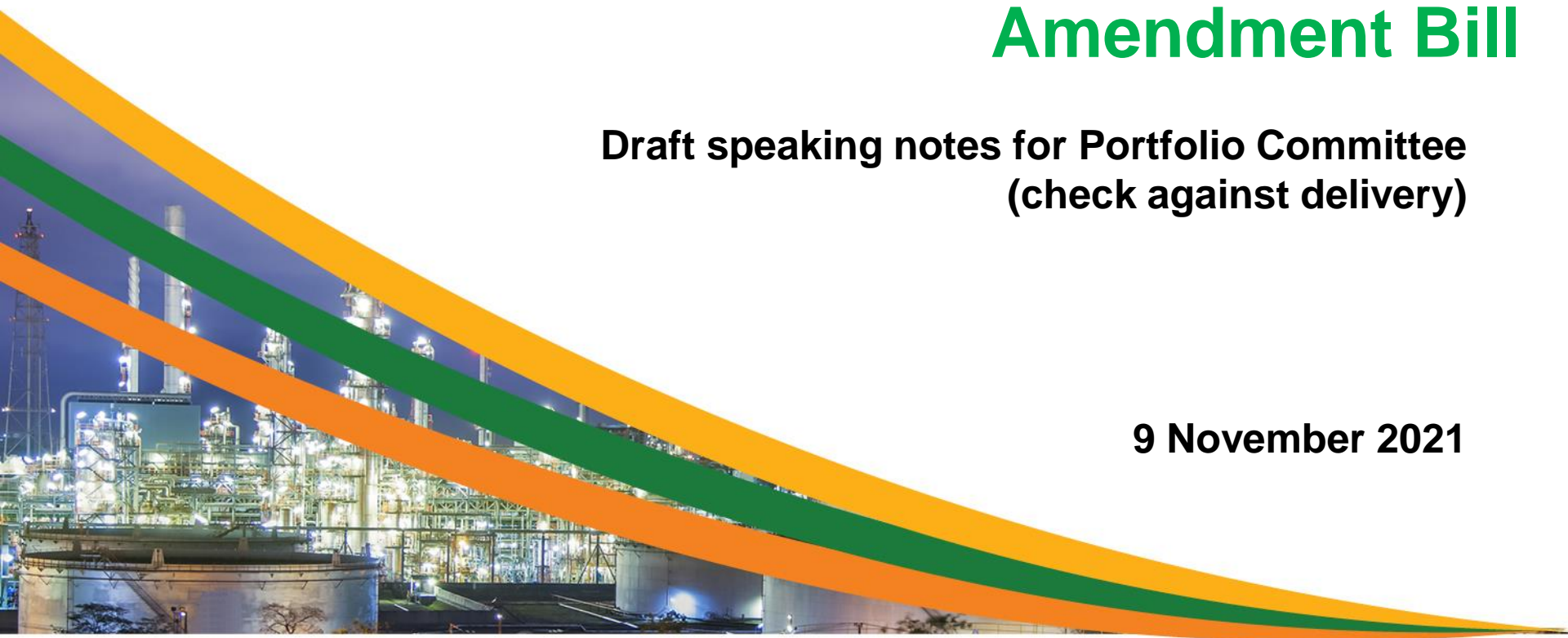


Copyright Amendment Bill and Performers' Protection Amendment Bill

Draft speaking notes for Portfolio Committee
(check against delivery)

9 November 2021



the dtic

Department
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

the dtic - together, growing the economy

the dtic Customer Contact Centre: 0861 843 384

the dtic Website: www.thedtic.gov.za



Part 1: Introduction

1. The Copyright and Performers' Protection Amendment Bills provide for a number of significant measures relating to intellectual property rights and cover key products (which the Bills refer to as 'works') that are used in society and the economy, such as, books, music, movies, photographs, sculptures and architectural designs; and their digital equivalents. The Bills clarify the commercial rights of parties and also address a challenge relating to the potential imbalance in power between parties in the contractual relationships that arise between originators of creative works and owners of the copyright to those works, and the negative developmental outcomes that arise from this.
2. The Bills were developed by **the dti** (predecessor to **the dtic**) following a lengthy period that stretched over 10 years, which included setting up a Copyright Review Commission to research, review and recommend on matters relating to the regulation of aspects of intellectual property in the music industry. In the period before the Bills were submitted to Parliament, the Department undertook consultation with stakeholders and invited public comment on early versions of the Bills, attracting a reported 122 submissions. A Conference was held in August 2015 and attended by more than 300 stakeholders on drafts of the Copyright Amendment Bill.

