



DRAMATIC, ARTISTIC and LITERARY
RIGHTS ORGANISATION (Pty) LIMITED



Affiliated to the International Confederation of Copyright Societies – CISAC
Member of the International Federation of Reproduction Rights Organisations – IFRRO
Reg. No. 1967/005018/07

16 July 2021

The Honourable Mr Duma Nkosi
Chairperson: Portfolio Committee on Trade and Industry
Attention Mr. A Hermans
Parliament of the Republic of South Africa
CAPE TOWN

By email only to: ahermans@parliament.gov.za

Dear Mr. Nkosi

COPYRIGHT AMENDMENT BILL, B13 OF 2017/ PERFORMERS PROTECTION AMENDMENT BILL, B24 OF 2016; Submission by the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd (DALRO)

DALRO herewith:

- (1) submits its comments in respect of the Copyright Amendment Bill, B13 OF 2017/ Performers Protection Amendment Bill, B24 OF 2016 (the “Bills”), and
- (2) requests to be heard at the public hearings scheduled to start on Wednesday, 4 and 5 August 2021, or at such later date as the hearings may be rescheduled to maximise participation by stakeholders and Members of Parliament.

Preface

We are aware that the Portfolio Committee’s (PC) notification is construing its discretion narrowly. This is inappropriate and unreasonable for two reasons:

Firstly, the PC is obliged to provide the space to air all constitutional reservations, not only those specified by the Presidency in asking for the Bills to be re-tagged and reconsidered. There is case law to the effect that a remitted Bill must be scrutinized for *all constitutional defects*, not only those enumerated by the Presidency that were enough to cause a re-tagging and remittal. We herein attach as Annexures “A” an executive summary of a legal opinion on the procedure to be followed in dealing with the Bill after the president’s referral back to parliament. We also attach as Annexure “B”, an executive summary of a legal opinion, focused on procedural aspects, including the necessity for re-tagging, and for new rounds of stakeholder consultations to take place on the Bills at both national and provincial levels.

Secondly, as a matter of substantive copyright law, it is not possible to meaningfully answer a call for submissions on exceptions only. Exceptions and limitations from copyright infringements are part of the fabric of copyright – it is as if in a tapestry, one would only wish to pull out moth-eaten threads vertically instead of fix the tapestry horizontally across maintaining correct patterns and thread count. Pulling out threads will further undo the tapestry, rather than fixing it and waste valuable time and effort. Exceptions and limitations make only sense when they are assessed against the exclusive rights from which they should provide specific and narrowly crafted exemptions and when read in conjunction also with the application and enforcement of the exclusive rights through individual and collective licensing, and ultimately corrective civil, administrative or criminal enforcement. Thus, it is necessary to discuss exclusive rights, licensing and enforcement mechanisms holistically when discussing exceptions and limitations from infringement of exclusive rights.

For ease of reference, this submission is divided into three parts: A, B and C, which are preceded by a “Headlines Items” section and followed by a brief Conclusion and also contains a number of Annexures which are referred to in Parts A, B and C. Together, these different sections form an integral submission only divided for convenience:

Headline Items – giving a 10,000 metres “macro” view on how the PC should approach remedying the defective Bills, written in a non-technical fashion.

Part A – deals with Exceptions and Limitations in the Bills and matters directly relating thereto.

Part B – deals with provisions also requiring Constitutional scrutiny or scrutiny for reasons of alignment with international obligations and alignment with treaties South Africa is signatory to and/or has already decided to accede to, namely the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, the Beijing Treaty on Audiovisual Performances, and the Marrakesh Treaty.

Part C – deals with a number of other highly problematic provisions in the Bills that the previous Committee could not properly assess in the absence of appropriate economic impact assessments, and the current Committee should at least be willing to receive additional submissions with respect to these provisions as part of the new Section 76 consultative process.

Conclusion – a brief summing up and an offer to work constructively, once the Bills have been re-tagged and should be looked upon with fresh eyes.

DALRO emphasises a view expressed by many: **A Roadmap to update responsibly and impeccably the 1978 Copyright Act, would be the single biggest positive contribution the PC could make**, rather than seeking to rearranging or rewording passages of Bills which are bound to remain structurally defective.

Indeed, in making this submission to your Committee, DALRO believes that the rescinded Bills are rather a hindrance than a help in achieving the goal of passing an up to date first class copyright act, that will withstand national and international scrutiny. The present Bills are simply not helpful in developing truly adequate and effective legislation needed. **The Bills’ defects are so severe that they not only miss the threshold of being sufficiently beneficial to authors and performers, but the Bills also jeopardize the viability of the very value chain on which a creative economy depends.**

In our humble view, the Portfolio Committee would be well-advised to invite its members to submit Members Bills that allow for a complete redrafting of the Bills from scratch, or to appoint a committee of true copyright experts to produce an entirely fresh, loveable and viable draft.

Headline items:

- **Read literally, the exceptions proposed in the Bill propose to allow, free of charge, acts or reproduction to such an extent that this would erode the incentive to create educational and other literary works for which the educational institutions are the main or an important existing market. These exceptions and limitations need to be both narrowed down to permitting only the reproduction of short extracts to comply with the three-step test and also must be qualified so as to expressly carve-out literary works that are offered under a collective license such as the existing DALRO's Higher Education Institutions (HEI) Licence. This licence already permits faculty and students of universities and other tertiary institutions to make reproductions of copyright works in return for a reasonable licence fee. These licence fees are distributed to authors and publishers either directly (within South Africa) or through sister organisations with which DALRO has entered into reciprocal arrangements (abroad). The description of the DALRO Higher Education Institutions Licences is herein annexed as Annexure "C".**
- **The Exceptions and Limitations proposed in the Bills, some individually and some in the aggregate erode the purpose of the Bills. It is as if the Bill "*giveth half-heartedly*" with its memorandum to creators, authors, performers, publishers and producers, yet "*taketh doubly*" away with a barrage of contractual restrictions, threats of committing offenses when licensing and over-broad exceptions. DALRO supports effective and meaningful legislation to update the Copyright Act, 1978, but on the basis that the legislation would advance the interests of authors, artists and composers and the creative industries as a whole by protecting their interests, without destroying the value chain of copyright through free, or gratis, 'uses' of copyright works. Authors will have nothing to gain if there is nothing to share.**
- **Whereas, in principle, effective regulation of collecting societies should be for the benefit of rightsholders, we are concerned about the constitutionality of overly prescriptive provisions in the Bill. If unconstitutional, the provisions unenforceable in practice and thus will hamper rather than empower the collective management of copyright for the benefit of creators, producers and publishers.**
- **DALRO questions whether the recommendation by the Copyright Review Commission (CRC) of "only one collecting society per set of rights with regard to all music rights" is correctly implemented by the provision in the Bill that only "one collecting society for each right or related right granted under copyright" shall be registered, and submits that extending this recommendation, at least if to be applied beyond the music sector, should be thoroughly investigated. Right now there is a total absence of an economic and social impact assessment, if not within, then certainly outside the music sector. Imposing such a restriction without an economic rationale, against the recommendation of the CRC, is irrational and an unjustified restriction of the freedom to engage in business and trade, and hence unconstitutional.**
- **DALRO is well-positioned to offer licensing solutions for the Resale Royalty Right and libraries' reproduction of out-of-commerce and orphan works. DALRO offers its assistance to Parliament to workshop the rights that can be cleared through the mechanism of diligent search in combination with suitable collective licensing schemes to achieve these ends in a balanced way, and without infringing international obligations**

under both treaties already ratified and treaties to be acceded to by South Africa. DALRO has great reservations about the provisions of the Bills relating to these items not as a matter of principle but as a matter of unintended consequences and simple legislative defects.

- Neither the Explanatory Memorandum of the Bill nor the overly-brief and substantively meagre Socio-Economic Impact Assessment (SEAIS) Report for the Bill make reference to the impact of the Bill on collective licensing of literary works. Contrary to the Copyright Review Commission of 2011's recommendation– that DALRO facilitates distributions, in addition to publishers, to authors directly; not to erode the licensing market for DALRO and its stakeholding authors and publishers. DALRO has since started the process to distribute to authors directly and continues to transition not least with the help of ANFASA to achieve this recommendation.
- We re-state as PASA's own observations made to your predecessor and Chair of the Portfolio Committee Ms Fubbs on 6 June 2018 (herein annexed as Annexure "D") at her request, which is a comprehensive (yet not exhaustive) annotation of Drafts 1 and 2 of the CAB from the perspective of the literary rights sector and which we hope you appreciate as an extremely constructive approach to ensuring the CAB will eventually pass constitutional and international treaty muster. Even these annotations cannot deal with all defects or address the defects bound to be suffered by other sectors of creativity, e.g. music and film and the arts. Mending all these defects will provide a sound platform for jobs and investment into the vast creative arts talent that South Africa proudly calls home.
- DALRO supports the submissions in particular of (i) PASA, the Publishers Association of South Africa, (ii) ANFASA, the Association of Non-Fiction Authors of South Africa; (iii) VANSAs, the Visual Arts Network of South Africa (iv) IFRRO, the International Federation of Reprographic Rights Organisations. DALRO is mandated by members of these four organisations to license reprographic reproduction of extracts from published works and to reproduce works of visual art, works originating in South Africa (i)-(iii) and internationally from all corners of the world (iv).

Part A's focus is on these specific exceptions found in sections 12A to 12D, 19B and 19C. The sections introduce copyright exceptions which present instances where exclusive acts for the copyright owner may be undertaken by third parties without permission of the copyright owner, which according to their plain English literal meaning of the proposed statute would conflict with the international treaties which South Africa subscribes to, especially the so-called "three-step test".

DALRO's recommendations on Section 13 and 20 of the CAB, which seek to amend or introduce sections 12A to 12D, 19B and 19D:

1. Section 12A, deals with General Exception from copyright protection – entitled Fair Use

Ostensibly inspired by so-called US-style fair use, the section grafts on wording that is **inconsistent with the US statute** as is shown below:

Comparison between the 'fair use' provision in the new Section 12A of the Copyright Amendment Bill and Clause 13 and Section 107 of the US Copyright Act

Clause 13 of the Bill:	Section 107 of the US Copyright Act:
<p>12A.(a) In addition to uses specifically authorized, 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:</p> <ul style="list-style-type: none"> (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; (ii) criticism or review of that work or of another work; (iii) reporting current events; (iv) scholarship, teaching and education; (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche; (vi) preservation of and access to the collections of libraries, archives and museums; <p>and</p> <ul style="list-style-type: none"> (vii) ensuring proper performance of public administration. <p>(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—</p> <ul style="list-style-type: none"> (i) the nature of the work in question; (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work; (iii) the purpose and character of the use, including whether—(aa) such use serves a purpose different from that of the work affected; and (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and (iv) the substitution effect of the act upon the potential market for the work in question. <p>(c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.</p>	<p>Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section,</p> <p>for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.</p> <p>In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—</p> <ul style="list-style-type: none"> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. <p>The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.</p>

The table above illustrates that the South African fair use provision, even before it is to be interpreted side by side with the other exceptions under discussion here, is much broader in its introductory chapeau, and also in the way it frames the four-factor analysis.

The South African variant shows that the proponents did not think even the so-called US-styled fair use would be “enough” to erode exclusive rights, but went out of their way to broaden the wish list for potential free uses.

It is submitted that this alone, and especially the mentioning in section 12A (iv) of “teaching” and “education” is a direct attack on the livelihood of the South African publishing industry. Unlike the US publishing industry, SA’s publishing industry is 80% dependent on revenue from educational publishing and uses these revenues as a launchpad to deepen literary, advance local and indigenous content and to eventually have a thriving South African literature so important for SA’s identity as it is for the world at large.

If a decision is made against the advice of DALRO to introduce the foreign invading plant that is US-style fair use, at least do not introduce a viral version that is even drafted broader than the variant in the country of origin: then at least stick to a verbatim copy which will make application of some 100 years of US case law easier.

Constitutionally speaking, the new section 12A introduces a ‘wild version’ of the US-style open-ended copyright exception doctrine of ‘fair use’ into South African law which amounts to deprivation of property and violates the freedom to trade, occupation and profession.

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

From a Treaty alignment point of view, if passed into law in this form, the Bill will not, as it must, be limited to certain special cases of exceptions and limitations from exclusive rights and the Bill will interfere with the normal exploitation of works and will be extremely damaging to and interfering with the legitimate interests of authors, creators and their publishers, contrary to the purpose the Bill was intended for and contrary to the demands of international compliance.

We submit that, whilst even US-style fair use is capable of interpretations that put it at odds with the international treaty obligations if introduced into SA law, the broadened hybrid “wild” fair use in the current form is certainly beyond compatibility with the international obligations of South Africa, most notably, the Berne Convention three-step test.

Recommendation

- **We recommend that: (i) the over-broad fair use doctrine is revised, (ii) that the words “such as” are struck, (iii) that the provision be narrowed down to the words not highlighted in yellow above, and (iv) directly subjected to a test limiting Section 12A inherently by mandating a court to apply the three-step test of the Berne Convention as an overall yardstick.**
- **We also urge that widespread public consultation process and a proper economic impact assessment be conducted to assess for the first time the impact of the amendments on the various copyright sectors.**

2. Section 12D - Reproduction for educational and academic activities

The main issue for DALRO is contained within the introduction of overbroad education exceptions in Section 12D coupled with the fair use defence in Section 12A.

Whilst the purpose of the Bills is to benefit and protect authors by ensuring royalties relating to reprography of their works are passed through to them, however, the section has the effect of legitimising expropriation and plagiarising of copyright material at education institutions, thus conflict with a normal exploitation of copyright works. The exceptions, unreasonably prejudice the legitimate interests of the authors and take away due remuneration, rendering the section contrary to the three step test.

Sub-sections 12D (1)-(3) are not only poorly drafted, hard to read and ambiguous, the subsections could be construed quite easily to allow an individual to legitimately make an exact reproduction of an entire book which he has borrowed or taken from a library so as to avoid having to purchase his or her own copy. The risk is that the author's entire market would be destroyed, if the wording is not amended. We note that ReCreate and various Professors speaking in favour of the Bills continue to say that this is not intended and not the effect of the sub-section. That is encouraging, but DALRO would then request the PC to amend the section to state in unambiguous and easy-to-read terms what the apologists of the subsections claim.

Section 12D (4) further extends the right to make copies. The section allows for copies to be made, and a substitution of textbooks in the market '*where the textbook is out of print*' in South Africa. Despite the adding of the words '*for commercial purposes*' in section 12D(5), the legitimising of making copies of whole textbooks is not based on any policy statement and deprives the copyright owner from legitimate remuneration. The section needs to confirm that "out of print" does not apply to electronic editions and to new editions: where an accounting 101 title in its 4th edition may be "out of print" is actually replaced by the 5th edition –and hence is NOT out of print at all; there is simply a newer edition. Also the section needs to be narrowed to not apply to multi-volume and multi-author works. It is entirely possible that a chapter is removed in a future edition but that does not make the whole book "out of print".

Section 12D(6) legitimises plagiarism by allowing incorporation of portions of printed works, a restricted act in terms of copyright law, and also a further prejudice to the copyright owner. The section should simply be deleted.

Recommendation

- **The relationship between Section 12A and section 12D must be clarified as follows: Copying not permitted under Section 12D should be deemed also unfair under Section 12A; copying permitted subject to the unavailability of a license under Section 12D should also constrain copying under Section 12A.**
- **We submit that the section be amended and reworded to provide legal certainty and introduction of exceptions when reproduction is justifiable and in compliance with South Africa's treaty obligations.**
- **The textual deletions and clarifications as per above need to be inserted into Section 12D.**
- **The entire Section 12D should apply only to the extent that there is no licensing scheme in place. Where copying of extracts of books is permitted under license by collective management organisations, section 12D should be inapplicable.**

3. Section 12B deals with “Specific exceptions from copyright protection applicable to all works”.

Section 12B should be narrowed down to only permit the exceptions that are traditionally applicable and set out in Sub-section 12B(1)(a) to (e), (g), (h) and (i). These sub-sections form part of a traditional catalogue of exceptions. They could also have been introduced into the 1978 Copyright Act by regulations under Section 13 of the present Copyright Act. Whilst some of the wording is misleading and over-broad, these exceptions have a good sense and legitimate intention.

Constitutionally speaking, the remainder of section 12B amounts to an arbitrary and at times discriminatory deprivation of property:

Section 12B (1)(f) is a violation of the Berne Convention as it allows translation of works. This right will disproportionately discourage publishing in the national and indigenous languages of South and Southern Africa, quite apart from violating international agreements such as the Berne Convention and TRIPS Agreement. DALRO posits that the discrimination against indigenous languages that will result, even if not intended, is not consistent with the South African Constitution and may also violate cultural freedoms of its peoples and is simply unbecoming of a free and open democratic society. The pressure to give away translation rights as otherwise competitors will translate an indigenous work under an exception is unbearable.

Subsections 12B(2)-(6) are all massively overbroad and some are clearly introduced in the guise of exceptions benefitting individuals, but massively benefitting cloud services and US tech giant companies. The section is so broadly drafted as to virtually exempt cloud services from the copyright legislation altogether. There is no justification to allow the electronic storage of works in a massive way merely because the works may be accessed by individuals. This is a business model that YouTube and others are perfecting, as it is also a business model of professional pirates. The Sub-sections that stand out in this regard are Subsection 12B(1)(j) read with 12B(2)(b) and 12B(2)(c) The sections are unacceptable and might lead to unnecessary diplomatic stress on the South African government through its trading partners.

4. Clause 20 – new section 19C

DALRO recognises that publicly accessible libraries have special and legitimate needs in relation to uses of works that are in their collections. Exceptions relating to libraries’ reproduction of copyright works must be carefully crafted. We submit that Section 19C is poorly drafted, providing for exceptions for actions that are not restricted by copyright and also extremely broad exceptions that go way beyond the objects set out in the policy statements supporting “access” to works in the collection of libraries. The qualification “lawful access” is not sufficient to ameliorate the harm that these exceptions will cause. The inclusion of “galleries” as such is over-broad. Galleries are commercial entities that deal in visual and artistic works, typically, although some antique and literary works also occasionally are offered for sale in Galleries, such as original manuscripts of famous writers or personalities. There is no reason to grant exceptions to Galleries and this category of beneficiary should be simply deleted.

We submit that the exceptions for libraries and archives should be considered in consultation with authors, publishers and libraries and archives, and that any special exception for libraries and archives must be subject to the work not being commercially available, as is already captured in new Sections 19C(1) and 19C(5). Moreover, the exceptions should only apply to the extent that there are

not individual subscription agreements that already permit the uses in question, albeit permitting safeguards against cyber-attacks and overload of publishing platforms.

Section 19C(2) must be subject to a collective management lending scheme and this lending scheme must narrow down the number of times a copy of a work may be lent. The lending must be confined to physical copies and it should be made clear that lending of ebooks is subject to access and licensing terms and conditions.

Section 19C(3) to (11): These are traditional library exceptions that per se DALRO has no objection to, provided the wording can be made unambiguous. Rather than offering wording at this stage, DALRO is of the view that a consensual approach should be pursued with the library and stakeholder community to find wording that best meets the need of the libraries, museums and archives.

Section 19C (12) and (13) should also be made subject to there not being a licensing scheme offered for this type of copying and supply activity. Limiting the rights of copyright holders could substitute for the purchase of copies of literary works. Admitting that the functions of libraries is to form collections and also to engage in inter-library loan activities, the activities should be permissible subject to a collective licensing fee being paid where a Collective Management Organisation or Independent Management Entity offers such bundled one-stop shop licenses.

In Section 19C(4), provided that the term “a user” is replaced with “a patron of the library” and it is confirmed that only the singular applies, there is no activity in that section restricted by copyright, and therefore no exception is necessary. However, placing Section 19C(4) where it is could invite misinterpretation in such a way it can turn libraries, archives, museums and galleries into cinemas where they play films without permission or remuneration so long as they do not charge the patrons for it (even though the limited definition of “commercial” would entitle them to fund their showings by advertising revenue). Therefore, where there is no act limited by copyright, there is no room for Section 19C(4).

Section 19C(5) in making preserved works open to the public on a website is a ‘communication to the public’ and substitutes the offerings of the same works offered with the authority of copyright owners. (The normal standard is the act of viewing the work on computer terminals on the premises of the library.)

19C(15) should be deleted: the section currently seems to suggest that it does not constitute a “lex specialis” to Section 12A. Section 12A should be confined to users as private natural persons whereas libraries, museums, archives and the like are systematic structural mass users of copyright material. Section 19C should be read as a lex specialis and a library should not be able to rely on Section 12A. Section 19C(15) should be deleted with this understanding in mind or should be amended to make this clear.

Recommendation

- **DALRO submits that Section 19C shall be amended in light of above comments**
- **A round table of DALRO, authors, librarians and publishers must be convened to see if the stakeholders cannot agree on guidelines that could later be substituted for overbroad provisions. Guidelines could also be more frequently and easily amended than casting any over-broad exceptions into the statutory text. The National Library of South Africa already holds roundtable exchanges with publishers and these should be made more inclusive for wider stakeholders such as Authors, Creators, Museums, Archives.**

- **All of the exceptions that are red-raftered should be explicitly prefaced to apply only subject to the Three-Step Test.**

Part B – Constitutional and Treaty Alignment Concerns raised by the Bills

1. Introduction

Part B of DALRO’s submission focuses on the international law aspects of the Bills, to the extent that these have not been raised as corollary issues in Part A in relation to exceptions and limitations specifically mentioned in the Portfolio Committee’s Call for Submissions.

Part B namely discusses the Bills’ compliance with South Africa’s treaty obligations under the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) and the Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPs”), as well as the Bills’ readiness for compliance with the WIPO Copyright Treaty (“WCT”), the WIPO Performances and Phonograms Treaty (“WPPT”) and the Beijing Treaty on Audiovisual Performances (the “Beijing Treaty”). It also points to significant conceptualisation and drafting errors that remain in the Bills, despite the advice from Parliaments Panel of Experts.

The expert advice to the Portfolio Committee in October 2018 **by four experts the then Portfolio Committee appointed**, singled out provisions in the Bill that have no foundation in policy, whether in the Explanatory Memorandum to the Bill or in the SEIAS report or the Draft Intellectual Policy document that preceded it.

DALRO’s submission does not repeat the observations of the four experts, but notes that all the expert views form part of the work of the current Portfolio Committee based on the decision made by the National Assembly when rescinding the defective Bills.

Accordingly the Portfolio Committee is invited to consider the above point in the advice at http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf in para 1 pp. 15-33.

2. International law and treaty obligations

With this background, DALRO makes the following comments relating to the Bills and South Africa’s current and anticipated obligations under international treaties:

2.1. South Africa’s intended accession to WCT, WPPT and the Beijing Treaty

The Cabinet resolved on 5 December 2018 that South Africa should accede to WCT, WPPT and the Beijing Treaty. This motion has been introduced to Parliament and is on the agenda of the Portfolio Committee for Trade & Industry in the National Assembly on 26 February 2019.

The members of Parliaments Panel of Experts all advised that there were deficiencies in the Bills' compliance with these treaties. **Specifically, the Reports and Recommendations of the Panel of (four) Experts that the previous Committee requested, but which were not taken into account are annexed to this submission as Annexure "E"**. Some of the deficiencies were corrected by the withdrawal of certain proposed sections and of certain proposed deletions, but many others, notably in relation to the copyright exceptions and the protection of technological protection measures and copyright management information, were not adopted, leaving the Bills non-compliant with WCT and WPPT.

2.2. Copyright exceptions in the Bills and the Three-Step Test for exceptions under the Treaties.

The Panel of Experts advice to the Portfolio Committee dealt at length with the flexibilities allowed under international law for member states of the Treaties to devise their own copyright exceptions and the basic principle that govern them, namely the so-called Three Step Test. We do not intend repeating the full exposition here, but refer you to the advice at http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf, at para 4.

The members of the Panel of Experts all raised concerns of compliance of the construct of copyright exceptions appearing in the Bill and their compliance with the Three-Step Test. These new exceptions in the Bill are incorporated by reference in the Performers Protection Amendment Bill.

The Three-Step Test is set out in Article 9(2) of the Berne Convention as conditions for the application of exceptions to and limitations of the right of reproduction as follows:

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

Article 13 of TRIPs has extended the test to all exceptions to and limitation of the exclusive rights under copyright. The Three-Step Test was also extended by the WCT to all exceptions and limitations; both (i) to those which are specifically provided in the Berne Convention in certain specific cases; and (ii) to any possible exceptions to or limitations of those rights which have been newly recognized under WCT.

The Three-Step Test offers both flexibility and determines the limits beyond which national laws are not allowed to go in establishing exceptions and limitations to the exclusive right of reproduction.

The Bill, in Clause 13, introduces certain purposes in the 'fair use' clause, Section 12A, which do not appear in the US 'fair use' provision in section 107 of its Copyright Act, nor in the current 'fair dealing' provisions of the Act, namely:

- "personal use, including the use of a lawful copy of the work at a different time or with a different device education"
- "scholarship, teaching and education"
- "illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche"
- "preservation of and access to the collections of libraries, archives and museums"
- "ensuring proper performance of public administration."

There is no indication that either the DTIC or the Portfolio Committee took the Three-Step Test into account in developing and adapting the 'fair use' provision in the new Section 12A and the new copyright exceptions in Sections 12B, 12C(b), 12D, 19B and 19C, together with their expanded application as a result of the contract override clause in new Section 39B. This failure causes South Africa coming into conflict with its obligations under the Berne Convention and TRIPs, and also that South Africa will not be ready to accede to WCT and WPPT.

The Experts' advice to the Portfolio Committee also demonstrated that "education" and "teaching", in their generic sense, is not the proper subject matter for a "special case" under the Three-Step Test. Indeed, the Berne Convention makes special provision elsewhere for exceptions for specific educational purposes, namely in Article 10 for "illustration for teaching" and in the Appendix, where there is a special dispensation for developing countries relating to making of reproductions and translations.

Turning to specific exceptions in the Bill, DALRO is of the view that at least the following provisions will not meet the requirements of the Three-Step Test:

- The remnant of the 'fair dealing' exception for quotation in Section 12B(1)(a)(i) inasmuch as it is defined by the third party's purpose and not 'fair practice.'
- The exception allowing reproduction by broadcasters in Section 12B(1)(c), inasmuch as it relates to cinematograph films.
- The exception allowing any reproduction in the press, broadcast of communication to the public of articles in the press where the right thereto has not been expressly reserved in Section 12B(1)(e)(i) (which, by requiring formalities as a condition for copyright protection, is also is not compliant with Article 5(2) of Berne).
- The translation exception in Section 12B(1)(f) (also noting that in terms of the Article 2(3) of Berne, the protection of a translation of a work cannot prejudice the copyright in the original work and that in terms of Article 8 of Berne, copyright expressly includes the exclusive right of making and of authorizing translation).
- The exceptions for education purposes in Section 12D(1) and (3), 12D(2), 12D(4), 12D(6), 12D(7).
- The library exceptions in Sections 19C(3) (complicated by the uncertain meaning of the term "access"), 19C(4), 19C(5)(b) (insofar as it relates to placing works reproduced for preservation on publicly accessible websites) and 19C(9), all as read with Section 19C(1).

2.3. The compulsory licences in Schedule 2 of the Bill and the Berne Appendix

Schedule 2 of the Bill contains the compulsory licences for translation and reprographic reproductions that find their origin in the Appendix to the Berne Convention. These are special rules that are only available to developing countries.

The deviations of Schedule 2 from the explicit text of the Appendix and its incorporation by the amended Section 23(3) of the Act (which is meant to deal with the formalities of assignments and exclusive licences) are material errors in the conceptualisation and drafting of these provisions, leaving the Bill non-compliant with the Berne Convention in this respect.

In her advice to the Portfolio Committee, Ms Michelle Woods of WIPO showed how Schedule 2 could be anchored in the new Section 12B. This advice was not adopted.

It also has to be determined whether South Africa can avail itself of the benefits of the Appendix, specifically whether the country qualifies to make a notification in terms of Article 28(1)(b) of the Berne Convention.

Recommendation

- **South Africa's Department of Foreign Affairs should seek advice from the TRIPS COUNCIL on whether or not South Africa may avail itself of the notification referred to above.**

2.4. Extending the 'digital rights' to computer programmes and compliance with WCT

Computer programmes are deemed to be literary works under Berne and WCT, and WCT therefore requires the 'digital rights', namely the exclusive rights of 'communication to the public' and 'making available' to be extended at least to computer programmes. This does not appear in the Bill.

2.5. Enforcement of the 'digital rights' by criminal sanction

There remains no consequential amendment to the criminal sanction provision in Section 27 following the introduction of the exclusive rights of 'communication to the public' and 'making available', which applies to all other unauthorised exercise of the other exclusive rights with guilty knowledge. This omission has been drawn to the Portfolio Committee's attention, but not dealt with, with no explanation.

2.6. The obligations of National Treatment for foreign authors, artists and performers in respect of uses of works in South Africa

The consequences of the obligations under National Treatment, to which South Africa is bound under the Berne Convention and TRIPs, and which also appear in WCT, WPPT and the Beijing Treaty, do not seem to have been considered in devising Sections 6A, 7A and 8A or their predecessors in the Original Bill (which were provisos to the exclusive rights in Sections 6, 7 and 8).

Under National Treatment, the rights of copyright legislated in South Africa must apply equally to the nationals of other treaty countries as it does to nationals of South Africa. The obligations of National Treatment are:

- Article 5(3) of the Berne Convention: "[W]hen the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors." The obligation of National Treatment applies to WCT in the same terms under Article 3 of WCT.
- Article 3(1) of TRIPs: "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement."

With Sections 6A and 7A applying to rights created where an author owns the copyright and assigns it, then, under National Treatment, those rights must apply equally to South African authors and to authors of all treaty countries, currently those who are members of Berne and TRIPs.

The consequence of the application of National Treatment to Sections 6A and 7A as read with Section 39B is that foreign authors who have authorised rights of use or assigned copyright to South African persons under South African law, will have an unwaivable claim against the South African rightsholders and against South African collecting societies (in terms of the new Section 22D(1)(b) and (c) and 22D(2)(b) specifically naming authors as beneficiaries of collecting society distributions in addition to copyright owners).

The same consequence of National Treatment applies to Section 8A in respect of foreign performers in audiovisual works owned by South African copyright owners and/or where South African law applies to the contracting of their performances.

There is no policy statement foreseeing this outcome. The policy statements in the SEAIS Report and the Memorandum of Objects are clearly aimed at protecting the interests of South African authors and performers in their transactions in relation to their work.

