

**OPINION RE: LEGAL VALIDITY OR CONSTITUTIONALITY OF CERTAIN
PROVISIONS OF THE COPYRIGHT AMENDMENT BILL, 2018**

INTRODUCTION

1. We have been requested to furnish opinion to the Portfolio Committee on Trade and Industry on the legal validity or constitutionality of the following provisions of the Copyright Amendment Bill [B13 – 2017]:
 - 1.1 Clause 3 (Amendment to section 5(2) of the principal Act);
 - 1.2 Clause 5 (Insertion of section 6A in the principal Act – in respect of subsection (7) only);
 - 1.3 Clause 7 (Insertion of section 7A in the principal Act – in respect of subsection (7) only);
 - 1.4 Clause 9 (Insertion of section 8A in the principal Act – in respect of subsection (5) only);
 - 1.5 Clause 13 (Insertion of sections 12A to 12D in the principal Act);
 - 1.6 Clause 22(b) (Substitution of section 21(2) of the principal Act);
 - 1.7 Clause 23(b) (Substitution of section 22(3) of the principal Act); and
 - 1.8 The justification in law for the principle of 1 collecting society per intellectual property right, with reference to clause 25 (Insertion of Chapter 1A in the principal Act).

EXECUTIVE SUMMARY

- (A) Clause 3 (Amendment to section 5(2) of the principal Act) and the consequential amendment to Clause 22(b) (Substitution of section 21(2) of the principal Act).

We humbly hold the view that the proposed amendments do not interfere with current copyright and thus no deprivation results. Kindly refer to paragraphs 18, 19 and 20.

- (B) Clause 5 (Insertion of section 6A in the principal Act – in respect of subsection (7) only).

We are humbly of the view that it is quite conceivable that there may be instances where prejudice could result (deprivation) that would not be balanced by the benefits that the proposed amendments envisage to achieve. Kindly refer to paragraphs 21 to 32.

- (C) Clause 7 (Insertion of section 7A in the principal Act – in respect of subsection (7) only).

Same as in paragraph (B) above.

- (D) Clause 9 (Insertion of section 8A in the principal Act – in respect of subsection (5) only).

Same as in paragraph (B) above.

- (E) Clause 13 (Insertion of sections 12A to 12D in the principal Act).

We are humbly of the view that the relevant exceptions or limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Kindly refer to paragraphs 33 to 36.

- (F) Clause 23(b) (Substitution of section 22(3) of the principal Act).

We humbly hold the view that the reversion right is fair and valid in law.

- (G) We are humbly of the view that there is adequate justification in law for the principle of 1 collecting society per intellectual property right, with reference to clause 25 (Insertion of Chapter 1A in the principal Act). Kindly refer to paragraph 39.

LEGAL FRAMEWORK

Section 25 of the Constitution

2. Section 25 of the Constitution reads as follows:

"Property

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
- (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
- (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;

- (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section—
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6)." (our underlining).

Distinction between deprivation and expropriation

3. The distinction between deprivation and expropriation was dealt with by the Constitutional Court in a series of judgments discussed hereunder.
4. Van der Walt¹, points out that arguably the most significant development in constitutional property law after 1994 was the Constitutional Court's decision in **First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA t/a Wesbank v Minister of Finance**² ("FNB") and that the decision "sketched out the way forward as far as the interpretation of section 25 is concerned, especially with regard to deprivation of property".
5. Currie & De Waal³, in respect of section 25, points out that section 25(1) and (2) distinguish between deprivation of property and expropriation of property and prescribes distinct requirements for the legitimacy of each. Deprivation of property is permissible as long as it is not arbitrary and is carried out in terms of a law of general application. No compensation is payable unless the deprivation of property also amounts to expropriation of that property. In FNB, in paragraph 57 the Constitutional Court held that "interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned". According to Currie & De Waal⁴, in respect of FNB, "expropriation — the taking of property — because it necessarily involves such an interference is a form of deprivation, but in a particular and narrow form ... All expropriations

¹ A J van der Walt *Constitutional Property Law*, Third Edition, Juta's Property Law Library, page 8.

² 2002 (4) SA 768 (CC) ("FNB").

