



NORTH WEST PROVINCIAL LEGISLATURE

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PORTFOLIO COMMITTEE ON EDUCATION, ARTS, CULTURE, SPORTS AND RECREATION

NEGOTIATING MANDATE

To : Hon M.I Rayi
Chairperson of Select Committee on Trade and Industry,
Economic Development Small Business Development,
Employment and Labour

Name of Bill : Copyright Amendment Bill

Number of Bill : B 13-2017

Vote of the Legislature: The Portfolio on Committee on Education, Arts, Culture,
Sports and Recreation votes in favour of Copyright
Amendment Bill with Proposed Amendment

HON. P Sebegoe
Chairperson: Portfolio Committee on Education, Arts,
Culture and Sports Development

15/05/2023
Date



PROPOSED AMENDMENTS

1. The definition of “**persons with disability**” in the Bill read as including a person who has physical, intellectual neurological or sensory impairment that is any all disabilities, as opposed to limiting such persons to those who are unable to read printed works or otherwise to hold or manipulate a book as a result of a physical disability, as provided for in the Marrakesh Treaty¹ and approved of the Constitutional Court. It is therefore proposed that the definition be extended to other disabilities, including deafness, deaf-blindness, dyslexia etc. Moreover, that a sign language is due to become an official language, this section will also accommodate the deaf community.
2. Definition for “**authorised**” or “**permitted**” person or entity who may make the accessible format copies and instead refers to “any person as may be prescribed”. No clarity has been provided as to how such a person will be prescribed nor by whom , but is assumed to give effect to the provision, further regulation will be required in circumstances when a perfectly suitable definition exists in the Marrakesh Treaty² and approved by the Constitutional Court.
3. It is also not clear if the term “**public reception**” in the new definition would capture subscription broadcasting services which only broadcast to “sections of the public”. The current definition of “**broadcast**” in the Copyright Act refers specifically to “**intended for reception by the public or sections of the public**”. It is not clear if the definition is meant to expand the definition of “broadcast” to encrypted signals provided on wired platforms such as mobile platforms or online platforms and thereby include such online video distribution services such as Netflix or ShowMax within the ambit of being a broadcasting organisation for the purpose of the Bill

¹ Marrakesh Treaty to Facilitate Access to Published Works for Person who are Blind Visually Impaired or Otherwise Print Disabled of 2013

²² Ibid



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4. The definition of **“technological protection measure”** circumvention device are not compatible with the WPPT³ requirements to provide “adequate legal protection and effective legal remedies against the circumvention of effective legal remedies against the circumvention of effective technological measures.” Moreover , the exceptions in relation to prohibited conduct in respect of technological protection measures are insufficiently defined, therefore rendering them incompatible with the three -step test⁴.
5. Definition of the word **“Performers”** is narrow, it is therefore proposed that it be amended to **Creatives** so that it can accommodate various categories.
6. .The use of the term **“assignment of ownership”** in section 12B(6) instead of “transfer of ownership”, as used in Article 6(2) of WTC⁵ appears to be a huge error. The term “assignment” is naturally applied for the transfer of rights of copyright, not in respect of tangible good.
7. Section 2A(1)(b) excludes “computer software interface specifications” from copyright protection. This may amount to an arbitrary exclusion of copyright of such works. There is no definition of the “interface specifications”, nor is there a clear policy objective for such exclusion. “Interface specifications” could be entitled to copyright protection as a computer program.
8. Fair Use and Exceptions: The currently Copyright Bill has been criticised for not providing enough exceptions and limitation to copyright protection, particularly for education, research and innovation. Reviewing and expanding fair use provisions could help balance the interests of creators and users. The introduction of “fair use” would create legal uncertainty and increases the risk of litigation. There is a likelihood stemming from introduction of “fair use” will be a transfer of value from South African creators to large technology corporation, from Google, Facebook to new short form media platforms such as Tik -Tok, whom most creators van affords to litigate the issue of fair use. Rather than clearly listing uses and conditions for exceptions to copyright as the law currently provides, the “fair use” approached developed

³ World Intellectual Property Organisation Performances and Phonograms Treaty

⁴ Berne three step test is a clause that is included in several international treaties on intellectual property

⁵ WIPO Copyright Treaty



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in the United

States provides a defence for

unauthorised users of copyright works if their use is deemed fair, however that determination is done through courts. It is therefore proposed that section 12A be deleted.