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3. Following approval by Cabinet, the Bill was submitted to Parliament in 2017, considered by the PC and amended during the parliamentary process based on public comments, consultations, legal advice and discussion in the PC and it was thereafter adopted by both the National Assembly during the term of the 5th Parliament, on 5 December 2018 and the NCOP, on 28 March 2019 respectively.
4. The Bills were thereafter sent to the President for assent, who following advice and consideration, including the views of affected Departments and legal advice obtained, concluded that there may be constitutional challenges with the Bills and has referred the Bills back to Parliament under s79(1) of the Constitution.
5. In the letter to Parliament, dated 16 June 2020, the President noted as follows:
“In considering the numerous and varied submissions made and the process followed in Parliament to pass the Bills, I have a number of reservations as to the constitutionality of the Bills, These reservations lead me to conclude that, in its present form, the Bill may not pass constitutional muster and may therefore be vulnerable to constitutional challenge. I set out below those constitutional matters that require reconsideration so that these important statutes achieve their intended purpose without the risk of being set aside by the courts. I raise the constitutional issues ... mindful of the noble objectives of the amendments and with the intention that these objectives may yet be achieved in a manner that accommodates the visually impaired, educators, students and others who are meant to benefit from their provisions without opening the statutes to future constitutional challenges, which would further impact on the very access the Bill seeks to facilitate.”



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6. Six specific concerns were identified:
 - Incorrect Tagging
 - Retrospective and arbitrary deprivations of property
 - Impermissible delegation of legislative power to the Minister
 - Public participation in fair-use clause
 - Copyright exceptions
 - International Treaty implications

7. The Portfolio Committee's consideration of the Bills was based on the referral by the President. In the words of Parliament's Joint Rules: "The Committee must consider and confine itself to the President's reservations". We are advised that the focus is therefore on the constitutionality of the clauses affected by the President's reservations, not on whether in general the policy choices and trade-offs made in the Bill are appropriate or optimal. The Committee is thus limited to this review and we are advised would not, in this process, have the power to make changes to the Bills other than to the extent that they address the constitutionality issues raised by the President. We note this because it informed the comments that the Ministry and department made in August 2020.



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8. The Portfolio Committee received a detailed submission from the Department and Parliament's legal advisors and further considered the matter. The outcome was that the Portfolio Committee decided that the Bills should be retagged as section 76 Bills; and that the retrospective provisions of the Bill and the linked delegation of legislative power to the Minister, should be removed. These reservations raised by the President are thus settled in view of the decision of the Portfolio Committee and no further comment is made in this submission to these three reservations.
9. A public participation process was initiated for the remaining three reservations, namely:
 - a) The extent of public participation in providing comment on the fair-use clause;
 - b) Constitutional concerns relating to copyright exceptions; and
 - c) The implications of the proposed law on SA's international Treaty commitments.

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10. Public hearings and submissions

- a) We are advised that 91 organisations/individuals made submissions and 33 stakeholders made representations in the Parliamentary public hearings of 11 and 12 August 2021. The Department scrutinised the submissions and obtained the view of a panel of experts set up by the Ministry. The Panel members were Dr Tobias Schonwetter, an Associate Professor and the Director of the Intellectual Property Unit at the University of Cape Town's Law faculty; Associate Professor Malebakeng Forere from the School of Law at the Witwatersrand University and Judge Dennis Davis, a respected jurist with experience on matters of copyright. This document seeks to identify broad categories of issues that emerged from the public hearings, and which in the opinion of the Department or members of the Panel of Experts, required a response. The names of stakeholders are not included in this response and the issues were considered in the context of the President's reservations.
- b) The President raised concerns with section 12A, section 12B(1)(a)(i), section 12B(1)(c), section 12B(1)(e)(i), section 12B(1)(f), section 12D, section 19C(3), section 19C(4), section 19C(5)(b), section 19C(9). The PC advertised section 12A, 12B, 12C, 12D, 19B, 19C.
- c) The President's letter raised concerns about SA's international treaty obligations in the context of the Bill's provisions. The public was invited to make submissions on the alignment of the Bills to the obligations set out in the international treaties.

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11. The PC will now consider these public submissions. From the advice the Department received, the criteria that the PC of the National Assembly will need to apply in considering the relevance of submissions, will be informed by the following:
 - a) First, in respect of concerns regarding the lack of an opportunity for the public to comment on the fair-use provisions that were changed during Committee stages, without public hearings, the PC has now provided an opportunity for parties to express their views and it should make a decision on the substance of the concerns raised. The relevant issues identified by the Department in this regard are set out in Part 2 below.
 - b) Second, on the concerns regarding constitutionality of the copyright exceptions, the PC must decide whether it agrees with those representations that address this concern, and if it decides that it does agree, it is obliged to amend the text of the Bills to take account of the constitutional concern. The relevant issues identified by the Department in this regard are set out in Part 3 below.

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- c) Third, on the concerns raised regarding breaches with obligations in Treaties that SA is bound by, the PC will need to take a view on the legal question, whether a Bill may be remitted based on a breach of Treaty obligation, and if the answer is yes, Parliament will need to consider the Representations made and determine whether any of them require amendment of the text of the Bills. The relevant issues identified by the Department in this regard are set out in Part 4 below.
- d) Finally, where representations address policy choices made in the Bills that do not raise constitutional concerns in line with the President's remittal, or simply seek to improve the wording in the original drafting per se, the National Assembly on advice received, is unable to address these concerns in the present process - except insofar as they may relate to matters arising from the consultation defect iro fair-use provisions set out in (a) above - as it is bound to a narrower focus for a remitted bill.