2.7. Provisions relating to technological protection measures in both Bills

The definitions of ‘technological protection measure’ and ‘technological protection measure circumvention device’ are insufficient to meet the requirements of Article 15 of WCT, Article 18 of WPPT and Article 15 of the Beijing Treaty, which all require “adequate legal protection.”

The proposed text in para (b) of the definition of ‘technological protection measure’ indicates that all processes, etc. capable of controlling non-infringing uses are exempt from the concept, but this seems to cover most, if not all such processes, etc., as they might be used for various non-infringing uses, such as reproduction for private study or research, time-shifting, criticism or review or any other uses covered by limitations and exceptions, or all uses of works that have fallen into the public domain. Thus, in practice there is a risk that only very few, or none, of the circumvention devices defined below in reality would be covered by the protection of Section 27, as it is to be amended by the Bill.

The definition of ‘technological protection measure circumvention device’ focusses on whether a device is ‘primarily’ designed, produced or adapted for the purpose of circumvention. This will create loopholes for infringers, in that the definition is inadequate if the device is still deliberately designed with such a purpose as a feature.

The new subsection (5A) for the infringement provision, Section 27, does not completely fulfil the requirements of Article 11 of WCT, which requires “adequate legal protection and effective legal remedies” against the circumvention of technological protection measures. The proposed text appears to allow, for example, sale and dissemination of circumvention devices, as long as the person doing that has only reason to believe that the circumvention is not for purposes of copyright infringement. The private access to a work, however, does not necessarily infringe copyright, and the provisions may therefore lead to widespread dissemination of such devices, which would then for all practical purposes undermine the legal protection. The fact that the act of accessing data without authorization is an offence under Sec. 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), to which the proposed Sec. 28O(6) of the principal Act refers, apparently would not prevent a widespread dissemination of circumvention devices.

In this regard, Section 28O(6) and 28P(1) would seem to be an attempt to reduce the scope of the Electronic Communications and Transactions Act, without formally amending it, an action which, we submit, not only requires the inter-governmental cooperation of the responsible Government Department, but may well have constitutional implications.

The provisions in the exception clause, Section 28P(2), are problematic, in that it legitimises uses of measures circumvention devices simply by notice to the copyright owner. This is compounded by the broad scope of the new copyright exceptions, especially the 'fair use' defence to copyright infringement. The United States undertakes a three-yearly rule-making process for exemptions and this may be a solution for the Bill. However, as it stands, Section 28P(2) undermines the protection afforded by technological protection measures and that may well, too, not be sufficient for the amended copyright legislation to comply with Article 11 of WCT.

These deficiencies apply equally to the new Sections 8E and 8F to be introduced by the Performers Protection Amendment Bill. The definitions of 'technological protection measure' and 'technological protection measure circumvention device' are incorporated by reference from the Copyright Act, and I suggest a loose-standing set of definitions.

New Section 39(cH) contemplates "prescribing permitted acts for circumvention of technological protection measures". However, there are a number of errors, since this section cross-refers to Section 28B, where it should be 28P, and Section 28P has no reference to permitted acts "as prescribed."

2.8. Exceptions for the disabled, including the visually impaired, and the Marrakesh VIP Treaty

It is perfectly possible to draft Regulations under Section 13 of the 1978 Copyright Act that would permit South Africa to accede to the Marrakesh Treaty without the need for the community of print impaired and blind and visually impaired to wait for the redrafting of a Copyright Bill. Dr. Owen Dean very ably has described this process in an article: [Copyright Blind Spot | CIP - The Anton Mostert Chair of Intellectual Property \(sun.ac.za\)](#) The article is herein annexed as Annexure "F")

The PC should request the dti to convene a group of copyright experts to draft Regulations under Section 13 of the Copyright Act without delay and to request that the Department of Foreign Affairs make the necessary arrangements to accede to the Marrakesh Treaty as soon as the Regulations have been put into effect.

It is possible to have a single exception for all kinds of disabilities, as Section 19D seeks to do, but then, inasmuch as South Africa is not a member of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the "Marrakesh VIP Treaty"), the exception has to be compliant with the Three-Step Test.

The Memorandum of Objects (at paras 1.2-1.3) states that the Bill is "strategically aligned" with the Marrakesh VIP Treaty and that its amendment of the Act will allow South Africa to accede to that treaty. The Bill proposes a single exception, but its terms meet neither the Three-Step Test nor the Marrakesh VIP Treaty, as is shown below.

The beneficiary under the exception in Section 19D is "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.” This definition, although it includes beneficiaries under the Marrakesh VIP Treaty, goes far beyond that scope and, to the extent that it does so, means that its extended scope has to be tested for whether its component parts qualify as a “special case” under the Three-Step Test. It is likely that that definition will include persons who are not considered as disabled in common parlance, certainly including more persons than those, say, entitled to social grants from Government due to suffering from a disability.

Section 19D does not include any of the content required by Article 4 of the Marrakesh VIP Treaty, since the right to make accessible format copies for persons with a disability is open to “any person or organisation serving the disabled”, whereas the treaty limits that act to “authorized entities” and “a primary caretaker or caregiver” acting on behalf of a Beneficiary, in terms of Article 4. It therefore fails to meet the conditions for a copyright exception or limitation permitted by the Marrakesh VIP Treaty and, in the circumstances, will not meet compliance under the Three-Step Test either.

Recommendation

- **There is no need to wait with the accession of Marrakesh Treaty for the defective Copyright Bills to be redrafted. We refer to the article by Dr. Owen Dean, annexed herein as Annexure “F”, that illustrates how it is perfectly possible to draft Regulations under Section 13 of the 1978 Copyright Act and to accede to the Marrakesh Treaty**
- **DTI should be requested to convene a copyright expert drafting group and to draft without delay Regulations permitting access to the Marrakesh Treaty.**

2.9. The Africa Growth and Opportunities Act (USA)

South Africa is a beneficiary of the United States African Growth and Opportunity Act (AGOA), which significantly enhances South Africa’s market access to the US. The protection of intellectual property rights is an important prerequisite for AGOA eligibility in terms of Section 104(a)(1)(C)(ii):

“(1) (A country that) has established, or is making continual progress toward establishing--
- (C) the elimination of barriers to United States trade and investment, including by--
(i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;
(ii) the protection of intellectual property”

AGOA also has a measure in Section 104(b) to ensure ongoing compliance:

“If the President determines that an eligible ... country is not making continual progress in meeting the requirements described in subsection (a)(1), the President shall terminate the designation of the country made pursuant to subsection (a).”

Whether a beneficiary country meets the criteria is determined solely by the United States, since AGOA is not a reciprocal agreement.

To the extent that the Bills could be considered by the United States as an undoing of existing intellectual property protection, South Africa will place its beneficiary status under AGOA in jeopardy under Section 104 of AGOA.

3. Errors in conceptualisation and drafting of the Bills

3.1. The most notable errors remaining in the Bill, despite the advice of the Panel of Experts, are:

- 3.1.1. The new express rights of remuneration for authors, composers and artists coupled with government regulation, which may well prove unworkable since their conceptualisation and drafting do not take into account the situations applying to multi-author works, nor can they effectively govern works that are compilations of a variety of copyright-protected material from different kinds of copyright works and from different authors.
- 3.1.2. The retention in the Bill of remuneration rights for performers in Section 8A(1) to (4). The topic of remuneration of performers in audiovisual works should be dealt with in the Performers Protection Amendment Bill (in respect of which see para 3.2 below)
- 3.1.3. The 25-year limit on assignments of copyright in literary works is not a true reversionary right, as stated in the Memorandum of Objects, but is attached to the Copyright Act's provisions relating to the *formalities* for deeds of assignment and exclusive licences. This results in not only the relative provision - which is simply a new proviso to section 22(3) - expanding across a wide variety of copyright works for which it was never intended (judging from the recommendations of the Copyright Review Commission), but there are also no substantive provisions that govern the intended reversion of rights, namely the disposition of rights of the copyright owner and the re-acquisition of rights by the original author or authors.
- 3.1.4. The compulsory licences for reproductions and translations in Schedule 2 are linked to the provisions of the Copyright Act dealing with the formalities for licences, instead of being an expansion of the exceptions. Michelle Woods of WIPO offered the solution to correct this mistake, namely by making an appropriate adjustment to one of the proposed exceptions in the new section 12B (which was otherwise not compliant with treaty obligations), yet it was never taken up.
- 3.1.5. The resale royalty right is provided for under the Berne Convention. Its introduction is welcomed, yet some of the provisions must be adapted to make it also apply to traditional and indigenous expressions of culture. For instance, having the orphan works and "out of commerce" exceptions apply to the resale right might cause confusions, especially as also many traditional or indigenous works are bound to be "orphan", in the sense that their actual author(s) may remain unknown. The wording needs to be adapted to avoid confusion when seeking to apply the provision for the benefit of holders of copyright and holders of traditional knowledge and traditional and indigenous expressions of culture.
- 3.1.6. The renaming of "cinematograph films" in the Copyright Act, "audio-visual works", which, with the relative new definition, broadens the term without explanation and also does not amend related legislation that depends on this definition, namely the Registration of Copyright in Cinematograph Films Act.
- 3.1.7. The transitional provisions. The fact that the Intellectual Property Laws Amendment Act, Act 28 of 2013, has not been brought into operation after 5 years, with no final decision on its fate, compels the need for transitional provisions which are necessarily imperfect.

We draw to the Portfolio Committee's attention that many of the goals of the Intellectual Property Laws Amendment Act relating to traditional works have some overlap with the Indigenous Knowledge Systems Act. How this Act relates to a revised set of CAB and PPAB and how it inter-leaves with remnants of IPLAA in the existing Copyright and Performers Protection Act remains unsolved.

- 3.2. In relation to performers rights, both Bills have been developed in the Portfolio Committee in a way that grant performers co-extensive rights to prohibit certain uses of their performances, exclusive rights to certain uses of their performances, as well as certain remuneration rights.
- The “right to prohibit” in Section 5 (to be amended) is the original performers right introduced by the Performers Protection Act in 1967 and follows the format of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.
 - The exclusive right to be introduced in new Section 3 is a right offered to performers in audiovisual works by the Beijing Treaty.
 - The addition of a remuneration right for performers by Section 8A(1)-(4) in the Copyright Act will have to be measured against Article 11 of the Beijing Treaty, that provides for performers having an exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations **or**, after notification deposited with the Director General of WIPO, a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public.
- 3.3. Considering the extent of the comments on the Bill by the Panel of Experts, the changes made by the Portfolio Committee have by and large not been material, especially inasmuch as they have led to hardly any changes to the copyright exceptions and exceptions allowing uses of technological protection measure circumvention devices.

Part C – Additional Shortcomings with a severe risk of making the defective Bills unenforceable because of additional constitutional defects

1. Selected shortcomings of the Bill

Part C lists additional provisions that in DALRO’s view present serious challenges that hamper the functioning and correct application of the Bills. **The Bills will fail to provide “adequate and effective” enforcement of copyright legislation. Not providing such enforcement is itself a violation of the TRIPS agreement.**

2. Offences and procedural provisions of the Copyright Commission/ Tribunal

Many of the provisions that are perhaps meant to be “adequate and effective” enforcement mechanisms, and also meant to make the judicial system and access to justice easier for authors, creators, publishers and producers, are due to poor drafting, vulnerable to be found unconstitutional. This defect would in other words then backfire on the protection of the copyright interests, but not addressing the defect would equally be a violation of constitutional law and tenets of fundamental justice.

It is not least also for these severe defects that DALRO has urged the Portfolio Committee to send the Bills back to the drawing table.

What follow is a list of provisions the Portfolio Committee will need to consider in advancing on a constitutional manner to legislate in the field of copyright law:

8A. (7) (a) Any person who intentionally fails to register an act as contemplated in subsection (6)(a), or who intentionally fails to submit a report as contemplated in subsection (6)(b), shall be guilty of an offence.

(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.

22B (8) (a) Subject to subsection (7), any person who intentionally gives him or herself out as a collecting society in terms of this Chapter without having been accredited, commits an offence.

(b) A person convicted of an offence in terms of paragraph (a), is liable on conviction to a fine or imprisonment for a period not exceeding five years.

22C. (4) (a) Any person who intentionally fails to submit a report to a collecting society as contemplated in subsection (2)(b), shall be guilty of an offence.

(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.

(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.

27. “(5A) Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

(b) publishes information enabling or assisting any other person to circumvent a technological protection measure with the intention of inciting that other person to unlawfully circumvent a technological protection measure in the Republic; or

(c) circumvents such technological protection measure when he or she is not authorized to do so, shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

(b) by the substitution for subsection (6) of the following subsection:

“(6) A person convicted of an offence under this section shall be liable—

(a) in the case of a first conviction, to a fine **[not exceeding five thousand rand]** or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates or

(b) in any **[other]** case other than that contemplated in paragraph (a), to a fine **[not exceeding ten thousand rand]** or to imprisonment for period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each

article to which the offence relates.”; and
(c) by the addition after subsection (8) of the following subsection:

“(9) (a) For the purpose of subsection (6), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences, as the case may be, were committed and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, in respect of all uses to which this Act applies.

(b) If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsection (6), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”

Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing between performers and the copyright owner of audiovisual works for any of the acts contemplated in section 8. It requires the recording and reporting of any act contemplated in section 8 and makes the failure to do so, an offence.

Clause 11 of the Bill proposes the substitution of section 9A of the Act. It requires the recording and reporting of any act contemplated in section 9(c), (d), (e) or (f) and makes the failure to do so, an offence. It also makes certain amendments related to the parties involved in determining the royalty amount, and for referral to the Tribunal.

Clause 25 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation, administration and regulation of collecting societies. It also provides that where a person intentionally gives him or herself out as a collecting society, that person commits an offence.

Clause 26 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 or abuses copyright and technological protection measures.

Clause 27 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 or copyright owner. It also provides for penalties where the convicted person is not a natural person.

Clause 29 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, and 28S in the Act providing for prohibited conduct in respect of technological protection measures and of copyright management information; exceptions in respect of technological protection measures and copyright management information; and enforcement by the commission.

3. Select additional offences and penalties – and their curtailment - that raise treaty compliance and constitutional questions for the Portfolio Committee to resolve:

DALRO agrees that failure to provide returns of usage should be a criminal offence and is an important provision empowering the role of collective management organisations for the benefit of their members. However, the fine proposed for users who do not supply returns in Section 22C(4)(b) (10% of turnover) comes across as very arbitrary, especially considering the administrative nature of the offence. Whilst not expressing a view either way, we ask that expert opinion, perhaps from the Department of Justice, be obtained in respect of all the penalties proposed in the Bill.

We are extremely concerned that rightsholders and collective management organisations will be left without any remedy if these penalty provisions are held to be unconstitutional.

Finally, DALRO also believes that at least outside the field of needletime for sound-recordings, the definition of “royalty” in various sections of the Bills should stick to the ordinary meaning of the term in the industry as a proportion of turnover.

Rightsholders’ ability to act against infringers (often done at the behest of authors and performers in the literary publishing and music industries) will be eroded due to:

- the lack of new enforcement provisions equipped to deal with the Internet Age and
- the removal of the right to prevent trade in infringing copies.

Conclusion

DALRO applauds the South African Parliament and the Portfolio Committee for doubling down on working towards a first-rate Copyright Act that is up-to-date and passes national and international muster.

DALRO hopes that if Members of the PC take the time to read through the present submission, they will concur that the defective Copyright Bills that have been remitted and re-tagged is a task of Aугean proportion. It is beyond the scope of what the PC can do by committee drafting. Either through members Bills or even better through the provision of a roadmap the PC could oversee the drafting of a fresh piece of legislation that would meet with the aspirations and potential of South Africa’s creative people.

DALRO suggests that, in order to achieve this objective in good time, the PC would be well-advised to define a roadmap with stakeholder consultations to feed into a group of copyright experts to completely redraft the Copyright Bills.

DALRO is ready to engage in the goal of improving South Africa's legislation in the fields of copyright and performers rights and looks forward to being able to participate in any public hearings and future consultations, at national and provincial level.

Yours sincerely



Lazarus Serobe
Chief Executive Officer

Background on DALRO

DALRO, is a multi-purpose copyright collective management agency and rights broker established in 1967, which administers various aspects of copyright on behalf of authors, artists and publishers.

DALRO's main areas of administration are reprographic reproduction rights (from published editions), public performance rights (including stage rights for book musicals and dramas), management of film rights granted by authors, and reproduction rights (for both publishing and copying) in works of visual art.

DALRO is a full member of the International Federation of Reproduction Rights Organizations (IFRRO), as are copyright collective management associations from many other countries in the world.

Annexures:

1. Annexure "A" – Executive summary of a legal opinion on the procedure to be followed in dealing with the Bill
2. Annexure "B" – Executive summary of a legal opinion, focused on procedural aspects, including the necessity for re-tagging, and for new rounds of stakeholder consultations to take place on the Bills at both national and provincial levels
3. Annexure "C" - Description of the DALRO Higher Education Institutions Licences
4. Annexure "D" - PASA's own observations to then-Chair of the Portfolio Committee Ms. Fubbs on 6 June 2018, at her request, which is a comprehensive (yet not exhaustive) annotation of Drafts 1 and 2 of the CAB from a literary rightsholder perspective.
5. Annexure "E" - Reports and Recommendations of (four) Experts appointed by the previous Portfolio Committee.
6. Annexure "F" - Dr. Owen Dean's article that illustrates how it is perfectly possible to draft Regulations under Section 13 of the 1978 Copyright Act and to accede to the Marrakesh Treaty.

EXECUTIVE SUMMARY

THE PROCEDURE TO BE FOLLOWED IN DEALING WITH THE COPYRIGHT BILL AFTER THE PRESIDENT'S REFERRAL BACK TO PARLIAMENT

The Copyright Coalition of South Africa (the CCSA) briefed Adv. Stephen Budlender (SC) and Adv. Ingrid Cloete (together referred to as 'Counsels' in this summary) to provide an opinion and address the question on what procedure should be followed by Parliament now that the President of South Africa has referred the Copyright Amendment Bill, 2017 ("the Copyright Bill") and the Performers Protection Amendment Bill, 2016 ("the PPAB") (together, "the Bills") back to the National Assembly for reconsideration.

The President raised several *deficiencies* and specific *reservations* he had, including the incorrect tagging of the Bills. This opinion by Counsels addresses two aspects; that of the necessity to re-tag the Bills as section 76 bills, as well as the process that must be followed by Parliament once the Bills are re-tagged.

The Constitution prescribes different procedures for enacting ordinary bills not affecting the provinces (in section 75) and ordinary bills affecting the provinces (in section 76).

It is a Constitutional imperative that the correct procedure be followed when enacting ordinary bills, as failure to follow the appropriate procedure will result in an Act that is constitutionally invalid. This position was laid down in the *Tongoane and Others v Minister of Agriculture and Land Affairs* matter ("Tongoane"). [See *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) ("Tongoane") para 109]

According to section 76, the procedure to be used in enacting, depends on the subject-matter of the bills (schedule 4 or schedule 5 of the Constitution). Where a bill deals with the areas of competence falling within schedules 45 or 56 of the Constitution, it must be dealt with in terms of section 76 of the Constitution. Conversely, where a bill deals with an area of competence not falling within either schedule 4 or schedule 5 of the Constitution (that is, anything not mentioned in either schedule), it must be dealt with in terms of section 75 of the Constitution.

The Copyright Bill substantially affects two matters listed in schedule 4: "*trade*" and "*cultural matters*" which has respective implications on the provisions contained in the Bills. The Constitutional Court in *Tongoane* held that the test for determining whether an ordinary bill should be classified as a section 76 bill is whether the bill's provisions "substantially affect the interests of the provinces" and not necessarily affecting the provinces exclusively.

In this regard, the manner in which authors and copyright owners are able to deal with or "trade" in their copyright is regulated by the Act. The Copyright Bill's provisions therefore have a substantial effect on trade, and affects provinces as listed in schedule 4 of the Constitution.

Similarly, the Copyright Bill's provisions also have a substantial effect on cultural matters, such as "indigenous works". The Bill's authors themselves have recognised that the Copyright Bill deals with the "*customs of traditional communities*" and as a result found it necessary to refer the Bill to the National House of Traditional Leaders. Once it is accepted that the Copyright Bill deals with the customs of traditional communities such that it must be referred to the House of Traditional Leaders, it must follow that the Bill also affects "cultural matters" within the meaning of schedule 4 of the Constitution.

A key provision of the Copyright Bill also amends an Act that was itself enacted using the section 76 process. Similar to the current matter, the Intellectual Property Laws Amendment Act 28 of 2013 (IPLA Bill) was initially passed using the section 75 process. The then President Zuma referred the IPLA Bill back to the National Assembly also raising constitutional concerns including that the IPLA Bill affected “*traditional leadership and cultural matters*”, which are matters listed in schedule 4. After President Zuma had referred the IPLA Bill back to the National Assembly for reconsideration, it was re-classified as a section 76 bill, and correctly enacted in accordance with the section 76 process, a process which the current Bills should now follow.

Counsels submit and concur with the Presidents views that the Bills were incorrectly tagged and ought to have been dealt with as section 76 bills. If the National Assembly does not re-tag the Bills, and purports again to pass them following the section 75 process, a key reservation that the President holds regarding the constitutionality of the Bills will not have been addressed. In that situation, the President would seem duty-bound not to assent to the Bill, and instead to refer it to the Constitutional Court for a determination on its constitutionality, in terms of section 79(4) of the Constitution.

In the event that Parliament does re-tag the Bills as section 76 bills, the next question is what process Parliament is required to follow in enacting the Bills as these processes are materially different? The Constitutional Court noted in *Tongoane* that the section 76 process is more burdensome than section 75 and using the incorrect procedure renders the resulting legislation constitutionally invalid.

Once a bill is referred back to Parliament by the President and the bill is re-tagged, the defect can only be cured by beginning the (correct) legislative process afresh. One cannot simply cut and paste aspects of the process that were used in purporting to enact the bill previously into a new process.

There are key differences between the section 75 and section 76 procedures. The 1st difference between the two procedures is the voting procedure in the National Council of Provinces (“NCOP”) and the second difference is that, in the case of a section 76 bill, there is a mandated mediation process if there is disagreement between the NCOP and the National Assembly.

Proper process following re-tagging also requires that there be further public participation, both at the National Assembly and NCOP levels. In terms of section 59(1) of the Constitution, the National Assembly is obliged to facilitate public involvement in its legislative and other processes and those of its committees. The NCOP has a structurally identical obligation in terms of section 72(1) of the Constitution.

Parliament has a duty to involve the public when enacting legislation. Parliament’s obligations in this regard would not cease when it enacts legislation following the bill having been referred back and re-tagged. In terms of section 59(1) of the Constitution, the National Assembly is obliged to facilitate public involvement in its legislative and other processes and those of its committees. The NCOP has a structurally identical obligation in terms of section 72(1) of the Constitution, to facilitate public consultations in all provinces.

Facilitating public participation is a material part of the law-making process. Public participation is an essential part of the law-making process: if the bill is to be enacted following a fresh process, public participation must necessarily form part of that process if the resulting legislation is to be valid. Furthermore, a proper process requires that each of the nine provincial legislatures engage with stakeholders in their own provinces.

Counsel concludes that it necessary to re-tag the Bills as section 76 Bills. Failure to do so will render the resulting legislation constitutionally invalid. In addition, if the Bills are not re-tagged and the National Assembly purports to pass them again, the President will be obliged to refer the Bills to the Constitutional Court for a decision on their constitutionality. Once the Bills have been re-tagged, Parliament must then enact them following the section 76 process, including both the National Assembly and NCOP and lastly, Parliament has a duty to engage in fresh public consultation after the Bills are re-tagged.

EXECUTIVE SUMMARY

CAN THE CONSTITUTIONAL DEFECTS IN THE BILL BE CURED LATER VIA REGULATIONS OR SUBSEQUENT AMENDMENTS?

The President of South Africa has referred the Copyright Amendment Bill, 2017 (“the Copyright Bill”) and the Performers Protection Amendment Bill, 2016 (“the PPAB”) (together, “the Bills”) back to the National Assembly for reconsideration. The President raised a number of *deficiencies* and expressed specific *reservations* as to the Constitutionality of the Bills.

The President’s reservations were: the Bills had been incorrectly tagged as section 75 Bills instead of sections 76 bills; the retrospective application of the proposed new sections 6A(7), 7A(7) and 8A(5) of the Copyright Bill may be unconstitutional; and the new “copyright exceptions” introduced by sections 12A, 12B, 12C, 12D and 19B and 19C of the Copyright Bill are “likely to be declared unconstitutional. The President canvasses *deficiencies and “constitutional matters that require reconsideration”* which are substantiated in the opinion.

In view of the above, the Copyright Coalition of South Africa (the CCSA) briefed Adv. Stephen Budlender (SC) and Adv. Ingrid Cloete (together referred to as ‘Counsels’ in this summary) to provide an opinion on the principal question whether, or not, the Constitutional defects in the Bills can be cured later via regulations or subsequent amendments? Three options were considered in conjunction with the above principal question.

On the principal question of whether, or not, procedural defects can be cured by a later amendment, the opinion’s unequivocal conclusion is that the errors in the procedure to adopt the defective bills are incurable by way of later amendment. Specifically, the President’s referral identified two procedural defects with the manner in which the Bills had been passed, which would, should the Bills come into force, render them unconstitutional and invalid. These procedural defects are that (i) *the Bills were incorrectly tagged*, and (ii) that there was *inadequate public consultation concerning some of their provisions*. Neither of these procedural flaws can be cured with a subsequent amendment or through regulation. Any attempt, via regulation or amendment, to bring the substance of the Bills in line with the Constitution would be doomed to failure. No regulation or amendment can reach back in time and alter the process according to which legislation was made. Should the National Assembly elect not to follow the section 76 process, and simply refer the Bills back to the President for assent, the resulting legislation would be constitutionally invalid. To cure the bills procedural defects may only be achieved through a proper re-tagging and going through the correct process when enacting the Bills.

On whether the substantive defects can be cured later, the opinion is that the substantive defects cannot be cured later. Should the National Assembly elect only to attend to the procedural issues (by re-tagging the Bills and conducting further public consultation), and leave the substantive issues to be “cured” by later regulations or amendments, this approach is constitutionally impermissible for the reasons Counsels substantiate on in the opinion and which are summarised below.

Unconstitutional legislation is invalid from inception. Counsel’s opinion states that this approach is constitutionally impermissible, and vitiates the legislation making it void and ineffective from the beginning, thus the legislation in that sense is never “in force”.

The President, having formally expressed reservations, is duty bound regarding the Bills. Unless the President's substantive reservations are meaningfully addressed, President would be duty-bound not to assent to the Bills. The President cannot assent to a defective Bill he considers unconstitutional in the hope that it might, at some uncertain future date, be materially amended.

There are limits to regulations. Any regulations that attempt to cure unconstitutional legislation, would themselves be invalid as in order to be valid, regulations must remain within the confines of the empowering legislation. A real risk is that regulations promulgated with a view to saving the relevant provisions of the Bills from unconstitutionality would fall foul of these requirements, and would, as a result, be invalid.

Uncertainty offends against the rule of law. To pass an unconstitutional bill into law in the hope that it might be cured by a future uncertain amendment is contrary to the principles of legal certainty and predictability required by the rule of law.

A future amendment cannot undo rights violations. If the unconstitutionality of these provisions could be cured by a future amendment, by that time, rights violations will have already occurred, by virtue of the Bills having come into effect. These points have been substantiated in the opinion.

On whether a "savings clause" can be inserted into the Bills to ring-fence possibly unconstitutional provisions, Counsels are of the view **that the "savings clause" approach does not assist.** This approach is flawed, as it does not address the fatal procedural flaws in the Bills with regards, to incorrect tagging and inadequate public consultation. The issues of incorrect tagging and inadequate public consultation can only be solved by following the correct processes now, before the Bills are signed into law. Therefore, a "savings clause" cannot cure these defects, any more than regulations or amendment could.

Additionally, the "savings clause" proposal envisages carving out significant portions of the Bills. It is difficult to see what purpose this approach would serve as there can be little utility in the remainder coming into operation in the meantime; and the various provisions of the Bills are necessarily interwoven and inter-related. The law relating to the severability of unconstitutional provisions in legislation is dealt with substantially in the opinion and provides an understanding of this position. It is, in Counsels views, clearly advisable instead to address the constitutional problems with the substance of the Bills before enacting them, rather than trying to enact portions of it piecemeal.

In conclusion, Counsels submit that the constitutional defects in the Bills – both procedural and substantive – must be addressed before those Bills are signed into law. The constitutional issues cannot be cured with later legislative or executive action.

HIGHER EDUCATION INSTITUTIONS (HEI) LICENSING

1. Introduction

DALRO's main activities are:

- The administration of rights of reprographic reproduction in literary works and the issuing of licences and collection of royalties for this use.
- The administration of rights of public performance and broadcast in literary, dramatic and dramatico-musical works and the issuing of licences and collection of royalties for these forms of exploitation.
- The administration of rights of reproduction in visual arts and the issuing of licences and collection of royalties for this use.

2. DALRO's Function as a Reproduction Rights Organisation (RRO) in licensing Higher Education Institutions (HEIs)

In 1993, in response to appeals from the international copyright community for the establishment of an RRO in South Africa to bring photocopying of copyright-protected works under licensed control, DALRO established its Reprographic Reproduction Rights Licensing division. The core function of this division is to license the reproduction of extracts from books, and articles from journals and magazines on behalf of local and foreign rightsholders.

The most pressing need for this licensing service is obviously in the Higher Education (HE) sector where study material is compiled and disseminated to students, either by way of paper course packs and other forms of handouts, or by way of institutional intranets or electronic reserves. All the public HE institutions license their supplementary study materials through DALRO, either on a blanket (i.e. pre-authorised), or transactional (i.e. pay-as-you-copy) basis.

To fulfil this function, DALRO acquired mandates from all major South African publishers, especially those that publish for the academic, scholarly and FET sectors, as well as a growing number of newspaper publishers. This enables DALRO to offer the educational institutions licensed access to a near-inclusive repertoire of copyright-protected works. South African book publishers' represented by DALRO include Juta & Co, Van Schaik Publishers, LexisNexis, Pearson Education SA, Oxford University Press SA, Heinemann Educational SA, HSRC Press, UNISA Press, Wits University Press, UKZN Press and the Institute for Security

Studies. Local newspaper publishers which have entrusted their reproduction rights to DALRO's administration include Media24 Newspaper, Times Media and Mail & Guardian.

