**11.**The following section is hereby substituted for section 9A of the principal Act:

‘‘**Royaltiesregarding sound recordings**

**9A.** (1) *(a)* In the absence of an agreement to the contrary or unless otherwise authorised by law, no person may, without payment ofaroyalty to the owner of the relevantcopyright—

(i) broadcast**[,]** a sound recording as contemplated in section9*(c)*;

(ii) causethetransmissionofasoundrecordingascontemplatedinsection 9*(d)*; or**[play]**

(iii) communicate a sound recording to the public as contemplated in**[section 9*(c)*, *(d)* or *(e)* without payment of a royalty to the owner of the relevant copyright]** section 9*(e)*.

*(aA)* Any person who intends to perform an act contemplated in section 9*(c)*, *(d)*, or *(e)* must, at any time before performing that act, submit a prescribed notice in the prescribed manner to the performer, copyright owner, collecting society,indigenous communityor National Trust, as the case may be,of his or her intention to perform that act, and must, in that notice—

(i) indicate, where practicable, the date of the proposed performanceandthe proposed terms and conditions of the payment of a royalty;and

Policy: Why is it left to the user to propose terms and conditions of payment? The dti agrees that it should not be the user who dictates terms and conditions. This could perhaps rather be in accordance with the normal terms of usage for the relevant category of work and the user can propose exceptions if applicable.

Drafting note: It further appears from the way it is worded, as if the copyright owner has no right to refuse consent iro use. That must be corrected.

(ii) requesttheperformer, copyright owner, collecting society,indigenous community, or National Trustto sign the proposal attached to the noticeinquestion.

*(a*B*)* If the person referred to in paragraph *(a*A*)* has failed to submittherequired notice to the performer, copyright owner,collecting society,indigenous community, or National Trustbefore performing an act contemplated in section 9*(c)*, *(d)*, or *(e)*, that person must forthwith—

(i) notifytheperformer, copyright owner,collecting society,indigenous community, or National Trustof such act;

(ii) pay the generally applicable licence fees as per the proposal or as publishedbythe copyright owner, thecollectingsociety, indigenous community or the National Trustinrespectofthatperson’scategory of use;and

(iii) pay royalties calculated from the date of first useregardless of whether that date is prior to the coming into operation of the Copyright Amendment Act,2017.

*(a*C*)* The person contemplated in paragraph *(aB)*(i)must as soon as is reasonably practicable upon receipt of suchnoticerespond to such proposal.

*(a*D*)* If the person contemplated in paragraph *(aB)*(i)rejects such proposal, or if that person proposes different terms and conditions to such proposal and the proposal is rejected after negotiations, any party may in the prescribed manner refer the matter to theTribunal.

*(a*E*)* The Tribunal must adjudicate the matter as soon as is reasonably practicable and, if possible, before the performance which is the subject of the application make an order it deems fit, including, but not limited to, an order that a provisional payment of a royalty must be made into a trust account of an attorney nominated by the person contemplated in paragraph *(aB)*(i)pending the finalisation of the terms and royalty payable: Provided that such amount shall be paid over to the person contemplated in paragraph *(aB)*(i)as represents the difference, if any, between the amount determined as the appropriate royalty and the amount already paid, and any balance must berepaid.

*(b)* The amount of any royalty contemplated in paragraph *(a)* shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, indigenous community or National Trust, or between their **[representative]** collectingsocieties.

*(c)* Intheabsenceofanagreementcontemplatedinparagraph*(b)*,the user, performer or owner may in the prescribed mannerrefer the matter to the **[Copyright]** Tribunal **[referred to in section 29(1)]** or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of1965).

(2) *(a)* The owner of the copyright, collecting society, indigenous communityor the National Trust who receives payment of a royalty in terms of this section shallensure that**[share]**such royalty is equally shared between the copyright owner and**[with]** any performer whose performance is featured on the sound recordinginquestionandwhowouldhavebeenentitledtoreceivearoyaltyin that regard as contemplated in section 5 of the Performers’ Protection Act, 1967 (Act No.11 of 1967).

**[*(b)* Theperformer’sshareoftheroyaltyshallrepresentfairandequitable remuneration determined by an agreement between the performer and the owner of copyright, or between their representative collectingsocieties.**

***(c)* In the absence of an agreement contemplated in paragraph *(b)*, the performer or owner may refer the matter to the Copyright Tribunal referred to in section 29(1), or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of1965).]**

*(d)* Any payment made by the user of the sound recording in terms of this subsection shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers’ Protection Act, 1967 (Act No.11 of1967).

(3) In the event of any right to a royalty being assigned to anysuccessorin title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor intitle.’’.

# Substitution of section 11 of Act 98 of 1978

**12.** The following section is hereby substituted for section 11 of the principal Act:

‘‘**Nature of copyright in programme-carrying signals**

**11.** (1) Copyright in programme carrying signals vest the exclusive right to undertake,or to authorize, the—

*(a)* direct or indirect distribution of such signals by anydistributor to the general public or any section thereof in the Republic, or fromthe Republic;

*(b)* communication of the work by wire or wireless means to the public,so thatanymemberof thepublicmayaccesstheworkfromaplaceandatatimechosen by that person.’’.

# Repeal of section 12 of Act 98 of 1978

**13.** Section 12 of the principal Act is hereby repealed.

Drafting note: Given that fair use was in fact intended for all works, it was never correctly placed in section 12 (dealing with General exceptions iro literary and musical works). When subsection (1) was substituted in the Bill, it dealt with exceptions from protection iro literary and musical works, which meant that it still fit in section 12.

We cannot now change 12 into a fair use section as it is against the drafting rule of not substituting a section for something that has nothing to do with that section.

The idea is to start with a section dealing with fair use, then exceptions that apply to all and then specific exceptions: This has a nice logic to it and will make the Act read easier. It is proposed that this is done by repealing section 12, inserting 12A as fair use, 12B as specific exceptions applicable to all and then 12C to 12-whatever iro exceptions related to specific works, or as they appear in the Act section 13 etc. See notes below.

# Insertion of sections 12A, 12B,12C and 12 D in Act 98of1978

**14.** The following sections are hereby inserted in the principal Act after section 12:

‘‘**General exceptions from copyright protection**

**12A.** (1) *(a)* In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a differentdevice;

(ii) criticism or review of that work or of anotherwork;

(iii) reporting currentevents;

(iv) scholarship, teaching andeducation;

(v) comment, illustration, parody, satire, caricatureorpastiche;

(vi) preservation of and access to the collections of libraries, archives and museums;

(vii) expanding access for underserved populations;and

Drafting note / Policy: Consider whether the phrase “underserved population” should not be defined. If the interpretation is too broad, it would fall outside the TRIPS exceptions and limitations.

(viii) ensuring proper performance of publicadministration.

*(b)* Indeterminingwhetheranactdoneinrelationtoaworkconstitutesfairuse,allrelevantfactorsshallbetakenintoaccount,includingbutnot limitedto—

(i) the nature of the work inquestion;

(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole ofthework;

(iii) the purpose and character of the use, includingwhether—

*(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) thesubstitutioneffectoftheactuponthepotentialmarketfortheworkin question.

*(c)* For the purposes of paragraphs *(a)* and *(b)* and to the extent reasonably practicable and appropriate, the source and the name of the author shallbe mentioned.

**Specific exceptions from copyrightprotectionapplicable to all works**

**12B.** (1) Copyright in a work shall not be infringed by any of the following acts:

*(a)* Any quotation:Providedthat—

(i) that the extent thereofshallnotexceedtheextentreasonablyjustifiedbythepurpose; and

(ii) to the extent that it is practicable, the source and thenameoftheauthor,ifitappearsonorinthework,shallbe mentioned in the quotation;

Drafting note: “including….” removed, as a summary of a work, is a work in its own right and so a quotation from that, is a quotation. The phrase is accordingly duplicating the concept and the sentence itself appears to be outdated (what about blogs) and confusing.

“Fair use” (in Act reads “fair practice”) removed as the intention was not to add the requirements for “fair use” to quotations.

*(b)* anyillustrationinapublication,broadcast,soundorvisual record for the purpose of teaching:Providedthatsuchuseshall not exceed the extent justified by the purpose:Providedfurtherthat,totheextentthatitispracticable,the sourceandthenameoftheauthor,ifitappearsonorinthework,shall bementionedintheactofteachingorintheillustrationinquestion;

*(c)* the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consentoftheowneroftherelevantpartofthecopyrightinthework;

*(d)* the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collectionthereof;

*(e)* subject to the obligation to indicate the source and the name of the author in so far as it ispracticable—

(i) the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the samecharacter in cases in which the reproduction, broadcasting or such communication thereof is notexpresslyreserved;

(ii) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose;and

(iii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing currentinformation;

*(f)* the translation of such work by a person giving or receiving instruction: Providedthat—

(i) such translation is not done for commercialpurposes;

(ii) such translation is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes only;or

(iii) such work is translated and communicated to the public for non-commercial public informationpurposes;

Policy: “public information purposes” need to be made clear. It can be interpreted as that a person can translate a work for instruction purposes and provided it is not for a profit, can translate the whole of the work and make it available for free to the public.

*(g)* the use of such work in a *bona fide* demonstration of electronic equipment to a client by a dealer insuchequipment;

*(h)* the use of such work is for the purposes of judicial proceedings or preparing a report of judicialproceedings;

*(i)* the reasonable use of such work for the purposes of cartoon, parody, satire, pastiche, tribute or homage;and

*(j)* the making of a copy of such work by an individualof—

(i) the individual’s own copy of the work;or

(ii) a personal copy of the work made by the individual for the individual’s personal use and made for ends which are not commercial.

Policy concern: Consider whether (j) is not open for abuse – i.e. that a person may use this paragraph to make as many copies of the whole of a work for any reason

(2) For the purposes of subsection (1)*(j)*, permitted personal uses include—

*(a)* the making of a back-upcopy;

*(b)* time or format-shifting;or

*(c)* the making of a copy for the purposes of storage, which storage may includestorageinanelectronicstoragemedium or facility accessedby the individual who stored the copy or the person responsible for the storagemedium or facility.

(3) Theprovisionsofsubsection(1)shallalsoapplywithreferencetothe makingoruseofanadaptationofaworkandshallalsoincludetherightto use the work either in its original language or in a different language.

(4) An authorisation to use a literary work as the basis for the makingof an audiovisualwork,orasacontributionofthe literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.

(5) The provisions of subsection (1)*(d)* and *(e)* shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

Subsection (5) is the only subsection of section 12 that was not covered by the Bill. I’ve included it here and adjusted it so that the cross references here now refer to the correct subsections in 12A. Dti to confirm if it is necessary. If necessary, Experts to confirm if it applies to other paragraphs in subsection (1) as well

(6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other transfer of ownership of a transferred original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such transferred original or copy.