Part 2: Public Participation in consideration of fair-use clause

1. **THE ISSUE:** Intellectual property regimes across the world permit use of copyrighted material – but they do so using different legal approaches, which in turn may have very different impact in markets.
 - a) Some countries use what is called ‘fair dealing’, which provides for the law to set out the finite list of exceptions to copyright infringement. Great Britain for example follows the fair dealing approach.
 - b) Some countries use what is called ‘fair use’, which sets limits on the exclusive rights of a copyright holder and provide for access to copyright materials in the public interest
 - c) Fair Use is a doctrine under copyright law that permits certain uses of a work without the copyright holder’s permission, for example in news reporting, or scholarship and research, or when making comment on a published work. It allows users to make use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder.

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- d) The most prominent proponent of fair use is the United States, which also in its law provides for a more open-ended set of examples of what constitutes fair use, using the words “such as..”. This provides greater flexibility to enable its application in circumstances not foreseen at the time the legislation was passed.
- e) The draft Bill introduced in the Committee had a formulation that used the term ‘fair use’ but then provided a closed list of exceptions. During the public comments period, a number of representations were made that the fair use concept, or a hybrid concept leaning towards fair use, should require an illustrative list rather than a closed list of instances. Following discussions in the Committee, the PC resolved to support amendments to be drafted to give effect to the fair use approach or a hybrid model leaning towards fair use.
- f) The original provision in the introduced Bill reads: “In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, **for the following purposes**, does not infringe copyright in that work.”
- g) The revised provision in the current Bill reads: “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,”

Part 2: Public Participation in consideration of fair-use clause

- 2. THE PRESIDENT'S CONCERNS:** The heart of the President's concerns relate not to the content per se, or to consultation in general, but to the adequacy of public consultation on the **changes made** by the Committee during the process of reviewing the Bill, pertaining to the revisions in the fair use clause. The President held that the changes were far-reaching and ought to have been accompanied by further opportunities to the public to comment.

Part 2: Public Participation in consideration of fair-use clause

3. THE APPROACH AT THE TIME THE BILLS WERE CONSIDERED:

- a) The Copyright Amendment Bill was developed through a consultative parliamentary process, stretching over two years, where a diverse set of stakeholders and constituencies were active participants. A number of public hearings were held over an 18 month period in the National Assembly where both written and oral comment was sought on the objectives and the efficacy of the Bills and written submissions were received in the National Council of Provinces. More than 250 written submissions were received by the relevant parliamentary committees.
- b) Following the various submissions, changes introduced were at the request of the Committee, taking into account the public comments received. The Committee was of the view that the changes it introduced were consistent with the policy framework that informed the original Bill, gave effect to public comments and thus did not require further consultation.
- c) The Department, OCSLA and Parliamentary legal Advisors cooperated to give effect to a redraft as requested by the Committee and this was incorporated in a further version of the Bill. In their view at the time, they believed the changes would pass constitutional muster.
- d) However, certain stakeholders contended that the changes were material and would prejudice them.

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4. THE COMMENTS MADE BY THE DEPARTMENT IN AUGUST 2020:

- a) The Department noted to the Portfolio Committee in August 2020 that there is no codified way to determine the adequacy of consultation. Two key Constitutional Court judgements may assist the Portfolio Committee to consider whether the processes of public consultation on the changes, were adequate.
 - i. In the SA Veterinary Association case, the court stated that the Parliamentary Committee should provide for further public comment, where it makes a material amendment to a Bill.
 - ii. In the Doctors for Life case, the court stated that in evaluating the adequacy of consultation, it will consider inter alia, the nature and importance of the legislation and the intensity of its impact on the public.

Part 2: Public Participation in consideration of fair-use clause

- b) The principal concern relates to insufficient consultation on the changes to the formulation on fair use. In giving consideration to any public comments, for and against the fair-use formulation in the Bill, the Committee will need inter alia to consider the public interest concerns that the Bill seeks to address measured against the risk that arises from the cumulative impact of the erosion of copyright by the list of new exceptions, some of which have been described as very wide and open-ended.
- c) The Department recommended to the Portfolio Committee in August 2020 that it may wish to make a call on the sufficiency of the process, based on an assessment of the materiality of the change; the relationship taken as a whole to the original provisions that were subject to public comment; and finally the benefit of insulating the Bill against future constitutional attack, by providing for public consultation on the relevant referred provisions.

Part 2: Public Participation in consideration of fair-use clause

- 5. DTIC'S COMMENTS ON THE PUBLIC SUBMISSIONS OF 4 JUNE-9 JULY 2021:** The President's reservation on fair use, as noted above, relates to the consultation process in respect of those provisions that were developed by the Portfolio Committee during its Committee stage in 2017 **and** which were said to not be subject to public consultation before approval by the Portfolio Committee. The PC has now sought to rectify this deficiency through the new process of public consultation. Based on the review of submissions, described in Part 1, **the dtic** has prepared a set of comments and observations for consideration by the Portfolio Committee. These are set out below, from paragraph 6 onwards in the Section.
- 6.** The Bill contains copyright exceptions that trench upon constitutional protection. A main area of concern was whether the change from a fair dealing to a fair use doctrine was constitutional, with the two justifications offered for the argument in favour of unconstitutionality as follows: (a) breach of Section 25 of the Constitution being an arbitrary deprivation of property and (b) fair use breaches South Africa's international treaty obligations.