DALRO is also a full member of the International Federation of Reproduction Rights Organisations (IFRRO) (www.ifrro.org). Functioning under the umbrella of this organisation and being a member of an international network of RROs, DALRO has over time entered into agreements of reciprocal representation with several foreign RROs (<http://ifrro.org/members/dramatic-artistic-and-literary-rights-organisation-pty-limited>). These agreements duly mandate DALRO to grant licences for reproduction from books, journals, magazines and, in many instances, newspapers, published in the respective territories.

The rights that DALRO obtains from local publishers and from its foreign counterparts are non-exclusive. Users are therefore at liberty to either make use of DALRO's collective licensing services, a "one-stop shop" as it were, or to apply to the local and foreign rightsholders individually. Although the latter route is an option in theory, in practice it is likely to prove a daunting and frustrating experience.

3. Transactional vs Blanket Licensing

Reprographic Reproduction Rights:

Given South Africa's enabling legal framework of voluntary licensing, South African HE institutions are at liberty to either acquire licences transactionally (a grant of right in response to an up-front application), or to enter into a blanket licence agreement with DALRO which grants a pre-authorisation to copy from DALRO's repertoire, with retrospective reporting.

The forms of dissemination of copyright-protected works typically licensed by DALRO, either transactionally or on a blanket basis, include the following:

- Single item handouts distributed to student (beyond the permissible reproduction for classroom use contemplated in the Regulation to the Copyright Act).
- Course packs (also called "readers"), i.e. compilations of extracts from Books and Journal/Magazine Articles, sometimes supplemented by lecturers' notes, prepared for students as additional reading material to complement core textbooks.
- Reserve shelf (short loan) dissemination i.e. **copies** (as opposed to **original** published works) of extracts from published editions (Books and Journals) placed on the library's reserve shelf for on-copying by students.
- Posting of extracts from Books or Journal/Magazine Articles on the institutions password-protected intranet, or the library's course management platform (electronic reserve) to be accessed for download and optional printing by students. Examples of course management platforms are *Wed-CT*, *Blackboard* and *Moodle*.
- Copying of the extracts from Books or Journal/Magazine Articles onto a digital fixation such as a CD-ROM or flash drive (USB stick) for distribution to distance learners.

DALRO's blanket licensing service

The blanket licence is characterised by a grant in return for an upfront payment to DALRO, and retrospective reporting by the licensee on copies made. Blanket licences are currently on offer to HEIs with a proven

record of copyright compliance through transactional licensing, and with the requisite infrastructure to support and sustain full reporting on institutional copying.

The blanket licence tariff was negotiated with the HE institutions in collaboration with the Department of Education when the blanket licence was introduced in 1999.

It is annually adjusted for inflation only and currently stands at R124,10 (plus VAT) per full-time equivalent (FTE) student at a university, and R94,14 (VAT Exclusive) per FTE student at a university of technology.

DALRO's transactional licencing service

A transactional licensing service involves a reporting and the raising of a fee in respect of every copy that is made at the institution.

The transactional base rate was set back in 1993 when reprographic licensing commenced and has since been adjusted annually. The default rate for HEIs is R0,88 (VAT exclusive) per copy per page for books and journals, and a default rate for public HE institutions of R 8,39 per article.

4. Distribution of Royalties

Transactional licensing income is distributed twice annually, in February (covering royalty collections during the period 1 July to 31 December of the previous year) and August (covering royalty collections during the period 1 January to 30 June the same year). Blanket licence revenue is distributed once per annum, in May, accounting on copies made during the previous academic year. These three main distributions are all title-specific.

One further distribution is done in tandem with the blanket licence distribution. It is a supplementary distribution to local rightsholders only on income retained from countries with which DALRO has an "IFRRO Type B" bilateral agreement which entitles the parties to retain the income collected for each other's repertoires for distribution to its own rightsholders. This amount is supplemented by non-title-specific income DALRO receives from certain RROs.

In the *calendar* year of 2016, the following amounts were collected and distributed from all licensing:

- Total amount collected: R 47 694 538
- Total amount distributed: R 34 263 549
- Of the amount above, total amount distributed to local rightsholders: R 15 896 777

5. DALRO's Commission

The commission DALRO is permitted to deduct from Reprographic Rights Licensing depends on the mandate agreements from local rightsholders and DALRO's reciprocal agreements with foreign RROs, which is in the range of 15% to 25% deducted from the licence fees collected.

Draft 1

Draft 2

OBSERVATIONS BY PASA ON CURRENT WORKING DRAFT OF THE COPYRIGHT AMENDMENT BILL B-BILL AS AT 7 JUNE 2018

made at the request of the Chair of the Portfolio Committee on Trade & Industry on 6 June 2018.

For the sake of convenience, these observations are annotated as mark-ups to the relevant text in the working document.

The Chair has asked for PASA to identify provisions in the current working draft that are problematic. These observations identify text that need improvement, provisions that need to be reconsidered entirely, and provisions which PASA considers should be removed for reasons stated. This document therefore does not include specific suggestions for text. These observations focus on the publishing interest only, and are not intended to reflect the positions of other creative industries. This document should therefore not be seen as a comprehensive comment on the Bill.

PASA has made submissions and text proposals in respect of the Bill, which are cross-referred in this document. These submissions and text proposals are:

- PASA submission to the Portfolio Committee dated 7 July 2017 including:
 - Principal submission
 - Copy of submission to the dti dated 16 September 2015
 - Annex "What Publishers Do"
- Joint proposal by PASA and DALRO with suggested text dated 21 August 2017
- Joint supplementary submission by PASA and DALRO in respect of 'fair use' dated 8 March 2018
- Joint supplementary submission by PASA and DALRO on library exceptions dated 15 May 2018.

Mark-ups (highlighted in yellow or marked by comment notes) are based on the PASA-DALRO suggested text, 21 August 2017, although some other mark-ups have also been made to illustrate where more attention needs to be given to the text.

References to page numbers in these documents are references to page numbers as per the PDF / MS Word files submitted.

Draft 1

Draft 2

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 official text of the Bill.)

(MINISTER OF TRADE AND INDUSTRY)

[B 13—2017]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

=====

BILL

To amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for the reproduction of copyright work; 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 copyright works 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; to provide for certain new offences; and to provide for matters connected therewith.

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 of 1988, section 1 of Act 125 of 1992, section 50 of Act 38 of 1997, section 1 of Act 9 of 2002, 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 hereby amended—

Commented [PASA1]: Overriding question relates to the IP Laws Amendment Act, 2013, which is not in operation after nearly five years.
We understand a decision still has to be taken on which Department, dti or DST, will take on the responsibility for protecting traditional works. However, that Act's amendments to the Copyright Act pose a logistical challenge to drafting this Bill, i.e. in respect of cross-references and uses of definitions. As a result, the Bill cannot move forward until this decision has been taken.
PASA has held the consistent position that the provisions of that Act which amend the Copyright Act were poorly conceived and will not result in benefits to those who make traditional works.
PASA supports the Protection, Promotion, Development and Management of Indigenous Knowledge Bill, subject to few amendments.

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

“accessible format copy’ means a copy of a literary work in an alternative manner or form which gives a visually impaired person access to the said work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability; provided that the accessible format copy is used exclusively by visually impaired persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

~~“ ‘accessible format copy’ means a copy of a work in an alternative manner or form which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without disability;”;~~

(x) the insertion after the definition of “adaptation” of the following definition

“ ‘authorised entity’ means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations;”

(b) by the insertion after the definition of “artistic work” of the following definition:

“ ‘audiovisual work’ 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;”;

(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) by the insertion after the definition of “community protocol” of the following

Commented [PASA2]: PASA supports an exception in favour of visually-impaired persons in accordance of the terms of the Marrakesh VIP Treaty. This will necessitate another definition of “accessible format copy”. See text proposals in respect of new Section 19D below.

Commented [PASA3]: Definition for an exception in accordance with the Marrakesh VIP Treaty.

definition:

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

(e) by the insertion after the definition of “copyright” of the following definition:

“ ‘**copyright management information**’ means information attached 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 using the work or indicates that the use of the work is subject to terms and conditions;”;

(f) by the insertion after the definition of “National Trust” of the following definitions:

“ ‘**open licence**’ 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 and the owner of a right in that work—

(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. 11 of 1967);

“ ‘**visually impaired person**’ means a person who is blind, has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability, or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;”

Commented [PASA4]: See comments on Clause 24.

Commented [PASA5]: Definition for an exception in accordance with the Marrakesh VIP Treaty.

~~‘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) by the insertion after the definition of “sound recording” of the following definitions:

“ **‘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 for non-infringing purposes;

‘technological protection measure circumvention device’ means a device primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure.’; and

- (i) by the insertion after the definition of “traditional work” of the following definitions:

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

~~**‘visual artistic work’—**~~

~~(a) means an artistic work that aims to please the visual sense and includes an artistic work such as a painting, a sculpture, a drawing and an engraving; and~~

~~(b) excludes commercialised artistic work such as industrial design, architectural and engineering drawings, graphic design, fashion design, interior design, circuit layouts, commercial logos, and icons for applications.’;~~

Commented [PASA6]: See comments on Clause 7B and further. If PASA’s proposal for a new Chapter dealing with the resale royalty right is accepted, this definition will not be needed.

[Amendment of section 2 of Act 98 of 1978](#)

[x]. Section 2 of the principal Act is hereby amended by the addition after sub-section (3) of the following sub-section:

"(4) Ideas, procedures, methods of operation or mathematical concepts shall not be eligible for copyright."

Insertion of section 2A in Act 98 of 1978

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

“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 interface specifications;~~

~~(2) A table or compilation which by reason of the selection or arrangement of its content, constitutes an 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 protection shall—

~~(a) extend to an expression—~~

~~(i) inextricably merged with an idea such that the idea can be expressed intelligibly only in one or a limited number of ways; or~~

~~(ii) when the particular expression is required by law; or~~

(b) subsist in—

(i) official texts of a legislative, administrative or legal nature or in official translations of those texts; 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 items of press information: Provided that the maker of the speeches referred to in this subparagraph shall have the exclusive right of making a collection of the speeches in question.”

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Commented [PASA7]: Clause 2A will create confusion in interpreting the Act, once amended. Its provisions already exist elsewhere in the Act, or are more correctly placed in other existing sections, such as Section 2. PASA-DALRO suggested text, 21 August 2017, p5.

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Commented [PASA8]: See comment on Clause 13. This provision already appears in Section 12(8) and should either be retained there, if our suggestion not to change the existing structure of exceptions, or be moved to new Section 12B.

Amendment of section 5 of Act 98 of 1978, as amended by section 5 of Act 52 of 1984 and section 5 of Act 125 of 1992

3. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(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] an international [organizations as may be prescribed] or local organisations~~.”

Commented [PASA9]: PASA welcomes this removal. We note that vestiges of provisions under which copyright vests in the State remain, such as the prohibition on assignment, which must similarly be removed.

Commented [PASA10]: PASA objects to this amendment. It creates uncertainty and undermines clear existing provisions of the Act relating to works made in the course of employment and in terms of commissions.

Amendment of section 6 of Act 98 of 1978, as amended by section 3 of Act 56 of 1980 and section 6 of Act 125 of 1992

4. Section 6 of the principal Act is hereby amended—

(a) by the insertion after paragraph (e) of the following paragraphs:

“(eA) the issue to the public of copies of the work, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the work not previously put into circulation in the Republic or elsewhere by or with the consent of the copyright owner; provided that the issue to the public of copies of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic;

Commented [PASA11]: (Exhaustion clause that can also appear under the exceptions.)

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(eB) communicating the work by wire or wireless means to the public, so that any member of the public 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 following paragraph:

“(g) doing, in relation to an adaptation of the work, any of the acts specified [in relation to the work] in paragraphs (a) to [(e)] (eB) inclusive.”

Commented [PASA12]: PASA welcomes this amendment, which updates the Act to the digital age. If this is intended to be in compliance with the WIPO Copyright Treaty, attention must also be given to the exclusive right of distribution required by that Treaty (also known as the “making available” right). It is not clear to us whether it has been considered. PASA-DALRO suggested text, 21 August 2017, pp 1-4. See also the comments on Clauses 26 and 27.

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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.~~

~~“Royalties regarding literary or musical works~~

~~6A. (1) — Notwithstanding the transfer of the copyright in a literary or musical work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 6.~~

~~(2) (a) — The royalty percentage contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the author and the person to whom the author is transferring copyright, or between their representative collecting societies.~~

~~(b) — Any subsequent sale of the copyright in that work is subject to the agreement between the author and the transferor, contemplated in paragraph (a) or the order contemplated in subsection (3), as the case may be.~~

~~(3) — Where the author and transferor contemplated in subsection (2)(a) cannot agree on the royalty percentage, the author or transferor may refer the matter to the Tribunal for an order determining the amount.~~

~~(4) — The agreement contemplated in subsection (2)(a) must include the following:~~

~~(a) — The rights and obligations of the author and the transferor;~~

~~(b) — the royalty percentage agreed on, or ordered by the Tribunal, as the case may be;~~

~~(c) — the method and period within which the amount must be paid by the transferor to the author;~~

~~(d) — a cooling off period; an~~

~~(e) — a dispute resolution mechanism.’’~~

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

6. Section 7 of the principal Act is hereby amended—

(a) by the insertion after paragraph (d) of the following paragraphs:

Commented [PASA13]: PASA objects to the new Section 6A. This provision is an extrapolation of the Copyright Review Commission recommendation for the music industry. There has been no research on the needs of authors and publishers in the publishing industry and no impact assessment of such a provision. It will impede production of quality published material. See pp54-57 and 60 of PASA’s submission, 7 July 2017.

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“(dA) the issue to the public of copies of the work, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the work not previously put into circulation in the Republic or elsewhere by or with the consent of the copyright owner; provided that the issue to the public of copies of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic.”

Commented [PASA14]: (Exhaustion clause that can also appear under the exceptions.)

(dB) communicating the work by wire or wireless means to the public, so that any member of the public may access the work from a place and at a time chosen by that person;” and

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Commented [PASA15]: See the comment to Clause 4.

(b) by the substitution for paragraph (f) of the following paragraph:

“(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)] (dB) inclusive.”

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Insertion of section 7A in Act 98 of 1978

7. The following sections are 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.”

Commented [PASA16]: PASA objects to the new Section 7A. This provision is an extrapolation of the Copyright Review Commission recommendation for the music industry. There has been no research on how artistic works are used in published copyright works and no impact assessment of such a provision. It will impede production of quality published material. See point 3.2 on p 58 of PASA’s submission, 7 July 2017.

Resale royalty right regarding visual artistic works

7B. — (1) — The author of a visual artistic work in which copyright subsists must be paid royalties on the commercial resale of his or her work.

Commented [PASA17]: PASA has no objection to the introduction of a resale royalty right. The limitation of these provisions to “visual artistic works is the key to fixing the resale royalty right provisions. However, we believe that Sections 7B to 7E can be much improved. We therefore suggest that such provisions appear in a new Chapter before Chapter 3. See the insertion below. PASA-DALRO suggested text, 21 August 2017, pp18-22.

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

(b) — The Minister must, before prescribing the rate referred to in paragraph (a), publish the rate proposed in the Gazette and call for written comments by any interested party to be provided within 30 days after

publication.

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

~~(a) at the time when the resale is concluded~~

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

~~(ii) the term of validity of the resale royalty right has not expired;~~

~~(b) in the case of a deceased author, the deceased was at the time of death a South African citizen or was resident in the Republic;~~

~~(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 Convention for the Protection of Literary and Artistic Works; 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 the author was the first owner of any copyright in the work.~~

~~(5)(a) The Minister may designate any country for the purposes of subsection (3)(a)(i) by notice in the Gazette.~~

~~(b) The Minister may by like notice withdraw any designation contemplated in paragraph (a).~~

~~(6) Sections 7B, 7C, 7D and 7E applies to a visual artistic work that was made before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic work falls within the application of this Act.~~

Proof of author

~~7C. (1) Where a mark or name purporting to identify a person as the author of a visual artistic work appears on such work, that person is, in the absence of evidence to the contrary, presumed to be the author of such work.~~

~~(2) If a visual artistic work~~

~~(a) is a work of more than one author, the presumption in subsection (1) applies to each co-author of such visual artistic work; or~~

~~(b) includes indigenous cultural expressions or knowledge the relevant indigenous community is entitled to an equitable share in the resale royalty payable.~~

Duration of resale royalty right

~~7D. (1) The resale royalty right of an author of a visual artistic work expires at the end of the period of 50 years calculated from the end of the calendar year~~

~~(a) in which the author concerned died; or~~

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

~~(2) In the case of a visual artistic work created by an unknown author~~

~~(a) the resale royalty right in that work expires at the end of the period of 50 years calculated from the end of the calendar year in which the work was first made available to the public; or~~

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

Transmission of resale royalty right

~~7E. (1) A resale royalty right may not be alienated, save for transmission on the death of the holder of the right by testamentary disposition; or by operation of law.~~

~~(2) In the case of a bequest of a visual 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 royalty right.~~

~~(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 unenforceable. 22.~~

Substitution of section 8 of Act 98 of 1978, as amended by section 5 of Act 56 of 1980, section 6 of Act 52 of 1984, section 1 of Act 61 of 1989 and section 8 of Act 125 of 1992

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

“Nature of copyright in **cinematograph films** audiovisual works

Commented [PASA18]: Consequential amendments to the Registration of Copyright in Cinematograph Films Act, 1977?

8. (1) Copyright in **a cinematograph film** an audiovisual work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the **film** work in any manner or form, including making a still photograph therefrom;
- (b) causing the **film** work, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
- (c) broadcasting the **film** work;
- (d) causing the **film** work to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the **film** work, and is operated by the original broadcaster;

(dA) the issue to the public of copies of the film, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the film not previously put into circulation in the Republic or elsewhere by or with the consent of the copyright owner; provided that the issue to the public of copies of a film does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic;

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(dB) communicating the work by wire or wireless means to the public, so that any member of the public may access the work from a place and at a time chosen by that person;

Commented [PASA19]: (Exhaustion clause that can also appear under the exceptions.)

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Commented [PASA20]: See the comment to Clause 4.

- (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** work in paragraphs (a) to **(d)** **(dA)** 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.~~

~~Royalties regarding audiovisual work~~

~~8A. — (1) — Notwithstanding the transfer of the copyright in an audiovisual work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 8.~~

~~(2) — (a) — The royalty percentage contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the author and the person to whom the author is transferring copyright, or between their representative collecting societies.~~

~~(b) — Any subsequent sale of the copyright in that work is subject to the agreement between the author and the transferor, contemplated in paragraph (a) or the order contemplated in subsection (3), as the case may be.~~

~~(3) — Where the author and transferor contemplated in subsection (2)(a) cannot agree on the royalty percentage, the author or transferor may refer the matter to the Tribunal for an order determining the amount.~~

~~(4) — The agreement contemplated in subsection (2)(a) must include the following:~~

~~(a) — The rights and obligations of the author and the transferor;~~

~~(b) — the royalty percentage agreed on, or ordered by the Tribunal, as the case may be;~~

~~(c) — the method and period within which the amount must be paid by the transferor to the author;~~

Commented [PASA21]: The same issues raised in relation to Clause 5 apply here too.

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~~(d) — a cooling off period; and~~

~~(e) — a dispute resolution mechanism.”.~~

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:

10(1) the substitution for paragraph of the following paragraph:

“(e) communicating the sound recording by wire or wireless means to the public, so that any member of the public may access the sound recording from a place and at a time chosen by that person.”.

Deleted: Section 9 of the principal Act is hereby amended by

Commented [PASA22]: See the comment to Clause 4.

10(2) the addition after paragraph (e) of the following paragraph:

“(f) the issue to the public of copies of the sound recording, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the sound recording not previously put into circulation in the Republic or elsewhere by or with the consent of the copyright owner; provided that the issue to the public of copies of a sound recording does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic.”

Commented [PASA23]: (Exhaustion clause that can also appear under the exceptions.)

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:

“**Royalties regarding 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 of a royalty to the owner of the relevant copyright—

- (i) broadcast[,] a sound recording as contemplated in section 9(c);
- (ii) cause the transmission of a sound recording as contemplated in section 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 performs an act contemplated in section 9(c), (d) or (e) must—

- (i) register that act in the prescribed manner and form; and
- (ii) submit a report to the performer, copyright owner or collecting society, as the case may be, in the prescribed period and manner, for the purpose of calculating the royalties due and payable by that person.

Or see (aA), (aB), (aC), (aD) and (aE) below:

(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 community or 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 performance and the proposed terms and conditions of the payment of a royalty; and
- (ii) request the performer, copyright owner, collecting society, indigenous community, or National Trust to sign the proposal attached to the notice in question.

(aB) If the person referred to in paragraph (aA) has failed to submit the required notice to the performer, copyright owner, collecting society, indigenous community, or National Trust before performing an act contemplated in section 9(c), (d), or (e), that person must forthwith—

- (i) notify the performer, copyright owner, collecting society, indigenous community, or National Trust of such act;

- (ii) pay the generally applicable licence fees as per the proposal or as published by the copyright owner, the collecting society, indigenous community or the National Trust in respect of that person's category of use; and
- (iii) pay royalties calculated from the date of first use regardless of whether that date is prior to the coming into operation of the Copyright Amendment Act, 2017.
- (aC) The person contemplated in paragraph (aB)(i) must as soon as is reasonably practicable upon receipt of such notice respond to such proposal.
- (aD) 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 the Tribunal.
- (aE) 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 be repaid.
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- (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]** collecting societies.
- (c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may in the prescribed manner 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 of 1965).

- (2)(a) The owner of the copyright, collecting society, indigenous community or the National Trust who receives payment of a royalty in terms of this section shall ensure that [share] such royalty is equally shared between the copyright owner and [with] any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).
- [(b) The performer's share of the royalty shall represent fair and equitable remuneration determined by an agreement between the performer and the owner of copyright, or between their representative collecting societies.**
- [(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 of 1965).]**
- (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 of 1967).

(3) In the event of any right to a royalty being assigned to any successor in 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 in title.'.

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 any distributor to the general public or any section thereof in the Republic, or from the Republic;

(b) communication of the work by wire or wireless means to the public, so that any member of the public may access the work from a place and at a time chosen by that person.”.

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Amendment of section 11A of Act 98 of 1978

[x]. The following section is hereby substituted for section 11A of the principal Act:

“Nature of copyright in published editions

Copyright in a published edition vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

(a) making a reproduction of the edition in any manner;

(b) the issue to the public of copies of the edition, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the edition not previously put into circulation in the Republic or elsewhere by or with the consent of the copyright owner; provided that the issue to the public of copies of an edition does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic;

(c) communicating to the public of the edition, by wire or wireless means, including the making available to the public of the edition in such a way that members of the public may access the edition from a place and at a time individually chosen by them.”

Amendment of section 11B of Act 98 of 1978

[x]. Section 11B of the principal Act is hereby amended –

(a) by the addition after paragraph (e) of the following paragraphs:

“(eA) the issue to the public of copies of the program, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the program not previously put into circulation in the Republic or elsewhere by or with the consent of the copyright owner; provided that the issue to the public of copies of a program does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic;

(eB) communicating to the public of the program, by wire or wireless means, including the making available to the public of the program in such a way that members of the public may access the work from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (g) of the following paragraph:

“(g) doing, in relation to an adaptation of the computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (eB) [(e)] inclusive;”

Repeal of section 12 of Act 98 of 1978

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

Insertion of sections 12A, 12B, 12C and 12 D in Act 98 of 1978

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 lawfully acquired copy of the work at a different time or with a different device;
- (ii) criticism or review of that work or of another work;

Commented [PASA24]: From the perspective of having better legislation, PASA has no objection in principle to a single section that is the sole source of all exceptions, as is proposed to be done conceptually in Section 12B.

However, PASA believes that the extrapolation of the same exceptions in respect of all forms of copyright works is a mistake. The repeal of Sections 12, 16, 17 and 19A and its replacement with an equivalent general provision, new Section 12B, removes carefully crafted nuances in Sections 15(4), 16(1), 17, 18, 19A and 19B(1), thereby extending these exceptions in a way that has not been researched and for which there is no impact assessment. We suggest that the easiest way to remedy this is not to undertake these amendments in the Bill.

PASA’s preference remains with focused exceptions - PASA-DALRO suggested text, 21 August 2017, p8-10 – but only in order not to diverge from the format of this document, those text proposals are not inserted here.

Commented [PASA25]: We understand that new Section 12A is being reconsidered, the current suggestion being a ‘hybrid fair use’ model based on Section 35 of the Singapore Copyright Act - <https://sso.agc.gov.sg/Act/CA1987#pr35>... The adoption of this model will result in a substantial change to new Section 12A and will also need adaptation to cater for other ‘fair dealing’ exceptions that remain (as the Singapore model does).

PASA supports the five-factor test in the Singapore model, used to determine ‘fair dealing’ - PASA-DALRO suggested text, 21 August 2017, p8 – but is open to other realistic approaches to the fifth factor, such as marked up in the text.

The mark-ups in the text give an indication of the issues that need to be addressed in devising a ‘fair use’ clause based on the original Bill, which is not harmful to industry.

PASA reiterates that Government has not undertaken an impact assessment of a ‘fair use’ provision and points to the study it commissioned from PwC, delivered to Parliament 1 August 2017 - PASA-DALRO supplementary submission 8 March 2018. If an open exception is adopted, a key factor in maintaining a balanced approach is in appropriate remedies for infringement so as to discourage unjustified reliance on the open exception. See our comment on Clause 23.

- (iii) reporting current events;
- (iv) use of a lawfully acquired copy of a work for scholarship, teaching and education for educational institutions;
- (v) comment, illustration, parody, satire, caricature or pastiche;
- (vi) preservation of and access to the collections of libraries, archives and museums to the extent that the collections comprise lawfully acquired copies of the works therein;
- ~~(vii) expanding access for underserved populations; and~~
- (vii) ensuring proper performance of public administration of a lawfully acquired copy of the work.
- (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
- (i) the nature of the work in question;
- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
- (iii) the purpose and character of the use, including whether—
- (aa)* such use serves a purpose different from that of the work affected; and
- (bb)* it is of a commercial nature or for non-profit research, library or educational purposes;
- (iv) the substitution effect of the act upon the potential market for the work in question;
- (v) the reasonable availability of an authorised copy of the work, alternatively the availability of a reasonable licence for the work or extract in 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 shall be mentioned.

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Commented [PASA26]: Text along these lines is preferred to Singapore's Sec 35 "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price."

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Specific exceptions from copyright protection applicable to all works

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

- (a) Any quotation: Provided that—
- (i) that the extent thereof shall not exceed the extent reasonably justified by the purpose; and
 - (ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;
- (b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching; Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;
- (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 consent of the owner of the relevant part of the copyright in the work;
- (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 collection thereof;
- (e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—
- (i) the reproduction by the press, or in a broadcast, transmission or

Commented [PASA27]: PASA objects to the removal of the provisions in the current Section 12(1) requiring the mentioning of the source of copyright content used under these exceptions, and the name of the author. These requirements are needed to recognize the original work and may be necessary to validate the source of the extract, eg for quotation and for teaching. The removal of these requirements opens legitimate uses of exceptions to abuse.

Commented [PASA28]: See the comment on Clause 13 – for the purposes of a quick resolution of the Bill, PASA recommends that the existing format of the Act be retained. On the assumption that a single general clause will remain, specific provisions to which PASA objects as being to the unreasonable prejudice of copyright owners or which interfere with the normal exploitation of copyright works in publishing have been deleted in this text.

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 same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;

(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 current information;

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

(i) such translation is not done for commercial purposes;

(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 information purposes;~~

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

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

(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 individual of—

(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.

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

- (a) the making of a back-up copy;
- (b) time or format-shifting; or
- (c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.

(3) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to 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 making of an audiovisual work, or as a contribution of the 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.

~~(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.~~

Temporary reproduction and adaptation

12C. Temporary copies which are transient or incidental and part of a technological process

(1) Temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

Commented [PASA29]: PASA objects to new Section 12B(6), not only for prejudice to copyright owners in the publishing industry, but also out of concern that it may result in South Africa breaching its obligations under international treaties on intellectual property. Also see point 4 on p9 of PASA's submission, 7 July 2017. For the event of the introduction of the 'making available' right, PASA proposes an exhaustion clause as a proviso - PASA-DALRO suggested text, 21 August 2017, pp 1-3.- which could also be captured in a general clause such as new Section 12B.

of a literary, musical, artistic work or of an audiovisual work, a sound recording or a published edition or of a performance protected under the Performers' Protection Act, 1967, to be made, and which have no independent economic significance, shall not be an infringement of the exclusive right of copyright to make or authorise the making of a reproduction that work as meant in sections 6(a), 7(a), 8(1)(a), 9(a) and 11A of the Act.

(2) In this section 12C, "temporary acts of reproduction" and "acts of reproduction which are transient or incidental" shall mean reproductions that are not stored for any length of time exceeding the technological process of which they are a part. For avoidance of doubt, this definition shall be without prejudice to and not detract from any requirement contained in the Electronic Communications and Transactions Act, 2002, in terms of which a service provider or search engine is obliged to remove data or other material to avoid liability.

~~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 or adaptations is~~

~~(a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or~~

~~(b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.~~

Reproduction for educational and academic activities

12D. (1) Subject to subsection (3) the remaining provisions of this clause 12D, copyright in a work shall not be infringed by a natural person who makes a reproduction of a works or recordings of works, including recordings and broadcasts, for the purposes of that person's personal use in educational instruction or learning at an educational institution: Provided that such reproduction or the aggregate of all reproductions made by such person shall be compatible with fair practice [CRSS REFERENCE TO FAIR USE / FAIR DEALING FACTORS] and the copying does not exceed the extent justified by the purpose.

Commented [PASA30]: This text goes beyond what is needed for technological processes. PASA-DALRO suggested text p12.

Commented [PASA31]: The reproduction needs and tests for educational uses (instruction and learning) and academic uses (private research and study) are different. There is an existing exception for research and study, that may be replaced by an accepted purpose in an open exception. Section 12D should therefore be confined to education uses only.

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~~(2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.~~

(2) Educational institutions shall not reproduce or incorporate the whole or substantially the whole of a work published in book or as an article or contribution in a journal, or a recording of a work, unless a licence to do so is not available from the copyright owner, a collecting society, an indigenous community or the National Trust on reasonable terms and conditions or unless such a licence is not available from a collecting society registered in terms of Chapter 1A of this Act.