**Drafting Note:**Section 12 B is now included here so that progression of sections are 1. General exception (fair use); 2. Specific exceptions applicable to all works (which includes parallel importation); and 3. General exceptions to specific works.

**Policy** issue in terms of the system that needs to be used i.e international, national and regional, however from a technical point of view the clause is legally sound. Other jurisdictions such as Chile have used similar wording.

# Temporary reproduction and adaptation

**12C.** (1) Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies oradaptationsis—

*(a)* to enable the transmission of the work in a network between third partiesbyanintermediaryoranyotherlawfuluseofthework;or

*(b)* toadapttheworktoallowuseondifferenttechnologicaldevices,such as mobile devices, as long as there is no independenteconomic significance totheseacts.

# Reproduction for educational and academic activities

**12D.** (1) Subject to subsection (3),a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities:Provided that the copying does not exceed the extent justified by the purpose.

(2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resourcelistsandinanyothermaterialtobeusedinacourseofinstruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted onasecure networkandaccessibleonlybythepersonsgivingandreceivinginstruction at or from the educational establishment making suchcopies.

(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society, an indigenous community or the National Trust on reasonable terms and conditions.

**Policy concern**: Who determines what T&C were not reasonable? Should this not be limited to obtaining a licence before the whole could be incorporated and if the licence is unreasonable, the matter then be referred to the Tribunal for resolution first? The risk of this is that the Tribunal proceedings may delay the accessibility of the works.

(4) The right to make copies contemplated in subsection(1)extends to thereproduction of a wholetextbook—

*(a)* where the textbook is out ofprint;

*(b)* where the owner of the right cannot befound;or

*(c)* whereauthorisedcopiesofthesameeditionofthetextbookarenotfor sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparableworks.

(5) Theright to make copies shallnotextendtoreproductions for commercial purposes.

(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertationforsubmission, personaluse,librarydepositor posting on an institutional repository.

(7) *(a)* Theauthorofascientificorothercontribution,whichistheresult ofaresearchactivitythat received at least 50 per cent of its funding from the stateandwhichhas appeared in a collection, has the right, despite granting the publisher or editoranexclusiverightofuse,tomakethethe final manuscript version availabletothe publicunderan open licenceorbymeansofanopenaccessinstitutional repository.

*(b)* In the case of a contribution published in a collection that is issued periodicallyatleastannually,anagreementmayprovideforadelayin theexerciseoftheauthor’srightreferred to in paragraph *(a)* forupto12monthsfromthedateofthe first publication in that periodical.

*(c)* When the contribution is made available to the public as contemplated in paragraph *(a)*, the place of the first publication must be properlyacknowledged.

*(d)* Third parties, such as librarians, may carry out activities contemplated in paragraphs *(a)* to *(c)* on behalf oftheauthor.

*(e)* Anyagreementthat denies theauthorany of the rights contemplated in this subsection shallbeunenforceable.

(8) The source of the work reproduced and the name of the author shall beindicatedasfarasispracticableonallcopiescontemplated in subsections(1) to(5).’’.

Drafting note: As 13 A and 13 B deals with specific exceptions to all works, they were inserted as S12C and S12D

**Drafting Note:**Should section 13 not form part of section 12A as it deals with specific exceptions applicable to all works?

**Drafting experts:** wouldit be good drafting to delete section 13 here and transfer it to section 12A? Would that not affect the continuity of the law? It is the same question as iro section 12, except that at least with section 12, we are changing the content from being applicable to literary works only, to being applicable to all works, so it can be justified. Here it would just be moving the same clause to another section.

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# Amendment of section 16 of Act 98 of 1978, as substituted by section 14 of Act 125of1992

**15.**Section 16 of the principal Act is hereby amended by the deletion of subsection(1).

# Repeal of section 17 of Act 98 of 1978

**16.**Section 17 of the principal Act is herebyrepealed.

# Repeal of section 18 of Act 98of1978

**17.**Section 18 of the principal Act is herebyrepealed.

# Repeal of section 19A of Act 98 of 1978

**18.** Section 19A of the principal Act is herebyrepealed.

# Substitution of section 19B of Act 98 of 1978, as inserted by section 18 of Act 125 of 1992

**19.** The following section is hereby substituted for section 19B of the principal Act:

‘‘**General exceptions regarding protection of computerprograms**

**19B.** (1) A person having a right to use a copy of a computer program may, withoutthe authorisation of the copyright owner, observe, study or test thefunctioningoftheprograminordertodeterminetheideasandprinciples which underlie any element of the program if that person does so while performing any of the acts of loading, displaying, executing, transmitting or storing the program which he orshe is entitled to perform.

(2) The authorisation of the copyright ownershall not be required where reproductionofthecodeandtranslationofitsformareindispensableinorder to obtain the information necessary to achieve the interoperabilityof an independently createdcomputer program with other programs, if the following conditions aremet:

*(a)* The acts referred to in subsection (1) are performed by the licensee or anotherpersonhavingarighttouseacopyoftheprogram,orontheirbehalf by a person authorised to do so;

*(b)* the information necessary to achieve interoperability has not previouslybeenreadilyavailabletothepersonsreferredtoinparagraph*(a)*; and

*(c)* those acts are confined to the parts of the original program which are necessary in order toachieveinteroperability.

(3) Theinformationobtainedthroughtheapplicationoftheprovisionsof subsection (2) may notbe—

*(a)* used for goals other than those to achieve the interoperability of the independently created computerprogram;

*(b)* giventoothersexceptwhennecessaryfortheinteroperabilityoftheindependently created computer program;

*(c)* used for the development, production or marketing of a computer program substantially similar in its expression to the program contemplated in subsection (1);or

*(d)* used for any other act whichinfringescopyright.

(4) Forthepurposesofthissection,‘interoperability’meanstheability to exchange information and to use the information which has been exchanged.’’.

Policy: proposed broadening of this clause is a policy issue. The exceptions under section 12B should perhaps be applicable, especially iro use for educational purposes

# Insertion of sections 19C and 19D in Act 98 of 1978

**20.**The following sections are hereby inserted in the principal Act aftersection19B:

# ‘‘General exceptions regarding protection of copyright work for libraries, archives, museums and galleries

**19C.** (1) A library, archive, museum or gallery may, without the authorisation of the copyright owner, use a copyrightwork to the extent appropriatetoitsactivitiesinaccordancewithsubsections(2)to(13):Provided that thework is not used for commercial purposes.

(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.

(3) A library, archive, museum or gallery may provide temporaryaccesstoacopyright workindigitalorotherintangiblemedia,towhichithaslawful access, to a user or to another library, archive, museum or gallery.

(4) Alibrary,archive,museumorgallerymay,foreducationalorresearch purposes, permit a user to view a whole audiovisual work,listen toafulldigitalvideodisc,compactdiscorothersoundrecordingormusicalworkonitspremises,inaninstitutionalclassroomorlecturetheatre,or view such work or listen to such digital video disc, compactdisc or other sound recording or musical work by means of a secure computer network,withoutpermissionfromcopyrightowners,butmaynotpermitauser to make a copy or recording of the work for commercial purposes.

(5) A library, archive, museum or gallerymaymake—

*(a)* a copy of any work in its collection for the purposes of back-up and preservation;and

*(b)* a copy of a publicly accessible website for the purposes of preservation.

(6) Ifaworkoracopyofsuchworkinthecollectionofalibrary,archive,museum or gallery is incomplete, such library, archive, museum orgallery may make or procure acopy of the missing parts from anotherlibrary, archive, museum or gallery.

(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from ageing or obsoletetechnologiestonewtechnologiesinordertopreservetheworksfor perpetuity, and to make the resulting copies accessible consistent with this section.

(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act, 1997 (Act No. 54 of 1997).

(9) Alibrary,archive,museumorgallerymaymakeacopyofacopyrightwork when the permission of the owner of copyright, collecting society, the indigenous community concernedor the National Trust cannotafterreasonableendeavourbeobtainedorwheretheworkis not available by general trade or from thepublisher.

(10) Notwithstanding any other section, a library, archive, museum or gallery may buy, import or otherwise acquire anycopyrightwork that is legally available in anycountry.

(11) A library, archive, museum or gallery may reproduce in anyformat

anycopyright workwhichhasbeenretractedorwithdrawnfrompublic access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for preservation, research or any other legaluse.

(12) *(a)* A library, archive, museum or gallery may make a copy of any copyright work and make it available to another library, archive, museum or galleryorfor public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and researchpurposes.

*(b)* A library, archive, museum or gallery contemplated in paragraph *(a)*may also, for the purposes of that paragraph—

(i) take and show a photograph of such work or show video footage of suchwork;

(ii) create other images such as paintings of buildings;or

(iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in apublicplace.

(13) *(a)* Subject to paragraph *(b)*, a library may supply to any other library a copy of a copyright work in its collection, whether by post, fax or secure digitaltransmission.

*(b)* The receiving library, archive, museum or gallery must delete any digital file received from the otherlibrary, archive, museum or galleryimmediatelyaftersupplyingtheperson whohasrequesteditwith an digitalor paper copy of the work.

(14) Anofficeroremployeeof a library, archive, museum or galleryactingwithinthescopeofhisor her duties, shall be protected from any claim for damages, from criminal liabilityandfromcopyrightinfringementwhenthedutyisperformedingood faith and where there are reasonable grounds forbelievingthat—

*(a)* theworkisbeingusedaspermittedwithinthescopeofanexceptionin this Act or in a way that is not restricted by copyright; or

*(b)* the copyright work, or material protected by related rights, is in the publicdomainorlicensedtothepublicunderan openlicence.

(15) Nothinginthissectionshalldiminishanyrightsthatalibrary,archive,museumorgalleryotherwiseenjoypursuanttootherprovisionsof this Act, including those in sections 12 and 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library,archive,museumorgalleryshalltakereasonablestepstoensurethat any digital copy supplied by it is accompanied by informationconcerning the appropriate use of that copy.

# Generalexceptionsregardingprotectionofcopyright workforpersons withdisability

**19D.** (1) Any person or an organisation that serves persons with disabilities may, without the authorisation of the copyright owner, makeanaccessibleformatcopyforthebenefitofapersonwithadisability,supply that accessible format copyto a person with a disability by any means, including by non-commercial lending or by digitalcommunication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions aremet:

*(a)* Thepersonwishingtoundertakeanyactivityunderthissubsectionmust have lawful access to the copyrightwork or a copy of that work;

*(b)* the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copybut which does not introduce changes other than those needed to make the work accessible to a person with adisability; and

*(c)* the activity under this subsection must be undertaken on a non-profit basis.

(2) *(a)* A person with a disability, or an organisation that serves persons with disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, withouttheauthorisationoftheownerofthecopyright work,reproducethework for personal use.

*(b)* The provisions of paragraph *(a)* are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.

(3) A person with a disability or an organisation that serves persons with disabilitiesmay,withouttheauthorisationofthecopyright ownerexporttoorimport from another country any copy of an accessible format copy of a work referredtoinsubsection(1),aslongassuchactivityisundertakenonanon-profit basis by that person or organisation.