9. The President has raised reservation that copyright exceptions in the new sections 12A to S12D, 19B and 19C may encounter constitutional challenges. The specific sections are 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19(C), 19(C)(5)(b) and 19C (9), which may
10. constitute deprivation of property, section 12A and 12D may further violate the right to freedom of trade, occupation and profession
11. It is proposed that section 12B-12D be reviewed taking into account the Three-step as a criterion and the current exceptions in 12(4).
12. The new orphan works provision in the Act does not benefit anyone and will impose a legal risk for the CIPC⁶. Compliance is costly and onerous. Even after following the compliance provisions and being awarded a licensee under the orphan works statutory licencing scheme, the licensee has no guarantee that it will not be sued by a copyright owner if they appear. It is therefore suggested that the insertion of section 22A of the Act by clause 26 of the Bill and the definition of "orphan works" by clause 1(i) of the Bill be revised.
13. Failure to introduce a website blocking remedy will continue to be a material oversight in the Bill. The online enforcement of the new "digital rights" that are catered for in the Bill will remain deficient, specifically in instances where offenders and private site operators are based in other countries. Failure to address this oversight in the Bill would mean that the stated policy objective of providing effective legal protection of digital rights will not be reached. If the Bill were to enact the Bill in its current form South Africa would remain lagging behind other jurisdiction in Africa and elsewhere in the world where the site blocking

⁶ Company and Intellectual Property Commission



remedies have been catered for in law.

It is therefore recommended that relevant authorities should legislate new legal remedies to assist rights holders to combat piracy and other infringement in the online environment.

14. Digital rights managements: The Bill must be strengthened to protect against abusive practices related to digital rights management technologies, which can restrict user's ability to access, use or share copyrighted work.
15. Public domain: The Bill could clarify and expand the rules for determining when works enter the public domain, which could help promote greater access to cultural heritage and encourage creativity.
16. Collective management organizations: The Bill must introduce more robust Regulations for Collective Management Organisations, which are responsible for managing the rights and royalties of copyright owners. This could improve transparency and accountability, which has been a major issue in South Africa.
17. Section 3B – Given that the protection of sound recordings is already set out in section 9 of the Copyright Act, there is uneasiness with regards to the “protection of rights of producers of sound recordings” is deemed misplaced and creates legal and commercial uncertainty.
18. Amendments made on section 5(2) and 21(2) of the Act ,that vest copyright in “local organisation” designated by the Minister⁷, and the amendment to section 22 (1) of the Act, that prohibits the assignment of copyright held by the State are still maintained in the Bill.
19. The existing section 5 (2) of the Act confers copyright protection in works made under the direction or control of certain international organisations. Implicit in this rule is the understanding that the “international

⁷ Minister of Trade Industry and Competition



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- organisation” concerned would not be organised and existing under South African law or even the law of another Berne Convention⁸, that the author was not a national or resident of South Africa, and that the work not first published in South Africa.
20. 2organisation” as prescribed in its amendments of section 5(2) and 21(2) comes across as an arbitrary extrapolation of the existing rule. The Bill has no definition of “local organisation”, so it could be interpreted to mean any association of persons, whether incorporated or not. The amendment to section 21(2) that the object of these amendments is to vest copyright in works made under the direction or control of
21. Ministerial designated local organizations, without them having to employ their authors or to commission authors or to commission authors in return for payment in money or money's worth or to take assignment by the mutual agreement. The author of such a work therefore has no prospect of being remunerated for the supply of the copyright in their work to these local organizations. This situation is exacerbated by the exclusion from the royalty rights of authors and artists by new section 6(A)(c) and 7A(6)(c).
- 20 Section 8 A: Mandatory royalty entitlement for all audio-visual performers will result in reduced- incomes for performers, reduced engagement of South African performers in audio-visual productions and reduced investment in South Africa. This section proposes to regulate the remuneration terms of private contractual agreements between performers and copyright owners in audio-visual works including 8music, videos including section 8A(1), 8(A)(2)(a),8A(3),8A(5) and (6). However the intention of section 8A is to ensure that performers are remunerated appropriately , the provision has several unintended consequences which would harmfully impact performers in South Africa who perform background roles in music videos including by fundamentally changing the long -established international and South African practice of upfront payments to non-featured performers that is performers who are contributing to a music video on a once-off basis, such as dance performing in the background of the video by requiring that all performers be paid on a royalty basis.

