

Copyright Negotiating mandates

PROVINCIAL LEGISLATURE	RECOMMENDATIONS	DTIC AND CLSO RESPONSES	DECISION
CLAUSE 1 - DEFINITIONS			
“accessible format copy”			
GAUTENG	Retain the Court’s definition of accessible format copy for coherence with Blind SA CC and conformity with the Marrakesh VIP Treaty.	<p>Recommend retaining the Bill’s wording</p> <p>DTIC The accessible format copy in Bill is broader and provides for more works.</p> <p>CLSO The definition read with section 19D is exactly as the Court’s read in, save for a broader application as the treaty and the Court were limited to visual impairment. Our Bill has to go broader due to our Constitution requiring equal treatment – this is not prohibited by the treaty. It is not required (or recommended) to use the exact words of a treaty. WIPO on exceptions and limitations: “Limitations and exceptions to copyright and related rights vary from country to country due to particular social, economic and historical conditions. International treaties acknowledge this diversity by providing general conditions for the application of limitations and exceptions, leaving national legislators to decide if a particular limitation or exception is to be applied and, if it is the case, to determine its exact scope.” “‘accessible format copy’ means a copy of a work in an alternative manner or form which gives a beneficiary person 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.”</p>	

		<p>The Bill uses “person with a disability” instead of:</p> <ul style="list-style-type: none"> - “beneficiary person”, as “beneficiary” could have many meanings in the Copyright Act, which is broader in application than the Marrakesh treaty; - referring to a specific disability as the Bill is proposing that any disability should be covered by the exception to ensure equal treatment. <p>The Court then continues in its definition with substantive issues, which cannot be placed in definitions due to drafting conventions. Substantive issues must be contained in the body of the Bill:</p> <p><u>“The accessible format copy must be used exclusively by beneficiary 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;”</u></p> <ul style="list-style-type: none"> - Iro exclusive use by beneficiary persons: <ul style="list-style-type: none"> - Clause 19D(1) “Any person ..., make an accessible format copy for <u>the benefit of a person with a disability, supply that accessible format copy to a person with a disability</u>: - (2) (a) A person ... may, without the authorization of the owner of the copyright work, reproduce the work, where that person is a person— <ul style="list-style-type: none"> (i) <u>with a disability, for their personal</u> use; or (ii) who serves persons with disabilities, including an authorized entity, for <u>personal use by a person with a disability</u>. (3)(b) A person contemplated in paragraph (a) <u>may not export or import</u> an accessible format copy where such person knows, or has reason to know, that the 	
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		<p>accessible format copy will be used for <u>purposes other than to aid persons with a disability.</u></p> <p>- Re Integrity of the work: 19D(1): “(b) in converting the copyright work to an accessible format copy, <u>the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible in that alternative format and of the accessibility needs of the persons with a disability;</u>”</p>	
GAUTENG	<p>Section 1</p> <ul style="list-style-type: none"> ▪ Ensure that the definition of “accessible format copy” is aligned to that provided for in the Marrakesh Treaty in line with the intention of that treaty and that a definition of “beneficiary” that aligns with that used in the Treaty be inserted. 	<p>The definition is duly aligned - recommend retaining the Bill’s wording</p> <p>DTIC: The definition is beyond the Marrakesh treaty and in line with the Constitution. Countries are allowed to provide more rights and benefits to their citizens</p> <p>CLSO: Already provided: The definitions in the Bill already comply.</p>	
“authorized entity”			
KWAZULU-NATAL	<p>In relation to the definition “authorized entity”, some of the stakeholders advised that the finding of the Constitutional Court in relation to 19D of the Copyright Act in Blind SA v Minister of Trade, Industry and Competition & Others should be considered.</p>	<p>Amendment is proposed – blue font</p> <p><u>(b) an entity, including a government institution or non-profit organization that provides education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis as one of its primary activities or institutional obligations;”;</u></p>	
GAUTENG	<p>Adopt the court-crafted definition of ‘permitted entity’ by simply introducing the underlined words at the start of CAB s 1(c)(b) to read as follows: (b) an entity, including a government institution or non-profit organisation.</p>	<p>DTIC The Blind SA judgement is noted. The court crafted permitted entity is not in line with Marrakesh treaty. “Authorised entities” is more preferred.</p> <p>CLSO The definition of the Bill is beyond the Marrakesh treaty and in line with the Constitution. Countries are allowed to provide more rights and benefits to their citizens</p>	

		The Bill uses the term “authorized entity”. Propose an as per the court’s read in (see above) - Note: for “non-profit purposes” is also a specific requirement in 19D.	
NORTH WEST	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 Treaty and approved by the Constitutional Court.	Clause 35(c) does provide for this – recommend no amendments required DTIC The Bill is in line with the Treaty. The authorized entity must be provided for to provide accessible format copies. The Marrakesh Treaty does not provide a procedure. Some can be prescribed by Minister but not all. CLSO This is provided for - See clause 35(c): “(2) The Minister must make regulations providing for processes and formalities related to the authorization, or recognition, by the government of entities that provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis.	
“broadcast”			
GAUTENG	<ul style="list-style-type: none"> Retain current definition of "broadcast" in Copyright Act, 1978 and delete clause 1(d). The current definition of "broadcast" in the Copyright Act is as follows: "broadcast," when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs, or signals which - (a) takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and (b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;"). 	Proposed amendment: Propose to delete the amendment to the definition in the Bill so that the Definition in the Act is retained. I.e., delete clause 1(d) of the Bill. DTIC The recommendation to retain the current Act can be supported. There were extensive debates in the Portfolio Committee on wire implications and the implication for industries and the policy considerations underway - white paper. There are policy challenges that were identified. The broadcast definition was intended to cater for various transmissions and meet treaty obligations. The concern raised that it may exclude other forms of transmissions is noted for	

<p>NORTH WEST</p>	<p>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</p>	<p>further consideration.</p> <p>There is white paper being finalised. The deliberations in parliament looked at the implication of wire transmission. Concerns were raised about the implication of removing wire. There were concerns raised about the terms used in the definition in the Bill such as wholly or partially. With the amendments, concern was that now it omitted satellite transmission and programme carrying signal.</p> <p>The wire transmission is still taking place in South Africa. Removing wire may have unintended consequences for a vast number of industries still using the mode of transmission.</p> <p>CLSO</p> <p>CLSO consulted in the PC on the issue of broadcast and specifically iro "wired: We received feedback from E Media, Multichoice, NABSA and SABC:</p> <p>Inclusion of "wire" in the definition of "broadcast"</p> <p>In South Africa, the two main broadcast platforms are satellite and terrestrial (wireless). There is nothing in law preventing cable broadcasting being introduced into South Africa at this point, but the existing extent of terrestrial/satellite broadcasting services and capital outlay associated with cable roll-out mean it's unlikely that any party in South Africa would seek such a broadcasting licence at this late stage.</p> <p>The proposal is that this word be included. Broadcasting can happen by way of wire, although what could be regarded as broadcasting by wire in South Africa at the moment is not currently subject to licencing requirements. This licensing requirement may however change in the near future.</p> <p>The word "wire" may refer to a number of types of broadcasting:</p> <ul style="list-style-type: none"> • Cable, which is used in the USA and Europe (because of cost perhaps not likely in South Africa); 	
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		"audiovisual content services", of which broadcasting will be a sub-category.	
"commission"			
GAUTENG	Add definition of "Commission" Define the term "Commission" as meaning "the Commission established in terms of section 185 of the Companies Act".	Proposed new definition not recommended – the definition is already provided for in the Act and the Bill provides a transitional measure so that the definition is operational DTIC The Commission is defined in Intellectual Property Laws Amendment Act. CLSO "Commission" is defined in IPLAA. Note the transitional provisions in Clause 39(2), which provides an interim solution until IPLAA is made operational.	
"dramatic works"			
GAUTENG	Proposes the following (separate standing) definition for dramatic work be considered – as well as that the term is added as a separate concept throughout CAB: "dramatic work" means any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise and any compilation of dramatic works.	Not recommended – the definition needs to be developed and tested first DTIC The industry needs a clearer definition that aligns to its characteristics and accordingly the definition of dramatic work is recommended to be amended. However, any amendment at this stage is premature. It may lead to unintended consequences. It may further impact on various sections in the Act, which requires further consideration. It is thus necessary for the industry to first be consulted on it and for its impact to be assessed.	
"performer"			
GAUTENG	▪ The definition of "performer" should exclude "extras", in line with the Beijing Audiovisual Performances Treaty and international standard practice.	Recommend the amendment, but to be made in the Performer's Protection Amendment Bill (The definition in the Copyright Amendment Bill refers to the definition contained in that bill) DTIC The concern of the performers and other participants are noted. The definition of performer is aligned to the treaties.	

		<p>The Beijing Treaty does not exclude extras. Performer is defined. It is known that extras do not receive royalties and they are at the background. The recommendation on the extras is not necessary, however given the concerns raised, it can be recommended.</p> <p>CLSO</p> <p>However, the Bill’s definition does conform with that of Beijing. The Bill identifies a performer as an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs (various) works</p> <p>Definition in Beijing treaty - actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise performs (various) works</p> <p>“Extras” do not have speaking roles, and are in the background – they do not act, sing, deliver, declaim or play in works.</p> <p>Interpretation of laws – Courts will not allow an absurd interpretation</p>	
NORTH WEST	<p>Definition of the word "Performers" is narrow, it is therefore proposed that it be amended to Creatives so that it can accommodate various categories.</p>	<p>It is not recommended to use the word “creatives” as the Acts provide sufficient descriptions for performers</p> <p>DTIC</p> <p>The definition has to align to the treaty. The inclusion of the word creatives will not align with international best practices. The term creatives is too broad.</p> <p>CLSO</p> <p>It is not recommended to change the word to “creatives” – “Author” is the word used in the Copyright Act to capture all makers of works.</p> <p>“author”, in relation to—</p> <p>(a) a literary, musical or artistic work, means the person who first makes or creates the work;</p> <p>(b) a photograph, means the person who is responsible for the composition of the photograph;</p>	

		<p>(c) a sound recording, means the person by whom the arrangements for the making of the sound recording were made; [Para. (c) substituted by s. 1 (c) of Act No. 125 of 1992.]</p> <p>d) a cinematograph film, means the person by whom the arrangements for the making of the film were made;</p> <p>(e) a broadcast, means the first broadcaster; [Para. (e) substituted by s. 1 (c) of Act No. 125 of 1992.]</p> <p>(f) a programme-carrying signal, means the first person emitting the signal to a satellite; [Para. (f) substituted by s. 1 (c) of Act No. 125 of 1992.]</p> <p>(g) a published edition, means the publisher of the edition; [Para. (g) added by s. 1 (a) of Act No. 52 of 1984.]</p> <p>(h) a literary, dramatic, musical or artistic work or computer program which is computer-generated, means the person by whom the arrangements necessary for the creation of the work were undertaken; [Para. (h) added by s. 1 (d) of Act No. 125 of 1992.]</p> <p>(i) a computer program, the person who exercised control over the making of the computer program; [Para. (i) added by s. 1 (d) of Act No. 125 of 1992.]</p> <p>“(j) a derivative indigenous work, means the person who first made or created the work, a substantial part of which was derived from an indigenous work;</p> <p>(k) an indigenous work, means the indigenous community from which the work originated and acquired its traditional character; [(j) and (k) inserted by Act 28 of 2013]</p> <p>It is not clear what categories are not covered – if clarity is provided, these can rather be added to the definition. However, it is submitted that the definition is sufficient for its purpose. The Copyright AB refers to the PPAB, in which the definition reads: “‘performer’ means an actor, singer, musician,</p>	
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		dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary works, musical works, artistic works, dramatic works, [or works of joint authorship] or traditional works as contemplated in the Copyright Act". We submit that is quite a comprehensive description iro performers.	
"person with a disability"			
GAUTENG	No change required to the definition of 'persons with disabilities' as the breadth of the definition fulfils South Africa's Bill of Rights and international disability rights obligations;	Agree with Gauteng that the Bill already provides for the proposals – no amendments required DTIC Supported, the definition of persons with disabilities covers all forms of disabilities. The Bill provides for all disabilities in line with the Constitution.	
NORTH WEST	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 Treaty 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.	CLSO The definition already extends to all forms of disability as the decision was to not limit the exception to visual or print related disabilities as all persons with a disability should be treated equally: 'person with a disability' means a person who has a physical, intellectual, neurological, or sensory impairment and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person without a disability.	
"producer"			
GAUTENG	"producer" in relation to a sound recording or an audiovisual work, means the person by whom the arrangements necessary for the making of the sound recording or audiovisual work are undertaken.	Not recommended for inclusion in the Copyright Amendment Bill as the word is not used in the Act or Bill DTIC It is unclear what the concern is here. CLSO Not sure if the proposal is for this definition to be included in the Copyright Act? If so, that is not recommended – we only	

		define words that are actually used in an Act. The word “producer” is not used in the Copyright Act or Amendment Bill.	
“Technological protection measure” and “technological protection measure circumvention device and service”			
GAUTENG	<p>The definitions of “technological protection measure” and “technological protection measure circumvention device and service” are not compatible with Article 18 of the WPPT, and the exceptions in section 28P relating to prohibited conduct in respect of technological protection measures are inadequately defined, therefore rendering them incompatible with the three-step test.</p> <p>Section 1 [...] (k) 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 protected measure; ‘technological protection measure’ (a) means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation <u>is designed to prevent or restrict infringement of copyright in a work;</u> technological measure circumvention device or service’ means devices, products or components or the provision of services which:</p> <p><u>(a) are promoted, advertised or marketed for the purpose of circumvention of, or</u></p> <p><u>(b) have only a limited commercially significant purpose or use other than to circumvent, or</u></p> <p><u>(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.</u></p>	<p>No amendment to the wording of the Bill’s definitions recommended: These definitions are fully compatible with the treaties and the three-step test. As they are currently worded, they provide a very careful balance between rights of copyright owners and users.</p> <p>DTIC</p> <p>The definitions of TPMs were debated extensively. Given that the Bills will be new, a balance must be found between, protection and access. The stronger TPMs were advertised and experts advised of the challenges in countries that went that route such as the US. There was advise that the stronger TPMs will impact negatively on consumer protection and competition law. Within the developmental context they are sufficient. The balance between access to users and protection to authors is important. TPMs should not be too strong to an extent they harm other parts of the market including for consumers and competition.</p> <p>CLSO</p> <p>The proposed wording was in fact considered by the Portfolio Committee and advertised. The public’s responses showed that the current wording in the D Bill is a balanced approach and compliant with treaties. The proposed wording resulted in unintended consequences, including iro consumer law, competition law and other security related breaches. In South Africa, the imaginative reconfiguration of diverse components to adapt or repair a system to suit local needs and conditions will be prohibited: Foreign giants will decide what is and is not</p>	
NORTH WEST	The definition of "technological protection measure" circumvention device are not compatible with the WPPT		