(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it ispracticable.’’.

# Amendment of section 20 of Act 98 of 1978, as substituted by section 19 of Act 125 of 1992

**21.** Section 20 of the principal Act is herebyamendedby the substitution for subsections (1) and (2) of the following subsections, respectively:

‘‘(1) Notwithstanding the transfer of the copyright in a **[literary, musical or artistic work, in a cinematograph film or in a computer program]** work, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Providedthat an author who authorizes the use of his or her work in a soundrecording or**[cinematograph film or a television broadcast]** audiovisual work or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.

(2) Any infringement of the provisions of this section shall be treatedas an infringement of copyright under Chapter 2, **[and]** except that, for the purposes of the provisions of the said Chapter, the author shall be deemed **[to be]** to have the right to complain of infringementof the provisions of this section, rather than the owner of the copyright in question.’’.

Policy concern: Subsection (2) is worded in such a way that it takes away the rights of the copyright owner, without any clear policy rationale for this.

Drafting note: Subsection (3) and (4) did not make sense as the moral right cannot lapse on the death of the author. It remains in perpetuity.

(5) is redundant as sections 12 and 12A says that the name of the author must be mentioned – so it confirms that moral rights must be protected.

# Amendment of section 21 of Act 98 of 1978, as substituted by section 9 of Act 56 of 1980

**22.** Section21oftheprincipalActisherebyamendedbythesubstitutioninsubsection (1) for paragraph *(c)* of the followingparagraph:

‘‘*(c)* Where a person commissions the taking of a photograph, the painting or drawingofaportrait,themakingofagravure,themakingof**[acinematographfilm]**an audiovisualworkorthemakingofasoundrecordingandpaysoragreestopayfor it in money or money’s worth, and the work is made in pursuance of that commission, **[such person shall, subject to the provisions of paragraph *(b)*, bethe owner of any copyright subsisting therein by virtue of section 3 or 4]** the ownership of any copyright subsisting in the work shall be governed by contract: Provided that in the absence of a valid contract, ownership shall vest in the person commissioning the work and the author of the work shall have a licence to exercise any right which by virtue of this Act would otherwise be exercisable exclusively bytheowner.’’.

Drafting note:The provision has been technically improved where there is an absence of a contract.

The scope and application of this clause and its consequences are for policy discussions. The concern s that the proviso in practice results in 2 “copyright owners”, so an exclusively comissioned painting can in other words be re-printed (copies made) by the author and sold. That could not be the intention.

“Valid” – should this not rather read “if the contract does not provide for ownership…”

“Shall be governed” – The proviso governs what happens if there is no contract, which is actually no non-compliance of the law. This seems to be contradictory.

# Amendment of section 22 of Act 98 of 1978

**23.** Section 22 of the principal Act is herebyamended—

*(a)* by the substitution for subsection (1) of the followingsubsection:

‘‘(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment,testamentary disposition or operation of law: Provided that copyright owned by, vested in or under the custody of the state may not beassigned.’’;

*(b)* by the substitution for subsections (3) and (4) of the following subsections, respectively:

‘‘(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall haveeffect unless it is in writing andsigned by or onbehalf of the assignor, the **[licenser]** licensoror, in the case of an exclusive**[principal act]** sub-licence, the exclusive **[sub- licenser, as the case may be]** sub-licensor, as stipulated in Schedule 2: Provided that assignment of copyright shall be valid for a period of25 years from the date of agreement of suchassignment.

Policy concern:The CRC recommends an amendment to the legislation to allow for automatic reversion of assigned rights after 25 years from the date of assignment. the **dti** supports this and the assignment period should not be less than 25 years. The CRC states that the assignees should be able to recoup their investment within the first 20 years. To provide the artists or their heirs with an opportunity to reduce the level of losses arising  as a result of the desperate circumstances referred to in the report. However, the concern is that this clause limits the rights of authors / copyright owner to assign for less than 25 years: propose that this reads “up to 25 years”

(4) A non-exclusive licence to do an act which is subject to copyright may be **[written or oral]** verbal or in writing, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted **[by contract]** verbally orin writing, or an electronic equivalentthereof,shall not be revoked, either by the person who granted the licence or his or her successor in title, except as the contract may provide, **[or by a further contract]** by a further contract or by operation of law.’’; and

*(c)* by the substitution for subsection (8) of the followingsubsection:

‘‘(8) Unless otherwise prohibited from doing so, a licensee may granta sub-licence for the doing of any act that falls within the terms of the licence, including any implied term, without the consent of the original licensor.’’.

# Insertion of section 22A in Act 98 of 1978

**24.** The following section is hereby inserted in the principal Act aftersection22:

‘‘**Assignment and licences in respect of orphanworks**

**22A.** (1) A person who wishes to obtain a licence to do an act which is subjecttocopyrightor a resale royalty right inrespectofanorphanworkmustmakeanapplication to the Commission in the prescribedmanner.

(2) Beforemakinganapplicationintermsofsubsection(1),theapplicant must publish his or her intention to make such application by notice in the *Gazette* in English and one other official language, as well as in two daily newspapers having general circulation throughout the Republic in any official language.

(3) An application in terms of subsection (1) must be made in such form as may beprescribed and must be accompanied by copies of the published advertisement contemplated insubsection (2) and such fee as may be prescribed.

(4) WhentheCommissionreceivesanapplicationintermsofsubsection(1), theCommission may, after holding such inquiry as may be prescribed, grant to the applicant alicence to perform any act which is subject to copyright, subject to subsections (5) and (6) and the payment of a royalty.

(5) A licence issued in terms of subsection (4) is non-exclusive and is subject to such terms and conditions as the Commission maydetermine.

(6) The Commission may not issue the licence in terms of subsection (4)unless theCommission is satisfied that the applicant has undertaken the following steps in locating thecopyrightowner:

*(a)* Conducted a search of the database of the register of copyright maintained by the Commission that is available to the public through either the internet or any other means relevant to identifying andlocating a registered copyrightowner;

*(b)* conducted a search of reasonably available sources of copyright ownership and ownership informationandwhereappropriate,licensor information;

*(c)* conducted a search using appropriate technology tools, printed publicationsandenlisted,wherereasonable,internalorexternalexpert assistance;

*(d)* conducted a search using any other database available to the public, including any database that is available to the public through the internet;and

*(e)* undertaken actions that are reasonable and appropriate in terms of the facts relevant to the search,including—

(i) actionsbasedonfactsknownatthestartofthesearchandfactsuncovered during thesearch;

(ii) actions directed by the Commission;and

Drafting note: Here and in other matters, words and phrases are used that are from IPLAA. If IPLAA is not operational at the time that this Amendment Act becomes operational, we may have to include transitional provisions for those terms that are from IPLAA

(iii) the review of any records not available to the public through the internet that are known to be useful in identifying and locating the copyrightowner.

(7) Wherealicenceisgrantedintermsofsubsection(4),theCommission maydirecttheapplicanttodeposittheamountoftheroyaltydeterminedina particular account so as to enable the owner of the copyright in the work or, as the case may be, his or her heirs, executors or legal representatives to claimsuch royalty at anytime.

(8) Thecopyrightownermay,notlaterthanfiveyearsaftertheexpiration of a licence issued in terms of this section, collect the royalties fixed inthelicence or in default of payment by initiating legal action to recover such royalties.

(9) Anypersonwhocanadduceevidenceforthepurposesofprovingthat he or she is the owner of copyright in an orphan work, may have the copyright work returned to him or her with a claim in law to recover any royaltiesthataccruedto the copyrightwork aftersuchreturn.’’.

Policy concerns:

(8) – Why the limit of 5 years, and what happens to the money after 5 years? The dti indicates that it was not the intention to expropriate moneys by placing this limit on recovery – a copyright owner should always be able to recover royalties – propose the 5 year limit be deleted.

(9) - This is not sound in law. The orphan work did not change owners. It is still the owner’s. He / She was just not known. The owner cannot be required to recover something that belongs to him / her already. Propose this is replaced with “…must be entered onto the database of the register of copyright referred to in subsectin (6)(a) and may for the period during which the owner of copyright was unknown, recover royalties as contemplated in subsection (8).”

Committee discussion 2017.10.18: CLSO recommended that this issue be flagged and only dealt with after the discussion about fair use and fair dealing. If the committee goes with fair use, then need to see if orphan works will adequately be covered by that.

# Insertion of Chapter 1A in Act 98 of 1978

**25.** The following Chapter is hereby inserted in the principal Act after Chapter1:

# ‘‘CHAPTER 1A

# COLLECTING SOCIETIES

**Registrationand accreditation**

**22B.** (1) Any person who intends to act as a representative collecting society in terms of this Chapter must apply to the Commission in the prescribed manner and form for registration and accreditation.

(2) A collecting society that has been registered and accredited by the Commission to administerrights on behalf of—

*(a)* copyright owners or authors, or onbehalfofanorganisationrepresentingcopyrightowners or authors,hastheright to receive payment of a royalty in terms of thisAct;or

*(b)* performersorowners,or onbehalfofan organisationrepresenting performers or owners, has the right to receivepayment of a royalty in terms of section 5(1)*(b)* of the Performers’ Protection Act, 1967 (Act No. 11 of1967).

(3) The Commission may, for purposes of issuing a registration certificate, consult with any person and may grant such registration and issuearegistrationcertificateonsuchtermsandconditionsasmaybedetermined by the Commission.

(4) The Commission shall not register and issue a registrationcertificate to any applicant unless the Commission is satisfiedthatthe applicant—

*(a)* is able to ensure adequate, efficient and effective administration relating to collection of royalties;

*(b)* is able to comply with any condition for accreditation and the relevant provisions of the Companies Act, 2008 (Act No. 71 of 2008), the Broad-Based Black Economic Empowerment Act, 2013 (Act No. 46 of 2013), and any other applicable legislation; and

*(c)* has adopted a constitution meeting the prescribed requirements.

(5) A registration certificate issued in terms of this section is valid for a period not exceeding five years and, unless it is suspended or cancelled, mayberenewedin the prescribed manneronsuchtermsandconditionsas may be determined by theCommission.

(6) TheCommissionshallonlyregisteronecollectingsocietyforeachright granted under this Actor the Performers’ Protection Act, 1967 (Act No. 11 of 1967).

(7) If thereisnocollectingsocietyforarightreferred to in sub-section (6), the Commission may provide such assistance as may be necessary to assist in the formation of a collecting society.

# Administration of rights bycollectingsociety

**22C.** (1) Subject to such terms and conditions as may be prescribed—

*(a)* a collecting society,indigenous community or the National Trust may accept from a performer copyright owner, indigenous community or the National Trustor another collecting society of rights, exclusive authorisation to administer any rightinanyworkbytheissuingoflicencesorthecollectingoflicencefeesand royalties, or both; and

*(b)* a performer copyright owner, indigenous community or the National Trustor other collecting society of rights may withdraw such authorisation without prejudice to the right of the collecting society,indigenous community or the National Trustconcerned.