~~(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—~~

~~(a) where the textbook is out of print;~~

~~(b) where the owner of the right cannot be found; or~~

~~(c) where authorised copies of the same edition of the text book are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.~~

(3) The right to make copies shall provisions of this Section 12D do not extend to reproductions for commercial purposes.

~~(6) Any person receiving instruction at an educational institution may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.~~

(7)(a) The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.

Commented [PASA32]: PASA objects to this provision. To the extent that coursepacks are simply compilations of extracts from copyright works, their compilation must be licensed.

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Commented [PASA33]: PASA is concerned that this section is too vague and in any event covered by other proposed exceptions.

Deleted: §

Commented [PASA34]: This is in reality another manifestation of the exception for quotation, for which a fair dealing exception already exists and which may be covered by an open exception.

~~(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the 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 properly acknowledged.~~

~~(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.~~

~~(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.~~

(8) The source of the work reproduced and the name of the author, if it appears on the work, shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (5) reproductions made in terms of this Section 12D.''.

Commented [PASA35]: PASA objects to Section 12D(7) in its entirety. PASA-DALRO supplementary submission, 15 May 2018.

Amendment of section 16 of Act 98 of 1978, as substituted by section 14 of Act 125 of 1992

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 hereby repealed.

Repeal of section 18 of Act 98 of 1978

17. Section 18 of the principal Act is hereby repealed.

Repeal of section 19A of Act 98 of 1978

18. Section 19A of the principal Act is hereby repealed.

Commented [PASA36]: See comments on Clause 13.

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 computer programs

19B. (1) A person having a right to use a copy of a computer program may, without the authorisation of the copyright owner, observe, study or test the functioning of the program in order to determine the ideas and principles 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 or she is entitled to perform.

(2) The authorisation of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:

- (a) The acts referred to in subsection (1) are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorised to do so;
- (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in paragraph (a); and
- (c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.

(3) The information obtained through the application of the provisions of subsection (2) may not be—

- (a) used for goals other than those to achieve the interoperability of the independently created computer program;
- (b) given to others except when necessary for the interoperability of the independently 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 which infringes copyright.

(4) For the purposes of this section, ‘interoperability’ means the ability to exchange information and to use the information which has been exchanged.’.

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

20. The following sections are hereby inserted in the principal Act after section 19B:

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 copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13): **Provided that the work 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 temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.

(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work for commercial purposes.

(5) A library, archive, museum or gallery may make a copy of —

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

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

(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, 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 obsolete technologies to new technologies in order to preserve the works for

Commented [PASA37]: PASA questions the need for many of these exceptions, and considers others of them too broadly drafted to be accepted in the Bill. PASA insists on proper record keeping of reproductions, etc, made under library exceptions to be available for inspection by copyright owners and their agents. Uses under these exceptions must be subject to a licence from a collecting society not being available. PASA-DALRO supplementary submission, 15 May 2018. In its submission, PASA noted that it agrees with the need for library exceptions and offered to draft appropriate exceptions.

Commented [PASA38]: Definition of these terms is required. At the very least, institutions benefiting from these exceptions must be open to the public during normal hours of business.

Commented [PASA39]: This provision is too vague and ambiguous and will need to be recast.

Commented [PASA40]: In the absence of an explanation, this is already allowed, and the exception is unnecessary.

Commented [PASA41]: PASA objects to this provision as drafted. “temporary access” needs more definition, and the section’s reference to “lawful access” is interpreted to be “licensed access”, ie governed by contract. Although there may be leeway for a limited exception, the way that it is drafted will interfere with legitimate uses by the copyright owner. In any case, the recipient library for any such exception must be limited to a public library in South Africa.

Commented [PASA42]: The drafting seems to limit the exception to a single patron, therefore raising the question why an exception is required.

Commented [PASA43]: PASA does not accept this purpose, since it goes beyond the purpose of preservation.

Commented [PASA44]: Too vague to remain in the Bill. “Collection” needs further definition, and there have to be qualifications to prevent unreasonable prejudice to rightsholders.

~~perpetuity, and to make the resulting copies accessible consistent with this section.~~

Commented [PASA45]: This kind of activity is normally licensed. The provision (e.g. "aging technology") is very vague.

~~(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).~~

Commented [PASA46]: This exception is unnecessary.

~~(9) A library, archive, museum or gallery may make a copy of a copyright work when the permission of the owner of copyright, collecting society, the indigenous community concerned or the National Trust cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.~~

Commented [PASA47]: This provision is too broadly framed, and is in reality an orphan works provision. Orphan works provisions require due and diligent search. PASA is prepared to consider a provision allowing mass digitization of collections, including of orphan works in the collections.

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

Commented [PASA48]: Either the imported copy is a legal copy in South Africa, in which case no exception is required, or it is not, in which case its import will prejudice the legitimate dealing in the work by or on behalf of the rightsowner.

~~(11) A library, archive, museum or gallery may reproduce in any format any copyright work which has been retracted or withdrawn from public 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 legal use.~~

Commented [PASA49]: This is the function of a Legal Deposit library.

~~(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 gallery or for public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.~~

Commented [PASA50]: PASA recognizes the need of these institutions to use their collections for exhibitions in a way that would sometimes involve the exclusive rights of copyright. However, this exception is too broadly cast and needs to be limited to the institution's own collection as a point of departure, and the destination after the event of reproductions made for the event must be dealt with.

~~(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 such work;~~

~~(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 a public place.~~

~~(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 digital transmission.~~

(b) The receiving library, archive, museum or gallery must delete any digital file received from the other library, archive, museum or gallery immediately after supplying the person who has requested it with a digital or paper copy of the work.

(14) An officer or employee of a library, archive, museum or gallery acting within the scope of his or her duties, shall be protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—

(a) the work is being used as permitted within the scope of an exception in 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 public domain or licensed to the public under an open licence.

~~(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of 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, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.~~

Multiple copies for visually impaired persons

General exceptions regarding protection of copyright work for persons with disability

19D. (1) If an authorised entity has lawful possession of a copy (“the master copy”) of the whole or part of—

(a) a published literary work, or a print or text-based version of a dramatic, musical or artistic work; or

(b) a published edition,

it is not an infringement of copyright in the work or of the published edition for the authorised entity to make, or supply, accessible format copies for the personal use of visually impaired persons to whom the master copy is not accessible because of their impairment.

(2) Subsection (1) does not apply if the master copy is of a musical work, or part of

Commented [PASA51]: PASA has no objection to legitimate inter-library loan and to consider digital inter-library transfers as suggested here, but the drafting has to be tightened up and the recipient must be limited to a library in South Africa.

Commented [PASA52]: In principle, PASA is sympathetic to immunity for library officers and employees, but the drafting has to be tightened up.

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Commented [PASA53]: PASA supports the immediate adoption of an exception for the benefit of the visually disabled so that South Africa can accede to the Marrakesh Treaty. We submit that the annexed text, with the definitions, is Treaty-complaint. PASA submission 7 July 2018 at pp5-6 and14.

a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it.

(3) Subsection (1) does not apply in relation to the making of an accessible format copy if, or to the extent that, copies of the work or the published edition are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.

(4) Subsection (1) does not apply in relation to the supply of an accessible format copy to a particular visually impaired person if, or to the extent that, copies of the work or the published edition are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(5) An accessible format copy made under this section must be accompanied by—

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(6) If an authorised entity charges for supplying an accessible format copy made under this section, the sum charged must not exceed the cost of making and supplying the accessible format copy.

(7) An authorised entity making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.

(8) If the master copy is in copy-protected electronic form, any accessible format copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection, unless the copyright owner agrees otherwise.

(9) If an authorised entity continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.

(10) If an accessible format copy which would be an infringing copy but for this section is subsequently sold or let for hire or offered or exposed for sale or hire or communicated to the public —

(a) it is to be treated as an infringing copy for the purposes of that dealing;

and

~~(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.~~

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

~~(a) — The person wishing to undertake any activity under this subsection must have lawful access to the copyright work 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 copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; 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, without the authorisation of the owner of the copyright work, reproduce the work 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 disabilities may, without the authorisation of the copyright owner export to or import from another country any copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-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 is practicable.”~~

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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 hereby amended by 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: Provided that an author who authorizes the use of his or her work in a sound recording 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 treated as 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 infringement ~~of the provisions of this section,~~ rather than the owner of the copyright in question.”

Commented [PASA54]: The original Bill had a controversial provision denying authors' moral rights in the case of exceptions, which has been removed from the working document, and which PASA welcomes. We see no need to amend Section 20, other than if it is still desired to replace "cinematograph film" with "audiovisual work."

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

22. Section 21 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(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]~~ an audiovisual work 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]~~ 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

Commented [PASA55]: PASA objects to the amendments since they simply create uncertainty. We submit that the matter for Parliament to decide is whether or not to remove any one or more of "taking a photograph" or "painting, portrait or gravure" "cinematograph film / audiovisual work" or "sound recording" or repealing Section 21(1)(c) altogether. Removal from this list or repeal would result in first copyright ownership of such works related by employment or contract in terms of Sections 21 or 22. PASA is neutral on any decision taken in respect of the removal of any specific kind of work from Section 21(1)(c). The section could benefit from a definition of "commission".

~~the author of the work shall have a licence to exercise any right which by virtue of this Act would otherwise be exercisable exclusively by the owner.”~~

Amendment of section 22 of Act 98 of 1978

23. Section 22 of the principal Act is hereby amended—

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

~~“(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 be assigned.”~~

(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 have effect unless it is in writing and signed by or on behalf of the assignor, the [licenser] licensor or, 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 only be valid for a period of up to 25 years from the date of agreement of such assignment.~~

~~“(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 or in writing, or an electronic equivalent thereof, 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 following subsection:

~~“(8) Unless otherwise prohibited from doing so, a licensee may grant a 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 after section 22:

Commented [PASA56]: PASA objects to the various components of Clause 23 for the individual reasons set out in comments in respect of each subsection below. Section 22 of the Act should not be amended.

Commented [PASA57]: This provision is a consequential provision from Clause 3, which, as per the comment related to Clause 3, PASA objects to and it should be deleted. PASA disagrees with the perpetual vesting of copyright in the State. It has consequences in relation to traditional works under the IP Laws Amendment Act, as well as the provision for orphan works.

Commented [PASA58]: The limitation of assignments to 25 years is an incorrect application of the recommendation of the Copyright Review Commission recommendation, which was a recommendation for a reversion of rights to composers of musical works. PASA opposes this provision, since its application to literary, artistic and published works will be damaging to industry and result in unintended consequences. Whereas PASA does not speak for composers or musicians, a reversion of rights clause in relation to musical works is best dealt with in a separate section.

Commented [PASA59]: We see no pressing need to amend Section 22(4).

Commented [PASA60]: PASA opposes this amendment since it runs counter to basic principles of the law of contract concerning delegation or fights.

“Assignment and licences in respect of orphan works”

22A. (1) A person who wishes to obtain a licence to do an act which is subject to copyright or a resale royalty right in respect of an orphan work must make an application to the Commission in the prescribed manner.

(2) Before making an application in terms of subsection (1), the applicant 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 be prescribed and must be accompanied by copies of the published advertisement contemplated in subsection (2) and such fee as may be prescribed.

(4) When the Commission receives an application in terms of subsection (1), the Commission may, after holding such inquiry as may be prescribed, grant to the applicant a licence 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 may determine.

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

- (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 and locating a registered copyright owner;
- (b) conducted a search of reasonably available sources of copyright ownership and ownership information and where appropriate, licensor information;
- (c) conducted a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert assistance;
- (d) conducted a search using any other database available to the public.

Commented [PASA61]: PASA opposes this solution in respect of the use of orphan works, noting that orphan works are as much of an issue for publishers as they are for libraries and other users of literary works.

PASA submission 7 July 2017, para 5.7 on pp25-26.

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) actions based on facts known at the start of the search and facts uncovered during the search;

(ii) actions directed by the Commission; and

(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 copyright owner.

(7) Where a licence is granted in terms of subsection (4), the Commission may direct the applicant to deposit the amount of the royalty determined in a 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 claim such royalty at any time.

(8) The copyright owner may, ~~not later than five years after the expiration of a licence issued in terms of this section at any time,~~ collect the royalties fixed in the licence or in default of payment, by initiating legal action to recover such royalties.

(9) Any person who can adduce evidence for the purposes of proving that 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 royalties that accrued to the copyright work after such return~~ must submit his or her details for registration on the database of the register of copyright referred to in subsection (6)(a) and may for the period during which the owner of copyright was unknown, recover royalties as contemplated in subsection (8).”.

Insertion of Chapter 1A in Act 98 of 1978

25. The following Chapter is hereby inserted in the principal Act after Chapter 1:

“CHAPTER 1A

COLLECTING SOCIETIES

Registration and 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 administer rights on behalf of—

(a) copyright owners or authors, or on behalf of an organisation representing copyright owners or authors, has the right to receive payment of a royalty in terms of this Act; or

(b) performers or owners, or on behalf of an organisation representing performers or owners, has the right to receive payment of a royalty in terms of section 5(1)(b) of the Performers' Protection Act, 1967 (Act No. 11 of 1967).

(3) The Commission may, for purposes of issuing a registration certificate, consult with any person and may grant such registration and issue a registration certificate on such terms and conditions as may be determined by the Commission.

(4) The Commission shall not register and issue a registration certificate to any applicant unless the Commission is satisfied that the 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, may be renewed in the prescribed manner on such terms and conditions as may be determined by the Commission.

(6) The Commission shall only register one collecting society for each right granted under this Act or the Performers' Protection Act, 1967 (Act No. 11 of 1967).

(7) If there is no collecting society for a right referred 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 by collecting society

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 Trust or another collecting society of rights, exclusive authorisation to administer any right in any work by the issuing of licences or the collecting of licence fees and royalties, or both; and
- (b) a performer copyright owner, indigenous community or the National Trust or other collecting society of rights may withdraw such authorisation without prejudice to the right of the collecting society, indigenous community or the National Trust concerned.

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

- (a) issue a licence in respect of any rights under this Act;
- (b) collect fees and royalties in pursuance of such a licence;
- (c) distribute such collected royalties among, performers or copyright owners, collecting societies of rights, indigenous communities or the National Trust after deducting a prescribed amount from the collected royalties for its own expenses;
- (d) negotiate royalty rates; and
- (e) perform any other prescribed function.

(3) A collecting society may—

- (a) enter into an agreement with any foreign society or foreign organization administering rights corresponding to rights that it administers under this Act; and
- (b) entrust rights administered by it in the Republic to such foreign society or foreign organisation to administer in that country : Provided that no such collecting society, foreign society or foreign organisation shall permit any discrimination in respect of the terms of a licence or the distribution of royalties collected.

Commented [PASA62]: Whilst not wishing to comment extensively on these provisions, PASA makes two points in principle:
 1. Licensees of registered collecting societies have to keep records of their uses of licensed material and report on them to the collecting society. This information is critical for calculating distributions to rightsholders.
 2. Statutory support must be given to licences of registered collecting societies, to the point of preferring such licences over exceptions.

Control of collecting society by performers or copyright owners

22D. (1) A collecting society is subject to the control of the performers or copyright owners whose rights that collecting society administers, and the collecting society shall, in such manner as may be prescribed—

- (a) collect and distribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c);
- (b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the purpose of distribution of the royalties to the performers or copyright owners; and
- (c) provide to each performer or copyright owner regular, 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 owners shall, as far as may be possible, be distributed in proportion to the actual use of their works.

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 consistent with the registration conditions of that collecting society; or
- (b) the royalties collected by the collecting society in respect of rights administered by that collecting society are being utilised or distributed in accordance with the provisions of this Act.

Suspension and cancellation of registration of collecting society

22F. (1) The Commission may issue a compliance notice or apply to the Tribunal for an order to institute an inquiry into the affairs of a collecting 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 interests of the performers or copyright owners concerned.

(2) The Commission may, if it is of the opinion that it will be in the interest of the performers or copyright owners concerned, apply to the Tribunal for an order suspending the registration of the collecting society contemplated in subsection (1), pending an inquiry for such period as may be specified in the order.

(3) The Commission may, after the inquiry contemplated in subsection (2) has been finalised and if it is of the opinion that it will be in the interest of the performers or copyright owners concerned, apply to the Tribunal 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 subsection (3) during the period of suspension or cancellation of the registration of that collecting society following 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.’’.

Amendment of section 23 of Act 98 of 1978, as amended by section 20 of Act 125 of 1992

26. Section 23 of the principal Act is hereby amended—

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

“(1) Copyright shall be infringed by any person[,]—

(a) not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise;

(b) who tampers with any information kept by any other person in order to administer copyright in terms of this Act; or

(c) who abuses copyright and technological protection measures in order to constitute a defence to any claim of copyright liability or any independent cause of action that may be pursued either as a counterclaim in an action for infringement or instituted

independently.’’; and

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

Insertion of section 26(4) in Act 98 of 1978

[x]. The following sub-section is hereby inserted in the principal Act after section 26(3):

“(4) (a) In any proceedings brought under this Chapter with respect of the infringement of any copyright work in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it

(i) copyright shall be presumed, unless the contrary is proved, to subsist in the work;
and

(ii) the author, shall, unless the contrary is proved, be presumed to be the owner of the copyright;

Provided that if the copyright work in question is a cinematograph film registered in terms of the Registration of Copyright in Cinematograph Films Act, no 62 of 1977, the provisions of this sub-section 4 shall be without prejudice to the evidentiary value of any certificate or other evidence submitted in such proceedings pertaining to such registration.

(b) Where any matter referred to in subsection (4)(a) is at issue and an assignment of the copyright, or an exclusive licence granting an interest in the copyright, has been proven to exist, the assignee or exclusive licensee named in that licence shall be presumed to be the owner or exclusive licensee of the copyright in respect of the transferred or licensed rights in question, provided that this presumption shall not apply in any dispute between the named assignee or licensee and the author or any successor-in-title of the author to the copyright in the work concerned.”

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 of 1992

27. Section 27 of the principal Act is hereby amended by

(1) the addition in subsection (1) after paragraph (f) of the following paragraph:

“(g) communicates to the public for the purpose of trade or for any other purposes to such an extent that the owner of the copyright is prejudicially affected.”

Commented [PASA63]: PASA objects to this amendment, since it removes a basic right to prevent infringement of copyright. We expect that this deletion is contrary to the distribution right required by the WIPO Copyright Treaty.

Commented [PASA64]: Section 24 needs to be amended:
-to provide for remedies for copyright infringement in relation to the new rights of ‘communication’ and ‘making available’
-to provide for remedies to discourage unjustified reliance on exceptions, thereby providing balance to any open exception.
PASA-DALRO suggested text p16.

Commented [PASA65]: PASA requests that copyright owners have support in cases of infringement in order to balance open exceptions. This provision is a presumption for legal proceedings. PASA-DALRO suggested text 21 August 2017.

Commented [PASA66]: Section 27 needs to be amended to provide for criminal sanction for copyright infringement in relation to the new rights of ‘communication’ and ‘making available’. PASA-DALRO suggested text pp 3-4.

(2) the addition of the following 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 or owner of the copyright—

- (a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertise for sale or hire, a technological protection measure circumvention device if—
 - (i) such person knows, or has reason to believe, that that device will or is likely to be used to infringe copyright in a work protected by a technological protection measure;
 - (ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or
 - (iii) such person knows or has reason to believe that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by a technological protection measure;
- (b) publishes information enabling or assisting any other person to circumvent a technological protection measure with the intention of inciting that other person to unlawfully circumvent a technological protection measure in the Republic; or
- (c) circumvents such technological protection measure when he or she is not authorised to do so.

shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.”.

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 hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) This section shall apply to any copy of the work in question made

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outside the 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 an infringement of copyright in the country in which the work was made.”; and

(b) by the substitution for subsection (5) of the following subsection:

“(5) This section shall ~~[mutatis mutandis]~~ with the necessary changes, apply with reference to an exclusive licensee who has the right to import into the Republic any work published elsewhere, which would be an infringing copy of the work in the country in which it was made.”

Commented [PASA67]: PASA objects to this provision. It reverses the position on parallel importation, thereby prejudicing legitimate dealing with copyright works by the copyright owner. No impact assessment has been carried out in respect of this provision.

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 protection measures

28O. (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a technological protection measure circumvention device if such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technologically protected work.

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

(a) such other person intends to use the service to circumvent an effective 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 a technologically protected work.

(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 other person to unlawfully circumvent a technological protection measure.

(4) No person may, during the subsistence of copyright in a work and without a licence of the owner of the copyright in such work, circumvent an effective technological protection measure applied by the owner of the copyright to such work.

(5) A technological protection measure shall be deemed to be effective if the 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 protection objective.

(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

Exceptions in respect of technological protection measure

28P. (1) For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform any of the following:

- (a) An act permitted in terms of any exception provided for in this Act; or
- (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer 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 who wishes to circumvent a technological protection measure so as to perform a permitted 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 in order to 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 the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.

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

- (a) other person, including his or her name, address and all other relevant

information necessary to identify him or her; and

(b) purpose for which the services of such other person has been engaged.

Enforcement by Commission

28Q. The Commission must enforce this Act by—

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

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

(c) dealing with any other matter referred to it by any person, Tribunal or any other regulatory authority.

Prohibited conduct in respect of copyright management information

28R. No person may—

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

(b) in the course of business make, import, sell, let for hire, offer or expose for sale, advertise for sale or hire a copy of a work if any copyright management information has been removed or modified without the 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 copyright management information;

(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.’’.

Insertion of new Chapter 2A with sections 28A to 28L

[x.] The following Chapter 2A is hereby inserted in the principal Act after section 28:

**“Chapter 2A
RIGHT TO ROYALTIES ON RE SALE OF WORKS OF VISUAL ART AND
CRAFT WORKS**

28A. Definitions**In this Chapter:**

“author”, in relation to a subject work, means the person who makes or creates it;

“collecting society” has the meaning given in section 28J;

“contract date”, in relation to a sale, means the time at which the agreement for the sale of the subject work was concluded;

“qualifying individual” has the meaning given in section 28G and any individual who is a citizen of a country to which operation of this Chapter is extended in terms of section 37(1)(f);

“resale” is to be construed in accordance with section 28H;

“resale right” has the meaning given in section 28B (and, unless the context otherwise requires, includes a share in resale right);

“resale royalty” has the meaning given in section 28B;

“sale price” has the meaning given in section 28B(4);

“subject work” has the meaning given in section 28C;

“subject work of joint authorship” has the meaning given in section 28D;

“trustee in insolvency” means a trustee appointed on sequestration of an author in terms of the Insolvency Act, no 24 of 1936, including a provisional trustee;

28B. Right to a royalty on resale of subject works

(1) The author of a subject work shall, in accordance with this Chapter, have a right (“resale right”) to a royalty on any sale of the subject work which is a resale subsequent to the first transfer of ownership by the author (“resale royalty”).

(2) The resale right in a work shall subsist for the lifetime of the author.

(3) The royalty shall be an amount based on the sale price which is calculated in the manner as shall be prescribed.

(4) The sale price is the price obtained for the sale of the subject work, net of the tax payable on the sale.

(5) For the purposes of sub-section (1), “transfer of ownership by the author” includes in particular disposal of the work by a trustee in insolvency for the purposes of the realisation of the author’s estate.

28C. Subject works

(1) For the purposes of this Chapter, “subject work” means any work of visual art, such as a work of graphic or plastic art, a picture, a collage, a painting, a drawing, an engraving, a print, a lithograph, a sculpture, a tapestry, a ceramic, an item of glassware, and any work of craftsmanship.

Commented [PASA68]: PASA recommends the insertion of a new Chapter dealing with the resale royalty right immediately before Chapter 3. The numbering is subject to decisions on the remaining structure of the Bill. PASA-DALRO suggested text, 21 August 2017, pp18-22.

(2) Drawings of a technical nature, diagrams, maps, charts, plans, photographs, works of architecture and artistic works that have a utilitarian purpose and are reproduced by industrial process, are not subject works for the purpose of this Chapter.

(3) A copy of a work made by an automated or industrial process is not a subject work.

28D. Joint authorship

A "subject work of joint authorship" means a work created by two or more authors, to which the following provisions will apply:

(a) the resale right shall belong to the authors as owners in joint undivided shares;

(b) the resale right in respect of a subject work of joint authorship shall be held in equal shares or in such other shares as may be agreed in writing and signed by or on behalf of each joint author; and

(c) in the event of the death of one of the joint authors, the resale right of the joint author shall be terminate and only the remaining share or shares of the resale right of the surviving joint authors shall be capable of being exercised.

28E. Proof of authorship

(1) Where a name purporting to be that of the author appeared on the work when it was made, the person whose name appeared shall, unless the contrary is proved, be presumed to be the author of the work.

(2) In the case of a work alleged to be a work of joint authorship, sub-section (1) applies in relation to each person alleged to be one of the authors.

28F. Resale right is not assignable or waivable.

(1) The resale right is personal to the author and cannot be assigned, ceded, whether outright or as security, or otherwise transferred to any other person.

(2) A waiver of a resale right shall have no effect.

(3) Any agreement to share or repay resale royalties shall be void.

(4) Subsection (3) does not affect any agreement made for the purposes of the management of resale right in accordance with section 28J.

28G. Resale right by virtue of nationality, domicile or residence

The resale right may be exercised in respect of a sale by a person who, at the contract date, is a South African citizen or is domiciled or resident in the Republic.

28H. Resale

(1) The sale of a subject work may be regarded as a resale notwithstanding that the first transfer of ownership was not made for a money (or any) consideration.

(2) The sale of a subject work may be regarded as a resale only if the following conditions are satisfied:

(a) the buyer or the seller, or (where the sale takes place through an agent) the agent of the buyer or the seller, is acting in the course of a business of dealing in works of art; and
(b) the sale price is not less than an amount as shall be prescribed.

(3) The sale of a subject work is not to be regarded as a resale if—

(a) the seller previously acquired the work directly from the author less than three years before the sale; and
(b) the sale price does not exceed an amount as shall be prescribed.

28I. Liability for payment of the resale royalty

(1) The following shall be jointly and severally liable to pay the resale royalty due in respect of a sale—

(a) the seller; and
(b) the relevant person meant in subsection (2).

(2) The relevant person is a person who satisfies the condition mentioned in section 28H(2)(a) and who is—

(a) the agent of the seller; or
(b) where there is no such agent, the agent of the buyer; or
(c) where there are no such agents, the buyer.

(3) Liability shall arise on the delivery of the subject work in terms of the sale; provided that a person who is liable may withhold payment until evidence of entitlement to be paid the royalty is produced.

(4) Any liability to pay resale royalty in respect of a resale right which belongs to two or more persons as joint owners is discharged by a payment of the total amount of royalty to one of those persons.

28J. Collective management

(1) The resale right may be exercised only through a collecting society registered in terms of Chapter 1A.

(2) Where the holder of the resale right has not transferred the management of his right to a collecting society, the collecting society which manages copyright on behalf of artists or artistic works shall be deemed to be mandated to manage his right.

(3) A holder to whom subsection (2) applies has the same rights and obligations, in respect of the management of his right, as have holders who have transferred the management of their right to the collecting society concerned.

28K. Right of information

(1) A holder of resale right in respect of a sale, or a person acting on his behalf, shall have the right to obtain information by making a request under this section.

(2) Such a request—

(a) may be made to any person who (in relation to that sale) satisfies the condition mentioned in section 28H(2)(a); and
 (b) must be made within three years of the sale to which it relates.

(3) The information that may be so requested is any that may be necessary in order to secure payment of the resale royalty, and in particular to ascertain—
 (a) the amount of royalty that is due; and
 (b) where the royalty is not paid by the person to whom the request is made, the name and address of any person who is liable.

(4) The person to whom the request is made shall do everything within his power to supply the information requested within 90 days of the receipt of the request.

(5) If that information is not supplied within the period mentioned in sub-section (4), the person making the request may, in accordance with rules of court, apply to court for an order requiring the person to whom the request is made to supply the information. A magistrate's court established under the Magistrates Courts Act, No 32 of 1944, having jurisdiction over the person to whom the request is made, shall have the power to order such information to be supplied.

(6) Information obtained under this regulation shall be treated as confidential.

28L. Transitional provisions

(1) This Chapter does not apply to sales where the contract date preceded the coming into operation of the provisions of this Chapter.

(2) The provisions of this Chapter apply notwithstanding that the subject work sold was made before the coming into force of the provisions of this Chapter.

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Substitution of heading of Chapter 3 of Act 98 of 1978

30. The following heading is hereby substituted for the heading of Chapter 3 of the principal 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 of Tribunal

29. (1) There is hereby established a juristic person to be known as the

Intellectual Property Tribunal, which—

(a) has jurisdiction throughout the Republic;

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

(c) must perform its functions impartially and without fear or favour.

(2) Each organ of state must assist the Tribunal to maintain its independence and impartiality, and to perform its functions effectively.

(3) In carrying out its functions, the Tribunal may—

(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 its jurisdiction.

(3) The Tribunal consists of a chairperson, deputy chairperson and not less 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 of Tribunal

29A. (1) The Tribunal must carry out the functions entrusted to it in terms of this Act or any other legislation.

(2) The Tribunal may—

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

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

(c) review any decision of the Commission, dispute resolution institution or any regulatory authority if it relates to intellectual property rights;

(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 entered into as required by this Act or agreements entered into in order 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 or public affairs.

(2) The Minister must designate a member of the Tribunal as chairperson and another member as deputy chairperson of the Tribunal.

(3) The deputy chairperson shall perform the functions of the chairperson whenever—

- (a) the office of chairperson is vacant; or
(b) the chairperson is for any other reason temporarily unable to perform those functions.

(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 of the Tribunal.

Qualifications for appointment

29C. (1) To be eligible for appointment as a member of the Tribunal and to continue to hold that office, a person must, in addition to satisfying any other specific requirements set out in this Act—

- (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 that may conflict or interfere with the proper performance of the duties of a member of the Tribunal;
- (c) is disqualified in terms of section 69 of the Companies Act from serving as a director of a company;
- (d) is subject to an order of court holding that person to be mentally unfit or disordered;
- (e) has been found in any civil or criminal proceedings by a court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonourably, in breach of a fiduciary duty or of any other offence for which 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 this Act.

Terms of office of members of Tribunal

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 the Tribunal.

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

(3) In the event of the expiry of the term of office of a member of the Tribunal, the member has a matter pending for adjudication before the Tribunal, the member may continue to act as a member in respect of that matter only.

Removal or suspension of members of Tribunal

29E. The Minister may, at any time, remove or suspend a member of the Tribunal 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 the Tribunal;
- (c) due to a physical or mental illness or disability becomes incapable of performing 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 disclosure of 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, it appears to the member that the matter concerns a financial or other interest of the member contemplated in section 29C(2)(b), the member 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 in that hearing.