	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 test".	permissible in respect of the digital technologies that South Africans depend upon. Unless a nexus with infringement is clear these 3 freedoms are compromised: <ul style="list-style-type: none"> • “the freedom to arrange our conduct to our own benefit rather than that of the shareholders of the companies whose products we purchase (to use the product as the consumer wants to); • the freedom of third parties to offer accessories, consumables, services and repair for the products we own; and • the freedom of auditors to uncover and publicise defects in the products we rely on (they are threatened that any disclosure could jeopardise the TPM).” (Doctorow) 	
GAUTENG	The lack of definition of the terms “wire” and “wireless” could lead to confusion and interpretation issues. In addition, while internet access is referred to in the Memorandum on the Objects of the Copyright Amendment Bill, it is not specifically referred to in the relevant sections, which could result in interpretational issues for the creative industries and the users of copyrighted works which is especially concerning given their financial obligations.	The proposed amendments are not recommended – their meanings are as per the dictionary (generic meaning) and thus need not be defined DTIC The terms are not defined. They are used in the treaties and they are not defined (WPPT, WCT, Beijing Treaty). They may not be that common but also generic words that are related with online digital activities (wireless/ Wi-Fi and related transmissions).	
CLAUSE 2 – SECTION 2A (SCOPE OF COPYRIGHT PROTECTION)			
NORTH WEST	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.	Amendment not recommended – currently free access to computer software interface specifications is envisaged. To provide protection will require consultation and an impact assessment. DTIC Interface specifications are provided in the Bill. To consider them as copyright, will require a process. The ones focused upon are not copyright protected but available for free.	

		<p>They do not carry copyright protection. This is an area we can assess further and if we find there are such works, they can be addressed during the next amendments.</p> <p>CLSO</p> <p>We only need to define terms in a Bill where its ordinary dictionary meaning is broadened or limited. Science Direct defines this phrase as: "Interface specifications provide the standardized mechanism in which subsystems can effectively communicate with each other and enable them to operate as independent modules that, when collectively implemented, support the entire CM technical reference model." That is quite clear and the meaning of the Bill does not exceed or limit this meaning. There is thus no need to define this phrase.</p>	
CLAUSE 3 (SECTION 5) AND CLAUSE 24 – (IRO CONFERRING COPYRIGHT ON WORKS MADE BY LOCAL ORGANISATIONS)			
NORTH WEST	<p>Amendments made on section 5(2) and 21(2) of the Act, that vest copyright in "local organisation" designated by the Minister, 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. 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 organisation" concerned would not be organised and existing under South African law or even the law of another Berne Convention, that the author was not a national or resident of South Africa, and that the work not first published in South Africa. Organisation" 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</p>	<p>No amendments recommended: The concerns are already addressed in the Bill</p> <p>DTIC</p> <p>The copyright is under the direction and control of the local organisation. The Bill already provides for international organisations and the state. The local organisation exists and can have copyright. The copyright vested in local organization will operate similarly to the state and international organization that were already in the Copyright Act. There is copyright that can be generated by a local organization and not infringe copyright of an author. The Act gives Minister the powers to prescribe the local organisations.</p> <p>CLSO</p> <p>This concern is addressed by the phrase "as may be prescribed". Unless the local organisation has been reflected in regulations, it will not be affected by this provision.</p> <p>The fear re lack of remuneration is not founded: Section 5 does not regulate remuneration. That means that the Bill's new provisions for remuneration will also protect these authors.</p>	

	to section 21(2) that the object of these amendments is to vest copyright in works made under the direction or control of 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).	Section 5 only deals with the vesting of copyright in works made by or under the direction or control of the state or prescribed international or local organizations	
CLAUSES 5 (INSERTING S6A - SHARE IN ROYALTIES REGARDING LITERARY OR MUSICAL WORKS) AND CLAUSE 7 (INSERTING S7A - SHARE IN ROYALTIES VISUAL ARTISTIC WORKS)			
FREE STATE	There is a concern that the bill is using a one size fits all approach on the payment of royalties.	Proposed amendment: Propose to include “equitable remuneration” wherever “royalties” is used (with the necessary drafting adjustments to ensure sentences read well), in the following clauses:	
GAUTENG	Section 6 Amend s6A to read as follows: "Share in royalties regarding literary or musical works" (1) (none) (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, subject to any agreement to the contrary, be entitled to receive <u>equitable remuneration</u> or a fair share of the royalty received for the [execution] authorisation of any of the acts contemplated in section 6.		
		<ul style="list-style-type: none"> - Long Title; - CLAUSE 5 – SECTION 6A (heading, (2), (3)(a), (4) and (5)(b)); - CLAUSE 7 – SECTION 7A (heading, (2), (3)(a), (4) and (5)(b)); - CLAUSE 9 – SECTION 8A (heading, (1), (2)(a), (3), (4)(b) and (5)(b)); - CLAUSE 24 – SECTION 21(3)(c)(ii); - CLAUSE 26 – SECTION 22A ((4), (7), (8), (9)); - CLAUSE 27 – CHAPTER 1A (Section 22B(2)(a) and (b); (4)(c); Section 22C(1)(a), (2)(b) to (e), (3)(b) and (c), Section 22D(1)(a) and (b), (2), (2)(b), (3), (3)(a) and (b), Section 22E(2)(b)); - CLAUSE 33 – SECTION 29A(2)(e); 	

	<p>(3) (a) The author’s <u>equitable remuneration or share of the royalty contemplated in subsection (2)</u> shall be determined by a written agreement [in the prescribed manner and form] between the author and the copyright owner, or between the author and the person contemplated in subsection (2)(b), or between their respective collecting societies.</p> <p>(b) (none).</p> <p>(4) Where the author and copyright owner <u>are authorising rights in terms of section 6 but no agreement has been reached or the person contemplated in subsection (2)(b), cannot agree on the author’s equitable remuneration or share of the royalty, then the author or the copyright owner or either party may refer the matter to the Tribunal for an order determining the author’s equitable remuneration or share of the royalty.</u></p> <p><u>(5) In determining the equitable remuneration or share of royalty, the Tribunal shall be guided by –</u></p> <p><u>(a) the nature of the work;</u></p> <p><u>(b) the nature and extent of the author's contribution to the work;</u></p> <p><u>(c) the author's experience, expertise, and qualifications;</u></p> <p><u>(d) the terms and conditions of the agreement concluded by the parties, if any;</u></p> <p><u>(e) whether the work was made in pursuance of a commission by any person for money or money's worth;</u></p> <p><u>(f) the nature, extent and amount of consideration received by the author in money or money's worth for the creation of the work, including skills and training, enterprise development and other benefits;</u></p> <p><u>(g) the nature of the market for the work;</u></p>	<ul style="list-style-type: none"> - CLAUSE 35 – SECTION 39 paragraphs (cJ) and (cK); - CLAUSE 37 – SCHEDULE 2, Part A item 4(3) and Part B, item 4(2) <p>DTIC</p> <p>The remuneration of various works has been taken into consideration. contracts can also be used to allocate royalties. The Bill provides for various types of royalties. The royalties looked at sectors. The Bill can make allowance for other royalties by including the words ‘or equitable remuneration.</p> <p>Other proposed amendments not recommended:</p> <p>DTIC</p> <p>The royalty will only be paid upon execution of the act. The Minister’s powers are not to interfere in contracts. They are meant to create an enabling environment. It is unclear why the amendment was suggested, to remove execution and replace with authorisation.</p> <p>The Tribunal must take into account all factors. Parties will put the relevant factors before the Tribunal to decide. The proceedings are further inquisitorial and thus the Tribunal can also ask for further information. Prescribing factors may limit the discretion of the Tribunal.</p> <p>CLSO</p> <p>As the standard terms are included in the clause, the need to prescribe manner and form is perhaps not necessary. It is not clear what is achieved by the insertion (are authorizing ...reached or”. It is clear from the remainder of the section who these parties are and what they are trying to agree on and this addition thus does not add to the sentence.</p>	
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	<p><u>(h) the commercial success of the work, including the demand and need for the work and its potential for future commercialisation;</u></p> <p><u>(i) the copyright owner's role in creation, funding, marketing, and promoting the work;</u></p> <p><u>(j) general business and economic conditions and/or prevailing market conditions in the relevant sector;</u></p> <p><u>(k) the need to incentivise the creation of works, promote investment and stimulate employment in the creative industries; and</u></p> <p><u>(l) other relevant considerations.</u></p> <p>[(5)] (6) The agreement contemplated in subsection (3)(a) must include the following:</p> <p>(a) The rights and obligations of the author and the copyright owner or the person authorized by the author to use the work as contemplated in subsection (2)(b);</p> <p>(b) the author's <u>equitable remuneration or share of the royalty</u> agreed on, or ordered by the Tribunal, as the case may be;</p> <p>(c) the method and period within which the amount must be paid to the author by the copyright owner, or the person authorized to use the work as contemplated in subsection (2)(b), to the author; and</p> <p>(d) a dispute resolution mechanism.</p> <p>[(6) This section does not apply to—</p> <p>(a) a copyright owner who is the author of the literary or musical work in question;</p> <p>(b) a work created in the course of employment contemplated in section 21(1)(b) or (d); or</p> <p>(c) a work where copyright is conferred by section 5 in the state, or a prescribed local or international organization.”]</p>	<p>Similar iro adding a description before “either” – it is clear who may refer to the Tribunal.</p> <p>It is not clear if the intention was for subsection (6) to be deleted, or if that was just cut off in the mandate. Do not recommend the deletion of (6) as it provides for necessary exceptions from the application of this new section.</p>	
LIMPOPO	Clause 5 Insertion of section 6A in Act 98 of 1978		