(2) Subject to such conditions as may be prescribed, a collectingsociety may—

*(a)* issue a licence in respect of any rights under thisAct;

*(b)* collect fees and royalties in pursuance of such alicence;

*(c)* distributesuchcollectedroyaltiesamong, performersor copyright owners, collecting societies of rights, indigenous communities or the National Trust afterdeductingaprescribedamountfromthecollectedroyaltiesforits ownexpenses;

*(d)* negotiate royalty rates; and

*(e)* perform any other prescribed function.

(3) A collecting societymay—

*(a)* enter into an agreement with any foreign society orforeign organisation administeringrightscorrespondingtorightsthatit administers under this Act;and

*(b)* entrustrights administered by it in the Republic tosuchforeignsocietyorforeign organisationto administer inthat country : Provided that no such collecting society,foreignsocietyorforeign organisationshallpermitanydiscrimination inrespectofthetermsofalicenceorthedistributionofroyalties collected.

Drafting concern: “discrimination” refers to national treatment. Can this be reworded to better reflect the intention?

Drafting note: Subsections (2) and (3) swapped to ensure a better flow of the section

# Controlofcollectingsocietybyperformers,or copyright owners

**22D.** (1) Acollectingsocietyissubjecttothecontrol of the performers or copyright owners whose rights that collecting society administers,andthecollectingsocietyshall,insuchmannerasmay beprescribed—

*(a)* collect anddistribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)*(c)*;

*(b)* utilise amounts collectedasroyaltiesin accordance with the constitution of the collecting society contemplated in section 22B(4)*(c)* onlyforthe purposeof distributionofthe royalties to the performers or copyright owners; and

*(c)* provide to each performeror copyright ownerregular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner.

(2) Royalties distributed among the performers or copyright ownersshall, as farasmay bepossible,bedistributedinproportiontotheactualuseoftheirworks.

Drafting note: Community Trust deleted as the workings of the National Trust and collection by indigenous communities is dealt with by IPLAA

# Submission of returns and reports

**22E.** (1) A collecting society shall submit to the Commission such returns and reports as may be prescribed.

(2) The Commission may call for a report and specific records from a collecting society for the purposes of satisfying the Commission that—

*(a)* the affairs of the collecting society are conducted in a manner consistentwiththeregistrationconditionsofthatcollectingsociety;or

*(b)* theroyaltiescollectedbythecollectingsocietyinrespectofrights administeredbythatcollectingsocietyarebeingutilisedordistributed in accordance with the provisions of thisAct.

# Suspension and cancellation of registration of collecting society

**22F.** (1) The Commission may issue a compliance notice or apply to the Tribunalforanordertoinstituteaninquiryintotheaffairsofacollecting society, if the Commission is satisfied that the collecting society is being managed in a manner that contravenes the registration conditions of that collecting society or is managed in a manner detrimental to the interestsof the performers or copyright owners concerned.

(2) TheCommissionmay,ifitisoftheopinionthatitwillbeintheinterestoftheperformers or copyright owners concerned,applytotheTribunalforanorder suspending the registration of the collecting society contemplated in subsection (1), pending an inquiry for such period as may be specified in theorder.

(3) TheCommissionmay,afterthe inquirycontemplated in subsection (2) has been finalised andifitisoftheopinionthatit will be in the interest of the performers or copyright owners concerned,apply to theTribunal for an order of cancellation of the registration of the collecting society in question.

(4) The Commission shall be responsible for the administration and discharge of the functions of the collecting society contemplated in subscetion (3) during the period of suspensionorcancellationoftheregistrationofthat collectingsocietyfollowing the order of the Tribunal: Provided that the Tribunal may, on application by the Commission, appoint any suitable person to assist the Commission in the administration and discharging of the functions of that collecting society.’’.

# Amendmentofsection23ofAct98of1978,asamendedbysection20ofAct125of1992

**26.** Section 23 of the principal Act is herebyamended—

*(a)* by the substitution for subsection (1) of the following subsection:

‘‘(1) Copyright shall be infringed by anyperson**[,]**—

*(a)* notbeingtheownerofthecopyright,who,withoutthelicenceofsuchowner,doesorcausesanyotherpersontodo,intheRepublic, anyactwhichtheownerhastheexclusiverighttodoortoauthorise;

*(b)* whotamperswithanyinformationkeptbyanyotherpersoninorder to administer copyright in terms of thisAct; or

*(c)* whoabuses copyrightandtechnologicalprotectionmeasuresinorder to constitute a defence to any claim of copyright liability or any independent cause of actionthat may be pursued either as acounterclaim in an action for infringement or instituted indepen- dently.’’; and

*(b)* by the deletion in subsection (2) of paragraph*(b)*.

# Amendment of section 27 of Act 98 of 1978, as amended by section 11 of Act 52 of 1984, section 3 of Act 61 of 1989 and section 24 of Act 125 of1992

**27.** Section27oftheprincipalActisherebyamendedbytheadditionofthefollowing subsection:

‘‘(7) Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author orowner of the copyright—

*(a)* makes, imports, sells, distributes, lets for hire, offersor exposes for sale or hire or advertise for sale or hire, a technological protection measure circumvention deviceif—

(i) such person knows, or has reason to believe, that that device will or is likely to beused to infringe copyright ina work protected bya technological protection measure;

(ii) such person provides a service to another person to enable or assistsuch other person to circumvent a technological protection measure;or

(iii) suchpersonknowsorhasreasontobelievethattheservicecontemplatedinsubparagraph(ii)willorislikelytobeusedbyanotherpersontoinfringe copyright in a work protected by atechnological protection measure;

*(b)* publishes information enabling or assisting any other person to circumvent a technologicalprotectionmeasurewiththeintentionofincitingthat other persontounlawfullycircumventatechnologicalprotectionmeasureintheRepublic;or

*(c)* circumvents such technological protection measure when he or she is not authorised to doso,

shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonmentforaperiodnotexceedingfiveyears,ortobothafineandsuch imprisonment.’’.

Policy consideration: Confirm whether section 27 covers the new rights provided for in the bill, especially RRR and the Royalty provisions in the new sections 6A, 7A and 8A

# Amendment of section 28 of Act 98 of 1978, as substituted by section 12 of Act 52 of 1984 and amended by section 25 of Act 125 of 1992

**28.** Section 28 of the principal Act is herebyamended—

*(a)* by the substitution for subsection (2) of thefollowingsubsection:

‘‘(2) This section shall apply to any copy of the work in question made outsidethe Republic**[which if it had been made in the Republic would be an infringing copy of the work]**, if the making of such copy constituted aninfringement ofcopyright in the country in which the work wasmade.’’;and

*(b)* by the substitution for subsection (5) of the followingsubsection:

‘‘(5) This section shall **[*mutatis mutandis*]** with the necessary changes,apply with reference to an exclusive licensee who has theright toimportintotheRepublicanyworkpublishedelsewhere,whichwouldbe an infringing copy of the work in the country in which it was made.’’.

# Insertion of sections 28O to 28S in Act 98 of 1978

**29.** The following section is hereby inserted in the principal Act after section 28N:

‘‘**Prohibited conduct in respect of technological protectionmeasures**

**28O.** (1) No person may make, import, sell, distribute, let for hire, offerorexposeforsale,hireoradvertiseforsaleatechnologicalprotectionmeasure circumvention device if such a person knows or has reason to believe that it will or is likely to be used toinfringe copyright in a technologically protected work.

(2) No person may provide a service to any other person if—

*(a)* suchotherpersonintendstousetheservicetocircumventaneffective technological protection measure;or

*(b)* such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright in atechnologically protectedwork.

(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that otherperson to unlawfully circumvent a technological protection measure.

(4) No person may, during the subsistence of copyright in a work and withoutalicenceoftheowner ofthecopyrightinsuchwork,circumventaneffective technological protection measure applied by the owner of the copyright to suchwork.

(5) Atechnologicalprotectionmeasureshallbedeemedtobeeffectiveifthe use of the work is controlled by the exclusive licensee or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protectionobjective.

(6) The provisions of this section must be read together with the provisionsofsections86,87and88oftheElectronicCommunicationsand Transactions Act, 2002 (Act No. 25 of2002).

# Exceptions in respect of technological protection measure

**28P.** (1) For the purposes of this Act and of section 86 oftheElectronicCommunicationsandTransactionsAct,2002(ActNo.25of2002),nothing in this Actshall prevent any person from using a technological protection measure circumventiondevice to perform any of thefollowing:

*(a)* AnactpermittedintermsofanyexceptionprovidedforinthisAct;or

*(b)* the sale,offer to sell, procurement for use, design, adaptationfor use, distribution or possession of any device or data, including acomputer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph*(a)*.

(2) A person whowishesto circumventatechnologicalprotectionmeasuresoastoperformapermitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure,may—

*(a)* apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure inorderto perform such permitted act; or

*(b)* if the copyright owner has refused such person’s request or has failed to respond to it within reasonable time, engage theservices ofanyotherpersonforassistancetoenablesuchpersonto circumventsuchtechnologicalprotectionmeasureinordertoperform such permitted act.

(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measureintermsofsubsection(2)*(b)*shallmaintainacompleterecordofthe particularsofthe—

*(a)* otherperson,includinghisorhername,addressandallotherrelevantinformation necessary to identify him or her;and

*(b)* purposeforwhichtheservicesofsuchotherpersonhasbeenengaged.

Policy concern: Are the provisions of (2) and (3) (the process), not too onerous? (1) in any event allows the circumvention. This is not something that is a normal requirement.

# Enforcement by Commission

**28Q.** The Commission must enforce thisActby—

*(a)* performing all the relevant functions contemplated in section 187 of the Companies Act in respect of thisAct;

*(b)* referring matters to and appearing before the Tribunal;and

*(c)* dealingwithanyothermatterreferredtoitbyanyperson,Tribunalor any other regulatory authority.

# Prohibited conduct in respect of copyright management information

**28R.** Nopersonmay—

*(a)* in respect of any copy of a work, remove or modify any copyright management information;and

*(b)* inthecourseofbusinessmake,import,sell,letforhire,offerorexpose forsale,advertiseforsaleorhireacopyofaworkifanycopyrightmanagementinformationhasbeenremovedormodifiedwithoutthe authority of the copyright owner.

**Exceptions in respect of copyright management information**

**28S.** The prohibition in section 28R does not apply if a person—

*(a)* is authorised by the performer or copyright owner to remove or modify the copyrightmanagementinformation;

*(b)* does not know and has no reason to believe that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work;or

*(c)* does not know or has no reason to believe that the copyright management information has been removed or modified without the authority of the performer or copyright owner.’’.