³ Iain Currie & Johan de Wall *The Bill of Rights Handbook*, Fifth Edition, on page 541 ("Currie & De Waal").

⁴ Ibid.

are deprivations, but not all deprivations will have the effect of expropriating property" (our underlining).

6. In **Harksen v Lane NO⁵** ("Harksen") the Constitutional Court indicated in paragraph 32 that expropriation for purposes of s 28(3) ... (Interim Constitution) (the equivalent of section 25(2)) means the compulsory acquisition of rights in property by a public authority. (Compulsory means compelled by law, as opposed to a voluntary alienation of rights.) Expropriation also requires an appropriation (taking) of the rights by the expropriator⁶. Besides appropriation, expropriation must also be made with a just and reasonable purpose⁷.
7. In **Mkontwana v Nelson Mandela Metropolitan Municipality⁸** ("Mkontwana"), in paragraph 32 the Constitutional Court qualified its earlier treatment of the concept of deprivation as follows:

"Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need to be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation" (our underlining).

In **Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd⁹** ("Offit") the Constitutional Court per Skweyiya states that he is "in agreement with the *Mkontwana* judgment that there must at least be 'substantial interference' in order to warrant consideration by this Court in this

⁵ 1997 (11) BCLR 1489 (CC) ("Harksen").

⁶ Op cit., page 552.

⁷ Op cit., page 554.

⁸ 2005 (2) BCLR 150 (CC) ("Mkontwana").

⁹ Case CCT 15/10 [2010] ZACC 20; decided on 18 November 2010

matter of whether there has been unconstitutional infringement of section 25(1) of the Constitution"¹⁰. In paragraph 40, the Constitutional Court states that it "is inappropriate to postulate precise rules to determine what amounts to substantial interference, and the enquiry must be context-specific".

8. Van der Walt¹¹ points out that in FNB the Constitutional Court adopted a different style of reasoning and effectively abandoned the conceptual distinction of Harksen. According to him the Constitutional Court changed the nature of the inquiry by proposing that a certain methodology should be followed in all cases involving the constitutional validity and infringement of property rights. The "methodology centres on the fact that expropriation is regarded as a subset of deprivation"¹². He states that "the distinction between the two categories is more or less clear-cut and formal in South African law. Section 25(1) deals with deprivation in the form of uncompensated, regulatory restrictions on the use, enjoyment and exploitation of the property, while section 25(2)-(3) deals with expropriation in the form of compensated state acquisition or destruction of property"¹³.
9. Currie & De Waal¹⁴, points out that in FNB the Constitutional Court in paragraph 46, sets out the structure of analysis of direct applications of the property clause in the form of a set of questions, namely—

- (a) Does the law or conduct complained of affect 'property' as understood by ... (section) 25?
- (b) Has there been a deprivation of such property by the law or conduct?
- (c) If there has, is the deprivation consistent with the provisions of ... (section) 25(1)?

¹⁰ Ibid. , at paragraph 39

¹¹ Op cit., page 341.

¹² Ibid.

¹³ Op cit., page 192.

¹⁴ Op cit., page 535.

- (d) If not, is the deprivation justified under ... (section) 36 of the Constitution?
 - (e) If it is, does it amount to expropriation for purpose of ... (section) 25(2)?
 - (f) If so, does the deprivation comply with the requirements of ... section 25(2)(a) and (b)?
 - (g) If not, is the expropriation justified under ... (section) 36?"
10. Van der Walt¹⁵ states that if "expropriation constitutes a subset of deprivation, the section 25 (1) requirements for deprivation also apply to expropriation, in addition to the more specific section 25(2) and (3) requirements". Van der Walt¹⁶ points out that the "distinction between deprivation and expropriation is blurred, and the definition of deprivation is complicated, when regulatory limitations on the use of property are treated as expropriation purely because of the excessive effect of the regulation, even when the state did not intend to expropriate and does not acquire the property" and that these "instances are said to constitute a grey area between deprivation and expropriation, mostly to justify compensation in instances where a regulatory deprivation had expropriation-like effects in the sense that it placed an excessively unfair burden on one or a small group of property holders".
11. In **Agri South Africa v Minister for Minerals and Energy**¹⁷, the Constitutional Court describes the issue that it had to decide, as follows¹⁸:

"[24] At the epicentre of this application is the question whether (Sebenza (Pty) Ltd) Sebenza's mineral rights, enjoyed during the subsistence of the Minerals Act, (1991 (Act No. 50 of 1991),) were

¹⁵ Op cit., page 241.