	<p>“royalty” new definition means a percentage of the total turnover or revenue generated on the exploitation of a literary work or music work. This definition is aimed at avoiding an artist not being paid if there is no profit.</p>	<p>Proposed amendment not recommended – the definition provides a framework</p> <p>DTIC</p> <p>The royalty definition does not have to be too prescriptive. It provides a framework that can be followed. Royalties are meant to be paid when there are profits. The definition also refers to profits. The royalty in terms of gross profit was discussed in parliament and issues were not raised with it. It is recommended that it be retained.</p> <p>The recommendation on the royalty based on revenue is noted. During the public participation process, no serious issues were raised regarding the royalty based on profit. There were consultations on the clauses, it is recommended it be retained. The revenue recommendation can be considered in future following further consultation and study. It may have its own unintended implications.</p> <p>CLSO</p> <p>Note: The Bill’s definition reads: “the gross profit”</p> <p>Not recommended: We cannot include “a percentage of” as the whole section speaks of the author’s share in the royalty. “A percentage of” indicates that share already. So, to say “a percentage of” in the definition, means that the section will give the author a share of a portion of the total turnover / etc.</p>	
MPUMALANGA	<p>The stakeholders further suggested that royalty should be defined as a percentage of the total turnover / revenue generated by the musical work</p>		
NORTHERN CAPE	<p>Insertion of section 6A in Act 98 of 1978: (2)(b) subject to any agreement - It must be specific because of the nature of this act. Therefore it should read: "intellectual property agreement throughout the Bill. Words to be written into the Bill: "intellectual property agreement".</p>	<p>Proposed amendment not recommended - “agreement” is sufficient</p> <p>DTIC</p> <p>An agreement as a contract suffices. The detail of the agreement can be dealt with in the contract and not legislation.</p> <p>CLSO</p> <p>It is not clear why the words “intellectual property” must be included before “agreement”. The wording “subject to any agreement to the contrary” is a legal phrase meaning that</p>	

		parties may contract out of this stipulation. The agreement could be called a literary publishing agreement, or a musical distribution agreement or just an agreement. It is for the parties to decide what they want to call the agreement that will reflect this intention. However, the phrase itself simply means that the legislative terms may be contracted out of.	
NORTHERN CAPE	In terms of Royalties the percentage (%) must be stipulated to protect the artist for example: 60% (artist) - 40% (Producer/Company) shares in terms of royalties. Many of the people in the industry might not have the financial means to have intellectual property agreements drawn up (which is very costly). Therefore, it would be better if the person (irrespective of the field of artistic expression) knows what they are entitled to, be it on a sliding scale and upon valid consensus being reached between all concerned parties.	Proposed amendment not recommended – too prescriptive CLSO The challenge here is that many commenters were concerned about prescriptive terms and conditions. It is an area where the legislature must tread carefully as it could affect the right to choose a trade, occupation or profession, as making terms too strict, could result in persons not choosing to choose that trade etc. What the Bill does is to provide for standard terms in some clauses and then empowers the Minister to prescribe certain standard terms. These would then form the minimum requirements for a contract and will thus provide protection to authors who did not know of certain protective measures that the Act / Bill provides for them.	
GAUTENG	Section 6A, 7A Royalties and Fair Remuneration: That at the proposed Sections 6A, 7A be amended to cater for contractual freedom through the introduction of the below phrase where relevant: “In the absence of an agreement to the contrary...” With the appropriate amendments to CAB, authors and creators would be in a position to negotiate alternative terms to the restrictive terms	Proposed amendment not recommended – the prescripts are to protect vulnerable parties DTIC The contractual terms are critical. A contract is necessary for the protection. It should not be made discretionary. There have been many abuses of the royalties in South Africa CLSO The rationale for the new sections 6A and 7A is to provide protection for authors who do not have a lot of power when negotiating contracts. A discretion to contract out of providing this royalty may result in very few authors actually benefiting from this protection	

<p>NORTHERN CAPE</p>	<p>Stricter measures should be included in the Bill that will enforce Government Departments to ensure contractual obligations of artists are adhered to.</p>	<p>No amendment recommended. The Bill does not regulate government departments. If the mandate is referring to stricter measures to ensure contract compliance, this is already provided in the Bill</p> <p>DTIC The comment is not addressing the Bill directly. The Bill does not regulate government departments. The Bill provides for contractual terms to ensure protection of authors and copyright owners.</p> <p>CLSO Provision is made for minimum terms to be included in contracts (section 6A, 7A) the Minister may also prescribe contractual terms (section 39) that must be included and any circumvention of the rights and protection afforded by the Act – unless expressly allowed the Act – is invalid (Section 39B).</p>	
<p>NORTHERN CAPE</p>	<p>The timeframe to earn royalties should be shortened.</p>	<p>Proposal not recommended – this should be determined by the parties</p> <p>DTIC The timeframes of royalties are contractual issues and should not be in the Bill. Contracting parties can make own determinations. The Bill provides for the distribution of royalties by collecting societies and will to some extent address the timeframe of royalties. This is in clause 35, section 39 (c)</p>	
<p>WESTERN CAPE</p>	<p>Retrospective and Arbitrary Deprivations of Property:</p> <ul style="list-style-type: none"> • The Bill has been criticised for having a retrospective application to copyright assigned before the new sections come into operation and may be unconstitutional on the ground that they constitute an arbitrary deprivation of property under Section 25 of the Constitution. The Bill also proposed to reduce the protection that a copyright owner has over their copyright by introducing new purposes for which 	<p>No amendment recommended- The Bill does not have any retrospective clauses.</p> <p>DTIC The retrospective royalties’ clauses related to royalties were found to be unconstitutional. One of the reason the copyright amendment bill was returned to parliament. They were removed from the Bill.</p> <p>CLSO The provincial committee may have had regard to an old version of the Bill.</p>	

	works may be used without constituting copyright infringement.	Clauses 5, 7 and 9: With the referral by the President, these clauses with retrospective applicable have been deleted by the PC (6th).	
CLAUSE 7 - SECTIONS 7A, 7B, 7C, 7D, 7E AND 7F (RESALE ROYALTY)			
WESTERN CAPE	Section 7 refers to (1) royalties on resale; (2) payable at the rate prescribed...; (3) the seller and the art market professional concerned are jointly and severally liable... to pay the royalties... to the author or their heirs... all allows too little scope for unique circumstances, such as when the seller may be the artist him/herself, etc.	No amendment recommended – this can be arranged contractually. DTIC The Bill provides a framework in which parties can contract – unique circumstances can be agreed to by contract. The Bill cannot legislate for all circumstances and unique circumstances or exceptions. In that case where the author is the seller, the agreement can be drawn up in a manner that captures this circumstance. Furthermore, the Art market professional can be the one who addresses the royalties. This is a new amendment in the copyright law and will be reviewed in future.	
CLAUSE 9 – SECTION 8A (SHARE IN ROYALTIES REGARDING AUDIOVISUAL WORKS)			
FREE STATE	The bill must look into ensuring that it does not limit payments only to royalties where some industries in the entertainment industry make use of once off payments, such relates to dancers and actors.	Proposal to include “equitable remuneration” where “royalties” is used in certain clauses (with the necessary drafting adjustments to ensure sentences read well), including iro CLAUSE 9 – SECTION 8A (heading, (1), (2)(a), (3), (4)(b) and (5)(b)); DTIC The remuneration of various works has been taken into consideration. contracts can also be used to allocate royalties. The Bill provides for various types of royalties. The royalties looked at sectors. The Bill can make allowance for other royalties by including the words ‘or equitable remuneration. CLSO Already provided: The Performers Protection Bill does provide for royalties OR equitable remuneration (once off payments)	
FREE STATE	There is a concern that the bill is using a one size fits all approach on the payment of royalties.		

<p>GAUTENG</p>	<p>Delete s8A, as the Performers Protection Bill is the appropriate statutory instrument to deal with performers rights and the inclusion of performers protection provisions in the Copyright Act gives rise to duplication, inconsistency and confusion. Supports the increased protection of performers. However, the provisions allowing a performer to a share in royalties / equitable remuneration are already provided for in the PPAB. In our view, it is more appropriate that these provisions are located in the performers’ legislation rather than in copyright legislation. It is certainly not ideal for the provisions to be duplicated across both pieces of legislation as this will undoubtedly cause confusion.</p> <p>The NAB further submits at the outset that given the importance of the protections granted to performers in the PPAB, any matters pertaining to performers and the rights of performers should be removed from the CAB. The duplication of performer protections in both the CAB and the PPAB may lead to problems with the interpretation of the legislation and could result in difficulties in implementation.</p> <p>Alternatively, if s8A is retained in the Copyright Bill, amend it to:</p> <p>(i) Provide contractual freedom between performers and copyright owners which allow for different market practices (remuneration agreed upon may take the form of a lump sum payment (one-time payment) or receiving royalties or both, taking into account the specificities of the sector, contribution of the performer to the work as whole and to its commercial success);</p> <p>(ii) Clarify that the remuneration agreed on shall be determined between the performer and the copyright owner or their representatives when they are voluntarily</p>	<p>The proposed amendments are not recommended</p> <p>1. Section 8A to be retained in the Bill as the Acts are interlinked.</p> <p>DTIC</p> <p>Section 8A to be retained in the Bill. The reference to sound recordings in Copyright and Performers protection amendment bill is not an oversight nor arbitrary. The Bills are interlinked and this provides more protection and certainty of rights. The link ensures both bills can access collecting societies and the Copyright Tribunal.</p> <p>The measures in Copyright will support the PPAB, such as the Copyright Tribunal and collecting societies. Related rights” refer to the category of rights granted to performers, phonogram producers and broadcasters. In some countries, such as the United States of America and the United Kingdom, these rights are simply incorporated under copyright. Globally some laws include both copyright and performers. Other countries, such as Germany and France, protect these rights under the separate category called “neighbouring rights.”</p> <p>In South Africa, related rights are incorporated under copyright and protected under the Copyright Act 98 of 1978 and the Performers Protection Act 11 of 1976</p> <p>CLSO</p> <p>8A is subject to the PPAB (which is a specific Act in any event and will thus trump in the event of a conflict of laws), and as such the royalty share is subject to the possibility of equitable remuneration.</p> <p>2. Contractual freedom is not interfered with</p> <p>CLSO</p> <p>(ii) Subsection (2) already provide for parties to agree to remuneration. Subsection (2) does not interfere with contractual freedom. It is only the “manner and form” that will</p>	
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	<p>and expressly mandated by the relevant copyright owner and / or performer;</p> <p>(iii) Remove reference to “collecting societies” in subsection 2;</p> <p>(iv) Delete subsection 3 which empowers the Tribunal to set the royalty rate; and</p> <p>(v) Delete subsections 5 and 6 which propose mandatory requirements to register agreements and imposes criminal sanctions (fines / imprisonment or both) for failure to register said agreements</p> <p>Imposing registration and comprehensive reporting would create material administrative burdens and costs on distributors, diverting investment from content, and be practically impossible to comply with. The possibility of a punitive sanction for non-compliance could chill the market. There are more reasonable approaches to encouraging transparency which recognize the substantial amount of information already publicly available, and can be calibrated to avoid unreasonable burdens on producers and distributors.</p>	<p>be prescribed, i.e., are witnesses required, must the contract be in duplicate with both copies signed in the original etc.</p> <p>3. Collecting Societies are required to be included DTIC and CLSO</p> <p>(iii) Should a performer choose to receive royalties and agrees as such with the Copyright owner, then it is necessary to provide for a collecting society</p> <p>4. Tribunal has a role to play and should be included DTIC</p> <p>(iv) The section 8A provides a royalty right for the audio-visual works. There is a role for the Tribunal and the collecting societies. Disputes may arise amongst contracting parties - The Tribunal is intended to have powers to enable it to settle disputes including related to royalties.</p> <p>5. Reporting, Registration and sanctions are necessary to ensure protection of vulnerable parties DTIC</p> <p>(v) The reporting requirements are based on policy. It has a historical context linked to non-payment of royalties. There are log sheets required in order to facilitate payment of royalties. The Copyright Review Commission also made recommendation on this. Performers (actors) have complained that they are not paid their royalties. Their works are broadcasted, repeatedly without remuneration. The same applies to the music industry. This is serious, hence the PC criminalised it.</p>	
MPUMALANGA	Some stakeholders proposed that the two (02) Bills – Copyright Amendment Bill [B13D – 2017] and Performers’ Protection Amendment Bill [B24D – 2016] be delinked	The non- reporting is a serious issue that has impacted on many performers whose works is played on radio or television or any medium for commercial purposes without any compensation. There are series played repeatedly on television and actors have indicated that they are not paid for those works.	
NORTH WEST	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. Section 8 A: Mandatory royalty entitlement for all audio-visual performers will result in reduced- incomes or performers, reduced engagement of South African	The CRC found: music usage information (music log sheets)- It was noted that music log sheets are kept mainly by	

	<p>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. Further that reducing the investments that records companies can make with South African artists and repertoire as all performers including nonfeatured 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</p> <ul style="list-style-type: none"> • amend section 8 A to provide contractual freedom between performers and copyright owners which allows for different market practices, that is 	<p>broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able accurately to distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties. For essential music users, the CRC believes that the legislation should be amended to make it compulsory for them to retain music usage information records. -page 77</p> <p>The reporting requirements are necessary to provide certainty on payments of royalties for commercial usage. The reporting provisions have a rationale and they address the challenges with royalties. This impacts the music and audiovisual sector.</p> <p>The reporting and recordal of commercial uses were introduced to address the policy gap of lack of royalty payments and no mechanism to ensure the use of works of performances for commercial purposes are addressed. . It is recommended that the reporting requirements be retained.</p> <p>The registration requirement similarly is an important amendment that serves a policy rationale. Penalties for juristic persons were considered. Although the penalties are considered strong, they are applicable. The penalties were strengthened to ensure adherence to the law and to deter certain practices.</p>	
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	<p>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.</p> <ul style="list-style-type: none"> • 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. 		
NORTH WEST	<p>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.</p>		