# Substitution of heading of Chapter 3 of Act 98 of 1978

**30.** ThefollowingheadingisherebysubstitutedfortheheadingofChapter3oftheprincipal Act:

# ‘‘[COPYRIGHT TRIBUNAL] REGULATORY AND ENFORCEMENT AGENCIES’’.

# Substitution of section 29 of Act 98 of 1978, as amended by section 26 of Act 125 of 1992

**31.** The following section is hereby substituted for section 29 of the principal Act:

‘‘**Establishment ofTribunal**

**29.** (1) There is hereby established a juristic person to be known as the IntellectualProperty Tribunal, which—

*(a)* has jurisdiction throughouttheRepublic;

*(b)* is independent and subject only to the Constitution and the law; and

*(c)* must perform its functions impartially and without fear orfavour.

(2) Each organ of state must assist the Tribunal to maintain its independence andimpartiality, and to perform its functionseffectively.

(3) In carrying out its functions, theTribunalmay—

*(a)* have regard to international developments in the intellectual property arena;and

*(b)* consult any person, organisation or institution with regard to any matter within itsjurisdiction.

(3) TheTribunalconsistsofachairperson,deputychairpersonandnotless than nine members appointed by the Minister, on a full-time or part-time basis.’’.

# Insertion of sections 29A to 29S in Act 98 of 1978

**32.** The following sections are hereby inserted in the principal Act after section 29:

‘‘**Functions ofTribunal**

**29A.** (1) The Tribunal must carry out the functions entrusted to it in termsof this Act or anyotherlegislation.

(2) The Tribunal may—

*(a)* adjudicate any application or referral made to it in terms of this Act, the Companies Actor any other relevant legislation, and may make any appropriate order in respect of an application orreferral;

*(b)* hear matters referred to it by the Commission, a dispute resolution institution or any regulatory authority, only if the disputerelates to intellectual propertyrights;

*(c)* review any decision of the Commission, dispute resolutioninstitution or any regulatory authority if it relates to intellectual propertyrights;

*(d)* adjudicate any application or referral made to it by any person, institution or regulatory authority where the dispute can only be directly referred to the Tribunal in terms of this Act and such dispute relates to intellectual property rights; and

*(e)* settle disputes relating to payment of royalties or terms of agreements enteredintoasrequiredbythisActoragreementsenteredintoinorder to regulate any other matter in relation to intellectual property rights.

# Appointment of members of Tribunal

**29B.** (1) The Minister must appoint as members of the Tribunal persons who have adequate and appropriate qualifications and experience in economics, law, commerce orpublicaffairs.

(2) TheMinistermustdesignateamemberoftheTribunalaschairperson and another member as deputy chairperson of theTribunal.

(3) Thedeputychairpersonshallperformthefunctionsofthechairperson whenever—

*(a)* the office of chairperson isvacant;or

*(b)* the chairperson is for any other reason temporarily unable to perform thosefunctions.

(4) The Minister, in consultation with the Minister of Finance, must determine the remuneration, allowances, benefits and other terms and conditions of employment of members ofthe Tribunal.

# Qualifications for appointment

**29C.** (1) TobeeligibleforappointmentasamemberoftheTribunaland to continue to hold that office, a person must, in addition to satisfying any other specific requirements set out in thisAct—

*(a)* not be subject to any disqualification set out in subsection(2);and

*(b)* have submitted to the Minister a written declaration stating that he or she is not disqualified in terms of subsection(2).

(2) A person may not be appointed or continue to be a member of the Tribunal, if that person—

*(a)* is an office-bearer of any political party, political movement or political organisation;

*(b)* has or through a related person acquires a personal financial interest thatmayconflictorinterferewiththeproperperformanceoftheduties of a member of theTribunal;

*(c)* isdisqualifiedintermsofsection69oftheCompaniesActfrom serving as a director of a company;

*(d)* is subject to an order of court holding that person to be mentallyunfit ordisordered;

*(e)* has been found in any civil or criminal proceedings by a court of law, whetherintheRepublicorelsewhere,tohaveactedfraudulently, dishonourably, in breach of a fiduciary duty or of any other offence forwhich such person has been sentenced to direct imprisonment without the option of a fine;

*(f)* has been removed from a position of trust;or

*(g)* has at any time found to be in contravention of thisAct.

# Terms of office of membersofTribunal

**29D.** (1) Each member of the Tribunal, including the chairperson and deputy chairperson, serves for a term of five years which may be renewed only once for a further period of five years.

The chairperson may, on one month written notice addressed to the Minister—

*(a)* resign from the Tribunal;or

*(b)* resign as chairperson, but remain as a member of theTribunal.

(2) A member of the Tribunal other than the chairperson may resign by giving atleast one month written notice to theMinister.

(3) IntheeventoftheexpiryofthetermofofficeofamemberoftheTribunal, the member has a matter pending for adjudication before the Tribunal, the member maycontinue to act as a member in respect of that matter only.

# Removal or suspension of members of Tribunal

**29E.** TheMinistermay,atanytime,removeorsuspendamemberoftheTribunal from office if such a member—

*(a)* becomes subject to any of the disqualifications referred to in section 29C(2);

*(b)* repeatedly fails to perform the duties of theTribunal;

*(c)* due to a physical or mental illness or disability becomesincapableofperforming the functions of the Tribunal;

*(d)* is found guilty of a serious misconduct;or

*(e)* engages in any activity that may undermine the integrity of the Tribunal.

# Conflict and disclosureof interest

**29F.** (1) A member of the Tribunal may not represent any person before the Tribunal.

(2) If, during a hearing in which a member of the Tribunal is participating, itappears to the member that the matter concerns a financialorotherinterestofthemembercontemplatedinsection29C(2)*(b)*,themember must—

*(a)* immediately and fully disclose the fact and nature of such interest to the chairperson, deputy chairperson and the presiding member at that hearing, as the case may be;and

*(b)* withdraw from any further involvement inthathearing.

(2) A member mustnot—

*(a)* makeprivateuseoforprofitfromconfidentialinformationobtainedas a result of performing his or her official duties as a member of the Tribunal;or

*(b)* divulgeanyinformationreferredtoinparagraph*(a)*toathirdparty, except as required and as part of the official functions as a member of the Tribunal.

# Proceedings of Tribunal

**29G.** (1) The chairperson is responsible for managing the case files of the Tribunal, and must, taking into account the complexity of amatter,assign the matter to—

*(a)* a member of the Tribunal;or

*(b)* a panel composed of any three members of theTribunal.

(2) When assigning a matter to a panel in terms of subsection (1)*(b)*,the chairpersonmust—

*(a)* ensure that at least one member of the panel is a person with suitable legal qualifications and experience;and

*(b)* designateamemberofthepaneltopresideovertheproceedingsofthe Tribunal.

(3) If a member of the panel is unable to complete the proceedings in a matterassigned to that panel due to resignation, illness, death, removal, suspension or withdrawal from a hearing in terms of this Act, the chairpersonmay—

*(a)* direct that the hearing of that matter proceed before the remaining membersofthepanel,subjecttotherequirementsofsubsection(2)*(a)*; or

*(b)* terminate the proceedings before that panel and constitute a new panel whichmayincludeanymemberoftheoriginalpanelanddirectthenew panel to conduct the hearing afresh.

(4) ThedecisionofaTribunalonamatterreferredtoitmustbeinwriting and must include reasons for thatdecision.

(5) A decision of a single memberof theTribunal hearing a matter in termsofsubsection(1)*(a)*,orofamajorityofthemembersofapanelinanyother case, is the decision of the Tribunal.

(6) A decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court and is binding subject to review or appeal to a HighCourt.

# Hearingsbefore Tribunal

**29H.** (1) The Tribunal must conduct its hearings in public—

*(a)* in an inquisitorialmanner;

*(b)* as expeditiously aspossible;

*(c)* as informally as possible;and

*(d)* in accordance with the principles ofnaturaljustice.

(2) Notwithstandingtheprovisionsofsubsection(1),aTribunalmember presidingatahearingmayexcludemembersofthepublic,specificpersons or categories of persons from attending the hearingif—

*(a)* evidence to be presented is confidential information, but only to the extent that the information cannot otherwisebeprotected;

*(b)* the proper conduct of the hearing requires it;or

*(c)* for any other reason that would be justifiable during proceedings in a HighCourt.

# Right to participate in hearing

**29I.** The following persons may participate in a hearingbeforetheTribunal, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

*(a)* TheCommission;

*(b)* the applicant, complainant andrespondent;and

*(c)* any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Tribunal, such interest is adequately represented by any other person participating at the hearing.

# Powers of member presidingathearing

**29J.** The member of the Tribunal presiding at a hearing may—

*(a)* direct or summon any person to appear before the Tribunal at any specified time andplace;

*(b)* question any person under oath oraffirmation;

*(c)* summon or order anypersonto—

(i) produce any book, document or item necessary for the purposes of the hearing;or

(ii) perform any other act in relation to this Act;and

*(d)* give direction prohibiting or restricting the publication of any evidence adduced during a Tribunalhearing.

# Rules of procedure

**29K.** Subject to the rules of procedure of the Tribunal, a memberofthe Tribunalpresiding at a hearing may determine any matter of procedureforthat hearing, with due regard to the circumstances of the case and the requirements of the applicable provision of this Act.

# Appeals and reviews

**29L.** (1) AparticipantinahearingbeforeasinglememberoftheTribunal may appeal against the decision of that member to a full panel of the Tribunal.

(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may—

*(a)* apply to the High Court to review the decision of the Tribunal;or

*(b)* appeal to the High Court against the decision of theTribunal.

# Interim relief

**29M.** (1) Any person may apply at any time, whether or not a hearing has commenced, to the Tribunal for an interim order in respect of the matter beforethe Tribunal.

(2) The Tribunal may grant such an orderif—

*(a)* there is *prima facie* evidence that the allegations may be true;

*(b)* an interim order is reasonably necessaryto—

(i) prevent serious, irreparable damage to that person;or

(ii) prevent the purposes of this Act frombeingfrustrated;

*(c)* the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings;and

*(d)* the balance of convenience favours the granting of theorder.

(3) An interim order in terms of this section must not extend beyond the earlierof—

*(a)* the date of the conclusion of a hearing into the matter before the Tribunal;or

*(b)* six months after the date of the issue of the interim order extensionof that order in terms of subsection(4).

(4) Ifaninterimorderhasbeengrantedandahearingintothatmatterhas not been concluded within six months after the date of that order, the Tribunal may, on good cause shown, extend the interim order for a further period not exceeding six months.

# Orders of Tribunal

**29N.** InadditiontothepowersintermsofthisActandtheCompanies Act, the Tribunal may make any appropriate order in relation to a matter brought before it, including—

*(a)* declaring particular conduct to constitute an infringement of this Act and as suchprohibited;

*(b)* interdicting conduct which constitutes an infringement ofthisAct;

*(c)* imposing an administrative fine in terms of section 175 of the Companies Act, with or without the addition of any other order in terms of thisAct;

*(d)* confirming a consent agreement in terms of section 173 of the Companies Act as an order ofthe Tribunal;

*(e)* condoning any non-compliance of its rules and procedures on good causeshown;

*(f)* confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;

*(g)* suspending or cancelling the registrant’s registration or accreditation subject to any such terms and conditions the Tribunal deems fit;or

*(h)* any other appropriate order required to give effect to a right contemplated in this Act or any other relevantlegislation.