¹⁶ Op cit., page 198; the complexity is borne out in the fact that Van der Walt devotes Chapter 5 to "deprivation" and Chapter 6 to "expropriation".

¹⁷ 2013 (4) SA 1 (CC) ("Agri SA").

¹⁸ Ibid, paragraph 24.

expropriated when the (Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002),) MPRDA took effect.”.

The commencement of the MPRDA had the effect of freezing the ability to sell, lease or cede unused mineral rights under the Minerals Act (old order rights) until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy. The commencement also had “the deliberate and immediate effect of abolishing the entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals”¹⁹.

12. Referring to FNB and Mkontwana, the Constitutional Court stated the following in respect of section 25²⁰:

[48] Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation. There is therefore more required to establish expropriation although there is an overlap and no bold line of demarcation between sections 25(1) and 25(2). Section 25(1) deals with all property and all deprivations, including expropriation, although additional requirements must be met for deprivation to rise to the level of expropriation." (footnotes omitted).

¹⁹ Ibid, paragraph 2.

²⁰ Ibid, paragraph 48.

The Constitutional Court held that when a determination has to be made whether there was deprivation of property, an affirmative answer would necessitate a further enquiry into the extent, if any, to which that deprivation limits the section 25(1) right and, if it does limit the right, whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution. A constitutionally invalid deprivation, either because it was not brought about through a law of general application or by reason of its arbitrariness, would put an end to the enquiry²¹.

13. The Constitutional Court found that "the MPRDA, which is a law of general application, had the effect of depriving Sebenza, and a similarly-positioned holder of a pre-existing mineral right, of elements of that right, as correctly conceded by the Minister". Also that it "is common cause between the parties that the deprivation was not arbitrary, and this is correct considering both the objects of the MPRDA and the transitional arrangements". The Constitutional Court then asked the question whether this deprivation has risen to the level of expropriation²².

14. In this regard, the Constitutional Court held further that Sebenza was deprived of components of its mineral rights in that the MPRDA brought about a substantial interference and limitation that went beyond the normal restrictions on the use or enjoyment of its property found in an open and democratic society. The Constitutional Court held as follows in respect of expropriation²³:

"Although expropriation is a species of deprivation, there are additional requirements that set expropriation apart from mere deprivation. They are (i) compulsory acquisition of rights in property by the state, (ii) for a

²¹ Ibid, paragraph 49.

²² Ibid, paragraph 53.

²³ Ibid, paragraph 67.

public purpose or in the public interest, and (iii) subject to compensation."

15. It is therefore clear from the above that expropriation, although a species of deprivation, is set apart from deprivation in that expropriation requires compulsory acquisition of property by the State, for a public purpose or in the public interest and subject to agreed to, or court determined, compensation.

Is copyright property within the meaning of section 25 of the Constitution?

16. In terms of section 25(4) of the Constitution, property is not limited to land. The **Bill of Rights Handbook** *Iain Currie & Johan de Waal* (Fifth Edition)²⁴ on page 539 states as follows in this regard:

" 'Property' for purposes of s25 should therefore be seen as those resources that are generally taken to constitute a person's wealth, and that are recognised and protected by law. Such resources are legally protected by private law rights – real rights in the case of physical resources, contractual rights in the case of performances, and intellectual property rights in the case of intellectual property. (footnote omitted)".

In **Moneyweb (Pty) Limited v Media 24 Limited and Another**²⁵ the Court, in paragraph 108, stated that copyright is an intellectual property right and as such protected by section 25(1) of the Constitution. In **Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another**²⁶ the Constitutional Court, in paragraph 17 referring to the proceedings in the Supreme Court of Appeal, stated that "the court noted that the protection of trade marks is of importance

²⁴

Currie & De Waal

²⁵

(31575/2013) [2016] ZAGPJHC 81; [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ) (5 May 2016)

²⁶

(CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005)

and that despite a measure of what it calls judicial reluctance their status is that of property albeit incorporeal. Even so, the court rightly observed that just like other property, intellectual property does not enjoy special status under the Constitution. It is not immune from challenge and therefore its enforcement must be constitutionally tenable" (footnotes omitted).