WESTERN CAPE	Clause 9 dealing with section 8A: This section should be scrapped, and relevant amendments made to 6A. Furthermore: Section 8A(6)(a) which requires that it be proved that someone “intentionally” failed to register an act as per (5)(a) and (5)(b) may be problematic in its application.		
NORTH WEST	Proposal that Section 8A(3) be deleted as it empowers the Tribunal to set the royalty rate.	<p>The proposed deletion is not recommended – this subsection provides a dispute resolution mechanism.</p> <p>DTIC The section 8A provides a royalty right for the audio-visual works. There is a role for the Tribunal. Disputes may arise amongst contracting parties. The Tribunal should not be removed wherein it can organize royalty disputes between performers and copyright owners.</p> <p>CLSO It is voluntary and not required. If the determination of the royalty is not to the liking of either party, there is no requirement that the contract must be upheld. (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.</p>	
CLAUSE 11 – SECTION 9A (ROYALTIES REGARDING SOUND RECORDINGS)			
WESTERN CAPE	Section 9A (Clause 11 in the Bill): As speed is important and action should be taken soon: How will one be able to determine what year was the year in which the majority of offences were committed, if a) the offences were not yet found to be “offences”, and if the trend of “offending” could still be on the increase?	<p>The mandated poses questions, rather than proposing amendments. However, as the questions are covered by the wording of the Bill, no amendments are recommended</p> <p>DTIC The procedures that take place to deal with charges and offences are timed. There will not be confusion with regards to the years of offences. Each case will have its own process and timeline. It is foreseen, this will not be a challenge.</p>	

		<p>CLSO</p> <p>(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.</p> <ul style="list-style-type: none"> - The determination of the majority of offences is not made prior to conviction. Upon conviction, the court will say – you are found guilty in that on XYZ date (or period) in the year 2022, you did ABC. So as per the court’s findings, read with the charge sheet, it will be very easy to determine the year in which the majority of offences were committed. - The Bill does not mention a “trend of offending” as this is in fact too vague to constitute an element of a crime. If the meaning is that the accused committed 5 acts in 2021, 7 in 2022 and is arrested in 2023, where they likely would have committed 9 – the answer is simply that an accused can only be found guilty on actual acts. If at the time of arrest the accused committed 5 acts in 2023, the relevant year will be 2022. - These offences will also only be prospective, so after the commencement of the Act – acts committed prior to the Act becoming operational will not constitute criminal offences. 	
<p>CLAUSE 15 - INSERTION OF SECTIONS 12A (GENERAL FAIR USE CLAUSE), 12B (SPECIFIC EXCEPTIONS), 12C (TEMPORARY REPRODUCTION AND ADAPTATION) AND 12D (REPRODUCTION FOR EDUCATIONAL AND ACADEMIC ACTIVITIES)</p>			
<p>WHOLE CLAUSE</p>			

FREE STATE	There is a need to conduct extensive research on the Section 12A-D pertaining to “fair issue” as it does not expatiate on what fair and unfair use relates to.	<p>Proposed amendments not recommended. Extensive research and consultation took place iro fair use and it was found to be a policy direction that will result in economic advantages for South Africa.</p> <p>Support for the clauses, is noted</p> <p>DTIC</p> <p>The fair use provision has been extensively consulted. It provides for four factors to address fair use. The fair use provision has safeguards.</p> <p>Copyright regimes across the world are slowly moving away from the closed-list system to an open system, which will keep up with innovation, and changing environment. Globally, research has found that fair use has not impacted negatively on the economy. On the contrary, there is evidence that shows that countries with open exceptions and fair use have high levels of innovation, economic growth and development.</p> <p>The Bill has adopted the hybrid model based on fair use doctrine that takes into consideration the list of exceptions. The Copyright Act 1978 is based on a fair dealing regime. Fair dealing sets out defined categories of acceptable uses. It only applies to a use of copyright material if the use is for one of the prescribed purposes. If a given use does not fall into one of the categories of use, then it cannot be found to be fair.</p> <p>Fair use is a doctrine under copyright law that permits certain uses of a work without the copyright holder’s permission. The fair use is an exception to the exclusive rights of a copyright owner. Fair use exceptions include but not limited to criticism, parody, comment, news reporting, teaching, scholarship, or research. It allows users to make use of copyright work without permission or payment when the benefit to society</p>	
GAUTENG	Submit that ss 12A-D and 19C are crucial to realise the right to education and freedom of expression for all members of society.		
MPUMALANGA	The scholar further argued that the Act prohibits fair access to information, teaching and learning materials, research resources; etc ... The scholar argued that that fair use is “to permit to increase access to knowledge” for all South Africans. Fair use has not caused any catastrophic damage or negative effects on the creative industries.... The fair use system provides that one cannot use or copy everything and anything without compensating someone one who is a rightful holder.		

		<p>outweighs the cost to the copyright owner.</p> <p>Fair dealing in our current Copyright Act is outdated, limited and static, and does not address the digital world. Fair use, on the other hand, is progressive, dynamic and future proof and 'digital-friendly'. Fair use has been used in courts in the U.S. and Europe for about 200 years and there is a wealth of jurisprudence to draw on.-Denise Nicholson</p> <p>Fair use was coded in the U.S. Copyright Act of 1976 and has not had to be amended, as it applies to new technologies as they arise. Ten other countries have also adopted fair use in their copyright laws and more countries are considering it, because it is 'future-proof' and benefits users and producers of information and knowledge. Its 4 factors give clarity to what can be used and reused, whereas fair dealing does not.-Denise Nicholson</p> <p>In terms of experience of the SA judiciary to address fair use, there is evidence of jurisprudence related to fair dealing.</p> <p>The SA Bill has the words 'such as', which will ensure that the Bill is future proof.</p> <p>WIPO study: The DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary. Fair use was in the first draft of the dtic published Bill in 2015. The Genesis Regulatory Impact Assessment study of 2014, referred to it as a regime South Africa must consider.</p> <p>CLSO</p> <p>Not recommended: The Department did a SEAIS, the committees of the 5th Parliament and 6th Parliament did extensive consultation on fair use. Considering the examples of countries that do use the fair use approach, it is clear what is fair and what is unfair. All exceptions are express in what the limits are iro what is fair and what is not.</p>	
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		<p>The Department did a SEAIS, there was also the Farlam report. The committees of the 5th Parliament and 6th Parliament did extensive consultation on fair use and it seems that there are people who favour the one approach and people who favour the other approach.</p> <p>Noted</p>	
MPUMALANGA	<p>The stakeholders further supported the international treaties towards dealing with the Bill; and agreed that international treaties must follow and adhere to the three (03) step test in relation to an exception... The rule is that an exception must be evaluated in accordance with this test, and if it does not, it will not comply with international treaties</p>	<p>No amendments recommended – the exceptions comply with all the guidance provided by the Courts iro compliance with the Constitution and all exceptions comply with treaties and the three-step test.</p> <p>DTIC</p> <p>The question then arises as to whether fair use results in a deprivation of property. It is clear that being a property right an IP right is subject to limitations in accordance with section 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. Given, as indicated that fair use finds favour with many countries, it is difficult to see how it can be considered to be an arbitrary deprivation. It is a provision that can be saved by the limitation clause as being one which finds much support in democratic societies based on similar values to the South African Constitution. The other exceptions were found to be constitutional and considered in the Bill and do not constitute deprivation of property in section 12D and 19C.</p>	
NORTH WEST	<p>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 constitute deprivation of property, section 12A and 12D may further violate the right to freedom of trade, occupation and profession. 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).</p>	<p>CLSO</p> <p>The exceptions will in our view pass constitutional muster and do not constitute arbitrary deprivation of property. Section 25 does not create a positive right to property – only a right to not be arbitrarily deprived. “No one may be deprived of (1) property except in terms of (2) law of general application, and no law may permit (3) arbitrary deprivation of property.”</p> <p>The two Bills are laws of general application.</p>	
WESTERN CAPE	<p>Retrospective and Arbitrary Deprivations of Property:</p> <ul style="list-style-type: none"> • The Bill has been criticised for having a retrospective application to copyright assigned before the new sections come into operation and may be unconstitutional on the ground that they constitute an arbitrary deprivation of property under Section 25 of the Constitution. The Bill also proposed to reduce the protection that a copyright owner has over their copyright by introducing new purposes for which works may be used without constituting copyright infringement. 		

	<ul style="list-style-type: none"> Sections 12A and 12D would represent disproportionate, and arbitrary, deprivations of the intellectual property rights. 	<p>Remaining question: Accepting for the moment the Copyright is property (Laugh it Off case accepted trademarks as property), is deprivation as per the Bills, arbitrary? Copyright has always been subject to exceptions.</p> <p>The Act provides for when Copyright vests and how it is transferred, what rights it gives to the holder of Copyright and what the exceptions to those rights are.</p> <p>Copyright without exceptions limits--</p> <ul style="list-style-type: none"> the POSITIVE rights contained in our own Constitution such as the right to the right to equality (s9); to human dignity (S10); to freedom of expression (s16); to a cultural life (S30); and to education (S29); and rights in the Universal Declaration of Human Rights such as the right to receive and impart information and ideas through any media (A19) and education (A26). <p>The purpose of the exceptions in the remitted Bills is to—</p> <ul style="list-style-type: none"> balance the above rights with the already established right in Copyright (not confirmed, but is likely to be found to be property); and align copyright with the digital era and promote multilateral development, which includes advancing constitutional values and human rights. <p>The exceptions are subject to a general four-factor test in clause 12A(b) and some are further subject to specific limits (discussed further in following slides). The exceptions are thus not open ended.</p> <p>What is “arbitrary deprivation”? First National Bank t/a Wesbank v SARS case:</p> <p>Test is narrower than S36’s proportionality evaluation as S36 requires “reasonableness” and “justifiability”. If deprivation is not arbitrary, S36 does not come into play (Par 65, 70).</p>	
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		<p>Par 100: Deprivation in S25 is arbitrary when the law of general application “does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.”</p> <p>Sufficient reason?:</p> <ul style="list-style-type: none"> • Relationships to consider: 1. Deprivation: Purpose of the law; 2. Purpose for deprivation: Person affected; 3. Purpose for deprivation: Nature of the property; 4. Purpose of deprivation: Extent of the deprivation. • A more compelling purpose will have to be established iro land or a corporeal moveable and when the deprivation in question embraces all the incidents of ownership • Considering all of these factors, sometimes a mere rational relationship between means and ends will be enough, sometimes a proportionality evaluation closer to that required by section 36(1) is required. <p>The exceptions and limitations are all within defined parameters Slide 8 and 9 of presentation to NCOP (18 April)</p> <p>There is sufficient reason when considering all the factors: Evaluation likely more towards a “rational relationship between means and ends”, than towards proportionality (S36) (although the three-step test in itself provides proportionality and so the Bill would comply even with a strict evaluation):</p> <p>Purpose of law and of deprivation and considering who is affected when exceptions are NOT included, and who if they ARE included: Must balance intellectual property with the rights to education, dignity, equality, trade, and freedom of expression.</p> <p>Nature of property: Intellectual property is not land, nor corporeal (thus does not require “a more compelling purpose” as for land).</p> <p>Extent of deprivation: The exceptions do not deprive the owner of ALL aspects of ownership and are limited to very specific</p>	
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		<p>instances that support the development of Constitutional and International Human Rights and are further limited by prescripts to be followed when making use of an exception (The South African Diamond Producers Organisation case referred to by the Western Cape Province simply applies the FNB Wesbank case's test and focuses on this leg).</p> <p>The exceptions in the Bills align copyright with the digital era and promote multilateral development, which includes advancing constitutional values and human rights. These relate to equality, facilitating access to knowledge for persons with disabilities, access to education, freedom of expression and access to information and ideas, which are central to advancing the values and rights in the Bill of Rights. They are not new to international best practice. They furthermore relate to matters that are of public interest and are for non-commercial purposes.</p> <p>The exceptions are not open ended –general four-factor test in clause 12A(b) and some have additional limits.</p> <p>Section 22: “Every citizen has the right to choose their trade, occupation or profession (“TOP”) freely. The practice of a trade, occupation or profession may be regulated by law.”</p> <p>Keep in mind that this right applies to producers, publishers etc. as well as to artists, musicians, writers.</p> <p>The latter grouping voiced concerns that the current wording of the Act means that they are unable to make a living of singing, writing etc. - i.e., the current wording limits their TOP right.</p> <p>Constitutional Court (South African Diamond Producers Organisation case): Legislation limits the choice of TOP if its effect makes the practice of that TOP so undesirable / difficult / unprofitable that the choice to enter it is limited.</p> <p>Test – consider:</p> <ul style="list-style-type: none"> • Is there a legal barrier to entry? 	
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		<ul style="list-style-type: none"> • Is there an effective limit on, or an effective bar to, that choice in that would “deter” persons from entering that trade, occupation or profession? <p>The remitted Bills aims to achieve a shift in the profits towards authors so as to address exploitive practices. This is not an effective limit / bar to producers, publishers etc. to choose a TOP, alternatively would pass the test set by section 36.</p> <p>The remitted Bills will however correct some of the effective limits that the current wording of the Act imposes on artists, musicians, writers and will also generate new trade, occupational and professional opportunities.</p> <p>The remitted Bills regulate the TOP – the test here is one of rationality.</p> <p>Constitutional Court: “(t)his means that the question is whether there is a rational basis for section 20A; whether another measure may have been more effective, or less disruptive, is not relevant.”</p> <p>Three step test is not a test to be included in legislation. The wording of the Bill does comply with this test. To include the test in the Bill over and above the specific exceptions that comply with the three-step test when taken as a whole, will result in exceptions becoming so strict that they will no longer be useable. Max Planck Institute advised that the test should be read as a whole and not as three separate requirements – e.g., “specific instances” added to the exceptions (which is already a specific instance), then means that within that exception you can only use that exception in a specific instance. International law specifically does not claim to provide an exhaustive list of cases that are covered by exceptions – this is especially of concern iro technology that develops fast</p> <p>Layering of restrictions creates unnecessary and onerous barriers, impact negatively on access to information,</p>	
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		<p>education, research, library services, which have constitutional implications iro equity etc.</p> <p>The multitude of legal tests creates confusion, uncertainty in law and thus affects the rule of law</p> <p>Max Planck institute (German research institute):</p> <ul style="list-style-type: none"> • The three steps must be considered as a whole when assessing exceptions; • The test does not require a narrow interpretation of limitations and exceptions – the interpretation must take objectives and purposes into account; • The step related to “certain specific cases does not prevent legislatures from introducing for instance fair use, as long as the scope thereof is reasonably foreseeable (fair use is not more or less foreseeable than fair dealing); • The test should be interpreted in a way that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms. <p>Australian Law Reform Commission reported that it considers fair use to be consistent with the three-step test: Based on history of test, interpretation of the test, and member practices concluded that it does comply</p>	
SECTION 12A (GENERAL FAIR USE CLAUSE)			
FREE STATE	Limited sufficient research, studies, assessments and reports (i.e., an Socio Economic impact Assessment System report) exists and the introduction of the principle ‘fair use’ in South Africa is not justified.	<p>Proposed amendments are not recommended: Fair use as an option is a policy decision that was thoroughly researched and as in line with global developments. It was found to be a policy direction that will result in economic advantages for South Africa.</p> <p>DTIC</p> <p>Copyright regimes across the world are slowly moving away</p>	
FREE STATE	Delete Section 12A until a proper economic assessment of the impact on the introduction of “Fair Use” is conducted in SA.		