Part 2: Public Participation in consideration of fair-use clause

7. By way of a principled response to these objections, the following observations are made:
 - a) The Department is advised that there is no basis for the argument that the fair use doctrine is unconstitutional. There are submissions that “fair use should be defined so that it is understood in the South African context“. It should be noted, however, that while the current fair dealing concept in the 1978 Copyright Act is not defined at all, four factors have been added to the fair use provision in the Copyright Amendment Bill to help determine fairness. As these factors will be applied by South African courts, it seems superfluous to expressly spell out that the South African context matters when interpreting the provision.
 - b) The current Copyright Act of 1978, for instance, already employs both a more general fair dealing provision and several more specific exceptions and limitations. In the Bill, the lawmaker proposes to complement a more general fair use provision (instead of the current fair dealing provision) with a set of more specific exceptions and limitations. The point has been made that the list of specific exceptions is rather long when compared to other countries which utilise a fair use provision. Yet, we are advised that this approach (by some referred to as a hybrid approach) is permissible and indeed combines flexibility with a heightened level of legal certainty.

Part 2: Public Participation in consideration of fair-use clause

- c) Some submissions argue that the application of fair use to natural persons exclusively should be preferred. It is the Department's view that this would unduly limit the usefulness of fair use as a critical access-enabling mechanism that helps in balancing the interests of rights holders and users of copyrighted materials. Oftentimes, meaningful access for individuals is only facilitated through juristic persons such as platforms. Several of the enumerated permitted purposes in s12 (such as "reporting current events") are linked to activities typically executed by juristic persons, e.g. media houses.
- d) The argument that fair use is unconstitutional is not supported by the Department. We are advised that whereas the judgement in ***Certification of the Constitution of the Republic of South Africa 1996 1996(4)SA 744(CC)*** refrained from classifying intellectual property as a property right thus protected by section 25(1) of the Constitution, the court in *Moneyweb* categorised intellectual property as a property right protected by s25(1), [para 108 of *Moneyweb*], a finding that followed upon the Constitutional Court matter in *Laugh it Off Promotions v SAB 2006(1)SA 144(CC)* See also *FNB v CSARS 2002(4)SA 768(CC)* at para 57; Being property rights, IP rights are subject to limitation in accordance with section 36 of the Constitution.

Part 2: Public Participation in consideration of fair-use clause

8. Based on the above, it is clear that IP rights are not absolute. Intellectual Property laws carry with them internal limitations such as section 12 in the current Copyright Act, and these internal limitation clauses, commonly known as exceptions, cannot be regarded as *arbitrary* deprivation of property. Thus, while the courts are correct in classifying IP rights as property rights, care must be taken not to treat IP rights as conventional property because it is a highly specialised field that has specialised limitations, and its limitations/exception cannot be extended to other forms of property. Accordingly, the fair use or even fair dealing clause, which seeks to provide limitations to IP protection are a custom in this field, and are in no way regarded as deprivation of property in any given jurisdiction. It is clear that being a property right an IP right is subject to limitations in accordance with s 36 of the Constitution (See *FNB v CSARS* 2002 (4) SA 768 (CC) at para 57) It follows that fair dealing is itself a limitation on IP protection. It is submitted on the basis of the comparative law as set out, the fair use doctrine cannot be considered to be an arbitrary deprivation. However, even if a court should find that it is in breach of s25 of the Constitution, in terms of the limitation clause in the Constitution, this would be justifiable by the fact that fair use is used in democratic societies based on similar values to the South African Constitution.

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9. A number of representations argued that fair use is in conflict with the [BERNE CONVENTION](#), the key international agreement governing copyright for more than a century. If this argument had any plausible legal basis, the US and other countries that have employed fair use in their copyright laws would have faced challenges by now under the Dispute Settlement Mechanism at the World Intellectual Property Organisation or other international forums that deal with copyright matters
10. The **key difference between the existing *fair dealing* provision in s12 of the current Copyright Act and the proposed *fair use* provision in s12A of the Copyright Amendment Bill** is relatively mundane, i.e. that by introducing the words “**such as**”, the currently closed list of permitted (fair) uses [research or private or personal study/use; review or criticism; reporting current events or news] is amended to an open list of permitted purposes - to allow courts to decide on a case-by-case basis in a more flexible way, whether a certain use should after all be permitted or not. At the same time, and unlike the current fair dealing regime in s12, the proposed s12A provides clear legislative guidance by way of a **four part test in s12A(b)**, of how fairness is henceforth to be determined by the courts in a particular case. According to the four part test on 12A(b):