DISCUSSION

17. We will now deal with specific provisions of the Bill against the above mentioned background:

Clauses 3 and 22

18. Clause 3 of the Copyright Amendment Bill [B 13—2017] ("the Bill"), seeks to amend section 5(2) of the Copyright Act, 1998 (Act No. 98 of 1978) ("the principal Act). Subsection (2) of section 5 of the principal Act reads as follows:

"(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organizations as may be prescribed."

The amendment proposed by clause 5 is to include such local organizations as may be prescribed. Currently, the section confers copyright on any work that is eligible for copyright and which is made by or under the direction or control of the state or made by or under the direction or control of such international organizations as may be prescribed²⁷. The legal consequence of

²⁷ In section 1 of the principal Act, "prescribed" is defined to mean "prescribed by or under this Act". Section 39(a) of the principal Act provides that the Minister may make regulations "as to any matter required or permitted by this Act to be prescribed by regulation".

the amendment would be that from the commencement of the amended section 2, copyright shall be conferred by section 2 also on all works which are eligible for copyright and which are made under the direction or control of such local organizations as may be prescribed (by regulation).

19. Clause 22(b) of the Bill proposes an amendment to section 21 of the principal Act. Section 21 of the principal Act provides as follows:

"Ownership of copyright

21. (1) (a) Subject to the provisions of this section, the ownership of any copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.

(b) Where a literary or artistic work is made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or

agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.

(d) Where in a case not falling within either paragraph (b) or (c) a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(e) Paragraphs (b), (c) and (d) shall in any particular case have effect subject to any agreement excluding the operation thereof and subject to the provisions of section 20.

(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international organization concerned, and not in the author." (our underlining).

The proposed amendment to section 21(2) (insertion of local organization in subsection (2)) is consequential to the amendment proposed to section 5. The result of the proposal is that ownership of any copyright conferred by section 5 on a prescribed local organization, initially vests in that local organization and not in the author of the work in question.

20. Ownership of copyright is regulated in section 22 of the principal Act. The amendments to sections 5 and 21 of the principal Act do not affect any existing ownership of copyright. From the commencement date of the amendments to the said sections, ownership of any copyright conferred on a local organization prescribed by regulation, initially vests in that local organization and not in the author of the work in question. In our view, there

is no interference with current copyright and thus no deprivation. Save for the inclusion of local organizations, the text of the clauses is the same as in the principal Act and the same conditions for both local and international organizations apply.

Clauses 5, 7 and 9

21. Clause 5 of the Bill seeks to insert a new section 6A in the principal Act under the heading "Share in royalties regarding literary or musical works".²⁸ Clauses 7 and 9 seek to do the same in respect of art works and audiovisual works. For the sake of being succinct, these clauses are discussed with reference to clause 5 as the wording and the implications are the same. The proposed section 6A(7) reads as follows:

- "(7) (a) This section applies to a literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that literary or musical work—
- (i) falls within the application of this Act; and
 - (ii) is still exploited for profit.
- (b) The Minister must prescribe the process to give effect to the application of this section to a work contemplated in paragraph (a).
- (c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date of the Copyright Amendment Act, 2019."

²⁸

Clause 7 seeks to insert section 7A: "Share in royalties regarding visual artistic works" and clause 9 seeks to insert section 8A: "Share in royalties regarding audiovisual works".

22. In **Veldman v Director of Public Prosecutions (Witwatersrand Local Division)**²⁹, the Constitutional Court stated the following in respect of the general presumption against retrospectivity:

"[26] Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed'." (footnotes omitted).

23. Section 6A(7) is inserted to aid authors who have before the enactment and commencement of the Bill made assignments of copyright in literary or musical works to their detriment and is designed to provide relief to authors who live in poverty as a result of not being fairly compensated.
24. It has been established that copyright is an intellectual property right and as such protected by section 25(1) of the Constitution³⁰.
25. In **FNB**³¹, the Constitutional Court held that any interference with the use, enjoyment or exploitation of private property is a deprivation of that property in the constitutional sense. In **Mkontwana**, the Constitutional Court found that "(n)o more need to be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to

²⁹ (CCT19/05) [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) (5 December 2005).