# Witnesses

**29O.** (1) Every person giving evidence at a hearing of the Tribunal must answer any relevant question.

(2) The law regarding a witness’s privilege in a criminal case in a court of law applies to a person giving evidence at a hearing of the Tribunal.

(3) TheTribunalmayorderapersontoansweranyquestionortoproduce any article or document, even if it is self-incriminating to do so.

# Costs

**29P.** (1) Subjecttosubsection(2),eachpartyparticipatinginahearingof the Tribunal shall bear its owncosts.

(2) Ifthe Tribunal—

*(a)* has not made a finding against a respondent, the member of the Tribunal presiding at the hearing may award costs to the respondent andagainstacomplainantwhoreferredthecomplainttotheTribunal; or

*(b)* hasmadeafindingagainstarespondent,amemberoftheTribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint to the Tribunal.

# Appointment of staff of Tribunal

**29Q.** The Chairperson or any delegated member of the Tribunal may—

*(a)* appointstaffandenterintoanagreementwithorhire independent contractors to assist the Tribunal in carrying out its functions; and

*(b)* in consultation with the Minister and the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of members of staff of the Tribunal or those contracted or hired to assistthe Tribunal.

# Finances

**29R.** (1) The Tribunal is financed from—

*(a)* money appropriated byParliament;

*(b)* any fees or fines payable in terms of this Act or any relevant legislation;

*(c)* income derived from investment and deposit of surplus money in terms of subsection (2);or

*(d)* other money accruing from anysource.

(2) The Tribunal may invest or deposit money that is not immediately required for contingencies or to meetcurrentexpenditures—

*(a)* on a call or short-term fixed deposit with any registered bank or financial institution in the Republic;or

*(b)* in an investment account with the Corporation for Public Depositsestablished by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46of1984).

# Reviews and reports to Minister

**29S.** (1) The Minister may, at any time, conduct an audit review of the performance by the Tribunal of its functions.

(2) InadditiontoanyotherreportingrequirementsetoutinthisActorany other legislation, the Tribunal must report to the Ministerannuallyon its performance and activities as required by the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) As soon as practicable after receiving a report of a review contemplated in subsection (1), or after receiving a report contemplated in subsection (2), the Minister must transmit and table a copy of the report in Parliament.’’.

# Repeal of sections 30, 31, 32, 33 and 36 of Act 98 of1978 5

**33.** Sections 30, 31, 32, 33 and 36 of the principal Act are hereby repealed.

# Amendment of section 39 of Act 98 of 1978, as amended by section 4 of Act 9 of 2002and section 5 of Act 28 of 2013

**34.** Section 39 of the principal Act is herebyamended—

*(a)* by the deletion of the word ‘‘and’’ at the end of paragraph*(c*D*)*;

*(b)* by the insertion of the following paragraphs after paragraph*(c*E*)*:

‘‘*(c*F*)* prescribing rules regulating the processes and proceedings of the Tribunal;

*(c*G*)* prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms ofthisAct;

*(c*H*)* prescribingpermitted actsfor circumvention of technological protection measures contemplated in section 28B after due consideration of the following factors:

(i) The availability for use of works protected bycopyright;

(ii) theavailabilityforuseofworksfornon-profitarchivaland educational purposes;

(iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or pro- tected by copyright on criticism, comment, news reporting, teaching, scholarship orresearch; or

(iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;

*(c*I*)* prescribing royalty rates or tariffs for various forms of use;

*(c*J*)* prescribing the percentage and period within whichdistributionof royalties must be made by collecting societies;

*(c*K*)* prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processesof royalties by a collecting society;

*(c*L*)* in consultation with the Minister responsible for communication, prescribing the local music content for broadcasting;’’; and

*(c)* by the addition of the following subsection, the existing section becoming subsection(1):

‘‘(2) Before making any regulations in terms of subsection (1), the Ministermustpublishtheproposedregulationsforpubliccommentfora period of not less than 30days.’’.

# Insertion of section 39B in Act 98 of 1978

**35.** The following section is hereby inserted in the principal Act aftersection39A:

# ‘‘Unenforceable contractual term

**39B.** (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shallbeunenforceable.

(2) This section does not prohibit or otherwise interfere with—

*(a)* open licencesor voluntary dedications of a work to the public domain;

*(b)* settlement agreements; or

*(c)* terms of service licences.’’.

Policy concern: Further discussion on *(b)* and *(c)* in terms of settlement agreements and terms of service licences needed. These paragraphs allows the exclusion of protection afforded by the Act by way of a licence or settlement agreement.

# Insertion of Schedule 2 in Act 98 of 1978

**36.** The following Schedule is hereby added to the principal Act, the existing Schedule becoming Schedule1:

# ‘‘Schedule 2

## (Section22(3))

# Part A Translation Licences

# Application of provisions in Part A

**1.** The provisions in this Part apply to copyright works which have been published in printed or analogous forms ofreproduction.

# Application for licence to translate copyrightwork

**2.** (1) Any person may, subject to item 4, apply to the Tribunalfor a licence to make a translation of the work(hereinafter in Part A referred to as‘‘the licence’’) into—

*(a)*  any language that is an official language within the Republic;

*(b)* aforeignlanguagethatisregularlyusedintheRepublic; or

*(c)*any other language,

for use by readers located in the Republic.

(2) Any person may apply to the Tribunal for a licence to translate a workinordertoconverttheworkintoausableoranalogousform ofreproduction.

(3) Nolicenceshallbegranteduntiltheexpirationofthefollowing applicable periods, commencing from the date of first publication of the original work:

*(a)* One week where the application is for a licence for translation into an officiallanguage;

*(b)* three monthswhere the application is for a licence into a foreign language in regularusein the Republic; and

*(c)* one year wheretheapplicationisforalicencefor translation into any language contemplated in subitem (1)*(c)*.

# Granting of licence

**3.** (1) Before granting a licence the Tribunal must be satisfied that—

*(a)* no translation of the work into the language in question has been executed by or with the authorisation of the copyright owner or that any previous editions in that language are out ofprint;and

*(b)* the applicant for the licence—

(i) has requested and unreasonably been denied authorisation from the copyright owner to translate the copyright work; or

(ii) afterduediligenceonhisorherpart,wasunableto find such copyright owner and canprove that he or she has byregisteredmail or electronic mail sent a copy of his or her application contemplated in item 2(1), to the principal place of business of the publisher whose name appears on the copyright work;

(2) Where thecopyright owner of the work in question is known and can be located, no licence shall be granted unless he or she has been given an opportunity to beheard.

(3) Where—

*(a)* theone weekperiodreferredtoinitem2(3)*(a)*applies, no licence shall be granted until the expirationofafurtherperiodoftwodays;

*(b)* thethree monthsperiodreferredtoinitem2(3)*(b)*applies, no licence shall be granted until the expirationof a further period of two weeks;or

*(c)* theone yearperiodreferredtoinitem2(3)*(c)*applies,no licence shall be granted until the expirationof a further period of three months,

calculated in accordance with subitem (4).

(4) The further periodscontemplated in subitem (3) shall be computed fromthe date on which therequirementsmentionedinsubitem (1)*(a)* and subitem and subitem (1)*(b)*(i) are fulfilled or, where the identity or the address of thecopyright owner is unknownfromthedateonwhichtheapplicantalsocomplieswiththe requirements mentioned insubitem (1)*(b)*(ii).

(5) If, during any of the said further periods, a translation into the language in question of the work is published in printedoranalogousformofreproductionby,orwiththeauthorisation of,thecopyright owner, no licence shall be granted.

(6) For works composed mainly of illustrations, a licence shall only be granted if the conditions stipulated in subitem (1) have been fulfilled.

(7) No licence shall be granted when the copyright owner has withdrawn all copies of the work from circulation.

# Scope and conditions of licence

**4.** (1) Any licence granted under this Partshall—

*(a)* be for the purpose of teaching; or

*(b)* be for training, scholarshiporresearch.

(2) Copies of a translation published under a licence may be sentabroad by the government or a public entityif—

*(a)* thetranslationisintoalanguageotherthanthelanguageusedinthe Republic that will be of use;

*(b)* the recipients of the copies are individuals who are South African nationals or are organisationsthat are registeredin the Republic;

*(c)* therecipientswillusethecopiesonlyforthepurposesofteaching, scholarship or research;

*(d)* boththesendingofthecopiesabroadandtheirsubsequentdistribution to the recipients are without any commercial purpose;and

*(e)* the government of the foreign country to which the copies are sent, has agreed to the receipt or distribution, or both, of the copies in that country.

(3) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the Republic and copyright owners in the country of the copyright owner.

(4) If the licensee is unable, by reason of currency regulations, to transmit the compensation to the copyright owner he or she shall report the fact to the Tribunal who shall make all effortsto ensure that such transmittal is in internationally convertible currency or its equivalent.

(5) As a condition of maintaining the validity of the licence, the translation must be correct for such use and all published copies must include thefollowing:

*(a)* The original title and name of the copyright owner ofthework;

*(b)* a notice in the language of the translation stating that the copy is available for distribution only in the Republic or in accordance with item 4(2);and

*(c)* if the translated workwas published with a copyrightnotice, a reprint of thatnotice.

(6) The licence shallterminateifa translation of the work in the same language allowed by the licence, is published—

*(a)* with substantially the same content as the original publication under the licence;

*(b)* by or with permission of the copyright owner;and

*(c)* in printed or analogous form of reproductionintheRepublicat a price reasonably related to the price normally charged in the Republic for comparable works.

(7) Any copies of the work already made before the licence terminates may continue to be distributed until stocks areexhausted.

# Licence forbroadcastingorganisation

**5.** (1) A licence under this Part may also be granted to a domestic broadcasting organisation if the following conditions aremet:

*(a)* Thetranslationismadefromacopymadeandacquiredinaccordance with the laws of the Republic;

*(b)* the translation is for usein broadcasts intended exclusively for teaching or for the dissemination of the results of specialised technical or scientific research to experts in a particular profession only;

*(c)* broadcasts are made lawfully and are intendedforrecipientsintheRepublic;

*(d)* sound or visual recordings of the translation may only be used by broadcasting organisations with theirheadquarters in theRepublic;and

*(e)* all uses made of the translation are without commercialpurpose.

(2) A broadcast contemplated in subitem (1) includes a broadcastmade through the medium of lawful sound or visual recording, made for the sole purpose of such broadcast.

(3) A licence may also be granted to a domestic broadcasting organisationunderalloftheconditionsprovidedinsubitem(1)totranslate anytextincorporatedinanaudiovisualworkthatwasitselfpreparedand published for the sole purpose of being used in connectionwithsystematic instructional activities.