Part 2: Public Participation in consideration of fair-use clause

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.*

Part 2: Public Participation in consideration of fair-use clause

11. As the current Copyright Act does not contain such factors for determining fairness, courts have to establish such factors on an ad hoc basis, and in the Moneyweb case which concerned fair dealing for the purpose of reporting current events, the courts thus established factors which are similar to the above factors in the CAB for all forms of fair use. This codification of factors contained in the Bill would contribute towards legal certainty.
12. This amendment also seeks to increase the provision's **flexible application, also in light of rapid technological change**, which might otherwise necessitate **frequent updating of the provision in the future**. But it does pose the question as to whether such a clause would indeed pass the international three step test.
13. The **three-step test** as contained in international instruments such as the Berne Convention and the TRIPS Agreement sets limits for domestic copyright exceptions and limitations, thereby creating an international standard against which national copyright exceptions and limitations are to be judged. More specifically, the test stipulates that national exceptions and limitations (like 12A) must:
 - iv. **be confined to certain special cases;**
 - v. **not conflict with the normal exploitation of the copyright work; and**
 - iv. **not unreasonably prejudice the legitimate interests of the rights holder / author**

Part 2: Public Participation in consideration of fair-use clause

14. We draw attention that the **Australian Law Reform Commission (ALRC), in 2014, already engaged with this very question.** We are advised that after an 18-month in-depth inquiry, during which the ALRC carried out more than 100 consultations and received close to 900 submissions, **it concluded that fair use provisions are compliant with the three step test.** Importantly, it also stated then: *“to deny Australia the significant economic and social benefits of a fair use exception, the arguments that fair use is inconsistent with international law should be strong and persuasive, particularly considering other countries are enjoying the benefits of the exception. The ALRC does not find these arguments persuasive, and considers fair use to be consistent with international law.”*
15. There is a real risk in forgoing an important policy-making opportunity against the backdrop of what we are advised are unsubstantiated claims of non-compliance with international law. While deleting the words “such as” may seem like a small adjustment to avoid a possible conflict with the three step test, such a change would indeed significantly alter the character of the provision. Adopting a “rather be safe than sorry” approach here would severely limit the utility of the proposed provision and alter a deliberate policy decision made by the law maker.

Part 2: Public Participation in consideration of fair-use clause

16. In summary, fair use is a positive tool for users and producers of information, as it facilitates access and reuse of copyright works for various purposes, including creativity and innovation, without infringing copyright law. As drafted by the PC, the formulation will enable the courts to work with the open list as its guideposts to develop the law as was the case with the 1978 Act
17. The comment of US Judge Pierre N. Leval in a view reinforced by the Australian Law Review report, is noted “*Fair use is not a grudgingly tolerated exception to the copyright owner’s rights of private property, but a fundamental policy of the copyright law. The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author’s monopoly. But it depends equally on the recognition that the monopoly must have limits.*”
18. The Department advises that, based on advice received and the foregoing, that from a constitutionality and policy viewpoint, no changes are necessary to the fair use concept, insofar as it relates to the introduction of an open-ended list in section 12A of the Bill. The question of copyright exceptions is addressed in the next part of this document.

Part 3: Copyright exceptions

1. **THE ISSUE:** The Copyright Bill sets out a number of exceptions to the normal exercise of copyright, such as
 - a) use by libraries, archives, museums and galleries,
 - b) use by students and teachers in an academic setting,
 - c) translations of works by students or teachers for non-commercial purposes;
 - d) use of quotations of an author,
 - e) use of works by a broadcaster,
 - f) reproduction of an article by the press, or in a broadcast, transmission or communication to the public of an article published; and
 - g) use in computer programs.

2. **THE PRESIDENT'S CONCERNS:** The President raises concerns whether the Bills' provisions may constitute arbitrary deprivation of property and interfere improperly with the constitutionally-protected freedom of trade, occupation or occupation. In respect of arbitrariness, the President draws attention to what is called the 'three-step test', namely that exceptions should be confined
 - a) to certain special cases
 - b) not conflict with the normal exploitation of the copyright work; and
 - c) not unreasonably prejudice the legitimate interests of the rights holder/author.

Part 3: Copyright exceptions

3. THE APPROACH OF THE DEPARTMENT AND PC AT THE TIME THE BILLS WERE CONSIDERED:

- a) The Department held that from a policy point, copyright exceptions were critical to a modern, workable system of copyright, that it was necessary to balance legitimate though competing interests and that the provisions set out in the Bill gave effect to this. The Department and the OCSLA and Parliament's legal advisors were all comfortable that the Bill would withstand scrutiny when its provisions were subject to either constitutional scrutiny; or to the three-step test.
- b) The Portfolio Committee appointed an independent expert who advised that the exceptions in the Bill were permissible under, and consistent with, the three-step test and were needed for copyright law to adapt to digital technology and in his view there were not any obvious conflict with international law. The wording in the provisions were carefully crafted with limits set such as, "the extent thereof shall not exceed the extent reasonably justified by the purpose" which limit their scope effectively.
- c) The Committee was advised that fair and balanced copyright limitations and exceptions are permitted by the Berne Convention (article 9(2)), TRIPS Agreement (article 13) and other international treaties.

Part 3: Copyright exceptions

4. THE COMMENTS MADE BY THE DEPARTMENT IN AUGUST 2020:

- a) In respect of constitutional scrutiny, the deprivation of property is allowed in law. The deprivation must not be arbitrary and must be in terms of the law of general application in terms of section 25(1) of the Constitution. The proposed provisions would be law of general application and I am advised they are not arbitrary, The Committee found as advised that the limitations caused by these provisions were reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitations of these provisions were found to be in line with section 36 of the Constitution.