(2) A member must not—

- (a) make private use of or profit from confidential information obtained as a result of performing his or her official duties as a member of the Tribunal; or
- (b) divulge any information referred to in paragraph (a) to a third party, 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 a matter, assign the matter to—

- (a) a member of the Tribunal; or
- (b) a panel composed of any three members of the Tribunal.

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

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

(b) designate a member of the panel to preside over the proceedings of the Tribunal.

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

(a) direct that the hearing of that matter proceed before the remaining members of the panel, subject to the requirements of subsection (2)(a); or

(b) terminate the proceedings before that panel and constitute a new panel which may include any member of the original panel and direct the new panel to conduct the hearing afresh.

(4) The decision of a Tribunal on a matter referred to it must be in writing and must include reasons for that decision.

(5) A decision of a single member of the Tribunal hearing a matter in terms of subsection (1)(a), or of a majority of the members of a panel in any other 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 High Court.

Hearings before Tribunal

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

(a) in an inquisitorial manner;

(b) as expeditiously as possible;

(c) as informally as possible; and

(d) in accordance with the principles of natural justice.

(2) Notwithstanding the provisions of subsection (1), a Tribunal member presiding at a hearing may exclude members of the public, specific persons or

categories of persons from attending the hearing if—

- (a) evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;
- (b) the proper conduct of the hearing requires it; or
- (c) for any other reason that would be justifiable during proceedings in a High Court.

Right to participate in hearing

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

- (a) The Commission;
- (b) the applicant, complainant and respondent; 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 presiding at hearing

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 and place;
- (b) question any person under oath or affirmation;
- (c) summon or order any person to—
 - (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 Tribunal hearing.

Rules of procedure

29K. Subject to the rules of procedure of the Tribunal, a member of the Tribunal presiding at a hearing may determine any matter of procedure for that 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) A participant in a hearing before a single member of the Tribunal 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 the Tribunal.

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 before the Tribunal.

(2) The Tribunal may grant such an order if—

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

(b) an interim order is reasonably necessary to—

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

(ii) prevent the purposes of this Act from being frustrated;

(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 the order.

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

(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 extension of that order in terms of subsection (4).

(4) If an interim order has been granted and a hearing into that matter has 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. In addition to the powers in terms of this Act and the Companies 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 such prohibited;
- (b) interdicting conduct which constitutes an infringement of this Act;
- (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 this Act;
- (d) confirming a consent agreement in terms of section 173 of the Companies Act as an order of the Tribunal;
- (e) condoning any non-compliance of its rules and procedures on good cause shown;
- (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 relevant legislation.

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) The Tribunal may order a person to answer any question or to produce any article or document, even if it is self-incriminating to do so.

Costs

29P. (1) Subject to subsection (2), each party participating in a hearing of the Tribunal shall bear its own costs.

(2) If the 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 and against a complainant who referred the complaint to the Tribunal; or
- (b) has made a finding against a respondent, a member of the Tribunal 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) appoint staff and enter into an agreement with or hire 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 assist the Tribunal.

Finances

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

- (a) money appropriated by Parliament;
- (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 any source.

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

- (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 Deposits established by section 2 of the Corporation for Public Deposits Act,

1984 (Act No. 46 of 1984).

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) In addition to any other reporting requirement set out in this Act or any other legislation, the Tribunal must report to the Minister annually on 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 of 1978 5

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

Insertion in Section 37 of Act 98 of 1978

[x]. The following sub-section is hereby inserted in the principal Act after section 37(1)(e):

“(f) in relation to the resale right for royalties made or created by citizens of that country as it applies to the resale right for royalties made or created by citizens of or persons domiciled or resident in the Republic.”

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

34. Section 39 of the principal Act is hereby amended—

- (a) by the deletion of the word “and” at the end of paragraph (cD);
- (b) by the insertion of the following paragraphs after paragraph (cE):

“(cF)prescribing rules regulating the processes and proceedings of the Tribunal;

~~(cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;~~

(cH) prescribing permitted acts for circumvention of technological protection measures contemplated in section 28B after due consideration of the

Commented [PASA69]: Consequential amendment to proposal for resale royalty right provision in a new Chapter before Chapter 3.

Commented [PASA70]: PASA objects to the Minister to have the power to prescribe any contract terms for the publishing industry by regulation, since it interferes with the freedom of contract.

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following factors:

- (i) The availability for use of works protected by copyright;
 - (ii) the availability for use of works for non-profit archival and educational purposes;
 - (iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or
 - (iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;
- (cI) prescribing royalty rates or tariffs for various forms of use;
- (cJ) prescribing the percentage and period within which distribution of royalties must be made by **collecting societies**;
- (cK) 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 processes of royalties by a **collecting society**;
- (cL) 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 Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”.

Insertion of section 39B in Act 98 of 1978

35. The following section is hereby inserted in the principal Act after section 39A:

“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 shall be unenforceable.~~

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

~~(a) open licences or voluntary dedications of a work to the public domain;~~

~~(b) settlement agreements~~ Insertion of Schedule 2 in Act 98 of 1978

36. The following Schedule is hereby added to the principal Act, the existing Schedule becoming Schedule 1:

“Schedule 2

(Section 22(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 of reproduction.~~

Application for licence to translate copyright work

2. (1) ~~Any person may, subject to item 4, apply to the Tribunal for 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) a foreign language that is regularly used in the Republic; 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 work in order to convert the work into a usable or analogous form of reproduction.~~

~~(3) No licence shall be granted until the expiration of the following 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 official language;~~

Commented [PASA71]: This blanket ban on contracting out is extremely prejudicial to publishing and all other creative industries and should be removed in its entirety. PASA excepts that there may be specific exceptions in relation to which a ban on contracting out may be justified.

Commented [PASA72]: This insertion had its origin in a comment from PASA in 2015 showing one of the ways in which a blanket ban on contracting out could be detrimental to industry. The comment was not intended to support a carve-out of settlement agreements. PASA submission 7 July 2017, pp24-25.

Deleted: ~~“of”~~
~~“(c) — terms of service licences.”~~

Commented [PASA73]: Before Section 36 and Schedule 2 can be adopted, legal opinion has to be obtained whether South Africa is considered as a developing country in terms of the Berne Convention and TRIPS in order to avail itself of the benefits of the Berne Convention Appendix. If the legal opinion is positive, Schedule 2 needs to be compliant with the Berne Convention Appendix. We do not believe that it is compliant. PASA has no objection to Schedule 2 if South Africa qualifies to have it and if Schedule 2 is compliant with the Berne Convention Appendix.

- (b) three months where the application is for a licence into a foreign language in regular use in the Republic; and
- (c) one year where the application is for a licence for translation into any language contemplated in sub-item (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 of print; 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) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail 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 the copyright 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 be heard.
- (3) Where—
- (a) the one week period referred to in item 2(3)(a) applies, no licence shall be granted until the expiration of a further period of two days;
 - (b) the three months period referred to in item 2(3)(b) applies, no licence shall be granted until the expiration of a further period of two weeks;
or
 - (c) the one year period referred to in item 2(3)(c) applies, no licence shall be granted until the expiration of a further period of three months,
calculated in accordance with sub-item (4).
- (4) The further periods contemplated in sub-item (3) shall be computed from

the date on which the requirements mentioned in sub-item (1)(a) and sub-item and sub-item (1)(b)(i) are fulfilled or, where the identity or the address of the copyright owner is unknown from the date on which the applicant also complies with the requirements mentioned in sub-item (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 printed or analogous form of reproduction by, or with the authorisation of, the copyright owner, no licence shall be granted.

(6) For works composed mainly of illustrations, a licence shall only be granted if the conditions stipulated in sub-item (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 Part shall—

(a) be for the purpose of teaching; or

(b) be for training, scholarship or research.

(2) Copies of a translation published under a licence may be sent abroad by the government or a public entity if—

(a) the translation is into a language other than the language used in the Republic that will be of use;

(b) the recipients of the copies are individuals who are South African nationals or are organisations that are registered in the Republic;

(c) the recipients will use the copies only for the purposes of teaching, scholarship or research; and

(d) both the sending of the copies abroad and their subsequent distribution 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 efforts to 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 the following:

- (a) The original title and name of the copyright owner of the work;
- (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 work was published with a copyright notice, a reprint of that notice.

(6) The licence shall terminate if a 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 reproduction in the Republic at 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 are exhausted.

Licence for broadcasting organisation

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

- (a) The translation is made from a copy made and acquired in accordance with the laws of the Republic;
- (b) the translation is for use in 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 intended for recipients in the Republic;

(d) sound or visual recordings of the translation may only be used by broadcasting organisations with their headquarters in the Republic; and

(e) all uses made of the translation are without commercial purpose.

(2) A broadcast contemplated in sub-item (1) includes a broadcast made 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 organisation under all of the conditions provided in sub-item (1) to translate any text incorporated in an audiovisual work that was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Part B

Reproduction Licences

Application of provisions in Part B

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

Application for licence to 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 in printed 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 sciences including mathematics;

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

(c) five years for all other works.

Granting of licence

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

(a) no distribution by, or with authorisation of, the copyright owner of copies in printed or analogous forms of reproduction of that particular edition has taken place in the Republic to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the Republic or that, under the same conditions, such copies have not been on sale in the Republic for a continuous period of at least six months; and

(b) the applicant for the licence—

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

(ii) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail 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 the copyright owner is known and can be located, no licence shall be granted unless he or she has been given an opportunity to be heard.

(3) Where the three-year period referred to in item 2(2)(a) applies, no licence shall be granted until the expiration of six months calculated from the date on which the requirements mentioned in sub-item (1)(a) and sub-item (1)(b)(i) are fulfilled or, where the identity or the address of the copyright owner is unknown, from the date on which the applicant also complies with the requirements mentioned in sub-item (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 sub-item (1)(b)(ii) have been mailed.

(5) If, during the period of six or three months referred to in sub-item (3) or (4), any distribution or sale as contemplated in sub-item (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 the subject of the application 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 Part shall—

- (a) be for use in connection with systematic instructional activities only;
- (b) allow publication only in a printed or analogous form of reproduction at a price reasonably related to or lower than that normally charged in the Republic for comparable work; and
- (c) allow publication within the Republic only and shall not extend to the export of copies made under the licence.

(2) If the Tribunal is satisfied that facilities do not exist in the Republic to do the printing or reproduction or that existing facilities are incapable for economic or practical reasons of ensuring such printing or reproduction, and the contract between the prospective licensee and the establishment doing the work of reproduction so requires, the Tribunal may allow reproduction outside the Republic: Provided that—

- (a) all copies reproduced are to 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 the establishment doing 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 is done;

- (c) the prospective licensee may not entrust the work of reproduction to an 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 licence is transferable.
- (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 the Republic and copyright owners in the Republic.
- (3) 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 efforts to ensure 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 the following:
- (a) The title and name of the owner 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) if the edition which is reproduced bears a copyright notice, a reprint of that notice.
- (5) The licence shall terminate if—
- (a) copies of an edition of the work in printed or analogous form of reproduction are distributed in the Republic in connection with systematic instructional 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 the licence.
- (6) Any copies of an edition of the work already made before the licence terminates may continue to be distributed until stocks are exhausted.

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 in the Republic.

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.

Transitional provision

38. Any reference in the Copyright Amendment Act, 2019, to the phrases “indigenous cultural expressions”, “indigenous community” or “National Trust” shall only be effective upon the date on which the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013) becomes operational.

Commented [PASA74]: See introductory note with respect to the IP Laws Amendment Act. Nearly five years of its passing into law, it is still not in force. PASA submits that it will be necessary for the decision to be made whether the IP Laws Amendment Act, or at least those of its provisions that amend the Copyright Act, should come into force or not before this Bill can proceed.

Short title and commencement

39. This Act is called the Copyright Amendment Act, 2017, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

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

1. BACKGROUND

- 1.1. The Copyright Amendment Bill (“the Bill”) seeks to align copyright with the 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 are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. For this reason, a need exists for Intellectual Property (“IP”) legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with 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 Government was called to address.
- 1.2. The Bill is consistent with the Draft National Policy as commented on and the 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 coherence in aligning the approach of various Government Departments to IP matters. The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual Property Organisation (“WIPO”) digital treaties namely the WIPO Copyright Treaty (“WCT”); the WIPO Performance and Phonograms Treaty (“WPPT”); the Beijing Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The alignment is for purposes of ensuring effective governance, social protection, employment creation and reduction of inequalities.
- 1.3. The amendment of the Act means that South Africa will be able to accede to international treaties and conventions which require domestic legislation to be

consistent with international imperatives.

2. OVERVIEW OF BILL

- 2.1. The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. It is also envisaged that the proposed legislation will reward and incentivise authors of knowledge and art. Various sectors within the South African Copyright regime are dissatisfied. 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 improved exceptions and limitations into Copyright law. The Bill also aims to 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 creative industry.
- 2.2. The objectives of the Bill are—
 - 2.2.1. to develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa;
 - 2.2.2. to address the licensing of copyright works or material in relation to commissioned work to facilitate commercial exploitation by any person so licensed.
- 2.3. The Bill introduces provisions which deal with matters pertaining to Collective Management. Collecting Societies will only be allowed to collect for their registered members, and all Collecting Societies have to be registered 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 Needle time).
- 2.4. The Bill deals with the protection of works and rights of authors in the digital environment.
- 2.5. The Bill provides for the availability of accessible format **copies** 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, dyslexia etc.

- 2.6. The Bill introduces an Artist Resale Royalty. This resale right means that an artist could be entitled to a royalty even when their work is resold.
- 2.7. Scope is left for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty. Limited circumstances have been provided for in this regard. Furthermore, this provision stipulates the factors that need to be considered in determining whether the use of a copyright amounts to fair use.
- 2.8. The Bill proposes a new structure for the tribunal that will settle disputes in the area of all domains of IP. The current Tribunal process takes long to settle 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.

3. ANALYSIS OF BILL

- 3.1. Clause 1 of the Bill proposes the insertion into the Act of a range of new definitions necessitated by certain amendments embodied in the Bill.
- 3.2. Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.
- 3.3. Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for State ownership of copyright funded by the State.
- 3.4. 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 work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.5. 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 internet access.

- 3.6. 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 internet access.
- 3.7. Clause 7 of the Bill proposes an amendment to section 9 of the Act providing for communication to the public of a sound recording by wire or wireless means, including internet access. Furthermore, by providing for a person who intends to broadcast, cause transmission of or make any work available to the public, to give the author, collecting society or indigenous community a notice in the prescribed manner of his or her intention to perform such acts, indicating where practicable, the date of the proposed performance, proposed terms and conditions for the payment of royalties and requires the copyright owner, collecting society or indigenous community to sign the proposal attached thereto.
- 3.8. Clause 8 of the Bill proposes the substitution of section 9A of the Act. It embodies a variety of additions and amendments pertaining to the payment of royalties in respect of intellectual property rights.
- 3.9. 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 commercial resale of his or her work of art, subsequent to the first transfer by the author of such work of art.
- 3.10. Clause 10 of the Bill proposes an amendment to section 12, providing for fair dealings and uses of copyright work.
- 3.11. 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 exhaust the rights of distribution and importation locally and internationally in respect of the transfer of the original or copy.
- 3.12. Clause 12 of the Bill proposes the insertion of sections 13A and 13B in the Act providing for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process.
- 3.13. Clause 13 of the Bill proposes an amendment to section 16 of the Act, providing for the deletion of subsection (1).

- 3.14. Clauses 14 and 15 proposes the repeal of sections 17 and 18 of the Act, respectively.
- 3.15. Clause 16 of the Bill proposes the repeal of section 19A of the Act.
- 3.16. 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 computer program shall be entitled, without the authorisation of the copyright owner, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he or she does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to do.
- 3.17. 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 exceptions regarding protection of copyright work for persons with disability.
- 3.18. Clause 19 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, 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.
- 3.19. 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 work between the person commissioning the work and the author who executes the commission.
- 3.20. Clause 21 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned.
- 3.21. Clause 22 of the Bill proposes the insertion into the Act of a new section 22A, making provision for assignment and licences in respect of orphan works.
- 3.22. Clause 23 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the registration and regulation of Collecting Societies.
- 3.23. 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.

- 3.24. 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.
- 3.25. Clause 26 of the Bill proposes amendments to section 28 of the Act, which provides for the copying of a work to constitute an infringement of copyright, if such copying would have constituted infringement in the country in which the work was made.
- 3.26. 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 and exceptions.
- 3.27. Clause 28 of the Bill proposes an amendment to the heading in Chapter 3 of the Act [Copyright Tribunal] by replacing it with the heading “Regulatory and Enforcement Agencies”.
- 3.28. Clauses 29 and 30 of the Bill propose the insertion of sections 29A to 29S into 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 and suspensions; and procedural matters on the conduct of hearings of the Tribunal.
- 3.29. Clause 31 of the Bill proposes the repeal of sections 30, 31, 32, 33 and 36 of the Act.
- 3.30. 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 Collecting Societies.
- 3.31. Clause 33 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purport to renounce a right or protection afforded by the Act will be unenforceable.

3.32. Clause 34 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.

3.33. Clause 35 of the Bill provides for the short title and commencement.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

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

5. FINANCIAL IMPLICATIONS FOR STATE

5.1. Any financial requirement will be accommodated within the existing budget.

6. PARLIAMENTARY PROCEDURE

Tagging

6.1. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) distinguishes between four categories of Bills: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it would be constitutionally invalid.

6.2. The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.

6.3. 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. The Constitutional Court in its judgment stated as follows:

“[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 functional area listed in schedule 4’. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a

¹ 2010 (8) BCLR 741 (CC)

Bill in order to determine legislative competence. This ‘involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.’ (footnote omitted).

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with 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 its content.’’

- 6.4. 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.
- 6.5. The Act regulates copyright. In terms of section 2 of the Act, and subject to the provisions of the Act, the following works, if they are original, are eligible for copyright, namely literary works, musical works, artistic works, **audiovisual works**, sound recordings, broadcasts, program-carrying signals, published editions and computer programs.
- 6.6. The Bill, amongst others things, seeks to provide for certain exceptions in respect of infringement of copyright for educational purposes, e.g. the new section 13B [clause 12 of the Bill] which regulates the making of copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose. “Education at all levels, excluding tertiary education” is a functional area listed in Schedule 4 to the Constitution. The Bill also proposes general exceptions regarding protection of copyright work for archives, libraries, museums and galleries. “Archives other than national archives”, “Libraries other than national libraries” and “Museums other than national museums” are functional areas listed in Schedule 5 to the Constitution. The question is whether or not the abovementioned provisions of the Bill in

substantial measure fall within a functional area listed in Schedule 4 or 5. The purpose of the Bill is to regulate copyright and not to regulate any matter falling under the functional areas in question. The Constitutional Court, in paragraph 71, stated the following with regard to the test for tagging:

“[71] . . . the ‘substantial measure’ test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.” (emphasis added).

- 6.7. 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.
- 6.8. 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

- 6.9. 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 its comments.”.
- 6.10. 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 Traditional Leaders.

14 March 2019

The Minister of Trade & Industry
The Hon. Dr Rob Davies

by email to mebrahim@thedti.gov.za

cc: The Director-General, dti

by email to EMsiza@thedti.gov.za

and to

The Hon. Mr Edwin Makue
the Select Committee on Trade and International Relations
National Council of Provinces
Parliament of the Republic of South Africa

by email to the Committee Secretariat:
hmtileni@parliament.gov.za

cc: Michele Woods
Joel Baloyi
Wiseman Ngubo

Dear Minister Davies, dear Mr Makue

**COPYRIGHT AMENDMENT BILL, NO B13 OF 2017 and
PERFORMERS PROTECTION AMENDMENT BILL, NO. B24 OF 2016:
Request to deal with incorrect statements made in the dti
presentation on 6 March 2019 regarding provisions of the Bill
having been "cleared" or "verified" by the Panel of Experts**

On 6 March, I attended the meeting of the Select Committee where the dti presented its responses to the public comments that arose from the Select Committee's call for comments on the Copyright Amendment Bill. As a member of the Panel of Experts appointed by the Portfolio Committee that had submitted a written advice on the Bill in October 2018, I was profoundly disturbed and disappointed by statements made in the dti presentation that the Panel had "cleared" the Bill or certain

Basel

Advokatur · Notariat:
Dr. Felix Iselin, Notar
Dr. Gert Thoenen, LL.M.
Dr. Benedikt A. Suter, Notar
Dr. Caroline Cron
Dr. Martin Lenz, Notar
Fachanwalt SAV Erbrecht
Dr. Beat Eisner
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Dr. Lucius Huber
Prof. Dr. Andrea Eisner-Kiefer
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van Quy Peter Tran
Michel Jutzeler
Basil Kupferschmid
eingetragen im Anwaltsregister
des Kantons Basel-Stadt
André Myburgh
Rechtskonsulent

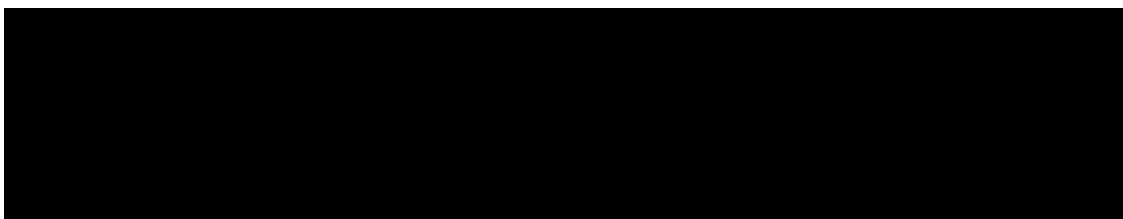
Karlsruhe

Rechtsanwälte:
Dr. Eberhardt Meiringer
Dr. Michael Pap
Dr. Oliver Melber
Alexander Doll
Hartmut Wichmann
Christian Walz
Hartmut Stegmaier
Bernd Schmitz
Stefan Flaig
Karen Fiege
Dr. Michael Artner
Bernhard Fritz
Ullrich Eidenmüller
Christian Schlemmer
Severine Deutsch
Martin Eigenberger
Jörg Schröder
Dr. Rico Faller
Sebastian Jung
Cornelius Weiß
Dr. Jürgen Höffler
Vanessa Meiringer
Julia Stein
Swantje Schreier
Michaela von Poeppinghausen
Marko Wedemeyer
Katuscia Indirli

Wirtschaftsprüfer · Steuerberater:
Dr. Michael Ohmer

Erfurt

Rechtsanwälte:
Bernd Gindorf
Jan Helge Kestel
go Vollgraf



provisions of it, confirmed by the PowerPoint presentation (slide 24) that the Panel had “verified” certain sections of the Bill in respect of which there had been demands for their withdrawal.

The purpose of this letter is to respectfully ask the Minister to ensure that these misstatements made on behalf of the dti are corrected on public record at the next meeting of the Select Committee on the Bill, currently scheduled for 20 March 2019, and to respectfully ask the Select Committee to consider the actual responses of the Panel members in its deliberation of the Bill.

In order to enable the Select Committee to carry out its own research into the veracity of the statements by the dti, you are referred to the advices of the Panel members:

- Ms Michelle Woods of WIPO, Geneva, Switzerland, cover letter and mark-up attached (referred to in this letter as “*Woods 1*” and “*Woods 2*” respectively).
- Mr Joel Baloyi of UNISA, Pretoria, at <http://legalbrief.co.za/media/filestore/2018/10/Baloyi.pdf> (“*Baloyi*”).
- Mr Wiseman Ngubo of CAPASSO, Johannesburg, at <http://legalbrief.co.za/media/filestore/2018/10/Ngubo.pdf> (“*Ngubo*”).
- Myself, André Myburgh, of Lenz Caemmerer, Basel, Switzerland, at http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf (“*Myburgh*”).

At the same time, I refer to the submission by Adv Nick Matzukis, the only author of a work on copyright law in the music industry in South Africa, where his ‘support’ of the reporting obligation was taken out of context (slides 12 and 24 of the dti presentation). Adv Matzukis’ submission to the Select Committee was, in fact: “With great respect and deference, the Bill should, quite simply, not be approved by the NCOP in its current form.”

Mandate to the Panel of Experts

The Portfolio Committee asked the Panel of Experts to advise it “on any technical or drafting issues pertaining to the Committee’s amendments to the Copyright Amendment Bill”, to focus on amongst others “the appropriateness of the terminology used in the Bill, when considering the Copyright law terminology currently used in South Africa”, “whether the wording of the Bill reflects the policy objectives as agreed to by the Committee” and “whether the clauses that address international treaties, correctly reflect the content of those treaties ...” Their inputs were required by way of track changes to a Microsoft Word document containing the then-current version of the Bill. (*Myburgh* p.132).

Neither the scope of the mandate, nor the time allowed (just three weeks, with no prior notice) enabled the Panel members to “clear” or “verify” anything, in the way communicated by the dti to the Select Committee on 6 March.

Advice of the Panel of Experts

A principal focus point for the Panel of Experts was the copyright exceptions and exceptions to enforcement of technological protection measures in the Bill. These exceptions appear in

the new Sections 12A, 12B, 12C(b), 12D, 19B, 19C, 19D and 28P, as read with the contract override provision in new Section 39B, and the new Schedule 2. The exceptions are also incorporated by reference into the Performers Protection Amendment Bill. It is in respect of these provisions that South Africa's treaty obligations are highly relevant, whether they are under the Berne Convention or TRIPs, to which the country is already a party, under WCT, WPPT and the Beijing Treaty, for which Cabinet has already recommended South Africa must become a party, or the Marrakesh Treaty, in respect of which there is the express intention for South Africa to become a party at some point in the future.

We ask that you take the following statements of the Panel of Experts into account:

- Michelle Woods:
“While I have tried to cover as many points related to the multilateral copyright treaties as possible in the time available for this review, there are likely additional points within this category that could be addressed.”
“Given the instructions and the relatively limited time period for undertaking the requested review, I have not commented on a number of areas ...”
(*Woods 1 p.1.*)
- Joel Baloyi:
“I do not comment on every part of the Bill. My expertise is mainly in the area of the creative industries (the music, film and to a lesser extent, literary publishing industries). In the call I received in which I was advised of my appointment as a member of the panel of experts I was asked to focus on issues relating to the music and film industries. I have tried to do this in my opinion...” (*Baloyi p.1.*)
“The most pertinent question to ask here is whether the proposed limitations and exceptions under these clauses were subjected to a three-step test, as required under the Berne Convention, the TRIPs Agreement and other international treaties... In this regard it needs to be reiterated that where the minimum rights guaranteed under international treaties are eroded by national law, such erosion shall only affect the rights of the nationals of the country concerned, and not those of other countries who are members of the same treaty. In this regard the question to ask is why the Legislature would be hell-bent on clipping the wings of South African rights-holders, while foreign rights-holders can fly like eagles.” (*Baloyi p.24.*)
- Wiseman Ngubo:
“It is however pertinent to note that technical wording and policy are difficult to divorce from merits of any clauses. This difficulty has resulted in a very limited assessment of the Bill as it needed to fit the scope of the instructions. The process might have been better served by affording the panel an unlimited scope to review the Bill holistically as some clauses within the Bill have no policy informing them nor have they been debated in parliament, thus the review was without much needed context.” (*Ngubo p.1*)
“The introduction of general exceptions within the Bill requires a more extensive impact assessment. The SEIAS report does not cover any objections raised by the stakeholders, in fact it states that the stakeholders had accepted the policy issues despite how contentious these provisions proved to be. This showcases a fatal flaw in the report. In

addition, the introduction of the general exceptions as currently articulated seems contrary to the policy objective which is to ensure the protection of authors and copyright owners in the digital environment... Further, the Berne Convention (to which South Africa is a signatory) established the 3 step test in relation to the implementation of exceptions and limitation of copyright. This test is also articulated in the TRIPS Agreement (to which South Africa is a signatory) as well as the WIPO Internet Treaties which South Africa intends to ratify... [T]he introduction of these clauses must be evaluated in light of this test. Without any provisions to make the clauses less burdensome on copyright owners, the provisions would not be seen to be unreasonably prejudicial to their interests.” (*Ngubo* p.19)

- André Myburgh:

“The legal issues raised by the Bill and by the process it took to get to this point, are substantial and material, whether from the perspective of compliance with the Constitution, South Africa’s meeting of its obligations under the international treaties to which it is a party, and the conceptualisation of its provisions arising from the policy considerations that underly it. This advice shows that the Bill has material flaws in all these respects, very few of which can be corrected by mere changes in the wording of the clauses of the Bill.” (*Myburgh* p.14)

“... the entire framework of copyright exceptions introduced in the Bill, especially what has been described as the “hybrid model grounded in fair use” comprising Sections 12A, 12B, 12C(1)(b), 12D, 19B and 19C introduced by Clauses 13, 19 and 20, has not been measured against the Three-Step Test, thereby resulting in a material risk of South Africa coming into conflict with its obligations under Berne and TRIPs.” (*Myburgh* p.60.)

By the Panel following the instructions of the Portfolio Committee not to evaluate policy decisions, the points expressed in the advices are not “views” advancing or countering policy positions, but advice from experienced copyright practitioners selected by the Portfolio Committee.

By and large, *none* of the changes suggested in relation to the copyright exceptions and exceptions to enforcement of technological protection measures in the Bill were taken up by the Portfolio Committee. This is particularly disappointing, in that not only was advice on treaty obligations largely not followed, but nor were the recommendations from members of the Panel as to how certain desired policy outcomes could be made to work, namely the exception for the disabled, Section 19D, and the statutory licences for reproduction and translation of works not available in South Africa, Schedule 2.