GAUTENG	<p>Section 12 A: The incorporation of a Fair Use exception alongside that of Fair Dealing raises fundamental problems as the two are jurisprudentially incompatible. Fair Use is a wide and general exception whereas Fair Dealing is a closed and more specific list of exceptions. As such, the two forms of exceptions are fundamentally different. It is important for purposes of legal certainty, to elect one of these instead of attempting to have a legal system that recognises both. Generally, no legal system in any jurisdiction uses both.</p> <p>Alternatively Section 12A of the Copyright Amendment Bill, which introduces an open-ended US-style fair use provision, be deleted.</p>	<p>from the closed-list system to an open system, which will keep up with innovation, and changing environment. Globally, research has found that fair use has not impacted negatively on the economy. On the contrary, there is evidence that shows that countries with open exceptions and fair use have high levels of innovation, economic growth and development. The Bill has adopted the hybrid model based on fair use doctrine that takes into consideration the list of exceptions. The Copyright Act 1978 is based on a fair dealing regime. Fair dealing sets out defined categories of acceptable uses. It only applies to a use of copyright material if the use is for one of the prescribed purposes. If a given use does not fall into one of the categories of use, then it cannot be found to be fair.</p>	
KWAZULU-NATAL	<p>Some organizations who made written submissions have strongly rejected the replacement of the 'fair dealing' system by the introduction of the 'fair use' system in the South African Copyright law. They advanced that the 'fair use' approach has been rejected in UK, Australia, New Zealand, and the European Union. Some went further by pointing out that the introduction of 'fair use' is strongly supported by certain big technology corporations such as Google, which will be the immediate principal beneficiaries, at the cost of the livelihoods of South African authors and copyright owners. For instance, the Writers Guild of South Africa, argue that there exists an overwhelming reality that the envisaged Act on copyright falls short in protecting the authors (and other creators) and owners of copyright works.</p>	<p>Fair use is a doctrine under copyright law that permits certain uses of a work without the copyright holder's permission. The fair use is an exception to the exclusive rights of a copyright owner. Fair use exceptions include but not limited to criticism, parody, comment, news reporting, teaching, scholarship, or research. It allows users to make use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright owner.</p> <p>Fair dealing in our current Copyright Act is outdated, limited and static, and does not address the digital world. Fair use, on the other hand, is progressive, dynamic and future proof and 'digital-friendly'. Fair use has been used in courts in the U.S. and Europe for about 200 years and there is a wealth of jurisprudence to draw on.-Denise Nicholson</p> <p>Fair use was coded in the U.S. Copyright Act of 1976 and has not had to be amended, as it applies to new technologies as they arise. Ten other countries have also adopted fair use in their copyright laws and more countries are considering it, because it is 'future-proof' and benefits users and producers of information and knowledge. Its 4 factors give clarity to</p>	
LIMPOPO	<p>Clause 15 Insertion of section 12A in Act 98 of 1978</p> <p>Section 12A: The proposed doctrine of "fair use" is too wide and may subject artists to exorbitant litigation in an attempt to challenge the use of their work under the doctrine of fair use. Section 12A should be deleted and</p>		

	the Department should conduct an economic assessment of the impact of introducing fair use doctrine in South Africa.	what can be used and reused, whereas fair dealing does not.- Denise Nicholson In terms of experience of the SA judiciary to address fair use, there is evidence of jurisprudence related to fair dealing. The SA Bill has the words ‘such as’, which will ensure that the Bill is future proof. WIPO study: The DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary. Fair use was in the first draft of the dtic published Bill in 2015. The Genesis Regulatory Impact Assessment study of 2014, referred to it as a regime South Africa must consider. Introduction of a hybrid fair use provisions is a policy position of the dtic and it is addressing socio economic challenges of a developmental state of SA The Portfolio Committee on Trade and Industry agreed that the Bill should use a hybrid approach to the fair use/ fair dealing, which must be anchored in fair use. A hybrid model is the mixing of fair dealing and fair use Mixing fair use with preexisting fair dealing provisions creates a hybrid model Fair use is not foreign to SA, other jurisdictions have introduced it The provisions of fair use have safeguards Countries that apply fair use tend to be more innovative and with a growing creative industry. There are several countries in the world with open broad exceptions and have not been found to be in contravention of international law Other countries have adapted fair use such as the US, Israel Sri Lanka.	
NORTH WEST	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 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.		
KWAZULU-NATAL	It is clear from the written submissions that there are opposing views on the policy that should inform the Bills. The Bills before the Committee proposes a hybrid approach in that it makes provision for specific exceptions and then provides a general fair use exception that will cover instances not specifically foreseen. When considering the varying perspectives, the Committee must keep various constitutional rights in mind, as well as matters related to equity and efficiency policy considerations. It is necessary that the Bills provide a	CLSO The Department did a SEAIS, there was also the Farlam report. The committees of the 5 th Parliament and 6 th Parliament did extensive consultation on fair use and it seems that there are	

	<p>balance in order to respond to constitutional concerns, and the economic, finance, and social policy outcomes. Support and promotion of innovation, research and development, transformative goals, encouraging investment and propelling inclusive growth, remain critical policy priorities.</p>	<p>people who favour the one approach and people who favour the other approach.</p> <p>Deleting section 12A will result in no exceptions being applicable to copyright, save for the ones expressly listed in sections 12B onwards. There will thus be no exceptions even for the list, which is currently provided in the Act. Copyright without exceptions limits--</p> <ul style="list-style-type: none"> • the POSITIVE rights contained in our own Constitution such as the right to the right to equality (s9); to human dignity (S10); to freedom of expression (s16); to a cultural life (S30); and to education (S29); and • rights in the Universal Declaration of Human Rights such as the right to receive and impart information and ideas through any media (A19) and education (A26). <p>If fair use is to be changed back to fair dealing, an extensive amendment exercise will have to be undertaken as the current Act does not provide equal protection to copyright owners, authors and users (Consider the challenges raised in the Blind SA case). As such the Act may be found unconstitutional if a balance is not brought about by this Bill.</p> <ul style="list-style-type: none"> • The Bill used the tool of “fair use” so that it will not be necessary to amend the Act in a few years’ time again when technology has developed outside of what could be foreseen now. • In order to balance the Bill if using the fair dealing policy, consultations and desk top studies etc. will have to be conducted to ensure that the list of exceptions is as encompassing as possible. • A Canadian Court in fact referred to exceptions as “rights of users”. <p>It is submitted that the current policy of fair use be retained as its policy will pass constitutional muster, that exceptions have clear limitations to ensure protection of owners, while</p>	
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		<p>balancing the rights of users to ensure constitutional rights are given effect to and that the Bill aims to provide more protection to authors.</p> <p>Considering the examples of countries that do use the fair use approach, it is clear what is fair and what is unfair. All exceptions are express in what the limits are iro what is fair and what is not. It seems that there are people who favour the one approach and people who favour the other approach.</p> <p>There are in fact countries that use fair use with a list of exceptions (hybrid in other words).</p> <ul style="list-style-type: none"> - Israel: "Israel's new Copyright Act, which took effect on 25th May, 2008, introduced a long list of limitations and exceptions to the exclusive rights of the copyright owner....Alongside these specific and conditional permits, Section 19 of the Act adds a general, open-ended permit to make fair use of a work."¹ - South Korea : In addition to a general fair use clause, provision is also made for specific exceptions such as quotations.² <p>Fair use will not create legal uncertainty or increase the risk of litigation. The new section 12A provides 4 clear factors to be considered. Similar factors have been part of the USA copyright law for decades. Not ALL determination of whether use is fair or not has to go to a court. It is only when there is a dispute. To determine if something is fair, our courts will consider international law, including that of the USA. Nothing stops users and copyright owners to do the same – as there is thus an indication of what our courts may find to be fair.</p>	
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¹ <https://www.tglaw.co.il/index.php?dir=site&page=articles&op=item&cs=10109&langpage=eng&language=eng>

² http://www.koreanlii.or.kr/w/index.php/Fair_use?ckattempt=1

		<p>Increased litigation?</p> <p>The law programme used by Parliament shows at least 1011 cases where “fair dealing” was mentioned together with the word “Copyright” (only reported cases) and Burchell’s IP law library had 21 cases that were discussed - even that is not a gauge on the litigation sparked by fair dealing as a defence: Many cases are not reported.</p> <p>Concerns that there are not enough guidelines on how to deal with fair use:</p> <ul style="list-style-type: none"> • Clause 15, section 12A(a) gives a number of examples of what constitutes fair use; • Clause 15, Section 12A(b) sets out 4 clear factors that a court must take into account when determining if use was fair • Clause 15 - section 12B to 12D, clause 21 - section 19B, Clause 22, Section 19C and D set out very specific rules that apply to each exception • Using judgments from other countries is accepted and thus there are many cases for courts to be guided by: “For more than three hundred years the South African judiciary has, "with a minimum of fuss - and mostly without specific mention that they were doing so - adopted a comparative law approach" with regard to foreign precedent” - Rautenbach 	
<p>MPUMALANGA</p>	<p>12A(d) “Authors, creators and owners of copyright works must where reasonably possible be consulted first before their work is used.”</p> <p>The department submitted that fair use is not defined in the proposed amendments; and that this will create legal uncertainty and increase the risk of litigation. The Committee noted that as stated above, the doctrine of fair use must have a clause in the Bill to state that where</p>	<p>The support for Clause 12A is noted.</p> <p>The proposed amendment is not recommended – section 12A deals with matters where no compensation is payable, because the use in question is fair – e.g., quotations, criticism, research.</p> <p>CLSO</p> <p>Fair use refers to uses that do not elicit compensation – it is when someone quotes from a work, or makes mention of a work in their news report. Because of this, it would be</p>	

	<p>reasonably possible, before any copyright holders work is used, prior permission must be sought from the holder, so that the holder can be compensated accordingly at the end. The proposed amendment to Clause 12A of the Bill is, therefore, supported by the Committee.</p>	<p>impractical to ask permission first – e.g. I need to submit a school assignment tomorrow and I want to use a quote from a recently published American author. I can find their website and there is an email for the publisher, so it is reasonably possible to consult, but I will likely not receive a response in time for my assignment.</p> <p>The rationale for the proposed amendment is however addressed in the Bill. It is a challenge that authors are not paid – but various clauses are now providing for additional payments (e.g., 6A, 7A) and the regulations that will deal with standard terms will also ensure that agreements clearly indicate what amounts will be paid to authors - the provisions regulating collecting societies are also much stricter.</p>	
NORTHERN CAPE	<p>Fair use doctrine to be revised and should be subjected to the three-step test overall yardstick to provide legal certainty;</p>	<p>It is submitted that the Bills do comply with international treaties and with the three-step test. No amendments recommended.</p> <p>DTIC</p>	
WESTERN CAPE	<p>Lack of Adherence with International Treaties:</p> <ul style="list-style-type: none"> • The Bill has been criticised for failing to adhere to international treaties, which could have implications for South Africa's international trade relationships. The Bill may also result in a loss of foreign investment in South Africa's creative industries. • Section 12A introduces the principle of 'Fair Use', which is contrary to South African law. Fair use is also not a widely used approach globally and it does not comply with the 'Three Step Test' set out in the Berne Convention and the TRIPS Agreement. Section 12 would breach these conventions and would be unconstitutional. 	<p>WIPO study: The DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary. Fair use was in the first draft of the dtic published Bill in 2015. The Genesis Regulatory Impact Assessment study of 2014, referred to it as a regime South Africa must consider.</p> <p>The exceptions comply with the three-step test. Consideration was made on the three-step test. They have safeguards. They were extensively debated in Parliament. Because the three-step test is a principle, it should not be in the law. This change was effected and removed based on public participation.</p> <p>The fair use in the Bill meets constitutional muster. The three-step test was considered and it was not advisable to add in the Bill as the three step is a principle and need not be added in a law.</p>	