⁸ Berne Convention adopted in 1886



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Further that reducing the investments that records companies can make with South African artists and repertoire as all performers including non-featured performers (artists with whom the record company has partnered and are remunerated in accordance with negotiated terms would be entitled to share in revenues from licensed uses of a music video. Nonetheless, subsequently fewer South African performers being engaged to perform in music videos as they would be either produced outside the country or those produced within the country would include fewer performers because the risks of large productions would simply be too high.

- It is therefore recommended to amend section 8 A to provide contractual freedom between performers and copyright owners which allows for different market practices, that is remuneration that is agreed upon may take the form of a lump sum payment or receiving royalties or both, taking into account the specificities of the sector, contribution of the performer to the work as a whole and to its commercial successes. To clarify that the remuneration agreed upon shall be determined between the performer and the copyright owner or their representatives when they are voluntarily and expressly mandated by the relevant copyright owner or performer.
 - To remove reference to collecting societies in subsection 2, and to delete subsection 3 which empowers the Tribunal to set royalty rate.
 - To delete subsection 5 and 6 which propose mandatory requirements to register agreements and imposes criminal sanctions for failure to register those agreements.
22. Section 8 A of the Bill – it is proposed that this clause must provide for contractual freedom between performers and copyright owners which allows for a different market practices. Remuneration must be agreed upon and maybe in a form of a lump sum payment or receiving royalties or both, taking into account the specificities of the sector, contribution of the performer to the work as a whole and to its commercial success.



Remuneration terms must be

agreed between parties and must be determined between the performer and the copyright owner or their representatives when they are voluntarily and expressly mandated by the relevant copyright owner and performer.

23. It is further proposed that collective societies be removed from section 8 A (2)

Proposal that Section 8 A (3) be deleted as it empowers the Tribunal to set the royalty rate.

24. Section 12 A of the Act introduced by Clause 15 of the Bill.

25. Section 12 B(1)(a), section 12 B(1)(h), section 12B(1)(b) opens extensive exclusions that are not adequately assessed in keeping with the three -step test that includes quotation and exception, private copying exception and reproduction of sound recordings by a broadcaster exception. Under this test exceptions and limitations to exclusive rights must apply in certain special cases, must not conflict with a normal exploitation of the work and must not necessarily prejudice the legitimate interests of right holders. ***It is therefore proposed that section 12B be withdrawn. Nonetheless, if the exclusive right of distribution is to be introduced, a provision for the exhaustion of that right must be retained. The best suggested approach will be to follow the example of the UK's Act⁹ by inserting the words "not previously put into circulation in the Republic by or with the consent of the copyright owner" in each of new section (eC),7(Dc),8(dc), 9(g),11A(d) and 11B(dc) along the following lines " distributing the original or a copy of the work to the public that has not previously put into circulation in the Republic by or with the consent of the copyright owner".***

26. The provisions of the new section 12D need to be substantially reconsidered as they will limit the normal exploitation of works used in education and prejudice the rights holders of those works. By itself , it's in

⁹ United Kingdom Copyright, Designs and Patents Act of 1988



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conflict with the requirements of the three-step test¹⁰. By opening the door to permission-free copying of the whole books and journals, new section 12D has unintended consequences for South African authors of text books and academic journal articles, as well as the South African publishing industry.

27. The granting of powers to a Tribunal to create a license between the commissioning parties where the parties themselves would not otherwise have done so, is deemed as violation of rights of the parties to contract freely as per the provisions of section 22 of the Constitution ¹¹.

28. The term “use” in the introduction to the exceptions in section 19C (1) conveys the senses of acts that are governed by all the exclusive rights of copyright, not only specified acts but for instance the act of reproduction. This terminology alone puts section 19C outside the ambit of being a special case, as

meant in the first step of the *three-step test*. The use of the term “appropriate” to qualify the copyright exceptions further means that these exceptions will unreasonably prejudice the legitimate interests of these rights holders concerned, thereby not meeting the third step of the three step test.