³⁰ See paragraph 16 above.

³¹ See footnote 2.

deprivation”³². In *Offit*, the Constitutional Court said “that there must at least be ‘substantial interference’ in order to warrant consideration by this Court” and further that “it is inappropriate to postulate precise rules to determine what amounts to substantial interference, and the enquiry must be context-specific”³³.

26. The fact that authors who have before the enactment and commencement of the Bill made assignments of copyright, may now under certain circumstances share in royalties, in our view amounts to substantial interference with the property use or enjoyment found in an open and democratic society and thus amount to deprivation.
27. The Bill, if enacted by Parliament, will apply generally to all persons and not only to a particular individual or group of individuals. The deprivation of the copyright will therefore be in terms of a law of general application.³⁴ The deprivation will still be unlawful though if the law allows arbitrary deprivation of the right in question. In this regard both substantive and procedural fairness are required to counter an argument of arbitrary deprivation.³⁵
28. The proposed section 6A provides for a procedure that must be followed in order to determine an author's share in the royalty received for the execution of any of the acts contemplated in section 6. Section 6A(7) further requires that—
 - the literary or musical work must—
 - fall within the application of this Act; and
 - still be exploited for profit;
 - the Minister must prescribe the process to give effect to the application of this section to the work in question; and

³² See paragraph 7 above.

³³ *Ibid.*

³⁴ *Currie & De Waal*, at p 542.

³⁵ *First National Bank* par 100.

- the share in the royalty only applies to royalties received in respect of the work in question after the commencement date of the Bill.

The Constitutional Court held that when a determination has to be made whether there was deprivation of property, an affirmative answer would necessitate a further enquiry into the extent, if any, to which that deprivation limits the section 25(1) right and, if it does limit the right, whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution³⁶.

29. Since there is a deprivation of the copyright in our view, the next step is to consider whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution.
30. Section 36 of the Constitution provides as follows:

"Limitation of rights

- 36. (1)** The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

³⁶

See paragraph 12.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

31. Currie & De Waal³⁷, in respect of reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom, stated the following:

"Put at its simplest, this part of the limitation test requires a law that restrict a fundamental right to do so for reasons that are acceptable in an open and democratic society based on human dignity, equality and freedom. In addition, the law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose. To satisfy the limitations test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits that it is designed to achieve" (the purpose of the law).

32. In order to establish the equilibrium between the competing interests, we have to distinguish between the right to property and the interest of authors who have before the enactment and commencement of the Bill made assignments of copyright in literary or musical works, to their detriment. The provision is designed to provide relief to authors who live in poverty as a result of not being fairly compensated. This in itself appears to provide the substantive fairness that is required for deprivation not to be arbitrary. However, because the procedure to assist these authors cannot be determined without further research and an impact assessment, the Bill offers a compromise by delegating the establishment of such a procedure to the Minister. Accordingly it is not an easy task to confine the provision to

³⁷

provide relief only to authors who made assignments to their detriment and it opens the provision to all assignments. The provision further cannot distinguish between the various scenarios that may result from the application of the provision as more research is required to determine the possible extent of the application of this provision. Instead the provision accordingly provides for general application. In our humble view it is quite conceivable that there may be instances where the harm done by the law (deprivation) would not be balanced by the benefits that it is designed to achieve (providing relief to authors who live in poverty as a result of not being fairly compensated) and accordingly would not be reasonable and justifiable in an open and democratic society.

Furthermore, the uncertainty regarding a fair process to be followed in order to avoid deprivation being arbitrary could affect the constitutionality of the clause. There is no clarity on how far back the retrospectivity will apply; it is not clear how to deal with further assignments of work (i.e. where the work is now owned by a 3rd or 4th copyright owner) or where the copyright owner is a not for profit organisation; it is not clear how assignment by multiple authors to one copyright owner would work. The principle of "Rule of Law" requires that laws:

"must be precise enough to enable individuals to conform their conduct to its dictate ... the criterion of precision or clarity emphasizes the need in a society committed to the rule of law, for individuals to be able to regulate themselves. In a society of autonomous moral agents, and in a state that accords such agents equal dignity and respect, the rightness of actions must be said to flow from the choices of the citizens themselves to conform their behaviour to the law, and not from ex post facto assessments of justice as divined by some leviathan".³⁸

³⁸ Constitutional Law of South Africa (2nd Edition) - Edited by Stuart Woolman and Michael Bishop/ Part II The Bill of Rights/ Chapter 34 Limitations. Par 34.7 Law of general application.