		<p>The exceptions in 12B-12D were consulted upon. The three-step test was considered against the exceptions. They were found to be in line with the three-step test.</p> <p>Broadly, though, the three-step test puts forward three cumulative conditions for national copyright exceptions and limitations and prescribes that such exceptions and limitations must:</p> <ol style="list-style-type: none"> 1. be confined to certain special cases; 2. not conflict with the normal exploitation of the copyright work; and 3. not unreasonably prejudice the legitimate interests of the rights holder / author. <p>Based on the examination it was respectfully submitted that newer in-depth research on the topic strongly suggests that open-ended, flexible fair use provisions like the one contained in the South African Copyright Amendment Bill are indeed permissible under and consistent with the three-step test – and in fact needed for copyright law to adapt to digital technology. As for the other exceptions contained in ss12B-12D the Bill, there was no obvious conflicts with the three-step test either: Several of these provisions stem from the current Copyright Act and it is assumed that their compliance with the three-step test is not all of a sudden challenged now. As far as newly introduced exceptions are concerned, some of these are based on similar provisions in foreign laws. This may not substantiate compliance with the three-step test per se but may at least suggest compliance if these provisions have not been challenged in the other country. Overall, the newly introduced exceptions are flexible but appear, on balance, to be specific enough to meet the requirement of the first step (“certain special cases”) as discussed in the context of s12A above. The extracts are from a technical opinion developed for the PC during the</p>	
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		<p>parliamentary process.</p> <p>CLSO</p> <p>Three step test is not a test to be included in legislation. The wording of the Bill does comply with this test. To include the test in the Bill over and above the specific exceptions that comply with the three-step test when taken as a whole, will result in exceptions becoming so strict that they will no longer be useable. Max Planck Institute advised that the test should be read as a whole and not as three separate requirements – e.g., “specific instances” added to the exceptions (which is already a specific instance), then means that within that exception you can only use that exception in a specific instance. International law specifically does not claim to provide an exhaustive list of cases that are covered by exceptions – this is especially of concern iro technology that develops fast</p> <p>Layering of restrictions creates unnecessary and onerous barriers, impact negatively on access to information, education, research, library services, which have constitutional implications iro equity etc.</p> <p>The multitude of legal tests creates confusion, uncertainty in law and thus affects the rule of law</p> <p>Max Planck institute (German research institute):</p> <ul style="list-style-type: none"> • The three steps must be considered as a whole when assessing exceptions; • The test does not require a narrow interpretation of limitations and exceptions – the interpretation must take objectives and purposes into account; • The step related to “certain specific cases does not prevent legislatures from introducing for instance fair use, as long as the scope thereof is reasonably foreseeable (fair use is not more or less foreseeable than fair dealing); 	
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		<ul style="list-style-type: none"> • The test should be interpreted in a way that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms. Australian Law Reform Commission reported that it considers fair use to be consistent with the three-step test: Based on history of test, interpretation of the test, and member practices concluded that it does comply <p>It is not correct to say that a new concept introduced by legislation is “contrary to South African law”.</p> <p>The only reason to introduce legislation is to introduce concepts into the South African law that is not currently there, or to amend, and even replace, concepts that are not working.</p>	
SECTION 12B (SPECIFIC EXCEPTIONS)			
GAUTENG	<p>Section 12B(1)(b) – reproduction of sound recordings by a broadcaster</p> <p>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: [...]</p> <p>(b) 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 <u>30 days</u> immediately following the date of the making of the reproduction, <u>and the copy shall not be used for transmission more than three times</u>: 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;</p>	<p>The proposed amendments are not recommended – the longer time period is required as broadcasters operate on longer term projects - The terminology of assignment in the Bill is widely used in terms of copyright</p> <p>DTIC</p> <p>This exception is currently in section 12(5) of the Copyright Act. The Act is limited to musical or literary works. Ephemeral rights form part of exceptions and allow a broadcaster to have a copy of the work such as sound recordings for a limited period of six months without being allowed to distribute it to any person. During live events that are broadcast, the broadcaster may have the copy of the music played. It allows broadcasters the right to use sound recording in their reproductions without paying royalties. These amendments regarding ephemeral exception affecting the broadcasters were proposed in the National Assembly. Some submissions proposed the Canadian model which was put to the public. Many unintended consequences and application to the SA context were found. It was advised that the current amendments be retained. Experts advised that</p>	

	<p>Propose subparagraph (i) should read as follows: “is authorized to broadcast or communicate the performer’s performance, work or sound recording to the public” (with the phrase “by telecommunication” being removed as it is not used in our law.</p>	<p>the current timeframes and provisions in the Bill and Act were in line with similar provisions globally. It is recommended that these changes not be considered now. That they can perhaps be assessed for future amendments. One of the broadcasters indicated that the reduction to 30 days from the operational point of view will be difficult to comply with. For the Radio Division this would mean they have to create and delete content monthly This exception is currently in section 12(5) of the Copyright Act. The Act is limited to musical or literary works.</p> <p>Ephemeral rights form part of exceptions and allow a broadcaster to have a copy of the work such as sound recordings for a limited period of six months without being allowed to distribute it to any person. During live events that are broadcast, the broadcaster may have the copy of the music played. It allows broadcasters the right to use sound recording in their reproductions without paying royalties.</p> <p>These amendments regarding ephemeral exception affecting the broadcasters were proposed in the National Assembly. Some submissions proposed the Canadian model which was put to the public. Many unintended consequences and application to the SA context were found. It was advised that the current amendments be retained. Experts advised that the current timeframes and provisions in the Bill and Act were in line with similar provisions globally. It is recommended that these changes not be considered now. That they can perhaps be assessed for future amendments. One of the broadcasters indicated that the reduction to 30 days from the operational point of view will be difficult to comply with. For the Radio Division this would mean they have to create and delete content monthly.</p> <p>The phrase “telecommunication”: The proposed wording is not in the Bill. It was a recommendation made during the public</p>	
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		<p>submission phase when the ephemeral rights were advertised with the wording from the Canadian law. Given the unintended consequences, this amendment is not recommended. The comments are likely based on the previous advertised clauses that were since deleted in the public participation process.</p> <p>CLSO This phrase “by telecommunication” does not appear in the Copyright AB nor in the PPAB</p>	
NORTH WEST	<p>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 Act 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".</p>	<p>Proposed amendments not recommended – the exceptions comply with the three-step test.</p> <ul style="list-style-type: none"> - The exceptions in paragraphs (a) and (b) are already recognized in the current Act - Paragraph (h) is limited to very specific instances and is limited by purpose (not for commercial purposes) and fair practice - Distribution: Parallel importation will have significant economic and competition benefits. <p>DTIC The exceptions were deliberated in the National Assembly. The three-step test was considered and exceptions were found to be compliant with the three-step test. Section 12B(6) introduces an international exhaustion model. When goods are distributed, it will be with the consent of the copyright owner. The proposed wording seems to suggest goods have already circulated in the Republic. This provision intends to allow the distribution of works with the permission of the copyright owner. On distribution, TRIPS article 6 allows exhaustion of rights and for the country to choose which system of exhaustion will determine how the parallel import will work. The term exhaustion refers to the principle in IP law that a right holder cannot prevent the further distribution or resale of the goods after consenting to the first sale also</p>	

		<p>known as the first sale doctrine. Once the goods have been put on the market by or with the consent of the right holder, further circulation cannot be controlled. Parallel imports refer to the original products sold by the right holder or with his consent in another market and then imported through a channel “parallel” to that authorized by the right holder. Parallel imports are not counterfeit or pirated goods and they do not infringe Intellectual Property Rights in the country of Origin.</p> <p>On the parallel importation: Parallel importation would allow distributors and booksellers to choose from a range of world markets as opposed to the South African market, which could lead to a more equitable pricing structure. Parallel importation would open access to cheaper copyright works from abroad. A relative lack of competition in the marketplace is an important factor. The lack of competition is evident from price of the books. National copyright legislation should therefore follow the rule of international exhaustion rather than the rule of national exhaustion.</p> <p>CLSO</p> <p>The exceptions in (a) and (b) are not new exceptions – It is thus not clear how these exclusions are now not compliant. It is submitted they comply with the three-step test.</p> <p>Act: Section 12: (3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: <u>Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.</u></p> <p>Bill: 12B(1)(a) exceptions iro quotation. Limits:</p>	
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		<ul style="list-style-type: none"> - the extent thereof shall not exceed the extent reasonably justified by the purpose, and it shall be compatible with fair practice; and - (ii) the source and the name of the author, if it appears on the work, shall be mentioned in the quotation; <p>Act: Section 12 (5): “(5) (a) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following 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.</p> <p>(b) Any reproduction of a work made under paragraph (a) 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.</p> <p>Bill: 12B(1)(b): “(b) 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</p>	
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		<p>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;”</p> <p>Personal copies: Bill: 12B(1)(h): the making of a personal copy of such work by a natural person for their personal use and made for ends which are not commercial: Provided that such use shall be compatible with fair practice. This exception complies with the three-step test:</p> <ul style="list-style-type: none"> - be confined to certain special cases: Only for <u>personal</u> copies and even so, you cannot make a copy if you want to make money off it. Furthermore, the making of a copy must be as per fair practice – taking a photo of your paintings for insurance purposes, copying a page or two from a book to take with you to reference instead of the whole book, which could be heavy. - not conflict with the normal exploitation of the copyright work and not unreasonably prejudice the legitimate interests of the rights holder / author: Due to the above restrictions, this cannot interfere with normal exploitation. Fair use will NOT include taking a work from a friend and copying the whole if it so that the person can use it; 	
GAUTENG	<p>Recommended Amendments 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: [...] (h) the making of a personal copy of <u>a work acquired lawfully</u> by a natural person for their personal use. : Provided that such use shall be compatible with fair practice.</p>	<p>The proposed amendments are not recommended. The proposed addition was advertised by the Portfolio Committee and resulted in many unintended consequences, interpretation challenges and a negative impact on various sectors DTIC The amendment of lawfully acquired was considered before but was found to be challenging. It was advertised and found to have many unintended consequences.</p>	

	<p>(2) For the purposes of subsection (1)(h), permitted personal uses are—</p> <p>(a) the making of a back-up copy; and</p> <p>(b) time or format-shifting.;</p> <p>(c) <u>For the purposes of section 12B(1)(h), a “copy” that is acquired lawfully-</u></p> <p><u>(a) includes 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 (other than a download of a kind mentioned in paragraph</u></p> <p><u>and (b) 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.</u></p>	<p>CLSO</p> <p>The proposed amendments are not recommended. The proposed addition was advertised by the Portfolio Committee and resulted in many unintended consequence, interpretation challenges and impact on sectors such as libraries (e.g., library users “borrow” books and are currently allowed to copy a few pages for personal / study purposes – that will not be possible if this is added.) The paragraph further includes “fair practice” as a standard, which does not have to be defined as it is a standard in copyright law and internationally recognized, included in the Berne Convention (Article 10 for quotations and illustrations for teaching). It is also already used in the principal Act.</p> <p>The definition is also not recommended as it will stifle the hands of the courts on subtle differences in the facts of a case before them. It is implied that copies may only be made from legally obtained works and need not be stated. An exception cannot be used to justify an illegal Act – i.e., a person cannot steal a compact disc and then say they are allowed to make a copy as the Act allows it. Their hands are already dirty.</p> <p>However, if the Committee wants to retain the aspect of lawfulness in the text of the Bill, it is recommended that the phrase “lawfully accessed” is rather used in paragraph (h), but not defined so that the courts can apply the phrase to the facts before them taking fair practice into account.</p>	
<p>KWAZULU-NATAL</p>	<p>Some of the interested parties argue for the rejection of Section 12B introduced by the envisaged Copyright Amendment Bill. It is advocated that the provisions amount to an arbitrary deprivation of property as contemplated in section 25 (1) of the Constitution. The deprivation is substantial and overly broad.</p>	<p>The proposed deletion of section 12B is not recommended. Some of the exceptions are currently in the Copyright Act and posed no challenges related to treaties or arbitrary deprivation. The new exceptions are not arbitrary in nature and comply with all the guidance provided by the Courts iro compliance with the Constitution and all exceptions comply with treaties and the three-step test.</p> <p>DTIC</p>	