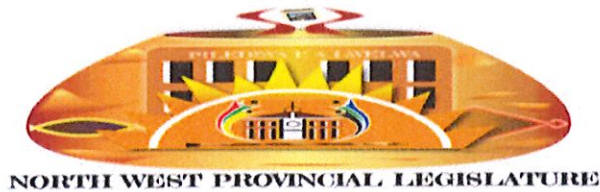
29. Section 19(c)(2) allows the lending tangible works. There is no lending right for literary, musical or artistic works, nor for published editions or computer programs, whether in the Act or proposed to be introduced in the Bill. The Bill introduces an exclusive right for “lending” only for sound recordings and audio visual works, but the there is no apparent policy justification or impact assessment justifying an exception from the exclusive rental right for sound recordings and audio visual works favouring libraries, archives, museum and galleries. There is therefore no justification that section 19C (2)

would not interfere with the ordinary exploitation of sound recordings and audio visual works, and the exception therefore does not meet the second step of the three-step test.

Section 19C (3) uses the term “access” that is not sufficiently precise to be used in respect of rights of copyright. The granting of “access” per se is not an exclusive right to copyright. The does not prevent the public from visiting libraries, museums and archives and viewing copyright protected works in its

¹⁰ Ibid

¹¹ Constitution of the Republic of South Africa



collections there. Section 19(3) is therefore deemed to be an error and therefore suggested that it be deleted from the exception.

30. The exception in section 19C(4) will automatically extend to the exceptions in the Performer's Protection Act¹² in terms of new section 8(2)(f) of the same Act, the impact on performers by the exception in favour of libraries, archives, museums and galleries to screen audio visual works and play sound recordings without permission or remuneration must be considered specifically. The detriment impact of this factor on copyright owners of sound recordings and audio visual works will equally impact the rights and remuneration of performers in those works.
31. The introduction of an exception such as the one contained in the new section 19D has been intended from the beginning of the copyright reform process in one form or another and has, in principle enjoyed widespread support not only for the relieve it offers disabled person but also because new section 19D stand central to South Africa's intended accession to the Marrakesh Treaty¹³. Several of the required provisions to ensure full compliance with the Marrakesh Treaty have been omitted from the exception in the new section 19D, and it is vulnerable to constitutional challenge
32. The new section 19D and its supporting definitions or lack thereof goes beyond the limitations on the rights of copyright owners that are needed to serve the needs of the disabled persons and therefore arguably result in a dispossessions of property that is disproportionate to what would constitute a reasonable and justifiable limitation of the rights of copyright owners. The exception currently contained in section 19D would thus open to constitutional challenge thereby not only continuing to risk the validity of the Copyright Act but also with the compliance with the order off the Constitutional Court.
33. The Constitutional court formulated the interim remedy by laying down guidelines to be followed in crafting such a remedy that would enable it to perform the fine balancing act required of it. Consequently, section 13A as drafted by the Constitutional Court be adapted to replace the exception sought to be introduced in section 19D.

¹² Performers Protection Act of 1967

¹³ Supra



34. Section 19D in its current format does not identify the works to which the exception applies, and no justification has been put forward to extend the categories of works beyond literary or artistic works as envisaged by the Marrakesh Treaty.

35. The Bill proposes to introduce Schedule 2 into the Act by amending section 22(3) of the Act in the following terms:

"(3) No assignment of copyright and no exclusive license to do an act which is subject to copyright in such a work shall have an effect unless it is in writing and signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-license, the exclusive sub-licensor as stipulated in Schedule 2"

This is deemed as an error because section 22(3) deals with the formalities of exclusive licenses. The decision is taken to introduce statutory licenses that are in line with the Appendix, and therefore it would be more appropriate to amend section 45 for this purpose.

36. Section 23(2) of the Act sets the standard for determining copyright infringement by importation. The Bill does not amend section 23 (2). The Bill's amendment of section 28 brings it into conflict with section 23(2)

37. Section 27(5B) (a)(i) to be amended to make clear that the offering and other dealings with circumvention devices are already infringing acts, without the need to show that the illegal device is subsequently used to infringe copyright. The current wording sets the bar for infringement so high such that it makes the whole provision ineffective.