Even should the Minister follow an unassailable process to make the regulations, between the promulgation of the Amendment Act and the publication of the regulations, individuals will not be able to conform their behaviour to the law.

A proposal was made during deliberations that the Department be instructed to do the necessary research and impact assessments in this regard and then revert to the Committee with an Amendment Bill afresh. This approach will ensure that when relief is provided to exploited authors, all constitutional concerns have been considered and addressed. The proposed process can then also indicate how the target group will be reached. It is recommended that the committee consider this approach in favour of a delegation to the Minister to establish a process by way of regulation.

Clauses 13 and 19

33. *Clause 13 of the Bill seeks to insert the following sections in the Act:*

12A. General exceptions from copyright protection.

12B. Specific exceptions from copyright protection applicable to all works.

12C. Temporary reproduction and adaptation.

12D. Reproduction for educational and academic activities.

Clause 19 seeks to insert the following sections in the Act:

19B. General exceptions regarding protection of computer programmes.

19C. General exceptions regarding protection of copyright work for libraries, archives, museums and galleries.

19D. General exceptions regarding protection of copyright work for persons with disability.

34. The clauses referred to above provide for copyright exceptions and the reason for these exceptions are discussed by Dr Schonwetter in an opinion to the Portfolio Committee. The exceptions limit the rights of copyright

owners and in our view amounts to substantial interference with the property use or enjoyment found in an open and democratic society and thus amount to deprivation.

35. Multilateral agreements have always permitted countries the policy space to move in, regarding matters pertaining to public interest. These clauses have been deliberated on at length. We must note that the South African Copyright law has always had some form of a limitation or exception from copyright infringement. The exceptions created in the Bill are not new to international best practice or multilateral fora. They furthermore relate to matters that are clearly of public interest and are for non- commercial purposes.
36. The question is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The provisions in question in our view do not invade the rights any more than it needs to in order to achieve its purpose. The law serves a constitutionally acceptable purpose and there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits that it is designed to achieve (the purpose of the law).

Clause 23

37. The reversion right is recognized internationally for songwriters and authors of books. Songwriters or composers are exploited as they lose their copyright when the work is assigned to a music publisher who often recoups their investment and makes excessive profits and the composer remains poor. If a book is out of print or not selling like it used to, given that many publishing contracts were concluded in a pre-digital world, these contracts are overtaken by new technologies. Therefore, for both authors and composers

this digital economy is the most compelling time to re-evaluate contracts. Perhaps the creator would like to open the content to a wider audience or create digital editions or make the work available on an open license. There are restrictions as contracts were drafted in a manner which lasts longer than the lifespan of the creator. There is a period of 25 years allowed to recoup investment costs and make profit and it allows both parties to negotiate updated terms in respect of the 25 years.

38. After the enactment of the Bill into law, all relevant parties will be aware that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment and will be in a position to adjust their actions accordingly.

One Collecting Society per set of rights

39. Section 22 of the Constitution provides as follows:

"Freedom of trade, occupation and profession

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

Collecting societies are currently not regulated. It is clear that the practice of a trade, occupation or profession may be regulated by law. There are numerous examples to be found in legislative instruments in this regard. In the case under discussion, the question of whether one collecting society per set of rights is the best option for the holders of copyrights will rest with the lawmakers.


CONCLUSION

40. We respectfully conclude that:

- (a) the amendments mentioned in paragraph 1.1, 1.5, 1.6 and 1.7 above are valid in law;
- (b) the anticipated limitation of one collecting society per intellectual property right (paragraph 1.8 above) is justifiable in law; and
- (c) the amendments proposed in paragraph 1.2, 1.3 and 1.4 above are assailable in law.



G. Hoon
Date: 9/11/2018



J. Strydom
Date: 9/11/2018