		<p>Translations and other exceptions are already provided for in the Act. It also provides for constitutional rights.</p> <p>CLSO</p> <p>The exceptions will in our view pass constitutional muster and do not constitute arbitrary deprivation of property.</p> <p>Section 25 does not create a positive right to property – only a right to not be arbitrarily deprived. “No one may be deprived of (1) property except in terms of (2) law of general application, and no law may permit (3) arbitrary deprivation of property.”</p> <p>The two Bills are laws of general application.</p> <p>Remaining question: Accepting for the moment the Copyright is property (Laugh it Off case accepted trademarks as property), is deprivation as per the Bills, arbitrary? Copyright has always been subject to exceptions.</p> <p>The Act provides for when Copyright vests and how it is transferred, what rights it gives to the holder of Copyright and what the exceptions to those rights are.</p> <p>Copyright without exceptions limits--</p> <ul style="list-style-type: none"> • the POSITIVE rights contained in our own Constitution such as the right to the right to equality (s9); to human dignity (S10); to freedom of expression (s16); to a cultural life (S30); and to education (S29); and • rights in the Universal Declaration of Human Rights such as the right to receive and impart information and ideas through any media (A19) and education (A26). <p>The purpose of the exceptions in the remitted Bills is to—</p> <ul style="list-style-type: none"> • balance the above rights with the already established right in Copyright (not confirmed, but is likely to be found to be property); and • align copyright with the digital era and promote multilateral development, which includes advancing constitutional values and human rights. 	
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		<p>The exceptions are subject to a general four-factor test in clause 12A(b) and some are further subject to specific limits (discussed further in following slides). The exceptions are thus not open ended.</p> <p>What is “arbitrary deprivation”? First National Bank t/a Wesbank v SARS case:</p> <p>Test is narrower than S36’s proportionality evaluation as S36 requires “reasonableness” and “justifiability”. If deprivation is not arbitrary, S36 does not come into play (Par 65, 70).</p> <p>Par 100: Deprivation in S25 is arbitrary when the law of general application “does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.”</p> <p>Sufficient reason?:</p> <ul style="list-style-type: none"> • Relationships to consider: 1. Deprivation: Purpose of the law; 2. Purpose for deprivation: Person affected; 3. Purpose for deprivation: Nature of the property; 4. Purpose of deprivation: Extent of the deprivation. • A more compelling purpose will have to be established iro land or a corporeal moveable and when the deprivation in question embraces all the incidents of ownership • Considering all of these factors, sometimes a mere rational relationship between means and ends will be enough, sometimes a proportionality evaluation closer to that required by section 36(1) is required. <p>The exceptions and limitations are all within defined parameters Slide 8 and 9 of presentation to NCOP</p> <p>There is sufficient reason when considering all the factors: Evaluation likely more towards a “rational relationship between means and ends”, than towards proportionality (S36) (although the three-step test in itself provides proportionality and so the Bill would comply even with a strict evaluation):</p>	
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		<p>Purpose of law and of deprivation and considering who is affected when exceptions are NOT included, and who if they ARE included: Must balance intellectual property with the rights to education, dignity, equality, trade, and freedom of expression.</p> <p>Nature of property: Intellectual property is not land, nor corporeal (thus does not require “a more compelling purpose” as for land).</p> <p>Extent of deprivation: The exceptions do not deprive the owner of ALL aspects of ownership and are limited to very specific instances that support the development of Constitutional and International Human Rights and are further limited by prescripts to be followed when making use of an exception (The South African Diamond Producers Organisation case referred to by the Western Cape Province simply applies the FNB Wesbank case’s test and focuses on this leg).</p> <p>The exceptions in the Bills align copyright with the digital era and promote multilateral development, which includes advancing constitutional values and human rights. These relate to equality, facilitating access to knowledge for persons with disabilities, access to education, freedom of expression and access to information and ideas, which are central to advancing the values and rights in the Bill of Rights. They are not new to international best practice. They furthermore relate to matters that are of public interest and are for non-commercial purposes.</p> <p>The exceptions are not open ended –general four-factor test in clause 12A(b) and some have additional limits.</p>	
KWAZULU-NATAL	<p>The advocates of fair dealing further argue that the scope of the personal use provisions in section 12B(h) is too wide and there is a missed opportunity to introduce private copying remuneration for authors.</p>	<p>Proposed amendments are not recommended – the proposed regime has many challenges and will require further research, consultations and impact assessments</p> <p>DTIC</p>	

NORTHERN CAPE	It must further be impressed in the Bill that the intended authors receive the royalties in respect of the provision of private levies.	The private copy levy recommendation was noted. Given that it is a new system and it has never been considered, it is not advisable to include now. There has been reports of unintended consequences and difficulties in implementing the private copy system. It has been found to have unintended implications in other countries.	
NORTH WEST	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 goods.	<p>Amendment proposed – see portion in blue font: Section 12B(6) <u>“(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.”</u></p> <p>DTIC The comment is supported. It is noted for further consideration. The terminology of assignment in the Bill is widely used in terms of copyright. The word ownership is recommended to be removed</p>	
SECTION 12C (TEMPORARY REPRODUCTION AND ADAPTATION)			
GAUTENG	Propose New section 12C(2) – subjecting the temporary reproduction and adaptation exception to the three-step test. Recommend, to ensure alignment with what was contemplated when introducing this exception in the EU Directive, the following revision of paragraph (2): (2) The making of transient or incidental copies or adaptations of a work contemplated in subsection (1), may— (a) only be done in certain special cases; (b) that do not conflict with the normal exploitation of the copyright work; and (c) do not unreasonably prejudice	<p>The proposed amendment is not recommended - the three-step test was not intended to be included in legislation. Such inclusion results in a layering of exceptions and results in an exception becoming impossible to use.</p> <p>DTIC Section 12C(2) was deliberated upon extensively on the three-step test in the National Assembly. The advertised subsection with the three-step test was effected on the Bill. Because the three-step test is a principle, it should not be in the law. Experts advised against the inclusion of a principle in a legislation. This</p>	

	<p>the legitimate interests of the copyright owner flowing from their copyright in that work.”</p>	<p>change was effected and removed based on public participation. The EU Directive was an example used by various stakeholders and was taken into consideration.</p> <p>CLSO</p> <p>Not recommended: Three step test is not a test to be included in legislation. The wording of the Bill does comply with this test. To include the test in the Bill over and above the specific exceptions that comply with the three-step test when taken as a whole, will result in exceptions becoming so strict that they will no longer be useable. The Max Planck Institute advised that the test should be read as a whole and not as three separate requirements – e.g., “specific instances” added to the exceptions (which is already a specific instance), then means that within that exception you can only use that exception in a specific instance.</p> <p>International law specifically does not claim to provide an exhaustive list of cases that are covered by exceptions – this is especially of concern iro technology that develops fast.</p> <p>Layering of restrictions creates unnecessary and onerous barriers, impact negatively on access to information, education, research, library services, which have constitutional implications iro equity etc. The multitude of legal tests creates confusion, uncertainty in law and thus affects the rule of law</p> <p>Max Planck institute (German research institute):</p> <ul style="list-style-type: none"> • The three steps must be considered as a whole when assessing exceptions; • The test does not require a narrow interpretation of limitations and exceptions – the interpretation must take objectives and purposes into account; • The step related to “certain specific cases does not prevent legislatures from introducing for instance fair use, as long as the scope thereof is reasonably foreseeable (fair use is not more or less foreseeable than fair dealing); 	
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		<ul style="list-style-type: none"> • The test should be interpreted in a way that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms. <p>Australian Law Reform Commission reported that it considers fair use to be consistent with the three-step test: Based on history of test, interpretation of the test, and member practices concluded that it does comply</p>	
SECTION 12D (REPRODUCTION FOR EDUCATIONAL AND ACADEMIC ACTIVITIES)			
GAUTENG	submit that ss 12A-D and 19C are crucial to realise the right to education and freedom of expression for all members of society.	Noted. No amendments required	
KWAZULU-NATAL	From the public interest perspective, it is advanced by some stakeholders that although the proposed amendment arguably limits authors' rights in relation to their work, these changes give effect to numerous constitutional rights, including the right to education. It is further submitted that section 12D (1) widens the ambit of the provision and promotes the right of access to information.		
GAUTENG	<p>Section 12D - Reproduction for educational and academic activities</p> <p>The entire Section 12D should apply only to the extent that there is no collective licensing scheme in place. Where copying of extracts of books and individual journal articles is permitted under license by collective management organisations, section 12D should be inapplicable.</p> <p>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 be deleted.</p>	<p>Proposed amendment re a licensing scheme not recommended – it may have unforeseen implications and require further research, consultation and an impact assessment. It will also require a public participation process. Proposed deletion of subsection (6) not recommended – it must be read with subsection (8), which prevents plagiarism DTIC</p> <p>Section 12D was debated extensively in parliament. It is an exception with safeguards. Some experts have noted challenges in the academic sector with licenses and the effect on the cost of books in SA. Introducing the licensing scheme may have implications that are unforeseen. This is a new amendment. It is recommended that it be considered in the</p>	

		<p>next amendment stage. This amendment may affect the exception and access to education.</p> <p>CLSO</p> <p>Not recommended: Subsection (6) does not allow plagiarism and does not allow unfettered incorporation of portions of work. It must be read with subsection (8) which reads: (8) (a) The source of the work reproduced and the name of the author, if it appears on the work, shall as far as is practicable, be indicated on all copies contemplated in subsections (1) to (6).</p> <p>(b) The use of the work as contemplated in subsections (1) to (6) shall not exceed the extent justified by the purpose and shall be compatible with fair practice.</p>	
NORTHERN CAPE	Adequate provision must be made in the Bill for the recognition of academic work.	<p>The Bill does provide sufficient protection – no amendment recommended</p> <p>DTIC</p> <p>The Bill addresses academic work in exceptions related to education in section 12D</p> <p>CLSO</p> <p>Section 12D requires the “source of the work reproduced and the name of the author, if it appears on the work” to be indicated on all copies.</p>	
NORTH WEST	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 conflict with the requirements of the three-step test. 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.	<p>Proposed amendment not recommended - This section gives effect to a constitutional right. It has clear parameters, complies with the three-step test and will pass constitutional muster.</p> <p>DTIC</p> <p>Section 12D was consulted upon and discussed. The provision has safe guards.</p> <p>The Preamble of the World Intellectual Property Organisation (WIPO) Copyright Treaty affirms the “need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to</p>	

		<p>information as reflected in the Berne Convention". This could be used to direct interpretation towards a broader construction of the listed exceptions, and to address this newly enshrined balance with a 'fair use' concept, which takes into account the rights of authors and the rights of access to information.</p> <p>Section 12D provides for exceptions related to educational and academic activities.</p> <p>The existing fair dealing exception in the 1978 Copyright Act fails to provide an exception for education purpose and other uses necessary for teaching.</p> <p>The Bill provides that schools and universities may make copies of extracts for educational purposes without licensing. The law is limited to excerpts. It specifically provides that course packs or other forms of copying may not "incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work" under normal circumstances. (12D(2)).</p> <p>The Bill permits copies of whole works only where there is an abuse of the market. It authorizes copying of full works only if "a licence to do so is not available from the copyright owner, collecting society, an indigenous community or the National Trust on reasonable terms and conditions"; "where the textbook is out of print"; "where the owner of the right cannot be found"; or where the right holder is engaged in anticompetitive conduct in the form of excessive pricing.</p> <p>Section 12D(1) and (2), restricted to educational and academic purposes that may not occur for commercial purposes.</p> <p>Access to education is a constitutional right and the Bill aims to facilitate this right with this exception.</p> <p>South Africa is a developing economy and public policy aims to transform the creative industry and bring access to knowledge and information to all South Africans. The CAB balances various interests including the public interest</p>	
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		<p>concerns of access to knowledge and education. The aim is to enhance access to and use of copyright works in a clearly regulated manner and enhance access to information for the advancement of education and ultimately democracy.</p> <p>CLSO</p> <p>The exception related to education and academic activities are in compliance with the three-step test.</p> <ul style="list-style-type: none"> - Confined to academic and educational activities (a right as per section 29 of our constitution) - Not conflict with normal exploitation and not unreasonably prejudice the legitimate interests of the rights holder / author: See discussions on limits below. This exception will not be in such conflict or so prejudice. <p>The exception has clear limitations:</p> <ul style="list-style-type: none"> - (2): Course packs may only be accessible by persons studying or teaching at the institution - (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. - (4) The right to make copies contemplated in subsection (1) <i>{note: only iro education or academic activities – that is what (1) says}</i> extends to the reproduction of a whole textbook— <ul style="list-style-type: none"> (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. 	
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		<ul style="list-style-type: none"> - (5) The right to make copies shall not extend to reproductions for commercial purposes.” - (8): Moral rights of author protected + (b) The use of the work as contemplated in subsections (1) to (6) shall not exceed the extent justified by the purpose and shall be compatible with fair practice. <p>This section gives effect to a constitutional right. It has clear parameters and will thus pass constitutional muster.</p>	
CLAUSE 22 – INSERTION OF SECTIONS 19C (LIBRARIES, ARCHIVES, MUSEUMS AND GALLERIES) AND 19D (PERSONS WITH A DISABILITY)			
SECTION 19C (LIBRARIES, ARCHIVES, MUSEUMS AND GALLERIES)			
GAUTENG	submit that ss 12A-D and 19C are crucial to realise the right to education and freedom of expression for all members of society.	Noted. No amendments required	
GAUTENG	In addition, s 19C is key to ensuring that our cultural heritage is adequately protected by providing for the digitalisation of the collections of libraries, archives, museums and galleries.		
GAUTENG	The Constitutional Court, in Blind SA CC, recognised the importance of access to educational materials for learners with disabilities as well as the fact that several learners with disabilities also live in poverty and are therefore doubly excluded from the market.		
GAUTENG	<p>General Exception (Libraries, Archives and Museums) and Private Copy</p> <p>The Bill introduces many provisions relating to exceptions and limitations to the copyright owner’s exclusive rights. In order to balance this situation, there is a strong persuasion for South Africa to follow the example of other jurisdictions (including the likes of Botswana, Alegria, France etc.), by introducing a system of private copy levies, to compensate rights-holders for the loss of income as a result of the wide exceptions and limitations that the Bill introduces., such a system would be good for</p>	<p>Proposed amendments are not recommended – the proposed regime has many challenges and will require further research, consultations and impact assessments. It will also require a public participation process.</p> <p>DTIC</p> <p>The private copy levy recommendations were noted. Given that it is a new system and it has never been considered, it is not advisable to include it now. There has been reports of unintended consequences and difficulties in implementing the private copy system. It has been found to have unintended implications in other countries.</p>	