The members of the Panel of Experts commented specifically on the following provisions relating to the exceptions, in respect of which the dti’s statements or inferences that they have been “cleared” or “verified” by the Panel are patently incorrect:

- Section 12A: *Baloyi* p.24, *Ngubo* p.19, *Myburgh* pp.38-41 and 59
- Section 12A(a)(iv): *Ngubo* p.20, *Myburgh* pp.60-61
- Section 12A(a)(v): *Ngubo* p.20, *Myburgh* pp.61-62
- Section 12A(a)(vi): *Myburgh* p.62
- Section 12A(a)(vii): *Myburgh* pp.62-63

- Section 12B(1)(a): *Woods 2* p.23, *Ngubo* p.21, *Myburgh* pp.40 and 63
- Section 12B(1)(b): *Woods 2* p.23, *Ngubo* p.21, *Myburgh* p.40
- Section 12B(1)(c): *Myburgh* p.63
- Section 12B(1)(d): *Woods 2* p.24
- Section 12B(1)(e): *Myburgh* pp.40 and 63
- Section 12B(1)(f): *Woods 2* pp.25, *Myburgh* p.63
- Section 12B(1)(i) and (2): *Ngubo* pp.22-23
- Section 12B(6): *Baloyi* p.24, *Ngubo* p.23
- Section 12C: *Baloyi* pp.26-27, *Ngubo* pp.23-24, *Myburgh* p.97
- Section 12D: *Ngubo* p.24, *Myburgh* pp.40 and 94-95
- Section 12D(3): *Woods 2* p.27-28, *Myburgh* p.63
- Section 12D(7): *Myburgh* p.63
- Section 19C: *Ngubo* p.27, *Myburgh* pp.40, 63 and 95-96
- Section 19C(4): *Woods 2*, p.31-32.
- Section 19C(6): *Woods 2*, p.32
- Section 19C(7): *Woods 2* p.33
- Section 19C(9), *Woods 2* p.33
- Section 19C(11): *Woods 2* p.34 (some points changed, but a key word not)
- Section 19D: *Woods 2* p.36 (only one change made), *Baloyi* pp.3-10, *Ngubo* pp.30-31, *Myburgh* pp.75-76
- Section 28P and related amendments to Section 23 and definitions: *Woods 2* pp.6, 48 and 54.
- Section 39B 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 ..., such term shall be unenforceable”: *Myburgh* pp.40, 59-60, 96
- Schedule 2: *Woods 2* pp.25 and 62, *Baloyi* pp.34-35, *Myburgh* pp.72-74

Rights of ‘communication to the public’ and ‘making available’ in respect of computer programmes

The only point on which the dti conceded in its presentation that a provision had been overlooked was in relation to the granting of the exclusive rights of ‘communication to the public’ and ‘making available’ for computer programmes (*Ngubo* p.26, *Myburgh* p.64). There is no provision to amend Section 11B of the Copyright Act to introduce these rights. Failure to do so would render the Bill non-compliant with the WIPO Copyright Treaty.

Interests of performers contrasted with the advice of experts

Another disappointment arising from the 6 March meeting was how the Chair of the Select Committee chose to deal with the advice of the Panel, and presumably other experts, by stating in a press release at <https://www.parliament.gov.za/press-releases/ncop-committee-applauds-broad-participation-stakeholders-copyright-bill> that “The interesting phenomenon is that the performers and artists who the bill seeks to cover are happy, but that experts have somehow expressed dissatisfaction on some aspects of the bills.”

Performers and artists, including those who were present at the 6 March meeting, supported the new rights in the Performers Protection Amendment Bill. The role of the Panel of Experts was confined to the Copyright Amendment Bill. Specifically, the copyright exceptions referenced above in respect of which the members of the Panel have expressed various concerns, but which the dti presentation claims to have cleared, are *for cases of reproductions, broadcasts, etc, of works by others where performers and artists will not be remunerated and where the producers of their work will be unable to enforce their rights.*

The positions of the members of the Panel of Experts are therefore either loose-standing from, and in respect of the exceptions, even consistent with, the position of those performers and artists.

Conclusion

Being the only member of the Panel of Experts who was present at the 6 March meeting, I am taking the initiative to ask that the statements made about the advice given by the Panel's members are corrected and that the Select Committee gives due consideration to those recommendations made by the members of the Panel and not taken up in the National Assembly in the version of the Bill adopted by it on 5 December 2018. I am copying the other members of the Panel with this letter.

Yours faithfully



ANDRÉ MYBURGH

B.Comm. LL.B. (Stell)

Attorney and Notary Public of the High Court of South Africa (non-practising roll)

Solicitor of England and Wales (non-practising roll)

Fellow of the South African Institute of Intellectual Property Lawyers



October 1, 2018

Mr. Andre Hermans
Mr. Tenda Madima
Committees Section
Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
P.O. Box 15
Cape Town 8000
Republic of South Africa

Re: Comments on Copyright Amendment Bill

Dear Messrs. Hermans and Madima,

My comments in response to the request to the Technical Panel of Experts on the Copyright Amendment Bill to comment on the draft bill are attached to this letter.

As requested, I have tried to keep my comments and proposed technical and drafting amendments within the limits described in the instructions. In particular, I have focused on whether the sections of the bill related to implementing multilateral copyright treaties correctly reflect the content of the WIPO copyright treaties, as well as related questions of terminology and wording.

The comments reflect my views but they are not offered and should not be viewed as official interpretations of international treaty provisions by the World Intellectual Property Organization (WIPO). While I have tried to cover as many points related to the multilateral copyright treaties as possible in the time available for this review, there are likely additional points within this category that could be addressed.

With respect to the instructions, I note the statement that the clauses of the Bill may have a broader scope than a treaty, but not a narrower one. This would indeed be the case with respect to many treaty provisions setting minimum standards. The Republic of South Africa could choose to adopt broader provisions at the national level while implementing multilateral copyright treaties. However where treaties contain conditions or detailed requirements, these features may need to be implemented in addition to the minimum requirements in order to have legislation that is consistent with treaty provisions. A number of my comments reflect considerations related to such conditions and requirements.

Given the instructions and the relatively limited time period for undertaking the requested review, I have not commented on a number of areas, such as the detailed provisions regarding collective management organizations, although there is a relationship between these topics and the international treaty framework. However on the subject of collective

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management and several others identified in the comments, including the incorporation of the provisions of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired and Otherwise Print Disabled* and the *Appendix to the Berne Convention (Paris Act 1971)*, the International Bureau of WIPO would be available to provide further advice and assistance if requested to do so.

Thank you for the opportunity to provide technical comments on the Copyright Amendment Bill. I would be pleased to respond to any questions or to provide clarifications with respect to the attached comments.

Sincerely yours,

A handwritten signature in blue ink that reads "Michele J. Woods". The signature is written in a cursive style with a blue highlight behind the name.

Michele J. Woods
Director
Copyright Law Division
Copyright and Creative Industries Sector
World Intellectual Property Organization

REPUBLIC OF SOUTH AFRICA

COPYRIGHT AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75) and redrafted by
the Portfolio Committee on Trade and Industry; explanatory summary of Bill
published in Government Gazette No. 40121 of 5 July 2016)*

(The English text is the official text of the Bill.)

(MINISTER OF TRADE AND INDUSTRY)

Draft 3.Edited.2018.09.31

No. of copies printed . 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for the reproduction of copyright work; to provide for the protection of copyright in artistic work; to provide for the accreditation 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 copyright works by persons with disabilities; to provide for the protection of ownership in respect of orphan works; to strengthen the powers and functions of the Copyright Tribunal; to provide for prohibited conduct in respect of technological protection measures; to provide for prohibited conduct in respect of copyright management information; to provide for management of digital rights; to provide for certain new offences; and to provide for matters connected therewith.

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 of 1988, section 1 of Act 125 of 1992, section 50 of Act 38 of 1997, section 1 of Act 9 of 2002, 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 hereby amended—

(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 manner

or form which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without disability;”;

- (b) by the insertion after the definition of “artistic work” of the following definitions:

“ **‘art market professional’** includes—

- (a) an auctioneer or auction house;
- (b) the owner or operator of an art gallery;
- (c) the owner or operator of a museum;
- (d) an art dealer; or
- (e) a person otherwise involved in the business of dealing in artworks;

‘audiovisual work’ 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;”;

[It is suggested to add here a definition of the term “authorized entity” \(or the equivalent term\) and to include in the definition the elements found in Article 2\(c\) of the Marrakesh Treaty. Other definitions would likely also be needed to implement the Marrakesh Treaty. See comments on Article 19D below.](#)

- (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;”;

[This definition appears to exclude many activities that could be considered commercial, including obtaining indirect economic advantage or financial gain \(drawing the line between direct and indirect may be difficult\) or economic activity by an individual that leads to financial gain but is not done in relation to a formal business or trade. The term “commercial” is also found numerous times throughout the bill in a variety of contexts, in some of which a more restrictive meaning of commercial might be advisable, for instance when applied to certain limitations and exceptions where a literal application of this definition might lead to questions as to whether the limitation or exception meets the three-step test. The definition could either be rewritten \(for example by changing the word “direct” to “any”\), deleted, or just applied \(even if modified\) to certain sections of the legislation.](#)

- (d) by the insertion after the definition of “community protocol” of the following

definition:

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

(e) by the insertion after the definition of “copyright” of the following definition:

“ **‘copyright management information’** means information attached to or embodied in a copy of a work, or which appears in connection with the communication of a work to the public, that—

When a work is communicated, the relevant information may not be attached to the work as such, but rather appear in a separate database, to which the work is linked. The proposed wording in the definition of ‘copyright management information’ corresponds to WCT Art. 12 and WPPT Art. 19.

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

b) identifies or indicates some or all of the terms and conditions for using the work or indicates that the use of the work is subject to terms and conditions;”;

(f) by the insertion after the definition of “National Trust” of the following definitions:

“ **‘open licence’** 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 and the owner of a right in that work—

(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. 11 of 1967);

‘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) by the insertion after the definition of “sound recording” of the following definitions:

“ **‘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 for non-infringing purposes;~~

Item (b) of the definition of ‘technological protection measure’ may be difficult to reconcile with WCT Art. 15, WPPT Art. 18 and Beijing Treaty Art. 15, which all require “adequate legal protection”, because the proposed text indicates that all processes, etc. capable of controlling non-infringing uses are exempt from the concept. This seems to cover most, if not all such processes, etc., as they might be used for various non-infringing uses, such as reproduction for private study or research, time-shifting, criticism or review or any other uses covered by limitations and exceptions, or all uses of works that have fallen into the public domain. Thus, in practice there is a risk that only very few, or none, of the circumvention devices defined below in reality would be covered by the protection under Sec. 27 of the Bill. It is therefore recommended that item (b) of the definition be deleted and more detailed rules be inserted in Sec. 27 of the Bill to balance the protection against limitations and exceptions.

‘technological protection measure circumvention device’ means a device primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure;”; and

The definition of ‘technological protection measure circumvention device’ may be too narrow to ensure the “adequate legal protection” required by WCT Art. 15, WPPT Art. 18 and the Beijing Treaty Art. 15. To focus on whether a device is ‘primarily’ designed, produced or adapted for circumvention purposes seems inadequate if it is still deliberately designed with such a purpose as a feature. It is therefore recommended that two additional elements be added as alternatives, namely that the devices are either

- promoted, advertised or marketed for the purpose of circumventing effective technological protection measures; or
- have only a limited commercially significant purpose or use other than to circumvent effective technological measures.

- (i) by the insertion after the definition of “traditional work” of the following definitions:

“ ‘Tribunal’ means the Copyright Tribunal established by section 29;

‘visual artistic work’ means an artistic work as contemplated in paragraph (a) of the definition of ‘artistic work’;”.

Insertion of section 2A in Act 98 of 1978

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

“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 interface specifications.

(2) A table or compilation which by reason of the selection or arrangement of its content, constitutes an 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 protection shall—

(a) extend to an expression—

(i) inextricably merged with an idea such that the idea can be expressed intelligibly only in one or a limited number of ways; or

(ii) when the particular expression is required by law; or

(b) subsist in—

(i) official texts of a legislative, administrative or legal nature or in official translations of those texts; 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 items of press information: Provided that the maker of the speeches

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 1984 and section 5 of Act 125 of 1992

3. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(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] an international or local [organizations] organization as may be prescribed.”.

Amendment of section 6 of Act 98 of 1978, as amended by section 3 of Act 56 of 1980 and section 6 of Act 125 of 1992

4. Section 6 of the principal Act is hereby amended—

(a) by the insertion after paragraph (e) of the following paragraphs:

“(eA) communicating the work to the public by wire or wireless means other than those mentioned in paragraphs (d) and (e), above;

The proposed addition to paragraph (eA) avoids an overlap between paragraphs (d) and (e) and (eA). That way it is clarified that the Law will continue to apply the flexibilities under Art. 11 bis(2) of the Berne Convention, notably in relation to simultaneous and unchanged cable retransmission of broadcasts.

(eB) making the work available to the public by wire or wireless means, so that any member of the public 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 following paragraph:

“(g) doing, in relation to an adaptation of the work, any of the acts specified **[in relation to the work]** in paragraphs (a) to [(e)] (eB) inclusive.”.

The Act, as proposed to be amended, does not appear to grant any rights of distribution and rental, as required by Art. 6 and 7 of the WCT. In order to accomplish that, the insertion of the following items in Secs. 6, 7 and 8 of the principal Act is suggested:

() distributing the original or a copy of the work to the public:

The right of distribution under item (...) does not apply to the original or a copy of the work that has already been subject to a sale or other transfer or ownership in [any country] [the national territory] authorized by the owner of the copyright.

The square brackets indicate the policy choice between national (the national territory) and international (any country) exhaustion. In the former case, copyright can be used to prevent the domestic distribution of copies, lawfully made abroad. This alternative has been preferred by countries that wish to strengthen national infrastructure and distribution systems, organized by the local rightsholders, by preventing ‘gray market’ imports. In the latter case, copyright will not prevent the importation of copies made with the authorization of local rightsholders abroad, and this solution has been preferred by countries that put a particular emphasis on international trade and the possibility to acquire any lawfully reproduced work in the most advantageous conditions available.

Furthermore, provisions regarding rental of computer programs, audiovisual works and works embodied in phonograms are established by Art. 7 of the WCT, as regards phonograms by Art. 13 of the WPPT, and as regards performances by Art. 9 of the Beijing Treaty. While the obligations for most of these categories are dependent on different conditions, spelled out in the said articles, a right of rental for computer programs is mandatory. Items inserting such rights in Secs. 6 and 8 of the principal Act could be worded as follows:

(...) renting the original or a copy of [an audiovisual work] [a work embodied in a phonogram or] a computer program to members of the public;

The right of rental under item (...) does not apply to rental of computer programs where the program itself is not the essential object of the rental.

Insertion of section 6A in Act 98 of 1978

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

“Share in royalties regarding literary or musical works

6A. (1) For the purposes of this section, ‘royalty’ means the gross profit made on the exploitation of a literary work or musical work by a copyright owner

or a person who has been authorized by the author to do any of the acts contemplated in section 6.

(2) Notwithstanding—

(a) the assignment of copyright in a literary or musical work; or

(b) the authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6.

the author shall have the right to share in the royalty received for the execution of any of the acts contemplated in section 6.

(3) (a) The author's share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or the person contemplated in subsection (2)(b), or between their representative collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4).

(4) Where the author and copyright owner, or the person contemplated in subsection (2)(b), cannot agree on the author's share of the royalty, any party may refer the matter to the Tribunal for an order determining the author's share of the royalty.

(5) The agreement contemplated in subsection (3)(a) must include the following:

(a) The rights and obligations of the author and the copyright owner or the person contemplated in subsection (2)(b);

(b) the author's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid by the copyright owner, or the person contemplated in subsection (2)(b), to the author; and

(d) a dispute resolution mechanism.

(6) This section does not apply to—

(a) a copyright owner who commissioned, or who is the author of, the literary or musical work in question;

(b) a work created in the course of employment contemplated in section 21(1)(b) and (d); or

(c) a work where copyright is conferred by section 5 in the state, local or international organizations.

(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.’’.

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

6. Section 7 of the principal Act is hereby amended—

(a) by the insertion after paragraph (d) of the following paragraphs:

“(dA) communicating the work to the public by wire or wireless means other than those mentioned in item (c), as regards the inclusion in television broadcast, and item (d), above;

The proposed addition to paragraph (dA) avoids an overlap between paragraphs (c) and (d) and paragraph (eA). That way it is clarified that the Law will continue to apply the flexibilities under Art. 11bis(2) of the Berne Convention as regards simultaneous and unchanged cable retransmission of broadcasts.

(dB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person;’’; and

(b) by the substitution for paragraph (f) of the following paragraph:

“(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)] (dB) inclusive.’’.

Insertion of section 7A, 7B, 7C, 7D, 7E and 7F in Act 98 of 1978

7. The following sections are hereby inserted in the principal Act after section 7:

‘‘Share in royalties regarding visual artistic works

7A. (1) For the purposes of this section, ‘royalty’ means the gross profit made on the exploitation of a visual artistic work by a copyright owner or a person who has been authorized by the author to do any of the acts contemplated in section 7, but does not include profit made on the commercial resale of a visual artistic work contemplated in section 7B.

(2) Notwithstanding—

(a) the assignment of the copyright in a visual artistic work; or

(b) the authorization by the author of a visual artistic work of the right to do any of the acts contemplated in section 7,

the author shall have the right to share in the royalty received for the execution of any of the acts contemplated in section 7.

(3) (a) The author’s share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or the person contemplated in subsection (2)(b), or between their representative collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4), as the case may be.

(4) Where the author and copyright owner, or the person contemplated in subsection (2)(b), cannot agree on the author’s share of the royalty, any party may refer the matter to the Tribunal for an order determining the author’s share of the royalty.

(5) The agreement contemplated in subsection (3)(a) must include the following:

(a) The rights and obligations of the author and the copyright owner or the person contemplated in subsection (2)(b);

- (b) the author's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;
 - (c) the method and period within which the amount must be paid by the copyright owner, or the person contemplated in subsection (2)(b), to the author; and
 - (d) a dispute resolution mechanism.
- (6) This section does not apply to—
- (a) a copyright owner who commissioned, or who is the author of, the visual artistic work in question;
 - (b) a work created in the course of employment contemplated in section 21(1)(b) and (d); or
 - (c) a work where copyright is conferred by section 5 in the state, local or international organizations.
- (7) (a) This section applies to a visual artistic work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic 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.

Resale royalty right regarding visual artistic works

7B. (1) The author of a visual artistic work in which copyright subsists or his or her heirs, as may be applicable, must be paid royalties on the commercial resale within the art market of that work.

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

(b) The Minister must, before prescribing the rate referred to in paragraph (a), publish the rate proposed in the *Gazette* and call for written

comments by any interested party to be provided within 30 days after publication.

(c) The Minister may from time to time in the manner contemplated in paragraph (b), amend the prescribed rate contemplated in paragraph (a).

(3) The seller and the art market professional concerned are jointly and severally liable to pay the royalties contemplated in subsection (1) to the author or his or her heirs as may be applicable.

In implementing this permissive provision of the Berne Convention, it would be advisable to avoid creating uncertainty in the art markets, in order to maintain and expand existing domestic art sales. In this respect, some thought could be given as to whether 7B(2)(c) could create such uncertainty by making it possible for the rate to be changed at any time with only a 30-day comment period. Consideration could be given to modifying the provision to avoid this possible effect or clarifying the language if this is not the intention. In 7B(3), having the seller and the art market professional may be redundant in situations where the art market professional is the seller. One way to address this would be to simply use the term “seller”, which has been done in a number of jurisdictions. In this case the joint and several liability provision could be deleted. In 7B(4) below, the addition of “designated institutions” could be considered as this is the practice in a number of jurisdictions. It may also be simpler to remove some of these implementation details from the legislation and to state that some of those details, such as setting the rates and collection procedures, will be established by regulation.

(4) The author of a visual artistic work or his or her heirs [or any designated institution], as may be applicable, shall be entitled to receive a resale royalty if—

(a) at the time when the resale is concluded—

(i) the author is a South African citizen or is domiciled or resident in the Republic or is a citizen of, or domiciled in, a designated country specified by the Minister in accordance with section 37; and

Art. 14ter(2) of the Berne Convention refers to the legislation of the country “to which the author belongs”. When that text was adopted in Brussels in 1948, the point of attachment for authors under Art. 4 of the Brussels Act was only nationality, but in Article 3(2) of the Stockholm and Paris Acts of 1967 and 1971, respectively, it was broadened to cover the author’s habitual residence as well. The assimilation of habitual residence with nationality applies “for the purposes of this Convention” and it must therefore be understood as covering also the reference in Art. 14ter(2). It is therefore suggested that the criterion be broadened as indicated in the proposed addition to the text of paragraph (4)(a)(i) and (4)(b) below.

- (ii) the term of validity of the resale royalty right has not expired;
- (b) in the case of a deceased author, the deceased was at the time of death a South African citizen or was domiciled or resident in the Republic or was a citizen of, or domiciled in, a country specified by the Minister in accordance with section 37;
- (c) the resale or any part of the transaction takes place in the Republic or in any country specified by the Minister in accordance with section 37; and
- (d) the resale of the work is recognisable after the commencement of section 9 of the Copyright Amendment Act, 2019.

(5) A resale royalty right applies whether or not the author was the first owner of any copyright in the work.

Proof of author

7C. (1) Where a mark or name purporting to identify a person as the author of a visual artistic work appears on such work, that person is, in the absence of evidence to the contrary, presumed to be the author of such work.

(2) If a visual artistic work—

- (a) is a work of more than one author, the presumption in subsection (1) applies to each co-author of such visual artistic work; or
- (b) includes indigenous cultural expressions or knowledge, the relevant indigenous community is entitled to an equitable share in the resale royalty payable.

Duration of resale royalty right

7D. (1) The resale royalty right of an author of a visual artistic work or his or her heirs, as may be applicable, expires at the end of the period of 50 years calculated from the end of the calendar year—

- (a) in which the author concerned died; or
- (b) in the case of more than one author, in which the last of the known authors died.

- (2) In the case of a visual artistic work created by an unknown author—
- (a) the resale royalty right in that work expires at the end of the period of 50 years calculated from the end of the calendar year in which the work was first made available to the public; or
- (b) where the identity of the author becomes known at a later stage, the resale royalty right of that author expires in accordance with the period contemplated in subsection (1).

Transmission of resale royalty right

7E. (1) A resale royalty right may not be alienated, save for transmission on the death of the holder of the right by testamentary disposition; or by operation of law.

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

(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 unenforceable.

Application of resale royalty right

7F. (1) Sections 7B, 7C, 7D and 7E apply to a visual artistic work that was made before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic work falls within the application of this Act.

(2) The resale royalty right only applies to a commercial resale made after the commencement date of the Copyright Amendment Act, 2019.’’.

Substitution of section 8 of Act 98 of 1978, as amended by section 5 of Act 56 of 1980, section 6 of Act 52 of 1984, section 1 of Act 61 of 1989 and section 8 of Act 125 of 1992

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

“**Nature of copyright in [cinematograph films] audiovisual works**

8. (1) Copyright in **[a cinematograph film]** an audiovisual work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the **[film]** work in any manner or form, including making a still photograph therefrom;
- (b) causing the **[film]** work, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
- (c) broadcasting the **[film]** work;
- (d) causing the **[film]** work to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the **[film]** work, and is operated by the original broadcaster;
- (dA) communicating the work to the public by wire or wireless means [other than those mentioned in paragraphs \(c\) and \(d\), above](#);

The addition to paragraph (1)(dA) avoids an overlap between paragraphs (c) and (d) and (dA). That way it is clarified that the Law will continue to apply the flexibilities under Art. 11bis(2) of the Berne Convention, notably in relation to simultaneous and unchanged cable retransmission of broadcasts.

- (dB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person;
- (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]** work in paragraphs (a) to [(d)] (dA) 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:

Share in royalties regarding audiovisual works

8A. (1) A performer shall, subject to the Performers Protection Act, 1967

(Act No. 11 1967), have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8.

(2) (a) The performer's share of the royalty contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the performer and the copyright owner or between their representative collecting societies.

(b) Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4), as the case may be.

(3) Where the performer and copyright owner contemplated in subsection (2)(a) cannot agree on the performer's share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer's share of the royalty.

(4) The agreement contemplated in subsection (2)(a) must include the following:

(a) The rights and obligations of the performer and the copyright owner;

(b) the performer's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid by the copyright owner to the performer; and

(d) a dispute resolution mechanism.

(5) (a) This section applies to an audiovisual work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that audiovisual 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.''

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—

(a) by the substitution for paragraph of the following paragraph:

“(e) communicating the sound recording to the public by wire or wireless means[.] other than those mentioned in paragraphs (c) and (d), above;”;

The addition to paragraph (e) avoids an overlap between paragraphs (c) and (d) and paragraph (e). That way it is clarified that the Act applies the flexibilities under the WPPT, which does not require protection of phonogram producers in relation to simultaneous and unchanged cable retransmission of broadcasts carrying their phonograms.

and

(b) by the addition after paragraph (e) of the following paragraph:

“(f) making the sound recording available to the public by wire or wireless means, so that any member of the public may access the sound recording from a place and at a time chosen by that person.”.

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:

“Royalties regarding sound recordings

9A. (1) (a) In the absence of an agreement to the contrary or unless otherwise authorized by law, no person may, without payment of a royalty to the owner of the relevant copyright—

- (i) broadcast[.] a sound recording as contemplated in section 9(c);
- (ii) cause the transmission of a sound recording as contemplated in section 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); ~~or~~
- (iv) make the sound recording available to the public as contemplated in section 9(f).

The rights covered by items (i) through (iii) are covered by Art. 12 of the Rome Convention and Art. 15 of the WPPT and may thus be made the subject of non-voluntary licenses. This does not, however, apply to the right of interactive communication to the public under Art. 10 and 14 of the WPPT, which must be granted as an exclusive right.

(aA) Any person who executes an act contemplated in section 9(c), (d), or (e) ~~or (f)~~ for commercial purposes must—

(i) register that act in the prescribed manner and form; and

(ii) submit a complete, true and accurate report to the performer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner, for the purpose of calculating the royalties due and payable by that person.

(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, the indigenous community, or [between] their [representative] collecting societies.

(c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may in the prescribed manner 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 of 1965).

(2)(a) The owner of the copyright, collecting society or indigenous community who receives payment of a royalty in terms of this section shall ensure that [share] such royalty is equally shared between the copyright owner and [with] any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).

[(b) The performer's share of the royalty shall represent fair and equitable remuneration determined by an agreement between the

performer and the owner of copyright, or between their representative collecting societies.

(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 of 1965).]

(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 of 1967).

(3) In the event of any right to a royalty being assigned to any successor in 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 in title.

(4) (a) Any person who intentionally fails to register an act as contemplated in subsection (1)(aA)(i), or who intentionally fails to submit a report as contemplated in subsection (1)(aA)(ii), shall be guilty of an offence.

(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.

(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed is the total income of that person during the financial year during which the offence or the majority of offences, were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.”.

Repeal of section 12 of Act 98 of 1978

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

Insertion of sections 12A, 12B, 12C and 12D in Act 98 of 1978

13. 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 authorized, 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 different device;

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

(iii) reporting current events;

(iv) scholarship, teaching and education;

(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;

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

(vii) ensuring proper performance of public administration.

(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—

(i) the nature of the work in question;

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

(iii) the purpose and character of the use, including whether—

(aa) such use serves a purpose different from that of the work affected; and

(bb) it is of a commercial nature or for non-profit research.

library or educational purposes; and

(iv) the substitution effect of the act upon the potential market for the work in question.

(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 shall be mentioned.

Specific exceptions from copyright protection applicable to all works

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

(a) Any quotation [that is compatible with fair practice](#): Provided that—

[The proposed wording in Section 12B\(1\)\(a\) includes the additional condition required by Art. 10\(1\) of the Berne Convention.](#)

(i) the extent thereof shall not exceed the extent reasonably justified by the purpose; and

(ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;

(b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall [be compatible with fair practice and that it shall](#) not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;

[The proposed wording in paragraph \(b\) includes the additional condition required by Art. 10\(2\) of the Berne Convention.](#)

(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 consent of the owner of the relevant part of the copyright in the work;

(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 collection thereof~~source and the name of the author should be indicated in so far as it is practicable;

The provision in paragraph (d) seems to aim at implementing Art. 2bis(1) of the Berne Convention. That provision is not an exception to the protection but rather an exclusion of certain speeches from protection. In the Bill, the protection as such is not affected, but an exception is proposed, which clearly defines its field of application, and it does not relate to the publication of collections. Therefore, the proviso appears to be superfluous. On the other hand, in line with Art. 6bis(1) of the Berne Convention, as well as other limitations in the Bill, it is suggested to consider including a proviso giving the rights owners appropriate rights in relation to having the source and their names mentioned. Alternatively, it may be considered whether it would be useful to avoid the overlaps between this item and item (e)(iii), immediately below, by merging the two provisions.

e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—

(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 same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;

(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 current information;

(f) the translation, broadcasting and publication of such work by a person giving or receiving instruction for purposes of teaching, scholarship and research, to the extent and under the conditions set out in Schedule 2 to this Act; : Provided that —

(i) such translation is not done for commercial purposes;

(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 purposes;

The proposed exception in paragraph (f) appears to aim at the implementation of the Appendix to the Berne Convention (Paris Act 1971), but it does not include the numerous conditions and details which are included in that Appendix. At the same time, the scope of application of paragraph (f) appears to be much more limited than what is set out in Schedule 2 and the proposed wording aims at redressing that. If this is the intention, the provisions in paragraph (f) and Schedule 2 would need to be reviewed for compatibility with the provisions of the Appendix to the Berne Convention. In addition, certain notifications would be required in this connection by Art. I of the Appendix to the Berne Convention. If the aim is not to implement the Appendix, then questions may arise regarding the compatibility of this provision with the three-step test. Further modifications here and in Schedule 2 have not been attempted pending clarity regarding the intention of the drafters.

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

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

(i) the making of a personal copy of such work by an individual for the individual's personal use and made for ends which are not commercial.

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

(a) the making of a back-up copy;

(b) time or format-shifting; or

(c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.

(3) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.

(4) An authorization to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the 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.

(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 assignment of ownership of an assigned 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 assigned original or copy.

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 or adaptations is—

- (a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or
- (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent, economic significance to these acts.

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, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.

~~(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 or an indigenous community on reasonable terms and conditions.~~

Exceptions and limitations to the right of reproduction must be compatible with the three-step-test, as laid out in Art. 9(2) of the Berne Convention and Art. 10 of the WCT. Whether this is the case for the proposal is a matter of interpretation. Subsection (3) appears to be doubtful in this respect, because it means that unless the rights owners themselves offer a license for reproduction of their entire books, etc., this is covered by a limitation allowing for free use. This may well be argued to conflict with the normal exploitation of works, notably works created and marketed for educational purposes. Even if this is not considered the case, it may be argued that systematic use of whole books, etc. without payment of equitable remuneration would unreasonably prejudice the legitimate interests of the authors as well as the publishers as successors in title. It is therefore recommended that the provision be deleted from the Bill.

In addition, subsections (1) and (2) allow for important limitations of the exclusive right of reproduction. It is suggested for consideration that a general safeguard clause be linked to those subsections, as has been done in comparable situations in other countries. Such a clause might have the following wording:

Subsections (1) and (2) of this Section only apply to the extent that a license to do the described acts is not available from the copyright owner, a collecting society, or an indigenous community on reasonable terms and conditions.