It is suggested to amend the said section as follows "subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright

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



- (i) Know that *the device or service will, or is likely to be used to circumvent copyright in a work protected by an effective technological protection measure.*
- (ii) Provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure
- (iii) Knows 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 an effective technological protection measure.
- (b) publishes information with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic; or
- (c) circumvent such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence.

35. According to clause 35(b)(cG) amending section 39 of the Act, the Minister¹⁴ may prescribe compulsory and standard contractual terms for contracts, among others for the new statutory royalty entitlements by the insertion of section 6A in the Act. This intrusion into copyright owners' freedom to negotiate and contract represents unacceptable overregulation of free markets that would devalue intellectual property and result in an unwillingness among investors to invest in South Africa. In addition, this interference with contracting freedom would disregard the rights and interests of local creators by forcing them to accept the terms of government ministry that may lack sufficient knowledge to prescribe key components of a contract, setting up such a rigid and inflexible system will also be time consuming if ever accomplished. As a result, authors may end up choosing to publish overseas.

36. Section 39(cH) contemplates "prescribing permitted acts for technological protection measures". However, there are number of errors, since this section cross reference section 28B, where it should be

¹⁴ Minister of Trade, Industry and Competition



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28P, and section 28P has no reference to permitted acts “as prescribed”. It is therefore proposed that the current provisions regarding TPM¹⁵s and exceptions in section 28P as they do not comply with international treaties be revised and be replaced with the treaties compliant text.

38. It is proposed that section 39(cG), (cl);(cJ) and 39B (1) of the Bill be deleted, it is deemed to sidestep the democratic process and extend Ministerial power to mandate standard and compulsory contractual terms in private contractual arrangement. Section 39 includes several provisions which deprive artists and producers of their freedom to contract and extend Ministerial power to regulate secluded contractual deals. Enforcement and Penalties: The Bill could establish stronger enforcement measures and penalties for copyright infringement, including provisions to address online piracy and counterfeiting, which are increasingly prevalent in South Africa. At the same time, any such measures must balance the need for protection against the need to avoid disproportionate or excessively punishment for minor offences.

39. The new section 27(6) and (9) of the Act increases the penalties for criminal infringement. Where the offender found guilty of an offence is a juristic person, all these provisions prescribe minimum fines calculated on the basis of a percentage of annual turnover, which is a minimum of 5% in section 27(6)(a) and a minimum of 10% in all the other provisions. The high penalties for penalties imposed on the juristic persons are disproportionate to their purpose of generating proper reporting on commercial uses of copyright works. It is not clear if contemplation was made in determining suitable penalties for these offences and consideration of alternative remedies.

40. The minimum sentence on judicial persons in new section 8A (6),9A (4) and section 27(6) and (9)(a) introduced by clauses 9,11,27 and 29 of the Bill as being so disproportionate in their impact as to place them beyond the limits of what is reasonable to achieve their purpose, so its therefore recommended that this clause be rejected .

¹⁵ Technological Protection Measures



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41. The objectives of the Bill are supported, however there is an overlap in performers protection will be untenable commercially and will result in confusion, duplication, and litigation. Due to the extent of the overlap between the protections that will be afforded to performers whose performances feature in audio-visual works/fixations if the Copyright Bill and the Performers Protection Amendment Bill¹⁶ in their current forms are enacted, it is proposed that the word “ performers protection” provisions from the Copyright Bill to do away with the duplicated provisions that already exists in the Performers Protection Amendment Bill. Since the PPA¹⁷ is the appropriate statutory instrument to deal with performers rights and should be included in the Copyright Act.

42. The Bill does not contain any transitional provisions to allow for phased implementation. It is therefore concerning that the Bill makes a far-reaching change to the copyright regime which will require time to implement. For instance, other businesses are heavily relying on copyright works that will need to be

updated in their respective internal business systems are processed and put to place measures to comply with the detailed compliance regime contemplated in the Bill. It is therefore proposed that such must be considered to allow parties to regulate their future contracts accordingly.

HON. P. Sebegoe
**Chairperson: Portfolio Committee on Education, Arts,
Culture, Sports and Recreation**

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¹⁶ Performers Protection Amendment Bill

¹⁷ Ibid