- b) On the application of the 3-step test as a measure of arbitrariness, other jurisdictions such as the United States, which explicitly employs a fair-use approach in its laws, were not considered to be in breach of the relevant international treaties that set out the 3-step test and that in the absence of any international jurisprudence that would limit the approach in the Bill on copyright exceptions, no serious basis for concern ought to arise if SA were to set out copyright exceptions.

Part 3: Copyright exceptions

5. **PROPOSALS ON PUBLIC SUBMISSIONS MADE IN 2021:** The Department is of the view that certain concerns raised in the submissions based on the President's remittal on copyright exception raises valid constitutional concerns which may require changes to the Bill. These are listed below, from paragraph 6
6. In Section 12 B(1)(a), the quotation exemption is potentially too broad. The section may need revisiting to comply with the Berne Convention especially in relation to inclusion of compatibility to fair practice and reference to the work already lawfully made available to the public. The word 'reasonably' is recommended to be deleted in s12B(1)(a)(i) in order to mirror the Berne convention.
7. In Section 12B(1)(i) and(2) were not included in the President's remittal as set out in paragraph 15.1 of his letter and thus falls outside the scope of the current focus. Should the PC however believe that it does fall within the remittal, we propose the following: the copy should only be allowed for works that were lawfully acquired as recommended in the public presentations that lawfully acquired should be defined as - "a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift; and does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy."

Part 3: Copyright exceptions

8. Section 12B(1)(b): were not included in the President's remittal as set out in paragraph 15.1 of his letter and thus falls outside the scope of the current focus. Should the PC however believe that it does fall within the remittal, we propose the following: To address overlaps in the exceptions on issues of education and teaching, it is recommended that section 12B(1)(b) be deleted and the wording inserted into S12D as S12D(9). This subsection is proposed to be moved from section 12B to section 12D of the Bill in the last subsection in section 12D, which is the section of the Bill that deals with reproduction for educational and academic activities. Section 12B(1)(b) provides for Illustrations, for teaching purposes.
9. s12 B(1)(e): It has been stated that this section is covered by s12(7) of the Copyright Act and specifically in section 12A(a)(iii). Section 12B(1)(e) can be removed in the Bill.
10. s12B(1)(f): The translation exceptions as proposed in s12B(1)(f) are potentially too narrow and does not take account of the needs of visually-impaired persons. it is recommended that it should not be limited to teaching. Instead, the provision can be changed to apply generally to translations for non-commercial purposes which promote the rights in ss29 (education), 30 (language and culture) and 31(cultural, religious and linguistic communities) of the Constitution.

Part 3: Copyright exceptions

11. S12B (1)(c): This section has been challenged. The Department has detailed drafting suggestions, based on international precedent. In addition, an appropriately-crafted amendment may be reconsidered along following lines: “It is not an infringement of copyright for a [broadcaster] to fix or reproduce in accordance with this section a performer’s performance or work, other than a cinematographic work, that is performed live or a sound recording that is performed at the same time as the performer’s performance or work, if the undertaking
- a. is authorized to communicate the performer’s performance, work or sound recording to the public by telecommunication;
 - b. makes the fixation or the reproduction itself, for its own broadcasts;
 - c. does not synchronize the fixation or reproduction with all or part of another recording, performer’s performance or work; and
 - d. does not cause the fixation or reproduction to be used in an advertisement intended to sell or promote, as the case may be, a product, service, cause or institution”
12. Section 12C provides for exceptions from copyright protection applicable to temporary reproduction and adaptation where the copies and adaptations are an integral and essential part of a technical process. It is proposed:
- a. The three step test be added to section 12C.
 - b. that the criteria of ‘as long as there is no independent, economic significance’ should also apply to

(a).



Part 3: Copyright exceptions

13. Section 12D(1) should be redrafted to comply with the three-step test
14. Section 19C(4): the provision states “...but may not permit a user to make a copy or recording of the work for commercial purposes.” Any purpose for copying should not be allowed unless in accordance with section 12A. Therefore, it is recommended that the words “for commercial purposes” should be deleted.

Part 4: International Treaty Implications

1. **THE ISSUE:** There are a number of international treaties that address matters related to intellectual property. These are:
 - a) *WIPO Performances and Phonograms Treaty (WPPT)* administered by the World Intellectual Property Organisation (WIPO), deals with the rights of two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds). South Africa is not a member, though Parliament has approved the ratification of the Treaty
 - b) *The Beijing Treaty on Audio Visual Performances (BTAP)* deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO, South Africa is not a member, though Parliament has approved the ratification of the Treaty
 - c) *WIPO Copyright Treaty (WCT)* deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member, though Parliament has approved the ratification of the Treaty
 - d) *Marrakesh VIP Treaty:* to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, South Africa is not a signatory. South Africa not a member and the Treaty has not been considered by Parliament.
 - e) *Berne Convention:* deals with the protection of literary and artistic works. South Africa is a member.