(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—

(a) where the textbook is out of print;

(b) where the owner of the right cannot be found; or

(c) where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.

(5) The right to make copies shall not extend to reproductions 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 dissertation for submission, personal use, library deposit or posting on an institutional repository.

(7)(a) The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has the right, despite

granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.

(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the 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 properly acknowledged.

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

(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.

(8) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (5).''

Amendment of section 15 of Act 98 of 1978, as amended by section 2 of Act 13 of 1988 and section 13 of Act 125 of 1992

14. Section 15 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) The copyright in an artistic work shall not be infringed by its **[inclusion] use** in **[a cinematograph film or a television broadcast or transmission in a diffusion service]** another work, if—

(i) such **[inclusion] use** is merely by way of background, or incidental, to the principal matters represented in **[the film, broadcast or transmission]** that other work; or

(ii) the artistic work so used, is situated in a public place.

(b) The copyright in an artistic work shall not be infringed by the issue to the public of copies, or the communication to the public of anything, whose making was by virtue of this subsection not an infringement of the

copyright.’’.

Amendment of section 16 of Act 98 of 1978, as substituted by section 14 of Act 125 of 1992

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 hereby repealed.

Repeal of section 18 of Act 98 of 1978

17. Section 18 of the principal Act is hereby repealed.

Repeal of section 19A of Act 98 of 1978

18. Section 19A of the principal Act is hereby repealed.

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 computer programs

19B. (1) A person having a right to use a copy of a computer program may, without the authorization of the copyright owner, observe, study or test the functioning of the program in order to determine the ideas and principles 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 or she is entitled to perform.

(2) The authorization of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:

(a) The acts referred to in subsection (1) are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in paragraph

(a); and

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

(3) The information obtained through the application of the provisions of subsection (2) may not be—

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

(b) given to others except when necessary for the interoperability of the independently 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 which infringes copyright.

(4) For the purposes of this section, ‘interoperability’ means the ability to exchange information and to use the information which has been exchanged.’.

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

20. The following sections are hereby inserted in the principal Act after section 19B:

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

19C. (1) A library, archive, museum or gallery may, without the authorization of the copyright owner, use a copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work 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 temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.

(4) A library, archive, museum or gallery may, for educational or research

purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work for commercial purposes: Provided that this subsection only applies if the works or recordings are not commercially available to the users on reasonable terms.

It is a matter of interpretation whether the provision in subsection (4) is compatible with the three-step-test in Art. 10 of the WCT, Art. 16 of the WPPT and Art. 13 of the Beijing Treaty. It may be argued that the permitted use is broad, compared to the quite limited provision of Art. 10(2) of the Berne Convention, which otherwise applies as regards literary and artistic works. On the other hand, there is a valid argument that use of materials in libraries and other institutions outside the premises of such institutions is necessary for the purposes of distance education, etc. In order to safeguard the normal exploitation reserved for rights owners, not least as regards audiovisual works specifically created for educational purposes, the addition of a proviso limiting the application of the subsection to cases where the works are not commercially available on reasonable terms is recommended.

(5) A library, archive, museum or gallery may make a copy of —

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

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

(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery: Provided that such missing parts are not commercially available on reasonable terms.

Provisions to this effect are commonplace in national copyright legislation. Most commonly, however, they apply only in cases where the missing parts are not commercially available at reasonable terms. The inclusion in subsection (6) of a proviso to that effect is suggested in order to safeguard the normal exploitation of the works and ensure that there is no unreasonable prejudice to the legitimate interests of the rights owners.

(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 obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section-: [Provided that such missing parts are not commercially available on reasonable terms.](#)

[Provisions to this effect are for important reasons increasingly commonplace in national legislation. The production or sale of older works and recordings in new formats is, however, also becoming a normal part of their commercial exploitation. Therefore the inclusion in subsection \(7\) of a proviso to that effect is suggested in order to safeguard the normal exploitation of the works and ensure that there is no unreasonable prejudice to the legitimate interests of the rights owners.](#)

(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) A library, archive, museum or gallery may make a copy of a copyright work when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot, after reasonable endeavour, be obtained or where the work is not available by general trade or from the publisher.

[The compatibility of the provision in subsection \(9\) with the three-step test of the international conventions and treaties is difficult to assess. On the one side, the provision does not allow for any use of the copies made, as is the case in subsection \(7\), above, but on the other hand, the provision does not in any way describe or limit the purposes that may be pursued by the making of the copies. Possibly, the provision could be clarified as follows: “A library, archive, museum or gallery may make a copy for its own collections, or for the collections of another such institution, of a copyright work which for important cultural or scientific reasons should be included therein, when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot, after reasonable endeavor, be obtained and where the work is not available by general trade or from the publisher. Only one such copy of each work may be made for the collection of each institution.”](#)

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

(11) A library, archive, museum or gallery may reproduce for preservation purposes, in any format, any copyright work which has been retracted or withdrawn from public 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, scholarship, research or any other legal use and for use by the judiciary.

It seems difficult to reconcile the permissibility under subsection (11) to use copies of retracted works for 'any other legal purposes' with the three-step test of the international conventions and treaties, because such use apparently would include lending to the general public. If that were the case, it might in practice nullify the effect of the withdrawal of the work and thus unreasonably prejudice legitimate interests of the authors. It is therefore recommended that the scope of the provision be clarified as indicated.

(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 gallery or for a public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.

(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 such work;

(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 a public place.

(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 digital transmission.

(b) The receiving library, archive, museum or gallery must delete any digital file received from the other library, archive, museum or gallery immediately after supplying the person who has requested it with a digital or paper copy of the work.

(14) An officer or employee of a library, archive, museum or gallery acting within the scope of his or her duties shall be protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—

(a) the work is being used as permitted within the scope of an exception in 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 public domain or licensed to the public under an open licence.

(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of 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, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.

General exceptions regarding protection of copyright work for persons with disability

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

(a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work 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 copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and

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

- (2)(a) A person with a disability, or an organization 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, without the authorization of the owner of the copyright work, reproduce the work 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 organization that serves persons with disabilities may, without the authorization of the copyright owner export to or import from another country any copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person or organization.
- (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 is practicable.”

[Proposed Section 19D appears to be intended to implement the Marrakesh Treaty and to extend its provisions to a broader group of beneficiaries, encompassing all persons with disabilities. The Republic of South Africa has the ability to adopt a national exception or limitation that applies to all persons with disabilities. However as drafted section 19D does not contain a number of provisions that would be needed to benefit from the provisions of the Marrakesh Treaty, and in particular the cross-border provisions. In addition to calling into question compliance with Treaty provisions, the lack of these provisions could create practical difficulties in exchanging works with authorized entities in other countries, as some implementing legislation in other jurisdictions requires strict compliance with Marrakesh Treaty provisions, and most implementing legislation incorporates the concept of authorized entities as the main actors in cross-border exchanges. As the goal of the Marrakesh Treaty is to harmonize limitations and exceptions to benefit persons who are blind, visually impaired, or otherwise print disabled, it is suggested to redraft this section to include a general national exception for persons with disabilities, together with a separate section covering the activities encompassed by the Marrakesh Treaty. In the latter case a number of additional definitions would be needed, including those to describe the works covered, the beneficiaries, and the activities of authorized entities or “organizations serving persons with disabilities.” It would also be important to clarify the copyright rights that are subject to the flexibilities based on the Marrakesh Treaty \(e.g. distribution and making available in addition to distribution\). Language would also be needed to ensure that the requirements of Article 5\(4\)\(b\) of the Marrakesh Treaty are met. Further information and specific suggestions on this subject could be obtained from the International Bureau of WIPO.](#)

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 hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) Notwithstanding the **[transfer]** assignment 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 or other derogatory action in relation to, the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorizes the use of his or her work in a sound recording 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.

The inserted text in subsection (1) aims at obtaining compatibility with Art. 6bis of the Berne Convention. It clarifies that the protection covers not only situations where the work is changed in one way or another, but also where the work is used ‘as is’ but in a prejudicial context.

(2) Any infringement of the provisions of this section shall be treated as 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 infringement of the provisions of this section, rather than the owner of the copyright in question.”.

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

22. Section 21 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(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] an audiovisual work~~ 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]** the ownership of any copyright subsisting in the work shall, subject to subsection (3), be governed by agreement between the parties.”;

In relation to audiovisual works, the provision in paragraph (c) does not seem compatible with Art. 14bis(2) of the Berne Convention. In countries following the common law tradition, normally the producer of an audiovisual work is considered the author of that work, without prejudice to the rights regarding other exploitation of pre-existing works that are included in the audiovisual work. In countries following the civil law tradition, the individual contributing authors are considered co-authors of the audiovisual work, but their rights are made subject to a presumption of legitimation for the producer to exploit them as part of the audiovisual work, as established in Art. 14bis(2). It is therefore suggested that the following general provision clarifying the ownership of rights in audiovisual works be inserted in order to replace the references to audiovisual works in paragraph (c):

In respect of an audiovisual work, the original owner of the economic rights shall be the producer, unless provided otherwise in a contract. The co-authors of the audiovisual work and the authors of the pre-existing works included in or adapted for the making of the audiovisual work shall, however, maintain their economic rights in their contributions or pre-existing works, respectively, to the extent that those contributions or pre-existing works can be subject of acts covered by their economic rights separately from the audiovisual work.

If the intention behind paragraph (c) is to follow the system normally used in countries following the civil law system, the following wording is suggested instead:

In respect of an audiovisual work, the original owners of copyright are its co-authors, such as the principal director, the authors of the screenplay, the authors of the dialogue and the composer of music specifically composed for use in the audiovisual work. Authors of pre-existing works adapted for or used in audiovisual works are assimilated to the co-authors. In the absence of agreement to the contrary, an agreement between the producer of an audiovisual work and a co-author of that work, other than the author of a musical work included in the audiovisual work, concerning the contribution of those authors to the making of the audiovisual work, shall be deemed to mandate the producer to exploit the rights in the author’s contributions together with the audiovisual work, and to subtitling or dubbing the texts, but without prejudice to any right of the author to obtain remuneration for such use of his or her work to the extent that is stipulated in the said agreement.

(b) by the substitution for subsection (2) of the following subsection:

“(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international or local [organization] organization concerned, and not in the author.”; and

(c) by the addition after subsection (2) of the following subsection:

“(3) (a) The agreement contemplated in subsection (1)(c) may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorize any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission.

(b) Where the agreement contemplated in subsection (1)(c) does not specify who the copyright owner is, limited ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorize any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to such rights as may be necessary for the purpose of the commission.

(c) The author of a work contemplated in subsection (1)(c) may approach the Tribunal for an order—

(i) where the work is not used by the person who commissioned the work for the purpose commissioned, licencing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the person who commissioned the work; or

(ii) where the work is used for a purpose other than that for which it was commissioned, ordering the person who commissioned the work to make payment of royalties to the author for such other use.

(d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the following:

(i) The nature of the work;

(ii) the reason why, and period for which, the person who commissioned the work did not use the work; and

(iii) public interest.

(e) Where the work contemplated in subsection (1)(c) is of a personal nature to the person who commissioned the work, the Tribunal may not licence the author to use that work.’’.

Amendment of section 22 of Act 98 of 1978

23. Section 22 of the principal Act is hereby amended—

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

“(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 be assigned.’’;

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

“(3) No assignment of copyright in a literary or musical work by an author to a publisher, and no exclusive licence to do an act which is subject to copyright in such work shall have effect unless it is in writing and signed by or on behalf of the assignor, the **[licenser]** licensor or, 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 in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.

(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 or in writing, or an electronic equivalent thereof, 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 following subsection:

“(8) Unless otherwise prohibited from doing so, a licensee may grant a 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 after section 22:

“Licences in respect of orphan works

22A. (1) A person who wishes to obtain a licence to do an act which is subject to copyright ~~or a resale royalty right~~ in respect of an orphan work must make an application to the Commission in the prescribed manner.

It is suggested to delete the reference to the resale royalty in this section in order to avoid confusion, as licenses would not generally be required as part of the operation of the resale royalty right system. In the case of the resale royalty right, the seller of the work would be entitled to make the sale, while with an orphan work the applicant for the license would be asking to exploit the copyright rights of another party. If there is a concern about payment of the resale royalty in cases where one or more parties entitled to receive the royalty payment is unknown or unlocatable, that situation could be addressed in the resale royalty right implementing regulations.

(2) Before making an application in terms of subsection (1), the applicant 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 be prescribed and must be accompanied by copies of the published advertisement contemplated in subsection (2) and such fee as may be prescribed.

(4) When the Commission receives an application in terms of subsection (1), the Commission may, after holding such inquiry as may be prescribed, grant to the applicant a licence 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 may determine.

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

- (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 and locating a registered copyright owner;
- (b) conducted a search of reasonably available sources of copyright ownership and ownership information and where appropriate, licensor information;
- (c) conducted a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert 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) actions based on facts known at the start of the search and facts uncovered during the search;
 - (ii) actions directed by the Commission; and
 - (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 copyright owner.

(7) Where a licence is granted in terms of subsection (4), the Commission may direct the applicant to deposit the amount of the royalty determined in a 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 claim such royalty at any time.

(8) The copyright owner may at any time collect the royalties fixed in the licence or in default of payment, by initiating legal action to recover such royalties.

(9) Any person who can adduce evidence for the purposes of proving that he or she is the owner of copyright in an orphan work must submit his or her details

for registration on the database of the register of copyright referred to in subsection (6)(a) and may for the period during which the owner of copyright was unknown, recover royalties as contemplated in subsection (8).”

Insertion of Chapter 1A in Act 98 of 1978

25. The following Chapter is hereby inserted in the principal Act after Chapter 1:

“CHAPTER 1A

COLLECTING SOCIETIES

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 accreditation.

(2) A collecting society that has been accredited by the Commission to administer rights on behalf of—

(a) copyright owners or authors, or on behalf of an organization representing copyright owners or authors, has the right to receive payment of a royalty in terms of this Act; or

(b) performers or copyright owners, or on behalf of an organization representing performers or copyright owners, has the right to receive payment of a royalty in terms of section 5(1)(b) of the Performers’ Protection Act, 1967 (Act No. 11 of 1967).

(3) The Commission may, for purposes of issuing an accreditation certificate, consult with any person and may grant such accreditation and issue an accreditation certificate on such terms and conditions as may be determined by the Commission.

(4) The Commission shall not accredit or issue an accreditation certificate to any applicant unless the Commission is satisfied that the applicant—

(a) complies with the requirements for accreditation and such requirements as may be prescribed;

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

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

(d) has adopted a constitution meeting the prescribed requirements.

(5) An accreditation certificate issued in terms of this section is valid for a period not exceeding five years and, unless it is suspended or cancelled, may be renewed in the prescribed manner on such terms and conditions as may be determined by the Commission.

(6) If there is no collecting society for a right, the Commission may provide such assistance as may be necessary to assist in the formation of a collecting society.

(7) (a) Any person who at the commencement of the Copyright Amendment Act, 2019, is acting as a representative collecting society in terms of this Chapter must, within 18 months of the commencement of the Copyright Amendment Act, 2019, apply to the Commission in the prescribed manner and form for accreditation.

(b) The person contemplated in paragraph (a) may continue to act as a representative society pending such accreditation subject to any—

(i) conditions that the Commission may instruct it in writing to comply with; and

(ii) finding of the Commission related to such application for accreditation.

(8) (a) Subject to subsection (7), any person who intentionally gives him or herself out as a representative collecting society in terms of this Chapter without having been accredited, commits an offence.

(b) A person convicted of an offence in terms of paragraph (a), is liable on conviction to a fine or imprisonment for a period not exceeding five years.

Administration of rights by collecting society

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

(a) a collecting society or indigenous community may accept from a

performer, copyright owner or indigenous community or another collecting society of rights, exclusive authorization to administer any right in any work by the issuing of licences or the collecting of licence fees and royalties, or both; and

(b) a performer, copyright owner or indigenous community or other collecting society of rights may withdraw such authorization without prejudice to the right of the collecting society or indigenous community concerned.

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

(a) issue a licence in respect of any rights under this Act;

(b) collect fees and royalties in pursuance of such a licence;

(c) distribute such collected royalties among performers or copyright owners, collecting societies of rights or indigenous communities after deducting a prescribed amount from the collected royalties for its own expenses;

(d) negotiate royalty rates; and

(e) perform any other prescribed function.

(3) A collecting society may—

(a) enter into an agreement with any foreign society or foreign organization administering rights corresponding to rights that it administers under this Act; and

(b) entrust rights administered by it in the Republic to such foreign society or foreign organization to administer in that country: Provided that no such collecting society, foreign society or foreign organization shall permit any discrimination in respect of the terms of a licence or the distribution of royalties collected; ~~and~~

~~(c) only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic.~~

Proposed Section 22C(3)(c) raises concerns about possible interference with the payment of royalties pursuant to the national treatment principle of the Berne Convention. Deletion of the provision is therefore suggested.

Control of collecting society by authors, performers or copyright owners

22D. (1) A collecting society is subject to the control of the authors, performers or copyright owners whose rights that collecting society administers, and the collecting society shall, in such manner as may be prescribed—

- (a) collect and distribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) and subsection (2);
- (b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the purpose of distribution of the royalties to the authors, performers or copyright owners; and
- (c) provide to each author, performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that author, performer or copyright owner.

(2) Royalties distributed among the authors, performers or copyright owners shall—

- (a) as far as may be possible, be distributed in proportion to the actual use of their works; and
- (b) be distributed to the author, performer or copyright owner as soon as possible after receipt thereof, but no later than five years from the date on which the royalties were collected.

(3) Where the collecting society, for whatever reason, is unable to distribute the royalties within five years from the date on which the royalties were collected, that collecting society shall—

- (a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and

- (b) upon demand by the performer or copyright owner, or their authorized representatives, pay over the royalties together with the interest earned on the investment contemplated in paragraph (a).

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 consistent with the accreditation conditions of that collecting society; or
- (b) the royalties collected by the collecting society in respect of rights administered by that collecting society are being utilised or distributed in accordance with the provisions of this Act.

Suspension and cancellation of accreditation of collecting society

22F. (1) For purposes of this Act, ‘compliance notice’ means a compliance notice contemplated in section 171 of the Companies Act, 2008 (Act No. 71 of 2008), read with the necessary changes.

(2) The Commission may issue a compliance notice or apply to the Tribunal for an order to institute an inquiry into the affairs of a collecting society, if the Commission is satisfied that the collecting society is being managed in a manner that contravenes the accreditation conditions of that collecting society or is managed in a manner detrimental to the interests of the performers or copyright owners concerned.

(3) The Commission may, if it is of the opinion that it will be in the interest of the performers or copyright owners concerned, apply to the Tribunal for an order suspending the accreditation of the collecting society contemplated in subsection (1), pending an inquiry for such period as may be specified in the order.

(4) The Commission may, after the inquiry contemplated in subsection (2) has been finalised and if it is of the opinion that it will be in the interest of the performers or copyright owners concerned, apply to the Tribunal for an order of cancellation of

the accreditation of the collecting society in question.

(5) The Commission shall be responsible for the administration and discharge of the functions of the collecting society contemplated in subsection (3) during the period of suspension or cancellation of the accreditation of that collecting society following 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.”.

Amendment of section 23 of Act 98 of 1978, as amended by section 20 of Act 125 of 1992

26. Section 23 of the principal Act is hereby amended—

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

“(1) Copyright shall be infringed by any person[,]=

(a) not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorize;

(b) who tampers with any [copyright management](#) information kept by any other person in order to administer copyright in terms of this Act or distributes, imports for distribution, broadcasts or communicates to the public, without authority, works or copies of works knowing that [electronic copyright management information has been removed or altered without authority](#); or

[The text added to paragraph \(b\) aims at securing a full implementation of the provision of WCT Art. 12. Reference is made to the remarks regarding proposed Sec. 28R of the principal Act.](#)

(c) who abuses copyright and technological protection measures in order to constitute a defence to any claim of copyright liability or any independent cause of action that may be pursued either as a counterclaim in an action for infringement or instituted independently.”; 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 of 1992

27. Section 27 of the principal Act is hereby amended—

(a) by the insertion of the following subsection:

“(5A) Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertise for sale or hire, a technological protection measure circumvention device if—

(i) such person knows, or has reason to believe, that that device will or is likely to be used to [access a work or infringe copyright in a work protected by a technological protection measure](#);

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

(iii) such person knows or has reason to believe that the service contemplated in subparagraph (ii) will or is likely to be used by another person to [access a work or infringe copyright in a work protected by a technological protection measure](#);

(b) publishes information enabling or assisting any other person to circumvent a technological protection measure with the intention of inciting that other person to unlawfully circumvent a technological protection measure in the Republic; or

(c) circumvents such technological protection measure when he or she is not authorized to do so.

shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.”;

It may be argued that the proposed subsection (5A) does not completely fulfill the requirements of Art. 11 of the WCT, which requires “adequate legal protection and effective legal remedies” against the circumvention of technological protection measures. The proposed text appears to allow, for example, sale and dissemination of circumvention devices, as long as the person doing that has only reason to believe that the circumvention is not for purposes of copyright infringement. The private access to a work, however, does not necessarily infringe copyright, and the provisions may therefore lead to widespread dissemination of such devices, which would then for all practical purposes undermine the legal protection. The fact that the act of accessing data without authorization is an offence under Sec. 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), to which the proposed Sec. 28O(6) of the principal Act refers, apparently would not prevent a widespread dissemination of circumvention devices. The suggested amendments of the proposed text aim at avoiding such dissemination. Furthermore, the addition of provisions clarifying the safeguarding of limitations and exceptions under the Law is proposed. Such safeguarding should be limited to certain of those limitations and exceptions, because otherwise it would in a similar way enable widespread circulation of circumvention devices and information which in practice would mean that the protection against circumvention would not be adequate, as required by the WCT. A similar aim appears to be pursued by the proposed Section 39(cH) of the principal Act. The following text is proposed as an option:

Upon the request by the beneficiary of an exception or limitation in accordance with Sections 12B(1)(b) to (e), 12D(2), 19B, 19C(5) to (7), (9) and (11), and 19D, the [appropriate public authority, to be specified] may order that the necessary means be made available, to the extent strictly required, to benefit from it and in accordance with the guidelines issued under Section 39(cH).

(b) by the substitution for subsection (6) of the following subsection:

“(6) A person convicted of an offence under this section shall be liable—

- (a) in the case of a first conviction, to a fine **[not exceeding five thousand rand]** or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates; or
- (b) in any **[other]** case other than those contemplated in paragraph (a), to a fine **[not exceeding ten thousand rand]** or to imprisonment

for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.”; and

(c) by the addition after subsection (8) of the following subsection:

“(9) For the purpose of subsection (6), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences, as the case may be, were committed and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, under all transactions to which this Act applies.”.

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 hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) This section shall apply to any copy of the work in question made outside the 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 an infringement of copyright in the country in which the work was made.~~”; and

The proposed amendment to subsection (2) that is proposed for deletion effectively would mean that copies made in countries without copyright protection could be freely imported into the Republic. Therefore, it would not be compatible with Art. 16(2) of the Berne Convention. The provision would also be incompatible with the principle expressed in Art. 5(2), last sentence, of that Convention, according to which the applicable law in international relations is that of the country where protection is claimed, that is, where the use takes place. This means that when foreign works are used in the Republic, that use is governed by the laws of the Republic and not the laws of the foreign countries of origin of the works. By referring to the legality of the copies under the law of the country in which the work was made, the proposed provision would extend extraterritorial effect in the Republic to such foreign laws, contrary to the principle of territoriality expressed in Art. 5(2) of the Convention.

(b) by the substitution for subsection (5) of the following subsection:

“(5) This section shall [*mutatis mutandis*] with the necessary changes, apply with reference to an exclusive licensee who has the right to import into the Republic any work published elsewhere, which would be an infringing copy of the work in the ~~country in which it was made~~ Republic.”

[Regarding the amendment suggested for subsection \(5\), reference is made to the comments to the similar amendment suggested for subsection \(2\).](#)

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 protection measures

28O. (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a technological protection measure circumvention device if such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technologically protected work.

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

(a) such other person intends to use the service to circumvent an effective 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 a technologically protected work.

(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 other person to unlawfully circumvent a technological protection measure.

(4) No person may, during the subsistence of copyright in a work and without a licence of the owner of the copyright in such work, circumvent an effective technological protection measure applied by the owner of the copyright to such work.

(5) A technological protection measure shall be deemed to be effective if the 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 protection objective.

(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

Exceptions in respect of technological protection measure

28P. (1) For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform any of the following:

- (a) An act permitted in terms of any exception provided for in this Act; or
- (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer 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 who wishes to circumvent a technological protection measure so as to perform a permitted 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 in order to 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 the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.

(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection

(2)(b) shall maintain a complete record of the particulars of the—

(a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and

(b) purpose for which the services of such other person has been engaged.

[As regards the proposed Sec. 28O and 28P, reference is made to the suggestions and remarks made with respect to the definitions of ‘technological protection measure’ and ‘technological protection measure circumvention device’ as well as to proposed Sec. 27\(5A\) of the principal Act.](#)

Enforcement by Commission

28Q. The Commission must enforce this Act by—

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

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

(c) dealing with any other matter referred to it by any person, Tribunal or any other regulatory authority.

Prohibited conduct in respect of copyright management information

28R. No person may—

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

(b) ~~in the course of business~~ make, import, sell, let for hire, offer or expose for sale, advertise for sale or hire or communicate to the public a work or a copy of a work, if any copyright management information has been removed or modified without the authority of the copyright owner.

[The amendments suggested to proposed paragraph \(b\) aim at ensuring the implementation of Art. 12 of the WCT, Art. 19 of the WPPT and Art. 16 of the Beijing Treaty. It is clarified that communication of a work to the public explicitly is made unlawful when the rights management information is not intact, and the limitation to business activities has been removed, partly because it is not permitted under the said treaty provisions, and partly because communication over the Internet may take on very serious proportions, even if it is not done in the course of business.](#)

Exceptions in respect of copyright management information

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

- (a) is authorized by the performer or copyright owner to remove or modify the copyright management information;
- (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 section 29 of Act 98 of 1978, as amended by section 26 of Act 125 of 1992

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

“Establishment of Tribunal

29. (1) The Copyright Tribunal is hereby established.

(2) The Chief Justice shall designate—

(a) three judges; and

(b) five judges, who have been discharged from active service in terms of section 3 of the Judges Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001),

as members of the Tribunal.

(3) The Minister must designate one of the persons contemplated in subsection (1) as chairperson and one as deputy chairperson.

(4) The members of the Tribunal contemplated in subsection (1) shall serve for a period not exceeding five years, which period is renewable for a further five years.

(5) The chairperson may, on one month written notice addressed to the Minister and the Chief Justice—

(a) resign from the Tribunal; or

(b) resign as chairperson, but remain as a member of the Tribunal.

(6) A member of the Tribunal other than the chairperson may resign by giving at least one month written notice to the Minister and the Chief Justice.

(7) In the event of the expiry of the term of office of a member of the Tribunal, the member has a matter pending for adjudication before the Tribunal, the member may continue to act as a member in respect of that matter only.”.

Insertion of sections 29A to 29H in Act 98 of 1978

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

“Functions of Tribunal

29A. (1) The Tribunal must carry out the functions entrusted to it in terms of this Act or any other legislation.

(2) The Tribunal may—

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

(b) hear matters referred to it by the Commission, a dispute resolution institution or any regulatory authority, only if the dispute relates to Copyright;

(c) review any decision of the Commission, dispute resolution institution or any regulatory authority if it relates to Copyright;

(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 Copyright;

(e) settle disputes relating to licensing schemes, payment of royalties or terms of agreements entered into as required by this Act or agreements entered into in order to regulate any other matter in relation to Copyright; and

(f) settle any dispute that relates to Copyright.

(3) The Tribunal does not have the power to review any administrative action by the Commission that does not relate to Copyright.

Removal or suspension of members of Tribunal

29B. The Minister may at any time, in consultation with the Minister responsible for Justice and the Chief Justice, remove or suspend a member of the Tribunal from office if such a member—

- (a) no longer qualifies to be a member of the Tribunal as referred to in section 29;
- (b) repeatedly fails to perform the duties of the Tribunal;
- (c) due to a physical or mental illness or disability, becomes incapable of performing 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 disclosure of interest

29C. (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, it appears to the member that the matter concerns a financial or other interest of the member contemplated in section 29B(d), the member 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 in that hearing.

(2) A member must not—

- (a) make private use of or profit from confidential information obtained as a result of performing his or her official duties as a member of the Tribunal; or

- (b) divulge any information referred to in paragraph (a) to a third party, except as required and as part of the official functions as a member of the Tribunal.

Proceedings of Tribunal

29D. The Minister must, in consultation with the Minister responsible for Justice, prescribe—

- (a) the form and procedure to make an application or referral to the Tribunal;
- (b) rules that determine the form and manner of proceedings before the Tribunal;
- (c) the fees applicable to proceedings before the Tribunal; and
- (d) any other matter necessary for the proper functioning of the Tribunal.

Hearings before Tribunal

29E. (1) The Tribunal must conduct its hearings in the prescribed manner and must specifically conduct its hearings—

- (a) in public;
- (b) in an inquisitorial manner;
- (c) as expeditiously as possible;
- (d) as informally as possible; and
- (e) in accordance with the principles of natural justice.

(2) Notwithstanding the provisions of subsection (1), a Tribunal member presiding at a hearing may exclude members of the public, specific persons or categories of persons from attending the hearing if—

- (a) evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;
- (b) the proper conduct of the hearing requires it; or
- (c) for any other reason that would be justifiable during proceedings in a High Court.

Right to participate in hearing

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

- (a) The Commission;
- (b) the applicant, complainant and respondent; 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 presiding at hearing

29G. 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 and place;
- (b) question any person under oath or affirmation;
- (c) summon or order any person to—
 - (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 Tribunal hearing.

Orders of Tribunal

29H. In addition to the powers in terms of this Act and the Companies 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 such prohibited;
- (b) interdicting conduct which constitutes an infringement of this Act;
- (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 this Act;

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

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

(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 relevant legislation.”.