# Part B Reproduction Licences

**Application of provisions in Part B**

**1.** The provisions in this Part apply tocopyright works which have beenpublished in printed or analogous formsofreproduction.

# Application for licenceto reproduce and publish copyright work

**2.** (1) Any person may, subject to item 4, apply to the Tribunal for a licence to reproduce and publish a particular edition of the work inprinted or analogous forms of reproduction (hereinafter in Part B referred to as‘‘the licence’’).

(2) No licence shall be granted until the expiration of the following applicable periods, commencing from the date of first publication of the particular edition of the work:

*(a)* Three years for works of technology and the natural and physical sciencesincludingmathematics;

*(b)* seven years for works of fiction, poetry, drama and music, and for art books;and

*(c)* five years for all otherworks.

# Granting of licence

**3.** (1)Beforegrantingalicence,theTribunalmust be satisfied that—

*(a)* no distribution by, or with authorisation of, the copyright owner of copies in printedoranalogousformsofreproductionofthatparticularedition hastakenplaceintheRepublictothegeneralpublicorinconnection withsystematicinstructional activities,atapricereasonablyrelatedtothatnormally chargedintheRepublicorthat,underthesameconditions,suchcopies havenotbeenonsaleintheRepublicforacontinuousperiodofatleast sixmonths; and

*(b)* theapplicantforthelicence—

(i) has requested, and unreasonablybeen denied, authorisation from the copyright owner;or

(ii) afterduediligenceonhisorherpart,wasunabletofindsuch copyright owner and can prove that he or she has by registered mail or electronic mail sent a copy of hisorherapplication contemplated in item 2(1),totheprincipal placeofbusiness of the publisherwhosenameappearsonthe copyright work.

(2) Where the copyright owner is known and can be located, no licence shall be granted unless he or she has been given an opportunity to beheard.

(3) Wherethethree-yearperiodreferredtoinitem2(2)*(a)*applies,no licence shall be granted until the expiration of six months calculated from the date on which the requirementsmentioned in subitem (1)*(a)* and subitem (1)*(b)*(i)are fulfilled or, where the identity or the address of the copyright owner is unknown,fromthedateonwhichtheapplicantalsocomplieswiththe requirements mentioned in subitem (1)*(b)*(ii).

(4) Where the seven-year or five-year periods referred to in paragraphs *(b)* and *(c)* of item 2(2) apply and where the identity or the address of the copyright owner is unknown, no licence shall be granted until the expiration of six months calculated from the date on which the copies of the application referred to in subitem (1)*(b)*(ii) havebeenmailed.

(5) If, during the period of six or three months referred to in subitem(3) or (4), any distribution or sale as contemplated in subitem (1)*(a)* has taken place, no licence shall be granted.

(6) No licence shall be granted if the copyright owner has withdrawn all copies of the edition which is thesubject of theapplication from circulation.

(7) Where the edition which is the subject of an application for a licence under this Part is a translation, the licence shall only be granted if the translation is in a language required by, or was made with the authorisation of, the copyright owner.

# Scope and condition of licence

**4.** (1) Any licence under this Partshall—

*(a)* be for use in connection with systematic instructional activitiesonly;

*(b)* allow publication only in a printed or analogous form ofreproduction at a price reasonably related to or lower than that normallychargedin the Republic for comparable work; and

*(c)* allow publication within the Republic only and shall not extend to the export of copies made under thelicence.

(2) If the Tribunal is satisfied that facilities do not exist in the Republic to do the printing or reproductionorthatexistingfacilitiesareincapable for economic or practical reasons of ensuring such printing or reproduction,and the contractbetweentheprospectivelicenseeandtheestablishmentdoingtheworkof reproduction so requires, the Tribunal may allow reproduction outside the Republic:Provided that—

*(a)* all copies reproduced areto be sent to the prospective licensee in one or more bulk shipments for distribution exclusively in the Republic;

*(b)* the contract between the prospective licensee and theestablishmentdoing the work of reproduction shall—

(i) include a stipulation regarding delivery and distribution as contemplated in paragraph *(a)*; and

(ii) provide a guarantee by the establishment engaged for doing the work of reproduction that the work of reproduction is lawful in the country where it isdone;

*(c)* theprospective licenseemay notentrusttheworkofreproductiontoan establishment created to reproduce copies of works in respect of which a licence has already been granted under this Part;

*(d)* the licence is non-exclusive;and

*(e)* the licenceistransferable.

(2) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in theRepublic and copyright owners inthe Republic.

(3) If the licensee is unable, by reason of currency regulations,to transmitthecompensationtothecopyright owner,heorsheshallreportthefacttotheTribunal whoshallmakealleffortstoensure such transmittal in internationally convertible currency or its equivalent.

(4) As a condition of maintaining the validity of the licence, the reproduction of that particular edition must be accurate and all published copies must include thefollowing:

*(a)* Thetitleandnameoftheowner of the work;

*(b)* a notice in the language of the publication stating that the copy is available for distribution only in the Republic;and

*(c)* iftheeditionwhichisreproducedbearsacopyrightnotice,areprintof thatnotice.

(5) The licence shall terminateif—

*(a)* copies of an edition of the work in printed or analogous form of reproduction are distributed in the Republicin connection withsystematicinstructional activities, at a price reasonably related to that normally charged in the Republic;

*(b)* by or with the authorisation of the copyright owner; and

*(c)* such edition is in the same language and is substantially the same in content as the edition which was published under thelicence.

(6) Any copies of an edition of the work already made before the licence terminates may continue to be distributed until stocks areexhausted.

# Licence for audiovisual works

**5.** Under the conditions provided in this Part, a licence may also be granted—

*(a)* to reproduce in audiovisual form a lawfully made audiovisual work, including any protected work incorporated in it if that audiovisual work was prepared and published for the sole purpose of being used in connection with systematic instructional activities;and

*(b)* to translate any text incorporated in that audiovisual work into a language generally used intheRepublic.’’.

# Amendment of certain expressions in Act 98 of 1978

# 37. The principal Act,save for sections 26(9) and 43, is hereby amended by the substitution for the expressions ‘‘cinematographic film’’and ‘‘film’’ where it appears in the Act, of the relevant expressions of ‘‘audiovisual work’’and ‘‘work’’ respectively.

Drafting note: Experts to confirm that these consequential amendments iro cinematograph film correctly reflects the definitions and sections:

This clause will impact ondefinitions of ‘‘author’’; ‘‘copy’’; ‘‘dramatic work’’; ‘‘infringing copy’’; ‘‘literary work’’; ‘‘performance’’; ‘‘photograph’’; ‘‘reproduction’’; ‘‘sound recording’’; section 1(2); 1(5)*(b)* and *(d)*; 2(1)*(d)*; 3(2)*(b)*; 4(1)*(e)*; 5(4); 7*(c)*;15(1); 15(3); 26(6); 26(10); 28E(1)*(b)*, *(e)*, *(f)*; *(g)*, *(i)*; 28H(2)*(b)*; 37(1)*(a)*; ).

Is it correct to exclude the change iro S26(9) and s43 – i.e. in ss 26(9) and 43 it remains cinematograph film?

# Short title and commencement

**38.** ThisActiscalledtheCopyrightAmendmentAct,2017,andcomesintooperation on a date fixed by the President by proclamation in the*Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE COPYRIGHT AMENDMENT BILL**

# BACKGROUND

* 1. TheCopyrightAmendmentBill(‘‘theBill’’)seekstoaligncopyrightwiththe digital era and developments at a multilateral level. The existing Copyright Act, 1978 (Act No. 98 of 1978) (‘‘the Act’’), is outdated and has not been effective in a number of areas. The creative industry is impacted upon; educators are hampered in carrying out their duties; researchers arerestricted to further developing research; and people with disabilities areseverely disadvantagedbyhavinglimitedaccesstocopyright works.Forthisreason,a need exists for Intellectual Property (‘‘IP’’) legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensurethataccesstoinformationandresourcesareavailableforpersonswith disabilities; and to ensure that artists do not die as paupers due to ineffective protection. The latter is supported by the experience of the power imbalance, vulnerabilities and abuse taking place in the music industry which Govern- ment was called toaddress.
  2. TheBillisconsistentwiththeDraftNationalPolicyascommentedonandthe recommendations of the Copyright Review Commission (‘‘the CRC’’) chaired by retired judge Ian Farlam, and is linked to the National Development Plan (‘‘NDP’’), in that it seeks to ensure consistency and coherenceinaligningtheapproachofvariousGovernmentDepartmentstoIP matters.The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual PropertyOrganisation(‘‘WIPO’’)digitaltreatiesnamelytheWIPOCopyright Treaty (‘‘WCT’’); the WIPO Performance and Phonograms Treaty (‘‘WPPT’’); the Beijing Treaty for the Protection of Audio Visual Perfor- mances;andtheMarrakeshTreatytoFacilitateAccesstoPublishedWorksfor PersonsWhoAreBlind,VisuallyImpaired,orOtherwisePrintDisabled.The alignmentisforpurposesofensuringeffectivegovernance,socialprotection, employment creation and reduction ofinequalities.
  3. The amendment of the Act means that South Africa will be able to accede to internationaltreatiesandconventionswhichrequiredomesticlegislationtobe consistent with internationalimperatives.

# OVERVIEW OFBILL

* 1. ThepurposeoftheproposedamendmentstotheActistoprotecttheeconomic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. It is also envisaged that theproposedlegislationwillrewardandincentiviseauthorsofknowledgeand art. Various sectors within the South African Copyright regime are dissatis- fied. Ranking highest are local performers and composers, who have not benefitted due to the lack of access to the Copyright system. (CRC report 2011). Thus, the Bill aims to make copyright consistent with the digital era, developments at a multilateral level, international standards and introduce improvedexceptionsandlimitationsintoCopyrightlaw.TheBillalsoaimsto enhance access to and use of copyright works, to promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creativeindustry.
  2. The objectives of the Billare—
     + to develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner;thisincludesflexibilitiesandadvancementsinthedigitalspacethat should empower all strata of the citizens of SouthAfrica;
     + to address the licensing of copyright works or material in relation to commissioned work to facilitate commercial exploitation by any personso licensed.
  3. The Bill introduces provisions which deal with matters pertaining to Collective Management. Collecting Societies will only be allowed to collect fortheirregisteredmembers,andallCollectingSocietieshavetoberegistered with the Companies and Intellectual Property Commission (‘‘CIPC’’). Collecting Societies will only be allowed to collect for one set of Copyright Rights (Performance, Mechanical and Needletime).
  4. TheBilldealswiththeprotectionofworksandrightsofauthorsinthedigital environment.
  5. The Bill provides for the availability of accessible formatcopies of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind but to other disabilities such as learning disabilities, dyslexiaetc.
  6. The Bill introduces an Artist Resale Royalty. This resale right means that an artistcouldbeentitledtoaroyaltyevenwhentheirworkisresold.
  7. Scope is left for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without payingaroyalty.Limitedcircumstanceshavebeenprovidedforinthisregard. Furthermore,thisprovisionstipulatesthefactorsthatneedtobeconsideredin determining whether the use of a copyright amounts to fair use.
  8. The Bill proposes a new structure for the tribunal that will settle disputes in theareaofalldomainsofIP. ThecurrentTribunalprocesstakeslongtosettle disputes and was found to be ineffective by the CRC in providing speedy redress to copyright owners. There is clear justification to follow the route taken in respect of the Companies, Trade Marks and Competition Tribunals which are good examples in this regard. This will be a Tribunal to deal with all IP matters.