Part 4: International Treaty Implications

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 - b) *The Beijing Treaty on Audio Visual Performances (BTAP)* deals with the intellectual property rights of performers in audio-visual performances. It is administered by WIPO, South Africa is not a member, though Parliament has approved the ratification of the Treaty
 - c) *WIPO Copyright Treaty (WCT)* deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member, though Parliament has approved the ratification of the Treaty
 - d) *Marrakesh VIP Treaty:* to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, South Africa is not a signatory. South Africa not a member and the Treaty has not been considered by Parliament.
 - e) *Berne Convention:* deals with the protection of literary and artistic works. South Africa is a member.

Part 4: International Treaty Implications

2. SA will finalise accession following the completion of the domestic legislation. The Department however took into account the provisions of international treaties in the drafting of the Bills.
3. South Africa is a signatory to many binding multilateral agreements, including the World Trade Organisation (WTO) that also comprises amongst others, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Berne Convention.
4. **THE PRESIDENT'S CONCERNS:** The President raised reservations about whether the Bills comply with the Treaties and referred the Bills back to Parliament to consider the Bills against SA's international law obligations.

Part 4: International Treaty Implications

5. Development objectives are embedded in the Bills. It is worth noting the comment by the Director of a Program on Intellectual Property at the Washington College of Law, Sean Michael Fiil-Flynn who stated: “The international three step test – originating in the Berne Convention and included in various forms in the TRIPS agreement and in other Copyright Treaties – is extremely sensitive to context. It does not require that all limitations and exceptions around the world be the same. It incorporates important protections for copyright owners, but grants a large amount of freedom to legislate within that limit to promote local social and economic concerns... Given the three-step test’s allowance of context-specific adaptation of limitations and exceptions, it is incredibly important to take note of South Africa’s unique context that it inherited from hundreds of years of legalized segregation and discrimination... This unique social fabric gives rise to a very particular problem. Economic analysis shows that a monopoly in a market with very high income inequality will rationally profit maximize by pricing to the rich sliver of the population and excluding the large majority of consumers ... The various exceptions that the South Africa Bill adopts are framed in terms that commonly appear elsewhere. For example, the Bill’s exception for educational uses of excerpts for teaching can be found in roughly 70% of developing countries in Latin America and Africa.”

Part 4: International Treaty Implications

6. The view of the legal and technical experts of the Committee at the time the Bill was drafted, is that the Bills are aligned with the contents of the relevant Treaties. The point has been raised that, even if the Bills are in conflict with the contents of applicable treaties, this would not constitute a basis for a referral to Parliament.
7. However, there are two reasons why the Department and the Committee's legal advisors recommended nonetheless to consider the concerns expressed by the President, particularly in relation to ratified Treaties.
 - i. First, the courts are obliged to consider the Republic's international obligations in considering any matter, including in a constitutional challenge to the provisions of a law. For example, should the issue of deprivation of property through the new laws be considered by the courts, they will no doubt look at relevant international jurisprudence and the contents of ratified treaties. To this extent, in respect of matters where constitutional concerns arise, it would be a worthwhile exercise for Parliament to consider the alignment of the contents of the Bills with Treaties.
 - ii. Second, even if the PC was to take the view that the referral was not constitutionally-sound, it would not be entitled in law to review and decide on the validity of a referral and would require a court order to this effect.

Part 4: International Treaty Implications

8. A number of the concerns relating to compliance with the obligations in the Treaties have already been addressed in Section 3 of this document and are not repeated here.
9. **COMMENTS ON THE PUBLIC SUBMISSIONS MADE IN 2021:** The Department is of the view that some concerns raised in the submissions on International Treaty implications of the Bill, may raise potential constitutional concerns and while the contrary case can clearly be made, to avoid litigation where the outcome is uncertain, these identified areas may require changes to the Bills.
10. The Panel of Experts recommends that Parliament considers a number of changes, taking into account the submissions relating to the Treaties, as set out from paragraph 11 below. The Department is still considering the proposals and will also share the comments with Parliament's Legal Advisors.
11. In respect of the WIPO Copyright Treaty (WCT), the following observations have been made:
 - a) 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."

Part 4: International Treaty Implications

- b) Technological protection measures: 1.1 Clause 1 Draft section 1(i): definition of “technological protection measure” and “technological protection measure circumvention device” Definition of “technological protection measure” (TPM). First, the definition of “technological protection measure” in draft section 1(i) is problematic because it refers to technologies that prevent or restrict infringement, as opposed to being designed to have that effect. They also propose the deletion of paragraph (b) in the definition.