Repeal of sections 30, 31, 32 and 33 of Act 98 of 1978

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32. Sections 30, 31, 32 and 33 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 2002 and section 5 of Act 28 of 2013

33. Section 39 of the principal Act is hereby amended—

(a) by the deletion of the word “and” at the end of paragraph (cD);

(b) by the insertion of the following paragraphs after paragraph (cE):

“(cF)prescribing rules regulating the processes and proceedings of the Tribunal;

(cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;

(cH) prescribing permitted acts for circumvention of technological protection measures contemplated in section 28B after due consideration of the following factors:

(i) The availability for use of works protected by copyright;

(ii) the availability for use of works for non-profit archival and educational purposes;

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

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

(cI) prescribing royalty rates or tariffs for various forms of use;

(cJ) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;

(cK) 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 processes of royalties by a collecting society;’’; 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 Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”.

Insertion of section 39B in Act 98 of 1978

34. The following section is hereby inserted in the principal Act after section 39A:

“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 shall be unenforceable.

(2) This section does not prohibit or otherwise interfere with open licences or voluntary dedications of a work to the public domain.”.

Insertion of Schedule 2 in Act 98 of 1978

35. The following Schedule is hereby added to the principal Act, the existing Schedule becoming Schedule 1:

“Schedule 2**(Section 22(3))**

[With respect to proposed Schedule 2, please see the comments regarding proposed Section 12B\(1\)\(f\).](#)

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 of reproduction.

Application for licence to translate copyright work

2. (1) Any person may, subject to item 4, apply to the Tribunal for 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) a foreign language that is regularly used in the Republic; 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 work in order to convert the work into a usable or analogous form of reproduction.

(3) No licence shall be granted until the expiration of the following 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 official language;

(b) three months where the application is for a licence into a foreign language in regular use in the Republic; and

(c) one year where the application is for a licence for translation into any language contemplated in sub-item (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 authorization of the copyright owner or that any previous editions in that language are out of print; and
 - (b) the applicant for the licence—
 - (i) has requested and unreasonably been denied authorization from the copyright owner to translate the copyright work; or
 - (ii) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail 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 the copyright 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 be heard.
- (3) Where—
- (a) the one-week period referred to in item 2(3)(a) applies, no licence shall be granted until the expiration of a further period of two days;
 - (b) the three month period referred to in item 2(3)(b) applies, no licence shall be granted until the expiration of a further period of two weeks; or
 - (c) the one-year period referred to in item 2(3)(c) applies, no licence shall be granted until the expiration of a further period of three months,
- calculated in accordance with sub-item (4).
- (4) The further periods contemplated in sub-item (3) shall be computed from the date on which the requirements mentioned in sub-item (1)(a) and sub-item (1)(b)(i) are fulfilled or, where the identity or the address of the copyright owner is unknown from the date on which the applicant also complies with the requirements mentioned in sub-item (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 printed or analogous form of reproduction by, or with the authorization of, the copyright owner, no licence shall be granted.

(6) For works composed mainly of illustrations, a licence shall only be granted if the conditions stipulated in sub-item (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 Part shall—

(a) be for the purpose of teaching; or

(b) be for training, scholarship or research.

(2) Copies of a translation published under a licence may be sent abroad by the government or a public entity if—

(a) the translation is into a language other than a language regularly used in the Republic;

(b) the recipients of the copies are individuals who are South African nationals or are organizations that are registered in the Republic;

(c) the recipients will use the copies only for the purposes of teaching, scholarship or research; and

(d) both the sending of the copies abroad and their subsequent distribution to the recipients are without any commercial purpose.

(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 efforts to 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 the use contemplated in the licence and all published copies must include the following:

- (a) The original title and name of the copyright owner of the work;
- (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 work was published with a copyright notice, a reprint of that notice.

(6) The licence shall terminate if a 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 reproduction in the Republic at 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 are exhausted.

Licence for broadcasting organization

5. (1) A licence under this Part may also be granted to a domestic broadcasting organization if the following conditions are met:

- (a) The translation is made from a copy made and acquired in accordance with the laws of the Republic;
- (b) the translation is for use in 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 intended for recipients in the Republic;
- (d) sound or visual recordings of the translation may only be used by broadcasting organizations with their headquarters in the Republic; and

(e) all uses made of the translation are without commercial purpose.

(2) A broadcast contemplated in sub-item (1) includes a broadcast made 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 organization under all of the conditions provided in sub-item (1) to translate any text incorporated in an audiovisual work that was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Part B

Reproduction Licences

Application of provisions in Part B

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

Application for licence to 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 in printed 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 sciences including mathematics;

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

(c) five years for all other works.

Granting of licence

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

(a) no distribution by, or with authorization of, the copyright owner of copies in printed or analogous forms of reproduction of that particular edition has taken place in the Republic to the general public or in

connection with systematic instructional activities, at a price reasonably related to that normally charged in the Republic or that, under the same conditions as contemplated in the licence to be granted, such copies have not been on sale in the Republic for a continuous period of at least six months; and

(b) the applicant for the licence—

(i) has requested, and unreasonably been denied, authorization from the copyright owner; or

(ii) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail 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 the copyright owner is known and can be located, no licence shall be granted unless he or she has been given an opportunity to be heard.

(3) Where the three-year period referred to in item 2(2)(a) applies, no licence shall be granted until the expiration of six months calculated from the date on which the requirements mentioned in sub-item (1)(a) and sub-item (1)(b)(i) are fulfilled or, where the identity or the address of the copyright owner is unknown, from the date on which the applicant also complies with the requirements mentioned in sub-item (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 sub-item (1)(b)(ii) have been mailed.

(5) If, during the period of six or three months referred to in sub-item (3) or (4), any distribution or sale as contemplated in sub-item (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 the subject of the application 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 authorization of the copyright owner.

Scope and condition of licence

4. (1) Any licence under this Part shall—

- (a) be for use in connection with systematic instructional activities only;
- (b) allow publication only in a printed or analogous form of reproduction at a price reasonably related to or lower than that normally charged in the Republic for comparable work; and
- (c) allow publication within the Republic only and shall not extend to the export of copies made under the licence.

(2) If the Tribunal is satisfied that facilities do not exist in the Republic to do the printing or reproduction or that existing facilities are incapable for economic or practical reasons of ensuring such printing or reproduction, and the contract between the prospective licensee and the establishment doing the work of reproduction so requires, the Tribunal may allow reproduction outside the Republic: Provided that—

- (a) all copies reproduced are to 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 the establishment doing 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 is done;
- (c) the prospective licensee may not entrust the work of reproduction to an 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 licence is transferable.

(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 the Republic and copyright owners in the Republic.

(3) 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 efforts to ensure 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 the following:

(a) The title and name of the owner 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) if the edition which is reproduced bears a copyright notice, a reprint of that notice.

(5) The licence shall terminate if—

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

(b) by or with the authorization 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 the licence.

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

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 in the Republic.’’.

Amendment of certain expressions in Act 98 of 1978

36. 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.

Transitional provision

37. (1) Any reference in the Copyright Amendment Act, 2019, to the phrases “indigenous cultural expressions” or “indigenous community” shall only be effective upon the date on which the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013) becomes operational.

(2) Until the date of commencement of the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013), ‘**Commission**’ means the Commission established in terms of section 185 of the Companies Act, 2008 (Act No. 71 of 2008).

Short title and commencement

38. (1) This Act is called the Copyright Amendment Act, 2019, and subject to subsection (2), comes into operation on a date fixed by the President by proclamation in the *Gazette*.

(2) The following sections come into operation on a date fixed by the President by proclamation in the *Gazette*, which date may not precede the commencement of the regulations relevant to each of the sections respectively:

- (a) Section 5, in respect of the insertion of section 6A(7);
- (b) section 7, in respect of the insertion of section 7A(7); and
- (c) section 9, in respect of the insertion of section 8A(5).

MEMORANDUM ON THE OBJECTS OF THE COPYRIGHT AMENDMENT BILL

1. BACKGROUND

- 1.1. The Copyright Amendment Bill (“the Bill”) seeks to align copyright with the 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 are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. For this reason, a need exists for Intellectual Property (“IP”) legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with 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 Government was called to address.
- 1.2. The Bill is consistent with the Draft National Policy as commented on and the 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 coherence in aligning the approach of various Government Departments to IP matters. The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual Property Organization (“WIPO”) digital treaties namely the WIPO Copyright Treaty (“WCT”); the WIPO Performance and Phonograms Treaty (“WPPT”); the Beijing Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The alignment is for purposes of ensuring effective governance, social protection, employment creation and reduction of inequalities.
- 1.3. The amendment of the Act means that South Africa will be able to accede to international treaties and conventions which require domestic legislation to be

consistent with international imperatives.

2. OVERVIEW OF BILL

2.1. The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. It is also envisaged that the proposed legislation will reward and incentivise authors of knowledge and art. Various sectors within the South African Copyright regime are dissatisfied. 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 improved exceptions and limitations into Copyright law. The Bill also aims to 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 creative industry.

2.2. The objectives of the Bill are—

2.2.1. to develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa;

2.2.2. to address the licensing of copyright works or material in relation to commissioned work to facilitate commercial exploitation by any person so licensed.

2.3. The Bill introduces provisions which deal with matters pertaining to Collective Management. Collecting Societies will only be allowed to collect for their registered members, and all Collecting Societies have to be accredited with the Companies and Intellectual Property Commission (“CIPC”).

2.4. The Bill deals with the protection of works and rights of authors in the digital environment.

2.5. The Bill provides for the availability of accessible format copies 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,

dyslexia etc.

- 2.6. The Bill introduces an Artist Resale Royalty. This resale right means that an artist could be entitled to a royalty even when their work is resold.
- 2.7. Scope is left for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty. Limited circumstances have been provided for in this regard. Furthermore, this provision stipulates the factors that need to be considered in determining whether the use of a copyright amounts to fair use.
- 2.8. The Bill proposes the strengthening of the Copyright Tribunal.

3. ANALYSIS OF BILL

- 3.1. Clause 1 of the Bill proposes the insertion into the Act of a range of new definitions necessitated by certain amendments embodied in the Bill.
- 3.2. Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.
- 3.3. Clause 3 of the Bill proposes an amendment to section 5 of the Act by also providing for ownership by local organizations that may be prescribed.
- 3.4. Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a literary or 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 work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.5. Clause 5 of the Bill inserts a new section 6A specifically providing for royalty sharing after assignment of copyright in a literary or musical work or where the author of a literary or musical work authorized another to do any of the acts contemplated in section 6.
- 3.6. Clause 6 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 internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

- 3.7. Clause 7 of the Bill inserts a new section 7A specifically providing for royalty sharing after assignment of copyright in an artistic work or where the author of an artistic work authorized another to do any of the acts contemplated in section 7. It also provides in sections 7B to 7E for the resale, duration, assignment or waiver of royalty rights. It also provides for authors to enjoy the inalienable resale royalty right on the commercial resale of his or her work of art, subsequent to the first assignment by the author of such work of art.
- 3.8. Clause 8 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 internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.9. Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing after assignment of copyright in audiovisual works or where the author of an audiovisual work authorized another to do any of the acts contemplated in section 8.
- 3.10. Clause 10 of the Bill proposes an amendment to section 9 of the Act providing for communication to the public of a sound recording 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 work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.11. Clause 11 of the Bill proposes the substitution of section 9A of the Act. It requires the recording and reporting of any act contemplated in section 9(c), (d) or (e) and makes the failure to do so, an offence. It also makes certain amendments related to the parties involved in determining the royalty amount, and for referral to the Tribunal.
- 3.12. Clause 12 of the Bill proposes the repeal of section 12, in order to provide for exceptions in all works, rather than only in literary and musical works.
- 3.13. Clause 13 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection, section 12B providing for specific exceptions and section 12C providing for the

permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process. It also proposes the insertion of section 12D providing for exceptions related to educational and academic activities.

- 3.14. Clause 14 of the Bill proposes an amendment to section 15 of the Act to provide for panorama and incidental use exceptions.
- 3.15. Clause 15 of the Bill proposes an amendment to section 16 of the Act, providing for the deletion of subsection (1).
- 3.16. Clauses 16 and 17 proposes the repeal of sections 17 and 18 of the Act, respectively.
- 3.17. Clause 18 of the Bill proposes the repeal of section 19A of the Act.
- 3.18. Clause 19 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 computer program shall be entitled, without the authorization of the copyright owner, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he or she does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to do.
- 3.19. Clause 20 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 exceptions regarding protection of copyright work for persons with disability.
- 3.20. Clause 21 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, 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.
- 3.21. Clause 22 of the Bill proposes an amendment to section 21 of the Act by providing for the ownership of any copyright subsisting in the work between the person commissioning the work and the author who executes the commission. It further provides for the protection of the author by allowing an application to the Tribunal where the work is not used, or not used for the purpose of the commission.

- 3.22. Clause 23 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned. It also provides a reversion right for where copyright in a literary or musical work was assigned by an author to a publisher.
- 3.23. Clause 24 of the Bill proposes the insertion into the Act of a new section 22A, making provision for assignment and licences in respect of orphan works.
- 3.24. Clause 25 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation and regulation of Collecting Societies. It also provides that where a person intentionally gives him or herself out as a Collecting Society, that person commits an offence.
- 3.25. Clause 26 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.
- 3.26. Clause 27 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. It also provides for an increase in penalties for penalties where the convicted person is not a natural person.
- 3.27. Clause 28 of the Bill proposes amendments to section 28 of the Act, which provides for the copying of a work to constitute an infringement of copyright, if such copying would have constituted infringement in the country in which the work was made.
- 3.28. Clause 29 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 and exceptions.
- 3.29. Clauses 30 and 31 of the Bill amend section 29 and propose the insertion of sections 29A to 29H into the Act, which provide for, amongst others, the strengthening of the Copyright Tribunal; its functions; appointment of its

members; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal.

- 3.30. Clause 32 of the Bill proposes the repeal of sections 30, 31, 32, 33 and 36 of the Act.
- 3.31. Clause 33 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 Collecting Societies.
- 3.32. Clause 34 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purport to renounce a right or protection afforded by the Act will be unenforceable.
- 3.33. Clause 35 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.
- 3.34. Clause 36 provides for the amendment of the expressions “cinematographic film” and “film”.
- 3.35. Clause 37 provides for transitional provisions related to terms inserted in the Act by the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013).
- 3.36. Clause 38 of the Bill provides for the short title and commencement.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

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

5. FINANCIAL IMPLICATIONS FOR STATE

- 5.1. Any financial requirement will be accommodated within the existing budget.

6. PARLIAMENTARY PROCEDURE

Tagging

- 6.1. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) distinguishes between four categories of Bills: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it would be constitutionally invalid.
- 6.2. The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.
- 6.3. 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. The Constitutional Court in its judgment stated as follows:

“[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 functional area listed in schedule 4’. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This ‘involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.’” (footnote omitted).

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with 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 its content.”

¹ 2010 (8) BCLR 741 (CC)

- 6.4. 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.
- 6.5. The Act regulates copyright. In terms of section 2 of the Act, and subject to the provisions of the Act, the following works, if they are original, are eligible for copyright, namely literary works, musical works, artistic works, audiovisual works, sound recordings, broadcasts, program-carrying signals, published editions and computer programs.
- 6.6. The Bill, amongst others things, seeks to provide for certain exceptions in respect of infringement of copyright for educational purposes, e.g. the new section 13B [clause 12 of the Bill] which regulates the making of copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose. “Education at all levels, excluding tertiary education” is a functional area listed in Schedule 4 to the Constitution. The Bill also proposes general exceptions regarding protection of copyright work for archives, libraries, museums and galleries. “Archives other than national archives”, “Libraries other than national libraries” and “Museums other than national museums” are functional areas listed in Schedule 5 to the Constitution. The question is whether or not the abovementioned provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4 or 5. The purpose of the Bill is to regulate copyright and not to regulate any matter falling under the functional areas in question. The Constitutional Court, in paragraph 71, stated the following with regard to the test for tagging:
- “[71] . . . the ‘substantial measure’ test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.” (emphasis added).
- 6.7. 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.
- 6.8. 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

6.9. 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 its comments.”.

6.10. 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 Traditional Leaders.



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Copyright Blind Spot

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INTRODUCTION

Blind people are at a distinct disadvantage and face serious challenges when it comes to reading the written word. They need written text to be rendered in braille or in electronic form to permit a text-to-speech functionality with easy navigation across the text. Unfortunately, such adapted-for-disability-utility versions of written text are in short supply or are not always optimally operational. The international community, and more particularly the World Intellectual Property Organization (WIPO), has embraced this plight of the blind. WIPO has fathered the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT). It was adopted on June 27, 2013 and came into force on September 30, 2016. The MVT is intended to mitigate the effects of the exclusive rights under copyright of authors in relation to their literary works by allowing those works to be reproduced in an adapted-for-disability-utility format without their authority in certain circumstances. South Africa is currently not a party to the MVT.

The objective of making adapted-for-disability-utility versions of written texts freely available for the use of the visually impaired is a worthy cause in principle. There is merit in introducing provisions into our copyright law to facilitate this by means of making an appropriate exception to the ambit of the copyright in literary works. The Department of Trade and Industries (DTI) has attempted to achieve this but has gone about doing so in an inept manner, which has thus far not been successful. The writer will address this question. In doing so, for simplicity, the example of texts converted to braille will be used but the same considerations apply to all forms of disability-utility versions of written text. References to braille apply *mutatis mutandis* to all such other forms. But first it is necessary to outline the lie of the land.

RATIONALE OF COPYRIGHT

Copyright is a body of law which provides creators of written and other works with the power to exercise control over the commercial exploitation of their works. The rationale is to place authors in a position to derive material benefits from the fruits of their labours in creating original works, thus providing them with a means for deriving income and incentivizing them to create more and better works for the benefit of all. In practice this is commonly achieved by enabling authors to charge royalties for the commercial exploitation of their works. However, this power of authors has the

potential to inhibit the availability of works, which can be contrary to the public good in some circumstances. Legislators have thus found it desirable to weigh up the private rights of authors (bearing in mind the purpose of copyright) against the public interest. The outcome is that copyright legislators make exceptions to the exclusive right of authors in certain defined circumstances in which it is deemed that the public interest outweighs the merits of the right of authors. This system is recognized, approved world-wide, and regulated in various international treaties, the most important of which are the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), a WIPO instrument, and the Agreement on Trade-Related Aspects of Intellectual Property Right (TRIPS), an instrument of the World Trade Organization (WTO). South Africa is a party to both these international treaties and is bound by them.

Care must be taken in granting exceptions to the authors' rights that they are not excessively eroded otherwise there is the risk of killing the goose that lays the golden egg.

Both the Berne Convention and TRIPS provide that the exceptions to authors' exclusive rights which they countenance must be subject to the so-called "three-step test", namely, (1) they must cover only certain special cases, (2) they must not conflict with the normal exploitation of the work, and (3) they must not unreasonably prejudice the legitimate interests of the rightsholder. The MVT, itself, is in effect an approved exception to authors' rights and, unsurprisingly, it specifically applies the three-step test in its provisions.

THE COPYRIGHT ACT

The law of copyright in South Africa is regulated by the Copyright Act, 1978. It has been amended substantively nine times since 1978, with the most recent amendment being in 2002. The Act, which was strongly based on the British Copyright Act of 1956, and is in conformity with the Berne Convention (often repeating the Convention's exact wording) and TRIPS, was state of the art in international terms at the time of its adoption. It is, however, deprecatingly referred to by its detractors as "dating from the Apartheid era" (as though this somehow renders it malevolent). While this may be true of the chronology of the year in which it was enacted, in no way can this Act be considered to have been tainted by the Apartheid policy or practices. It was good, sound copyright law at the time and for decades thereafter. However, like our secondary roads and their potholes, and our intermittent electricity supply, it has suffered from lack of proper maintenance and adequate preservation. It has now become badly outdated, particularly in its ability to deal properly with electronic works and digital communications.

The scope of the exceptions to authors' exclusive rights has also become too limited in the modern environment. The Act has fallen way behind the laws of peer countries like Australia and Canada. It requires substantial amendment, or perhaps to be replaced in its entirety by a new state of the art Act.

COPYRIGHT AMENDMENT BILL

To its credit, the DTI, which administers the law of copyright, perceived the necessity of updating the Act. A few years ago, it produced a draft amending Act. By virtue of the strong (justified) criticisms it elicited, it was redrafted several times. Despite the DTI's efforts, the draft Bill remained an abomination. It was poorly drafted and exhibited a lamentable lack of appreciation of the principles of copyright law and of the basic tenets of legal draftsmanship. When the Bill came before the Parliamentary Committee on Trade and Industry for consideration, the committee rightly recognized its poor quality and it decided to redraft the Bill itself.

It is said that a camel is a horse designed by a committee. Alas, the Parliamentary Committee, aiming at a horse, designed a five-legged, clumsy camel. While it was an improvement on the abominable beast designed by the DTI, it was very far from being an acceptable piece of legislation. The draft Bill was passed by Parliament and was sent to President Ramaphosa for signature, whereupon it would become law, in March 2019. Fortunately, President Ramaphosa was alerted to the shortcomings of the Bill and has thus far declined to sign it. In June 2020 he sent the Bill back to Parliament for reconsideration. The future course of the Bill is unclear. Hopefully,

Parliament will send it back to the drawing board, whereupon the drafting process ought to start afresh and be undertaken by a small working group of true copyright experts.

FAIR USE DOCTRINE

Amongst the chief shortcomings of the Bill is the introduction of its own adaptation of the American principle of “fair use” to the issue of exceptions to the author’s exclusive rights. The principal criticism of the Bill, and vehement objections to it by many legal scholars and specialist legal practitioners, authors, as well as businesspeople in the copyright industries, relate to this issue.

It is fair to say that some American doings and systems, like the weird and convoluted voting procedure for presidential elections, gun laws, and grid-iron football, are not suitable for export beyond the borders of America due to their odd and alien nature. The “fair use” doctrine is such a phenomenon. It is consonant with legal measures and procedures peculiar to American copyright law and practice that do not find expression in South African copyright law and practice. It is thus not adapted for incorporation into our law on this score alone. It is like taking an indigenous form of vegetation from one territory and introducing it into another environment in which it is alien. In its indigenous environment there are climatic and other natural forces that keep it in check. However, when it is introduced into its new environment with different climatic and other natural characteristics, it can run amok and become a pest.

It is believed in informed copyright circles that the American colossus, Google, like some imperial dictator, is seeking to create colonial copyright territories in South Africa and other parts of the world by implanting the American “fair use” doctrine in their copyright laws. This subjugation is being done to serve its own interests in the true colonial tradition. South Africa does not belong in this empire.

“Fair use” entails the court being granted a very wide latitude, subject to certain criteria, to determine just about any form of use (or misuse) of a copyright work, on an ad hoc basis, as constituting a permissible and legitimate form of unauthorised use of that work. “Fair use” is what any judge, in his wisdom and discretion, decides in a particular instance should not be the preserve of the copyright owner. It places copyright owners at the whim of individuals who may, or may not, have any schooling in copyright. It has the capacity to undermine the very foundations of copyright by seriously watering down the exclusive rights of copyright owners and emasculating them. It can have the effect of a virus that destroys from within. Perhaps this suits the interests of copyright colonialists and lies behind their invasive designs.

The American “fair use” doctrine provides fertile ground for litigation in view of its vagueness and the uncertainty that it creates (the law is what the judge says it to be). Would-be copyists can take advantage of this situation and indulge themselves secure in the knowledge that copyright litigation is expensive and complicated in South Africa and can barely be afforded by many impecunious authors. This certainly does not serve the public interest in the big picture.

It is doubtful whether the American approach complies with the three-step test and whether America is therefore in compliance with its obligations under the Berne Convention and TRIPS. It should be mentioned that American copyright law with its “fair use” system was in operation for centuries before America joined the Berne Convention, as a late comer, in March 1989. Its copyright law was not inspired by the Berne Convention (dating from 1886), unlike British law-based and European copyright laws, and was home grown, out on a limb from the rest of the world. America may be too important and influential to be labelled as non-conforming to the Berne Convention or to be excluded from membership on the basis that its copyright law is errant in some respects, especially when that membership had been solicited for so many years. Unfortunately, South Africa does not enjoy a similar status and would not be given the same latitude.

THE “FAIR DEALING” PRINCIPLE

By contrast with the doctrine of “fair use,” our Copyright Act deploys so-called “fair dealing” with a work in creating exceptions in certain carefully circumscribed and special cases set forth in the legislation. These are cases where the legislature considered that works should be available for

use outside the constraints of copyright restrictions in the public interest. These exceptions enjoy the considered approval of the lawmakers after canvassing public opinion. The “fair dealing” approach is inspired by the international three-step test and is followed by all countries whose copyright laws have their roots in British law. It has the merit of relative legal certainty with its measures enjoying public approval, as opposed to the somewhat arbitrary judge made ad hoc discretionary determinations which characterize the American “fair use” doctrine.

Not only does the Copyright Amendment Bill contain provisions introducing the alien “fair use” doctrine, but to exacerbate the matter it also seeks to overlay the Copyright Act’s “fair dealing” provisions, as well as further specific exceptions contained in the Bill, with the “fair use” system. This would mean that two very different approaches to limiting copyright owners’ rights would vie with each other in the amended Copyright Act. This would be an infallible recipe for confusion and legal uncertainty. Litigation would undoubtedly proliferate.

EXCEPTION IN FAVOUR OF THE VISUALLY IMPAIRED

While it is bad law, the Copyright Amendment Bill nevertheless has some good points. On the whole its sentiments (with a few notable exceptions, like “fair use”) are reasonably sound. It is largely the formulation and expression that are defective. A salutary aspect of the Bill is the introduction of section 19D, which provides for exceptions to the author’s exclusive rights in favour of persons with disability. The section purports to give effect to the MVT with the clear objective of enabling South Africa to accede to it. It is problematical whether Section 19D in its present guise in fact does justice to the MVT, but for the present purposes it will be postulated that it does so or will be brought fully into line with it for the purposes of the measures which will be suggested (consideration of this question is beyond the scope of the present discussion). Granting this protection in our Copyright Act is a condition precedent for such accession. This is a laudable initiative. Section 19D must be viewed against the background of the tension between “fair use” and “fair dealing”.

In essence, Section 19D (as varied as contemplated above, if necessary) is in the nature of a “fair dealing” provision. Importantly, (so it will be assumed) it meets the three-step test. Subject to it being completely in conformity with the MVT it can pass muster.

The problem is that the introduction of this exception into our law, while being perfectly legitimate, generally accepted, and in keeping with international norms, is being held up and stymied by the unacceptable nature and quality of the Amendment Bill, in particular its devotion to the alien “fair use” doctrine. One can understand the chagrin and frustration of Blind SA, the chief proponents of the exception, at their efforts to introduce it being thwarted in this manner. Through the agency of the public interest organization, Section 27, they have launched litigation in the Pretoria High Court seeking an order compelling the government to read section 19D in the Amendment Bill into the Copyright Act, without amending legislation, on the grounds that without this provision the Copyright Act is unconstitutional. This is an extraordinary and startling proposition, and the outcome of the litigation is uncertain. Furthermore, it is likely to take a considerable period, perhaps a year or more, before finality is reached in this litigation. With respect, it is not necessary for Blind SA to go to these lengths in order to fulfill their aspirations. An acceptable viable solution is at hand but has not been recognized. Stake holders and interested parties in respect of the proposed amendments to the Act (including the DTI, its sycophants and minions who frantically campaign for the introduction of the “fair use” principle, as well as Blind SA) seem to have a blind spot when it comes to understanding the Copyright Act. They are looking without seeing.

SECTION 13 REGULATIONS

The “fair dealing” provisions of the Copyright Act are contained in Section 12. The section specifies those limited instances in which the exclusive rights of authors are circumscribed. This section is now outdated, and it must be expanded to cater for modern requirements, particularly in the electronic and digital areas. A future properly considered amending act should address this question. Importantly, Section 12 is supplemented by Section 13.

Section 13 deals with general exceptions in respect of the reproduction of works. It empowers the Minister of Trade and Industries to make regulations allowing reproductions to be made of works without obtaining permission from the copyright owners in specific cases. These exceptions are required by the Section to not conflict with a normal exploitation of works and not to be unreasonably prejudicial to the legitimate interests of the copyright owners. In other words, the specific exceptions created by the Minister must comply with the three-step test. To date the Minister has made regulations allowing unauthorised reproductions (i.e., has created exceptions to copyright protection) in the case of reproductions by libraries or archives, multiple copying by libraries and archives, reproductions for purposes of education, and reproductions of building plans by local authorities. These are all special clearly-circumscribed cases as contemplated by test (1) of the three-step test and are in the nature of “fair dealings.”

The current provisions of Section 19D of the Amendment Bill (as revised and amended as suggested above) could comfortably be accommodated in regulations made by the Minister in terms of Section 13 of the Copyright Act. Section 19D deals essentially with the reproduction of literary works by converting them to braille. To the extent that Section 19D deals with manners of use of braille texts which do not amount to *reproduction* of works (e.g., supplying or distributing braille versions to others) no exceptions are required because those other manners of use do not currently fall within the ambit of the copyright in literary works and performing them without authority does not impact on the rights of the copyright owner and is perfectly legitimate under the law. Since compliance with the three-step test is built into the MVT, as long as the regulations stay true to the MVT there can be no doubt that they will comply with the three-step test and will thus be valid and not *ultra vires* the parameters laid down in Section 13. The terminology used in the regulations ought to be consistent with standard and recognized South African copyright terminology, in contrast to some of the unusual terminology used in Section 19D, in order to achieve consistency and clarity of interpretation.

Regulations could be proclaimed by the Minister of Trade and Industries in a matter of weeks. Accordingly, the way forward will be for him to draft and publish expeditiously regulations in terms of Section 13 conforming with the MVT. The desired exception could be in place very shortly. This will meet the aspirations of Blind SA and make their pending court case unnecessary. It will also qualify South Africa to accede to the MVT. There ought to be no reluctance on the part of the Minister to make such regulations. Having recourse to regulations under Section 13 will also make it possible to create other specific exceptions to copyright restrictions on making reproductions if deemed appropriate, provided they comply with the three-step test. This will necessarily exclude provisions purporting to create “fair use” exceptions since they will not satisfy the three-step test.

It is preferable that the proposed regulations should be viewed as an interim measure, and when, and if, a proper sound, amending act is drafted and passed by Parliament in the future it should contain a section approximating to Section 19D and giving full effect to the MVT. At that stage it may be necessary for the exception to deal with other forms of use of works besides reproduction. Such a section would supersede the regulations and they could be withdrawn, having served their purpose.

CONCLUSION

A lesson to be learned from this is that one should not be prejudiced against the current Copyright Act and condemn it before carefully studying and understanding it. Although now outdated in some respects, it continues to have merit. The timing of its adoption in 1978 and the political dispensation that applied at that time are purely incidental.

[Owen Dean](#)

14 April, 2021.

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