# ANALYSIS OFBILL

* 1. Clause 1 of the Bill proposes the insertion into the Act of a range of new definitions necessitated by certain amendments embodied in theBill.
  2. Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyrightprotection.
  3. Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for State ownership of copyright funded by theState.
  4. Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such workfrom a place and at a time individually chosen by them, whether interactively or non-interactively.
  5. Clause 5 of the Bill proposes an amendment to section 7 by providing for communication to the public of an artistic work by wire or wireless means, including internetaccess.
  6. Clause 6 of the Bill proposes an amendment to section 8 of the Act by providing for communication to the public of an audiovisual work by wire or wireless means, including internetaccess.
  7. Clause7oftheBillproposesanamendmenttosection9oftheActproviding for communication to the public of a sound recording by wire or wireless means,includinginternetaccess.Furthermore,byprovidingforapersonwho intendstobroadcast,causetransmissionoformakeanyworkavailabletothe public,togivetheauthor,collectingsocietyorindigenouscommunityanotice in the prescribed manner of his or her intention to perform such acts, indicatingwherepracticable,thedateoftheproposedperformance,proposed terms and conditions for the payment of royalties and requires the copyright owner, collecting society or indigenous community to sign the proposal attachedthereto.
  8. Clause 8 of the Bill proposes the substitution of section 9A of the Act. It embodiesavarietyofadditionsandamendmentspertainingtothepaymentof royalties in respect of intellectual propertyrights.
  9. Clause 9 of the Bill proposes the insertion into the Act of sections 9B to 9F, providing for the resale, duration, assignment or waiver of royalty rights. It also provides for authors to enjoy the inalienable resale royalty right on the commercialresaleofhisorherworkofart,subsequenttothefirsttransferby the author of such work ofart.
  10. Clause10oftheBillproposesanamendmenttosection12,providingforfair dealings and uses of copyright work.
  11. Clause 11 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection and section 12B providing for the first sale or transfer of ownership of copyright to exhausttherightsofdistributionandimportationlocallyandinternationallyin respect of the transfer of the original orcopy.
  12. Clause12oftheBillproposestheinsertionofsections13Aand13BintheAct providingforthepermissiontomaketransientorincidentalcopiesofawork, including reformatting, an integral and essential part of a technicalprocess.
  13. Clause 13 of the Bill proposes an amendment to section 16 of the Act, providing for the deletion of subsection(1).
  14. Clauses 14 and 15 proposes the repeal of sections 17 and 18 of the Act, respectively.
  15. Clause 16 of the Bill proposes the repeal of section 19A of theAct.
  16. Clause 17 of the Bill proposes an amendment to section 19B of the Act by providing that the person having a right to use a copy of a computerprogram shall be entitled, without the authorisation of the copyright owner, to observe, studyortestthefunctioningoftheprograminordertodeterminetheideasand principles which underlie any element of the program, if he or she does so whileperforminganyoftheactsofloading,displaying,running,transmitting or storing the program which he or she is entitled to do.
  17. Clause 18 of the Bill proposes the insertion of sections 19C and 19D into the Act by providing general exceptions regarding protection of copyright work for archives, libraries, museums and galleries, also exceptionsregarding protection of copyright work for persons withdisability.
  18. Clause19oftheBillproposesanamendmenttosection20oftheAct,thereby providing for an author to have the right to claim authorship of the work,and toobjecttoanydistortion,mutilationorothermodificationoftheworkwhere suchactionisorwouldbeprejudicialtothehonourorreputationoftheauthor.
  19. Clause 20 of the Bill proposes an amendment to section 21 of the Act by providing for the ownership of any copyright subsisting in the workbetweenthe person commissioning the work and the author who executes the commission.
  20. Clause 21 of the Bill proposes an amendment to section 22 of the Act by providingthatcopyrightownedby,vestinginorunderthecustodyoftheState may not beassigned.
  21. Clause22oftheBillproposestheinsertionintotheActofanewsection22A, making provision for assignment and licences in respect of orphanworks.
  22. Clause 23 of the Bill proposes the insertion of a new Chapter 1A into theAct and provides for the registration and regulation of CollectingSocieties.
  23. Clause 24 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright, omits to pay the author of the copyright work a royalty fee as and when the copyright work is used and omits to pay the author of artistic work royalty fees as and when the artistic work is sold as prescribed by the Act.
  24. Clause 25 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author.
  25. Clause 26 of the Bill proposes amendments to section 28 of the Act, which providesforthecopyingofaworktoconstituteaninfringementofcopyright, if such copying would have constituted infringement in the country in which the work wasmade.
  26. Clause 27 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, 28S in the Bill providing for prohibited conduct in respect of technological protection measures; exceptions in respect of technological protection measures; and prohibited conduct in respect of copyright management information andexceptions.
  27. Clause 28 of the Bill proposes an amendment to the heading in Chapter 3 of theAct[CopyrightTribunal]byreplacingitwiththeheading‘‘Regulatoryand EnforcementAgencies’’.
  28. Clauses29and30oftheBillproposetheinsertionofsections29Ato29Sinto the Act, which provide for, amongst others, the establishment of the Intellectual Property Tribunal; its functions; appointment of its members; qualifications for such appointment; term of office; removal andsuspensions; and procedural matters on the conduct of hearings of theTribunal.
  29. Clause 31 of the Bill proposes the repeal of sections 30, 31, 32, 33 and 36 of theAct.
  30. Clause 32 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst others to the procedure for the conduct of Tribunal hearings and relating to CollectingSocieties.
  31. Clause33oftheBillproposesanewsection39B,andprovidesthatatermin acontractthatpurportstopreventorrestrictanyactwhichbyvirtueoftheAct would not infringe copyright or which purport to renounce a right or protection afforded by the Act will beunenforceable.
  32. Clause 34 of the Bill proposes the insertion into theAct of a new Schedule 2, providingfor‘‘TranslationLicences’’and‘‘ReproductionLicences’’.
  33. Clause 35 of the Bill provides for the short title and commencement.

# DEPARTMENTS/BODIES/PERSONSCONSULTED

The Department of Trade and Industry consulted various stakeholders in different sectors within the South African Copyright regime such as Departments and their agencies,localperformers,composers,academics,non-governmentorganisations, copyright consultants and the general public, through meetings and a conference. The consultation took place pre- and post-Cabinetapproval.

# FINANCIAL IMPLICATIONS FORSTATE

Any financial requirement will accommodated within the existing budget.

# 7. PARLIAMENTARYPROCEDURE

## Tagging

7.1 The Constitution of the Republic of South Africa, 1996 (‘‘the Constitution’’) distinguishes between four categories of Bills: Bills amending the Constitu- tion(section74);ordinaryBillsnotaffectingprovinces(section75);ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it would be constitutionallyinvalid.

7.2.TheBillmustbeconsideredagainsttheprovisionsoftheConstitutionrelating tothetaggingofBills,andagainstthefunctionalareaslistedinSchedule4and Schedule 5 to theConstitution.

* 1. The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of **Tongoane and Others v Minister of Agriculture and Land Affairs and Others**[[1]](#footnote-3). The Constitutional Court in its judgment stated asfollows:

‘‘[58]What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ‘in substantial measure fall within a functionalarealistedinschedule4’.Thisstatementreferstothetestto beadoptedwhentaggingBills.Thistestforclassificationortaggingis different from that used by this court to characterise a Bill in order to determinelegislativecompetence.This‘involvesthedeterminationof the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.’’ (footnoteomitted).

[60]Thetestfortaggingmustbeinformedbyitspurpose.Taggingis notconcernedwithdeterminingthesphereofgovernmentthathasthe competencetolegislateonamatter.Noristheprocessconcernedwith preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on itscontent.’’

* 1. In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that ‘‘any Bill whose provisions in substantial measure’’ fall within a specific Schedule must be classified in terms of that Schedule.
  2. TheActregulatescopyright.Intermsofsection2oftheAct,andsubjecttothe provisionsoftheAct,thefollowingworks,iftheyareoriginal,areeligiblefor copyright, namely literary works, musical works, artistic works, audiovisual works, sound recordings, broadcasts, program-carrying signals, published editions and computerprograms.
  3. TheBill,amongstothersthings,seekstoprovideforcertainexceptionsinrespectofinfringementofcopyrightforeducationalpurposes,e.g.thenewsection13B[clause12oftheBill]whichregulatesthemakingofcopiesofworks,recordingsofworksandbroadcastsinradioandtelevisionforthepurposes of educational and academic activities if the copyingdoesnotexceedtheextentjustifiedbythepurpose.‘‘Educationatalllevels,excludingtertiaryeducation’’isafunctionalarealistedinSchedule4totheConstitution.TheBillalsoproposesgeneralexceptionsregardingprotectionofcopyright work forarchives,libraries,museumsandgalleries.‘‘Archivesotherthannational archives’’, ‘‘Libraries other that national libraries’’and‘‘Museumsother than national museums’’are functional areas listed in Schedule 5 totheConstitution. The question is whether or not theabovementionedprovisionsoftheBillinsubstantialmeasurefallwithinafunctionalarelistedinSchedule4or5.ThepurposeoftheBillistoregulatecopyrightandnottoregulateanymatter falling under the functional areas in question.TheConstitutionalCourt,inparagraph71,statedthefollowingwithregardtothetestfortagging:

‘‘[71] . . . the ‘substantial measure’ test permits a consideration of theprovisionsoftheBillandtheirimpactonmattersthatsubstantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows theprovincestofullyandeffectivelyplaytheirroleinthelaw-making process. This test must therefore be endorsed.’’ (emphasisadded).

The subject matter of the Bill is the regulation of copyright in the Republic and does not impact on matters that substantially affect the provinces.

* 1. Since none of the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4 or 5, the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

## Referral of Bill to House of Traditional Leaders

* 1. According to section 18(1) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), ‘‘*(a)*ny parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for itscomments.’’.
  2. Indigenous works will in terms of the Act be eligible for the payment of royalties. An ‘‘indigenous work’’ means a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community. The Bill provides for the registration of collecting societies to administer rights on behalf of copyright owners or authors.Since the Bill pertains to ‘‘customs of traditional communities’’ it would be necessary to refer the Bill to the House of TraditionalLeaders.

1. 2010 (8) BCLR 741 (CC) [↑](#footnote-ref-3)