- c) The definition of “technological protection measure circumvention device” in draft section 1(i) be amended also to include services and devices that: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs. This would ensure that the definition is adequately scoped to encompass all TPM circumvention devices and services, which would also be consistent with Article 6(2) of the EU Copyright Directive, for example, and would therefore likely to be found to be compatible with WPPT (and the WCT). There is a need to ensure that rightsholders may be legally able to enforce the new digital rights (the new exclusive rights of ‘communication to the public’ and ‘making available’). Given the magnitude of a loss that copyright owners suffer once their work is made available or communicated to the public without their consent, it has been recommended by the Panel of Experts that there should be sanctions and damages payable to the copyright owner whenever these rights are infringed



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- d) In line with the WCT and the WPPT obligations, the Bill (by way of clause 27) inserts s28O into the Act on prohibited conduct in respect of TPMs. It should be noted that subsection (6) in s28O in the Copyright Bill which refers to sections 86, 87 and 88 of the Electronic Communications and Transactions Act ("ECT Act") will need to be re-drafted to refer to relevant sections in the Cybercrime Act instead as these sections of the ECT Act referenced in the Copyright Bill have been repealed by that Act.

- e) Sections 11A and 11B of the Act to extend the relevant new exclusive rights of 'communication to the public', 'making available' and 'distribution' to published editions and computer programmes. These rights have to be extended to computer programmes to make the Act compliant with WCT.

Part 4: International Treaty Implications

12. In respect of the WPPT (WIPO Performances and Phonograms) Treaty, the following observations have been made:
- a) It is important for the definition of “broadcast” in the PPAB to be consistent with the definition of “broadcast” in the CAB. This is in particular because a specific jurisprudence has developed around the meaning of “broadcast” and it would therefore be necessary to ensure consistency in this regard.
 - b) “Broadcast” is defined in international treaties, including the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and the WPPT, as a technical term referring specifically to wireless, over the air, one-to-many transmissions. The current definition of “broadcast” in the Bill is therefore incompatible with the international standard as it extends the definition of broadcast beyond wireless transmissions by including transmissions “by wire.” This could potentially be understood as including certain online transmissions (i.e. transmissions by wire).
 - c) Definition of “producer” should add “or the entity which” after the phrase “the person who”, to align fully with the definition used in the WPPT.

Part 4: International Treaty Implications

- d) The legislation cannot create a “royalties or equitable remuneration” regime, as it will create uncertainty. In respect of performances embodied in sound recordings, it is clear from the provisions of the Rome Convention and the WPPT that the system has to be that of equitable remuneration. In respect of performances embodied in audiovisual works it can either be a royalties system or an equitable remuneration system. The BILL must be clear as to which system will apply and not use an “either or” provision, to prevent potential disputes
13. In respect of the Marrakesh Treaty, attention is drawn to the status of the Treaty: while referred to by the President, SA has not yet ratified the Treaty. Subject to this, the following observations are made:
- a) It is recommended that the definition as contained in Article 2 of the Marrakesh Treaty be inserted in the Definitions of the Copyright Bill: "Accessible format copy" means a copy of a work in an alternative manner or form which gives a person with disabilities access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.

Part 4: International Treaty Implications

- b) Definitions - add: "authorised entity" means an entity that is authorised or recognised 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. Note: This is the Marrakesh Treaty definition.

- c) Amend Section 19D(3) to read: (3) A person with a disability or a person that serves persons with disabilities, including an authorised entity, may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person, provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used for other than for persons with disability.

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14. Regarding the BERNE CONVENTION, while the President's letter does not refer specifically to this Treaty, the following observations are made, as the President's letter raises the broader principle of alignment of domestic legislation with international obligations:
- a) In order to comply with Article 14ter of the Berne Convention, Sections 7B to 7F should be recast so as not to confuse the resale royalty right (or, as it is more commonly known, the "artists' resale right") with a right of copyright, and that the recast provisions be inserted in a discrete chapter of the Copyright Act. One submission suggests that these recast provisions and their dedicated definitions, 'art market professional' and 'visual artistic work', appear in a new chapter of the Act, ideally after Section 28 of the Act.
 - b) Article 14ter of the WIPO Treaty states that the author, or after his or her death the persons or institutions authorised by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. It is submitted that this differs from the royalties received by the author for the use of copyright work. Consideration should be given to inserting a similar provision in the Bill to enhance the protection of the author's interest.

Part 4: International Treaty Implications

- c) Compulsory statutory licences under the Berne Appendix – amendment to Section 23(3) of the Act and new Schedule 2: Schedule 2 of the Bill, the compulsory licences for translation and reprints, has its origin in the Appendix to the Berne Convention. The Appendix contains special rules available only to developing countries. However, Schedule 2 departs in material respects from the text of the Appendix and is therefore not compliant with the Berne Convention. Also, Schedule 2 is not introduced into the law under provisions relating to statutory licences, but by amended Section 23(3) of the Act (which deals with the formalities of assignments and exclusive licences). It needs a total redraft.

Part 5: Conclusion

The changes that have been identified by the Department for consideration by the Portfolio Committee, on the basis of the remittal, have been set out in Parts 2-4 above.

Where changes are made to the Copyright Amendment Bill that affects the Performers Protection Bill, the latter Bill will need to be aligned with the former.

The Department proposes that it meets with Parliament's Legal Advisors to engage on the observations and identify some common areas that may need to be referred to the Committee.

It is worth noting that a number of submissions raise matters or observations that, while valuable, fall outside the remit of this current process in the National Assembly and will need to be considered and dealt with separately, either through public submissions in the NCOP process or through a future amending Bill that is brought to the Portfolio Committee.