	rights holders as it would provide them with an important alternative source of income This is only a fair way to ensure that rights-holders are not detrimentally affected by the changes proposed in the Bill.		
NORTH WEST	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.	<p>The proposed amendments are not recommended – the Bill limits the uses possible under this exception and it complies with the three-step test</p> <p>DTIC The use of the word use in an exception is not an exclusive right. The context of the provision is an exception. The use is not for commercial purposes.</p> <p>CLSO The sentence is “use a copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13)”. It is thus very specific. Not only must the use be as per the normal activities of a library, archive, museum or gallery, but it must also comply with the acts and limitations set out in subsections (2) to (13).</p>	
NORTH WEST	Section 19C(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.	<p>The proposed amendments are not recommended – interlibrary loans are a standard library practice. The terminology used is suited for the rights involved.</p> <p>DTIC This provision is an exception and not an exclusive right. The words access and lending is in the context of libraries and not to exploit the work. It has safeguards. It is not for commercial purposes.</p> <p>CLSO 19C(2) states: “(2) A library, archive, museum or gallery may lend a <u>copyright work...</u>”. This thus applies to ALL works that are subject to copyright. I am not sure that I understand the statement re “no apparent policy justification or impact assessment justifying an exception</p>	

	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 collections there. Section 19(3) is therefore deemed to be an error and therefore suggested that it be deleted from the exception.	from the exclusive rental right for sound recordings and audio-visual works..." <ul style="list-style-type: none"> - This practice is a normal practice between libraries etc. globally – A work belongs to A, but may be made available to B so that a user in B’s district may access the work from B’s premises. Where that access is completed, B must return the work to A. It is called an “Interlibrary loan system”. The exception on 19C aims to enable libraries to fulfil their function – which includes these loans. 	
WESTERN CAPE	Proposed Section 19C(3) provides for a library, archive, museum and gallery to provide “temporary access” to a copyright work to a user or another library. It was not clear from this what was meant by “access”. It was therefore submitted that proposed Section 19C needed to be reassessed.	Subsection (3) states: 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. <ul style="list-style-type: none"> - “Granting access” is the correct phrase for digital or intangible media. It simply means use / view – but covers all forms of digital / intangible works. 	
NORTH WEST	The exception in section 19C(4) will automatically extend to the exceptions in the Performer's Protection Act 12 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.	The proposed amendment is not recommended – the exception is iro a very specific instance namely use in a library, museum or archive – aimed at education and learning. Sufficient safeguards are provided to avoid abuse. DTIC Archives, Libraries, Museums and Galleries are central and essential to the knowledge ecosystem. They systematically preserve and make available the world’s cultural and scientific heritage for coming generations. Digital technology has brought in new dynamics in data format change and storage capacity increase. The inclusion of this exception and limitation in the legislation will enable an important role in library services and the ability of citizens to have continuing access to material held in libraries or archives. These institutions will be allowed to reproduce copyright works as part of their functions in collecting, preserving and unlocking valuable holdings that they are permanently accessible.	

		<p>The exception in 19C(4) provides for users of libraries, museums and archives to be permitted without authorization of the copyright owner, to access sound recordings, compact discs, or musical works, audio video disc and audio-visual works in full for educational or research purposes and not for commercial purposes. The user can view the work in a secure computer network or at the premises of the library and museum, institutional classroom or lecture theatre. The user will not be permitted to make a copy or record the viewing. The usage may be permitted.</p> <p>This exception may not permit the making of copies, does not permit the recording of the work, is limited to viewing or listening, for educational and research purposes only and not for commercial purposes.</p> <p>The rationale is to ensure access to education and learning, to promote knowledge and education using other modes of information such as videos, sound recordings and audio-visual works.</p> <p>CLSO</p> <p>This exception is in respect of teaching / academic studies. There is no difference between a student being able to go to a library and take a textbook and reading the whole textbook, and going to the audio studio of the library and viewing a film for academic purposes. This is NOT available for recreational purposes. The subsection further specifically state that the student may not make a copy or recording of the work for commercial purposes.</p> <p>Keep in mind that the right to education is protected in our Constitution and there is a duty placed on the state to make further education progressively available and accessible. The public has indicated that it is very expensive to access textbooks and other materials (such as the work covered by</p>	
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		this subsection) – this type of access assists students to reduce the cost of studying at no prejudice to the copyright owner.	
SECTION 19D (PERSONS WITH A DISABILITY)			
FREE STATE	The Bill must also protect the rights of artists living with disabilities in terms of issues pertaining to royalty shares and provide copies in braille.	<p>No amendment required – the Bill does provide this protection</p> <p>DTIC The Bill provides for persons with disabilities. It provides for royalties. It also provides for authorised entities.</p> <p>CLSO Already provided: All authors are protected by the Act and Bill, regardless of whether they are a person with a disability. Iro copies – The new section 19D now provides for alternative formats (i.e., including braille)</p>	
GAUTENG	<p>Section 19</p> <ul style="list-style-type: none"> Propose that, in order to avoid any interpretation that could lead to its unconstitutionality, s 19D be amended to comply with the Constitutional Court’s judgement in Blind SA v Minister of Trade, Industry and Competition. Delete the phrase “as may be prescribed and” from s 19D(1). <p>Amended clause The amended clause would read as follows: s 19D(1) “Any person who serves persons with disabilities, including an authorised entity.</p> <p>In addition to making changes to the definition as suggested in the previous section, we suggest the deletion of the phrase that is struck out below, entailing that s 19D(1) read as follows: ‘Any person who serves persons with disabilities, including an authorised entity [...]’.</p> <ul style="list-style-type: none"> This section so it can be amended appropriately by limiting the provisions of section 19D(1) to authorized entities. 	<p>Amendments proposed – See font in blue. Recommend that the broader wording of the Bill, with adjustments to accommodate the judgment, be retained to ensure compliance with the Constitution.</p> <p>General exceptions regarding protection of copyright work for persons with disability</p> <p><u>“19D. (1) [Any] An authorized entity, or any person as may be prescribed and who serves persons with disabilities[, including an authorized entity,] 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:</u></p> <p>...</p> <p><u>(3) A person with a disability, or someone acting on their behalf, including an authorized entity, may make an accessible</u></p>	

	<ul style="list-style-type: none"> ▪ Suggest replacing the constrictive “royalty” obligation with a standard that preserves contractual freedom of the parties to determine what is feasible and favourable. ▪ Section 19D(2)(a) Suggest the deletion of the phrase that is struck out below, entailing that s 19D(2)(a) reads as follows: ‘A person to whom the work is communicated by wire or wireless means may [...]’ <p>Import and export of works s 19D(3) Suggest that the following change in s 19D(3) be made where ‘subsection (1)’ is replaced with ‘s 1(a) of the Act’ that defines accessible format copy: ‘[...]may, without the authorization 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 s 1(a) of the Act[...].’</p>	<p>format copy of a work for the personal use of the person with a disability or otherwise may assist the person with a disability to make and use accessible format copies where the person with a disability has lawful access to that work or a copy of that work.</p> <p>[(3)] (4) (a) A person with a disability or a person who serves persons with disabilities, including an authorized entity, may, without the authorization 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),] for distribution, or to make it available to persons with a disability, as long as such activity is undertaken on a non-profit basis by that person.</p> <p>...</p> <p>[(4)] (5) The exception created by this section is subject to the obligation of indicating the source and the name of the author, if it appears on the work, on any accessible format copy.”.</p>	
KWAZULU-NATAL	All the interested parties support and promote provisions that will provide exceptions for people with disabilities. The interested parties argue that the move would allow people with disabilities to have fair access in alternative formats.	<p>Exceptions in respect of technological protection measures 28P. [(2) ...] (Delete in full) [(3)] (2) 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—...”</p>	
MPUMALANGA	The Bill comes in as an instruction from the Constitutional Court in Blind SA VS Minister of Trade, Industry and Competition and Others, where the Court ruled in September 2022 that the Copyright Act, 1978, is unconstitutional in respect to certain provisions relating to people with disabilities.	<p>DTIC The Blind SA judgment was noted and is being addressed. As may be prescribed is to ensure allowance is made for instances Minister can prescribe the authorised entities. Authorised entities are provided for.</p>	
NORTHERN CAPE	Provisions should be made in the Bill to always consider differently abled persons' requirements in the field, especially considering the court case in respect of Blind SA	Section 19D does not interfere with the Constitutional judgment which is currently effective. Section 19D provides rights for persons with disabilities. It provided more rights in	

<p>NORTH WEST</p>	<p>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 reprieve it offers disabled person but also because new section 19D stand central to South Africa's intended accession to the Marrakesh Treaty. 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. 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 dispossession 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. 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. 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</p>	<p>line with the Constitution. More rights were considered. Marrakesh treaty allows government to provide rights to accessible format copies in the context of the needs of that country.</p> <p>CLSO Agree.</p> <p>Section 19D fully complies with the Marrakesh treaty. Furthermore, the Constitutional Court provided a read-in provision only related to a visual disability while considering Marrakesh. That read in is very close to section 19D. Where that read-in goes broader, we do recommend that section 19D is amended to reflect that.</p> <p>The definitions referred to by the Court are contained in section 1 of the Act and Bill.</p> <p>Recommend that rather the phrasing be changed so that a 3rd group of persons are allowed as may be prescribed. So, if we amend (1) to read: “(1) Any <u>An authorized entity, or any person</u> as may be prescribed and who serves persons with disabilities, <u>including an authorized entity</u>, may,...” The definition of “authorized entity” allows 2 types of groups that may assist ito this section. Allowing a third group ensures that no person who serves persons with disabilities are inadvertently left out.</p> <p>There is no provision for a royalty in 19D</p> <p>No amendment recommended here in subsection (2). It is necessary that it be clear that the acts allowed by subsection (2) are only iro accessible format copies for non-profit reasons, retaining the integrity of the work etc. It is recommended that the reference to subsection (1) in subsection (3) is removed as that subsection already contains all the required limitations and the referral to subsection (1) may have unintended consequences.</p> <p>Do not recommend referring to a paragraph of a definition: Section (1) does not have paragraphs to refer to. It provides</p>	
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	<p>beyond literary or artistic works as envisaged by the Marrakesh Treaty.</p>	<p>definitions. If we use the phrase, it automatically makes section 1 applicable. To refer to section 1 may confuse interpretation as we do not refer to section 1 in any place where a definition is used. Furthermore, the paragraphs of clause 1 of the Bill will not be included in the Act.</p> <p>By limiting section 19D to persons with a visual disability and only literary works, the Bill may in fact be rendered unconstitutional as it would discriminate against persons with any other form of disability.</p> <p>Blind SA case: The Court could not consider other types of disabilities as it was limited to the facts before it. Section 19D gives effect to rights that are for all - able bodied and persons with any form of disability—</p> <ul style="list-style-type: none"> - the right to equality (s9); - the right to human dignity (S10); - the right to freedom of expression (s16); - the right to a cultural life (S30); and - the right to education (S29). <p>All works?</p> <p>Blind SA (Dr Samtani): The Court’s read in does not function as a ceiling.</p> <ul style="list-style-type: none"> - Section 19D must provide for all works, and not just literary works. The court was limited to the facts before it and thus read in a definition for “literary works”, but that definition already exists in the Act. - The challenge exists on ALL works – e.g., what is sheet music? <ul style="list-style-type: none"> - ‘literary work’?: it is often published in the form of a book. However, the Act does not include it as an explicit example; - “musical works”? A work consisting of music, exclusive of any words or action (NB – not 	
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		<p>excluding notes) intended to be sung, spoken or performed with the music</p> <ul style="list-style-type: none"> - “sound recordings”? Any fixation or storage ofdata or signals representing sounds” <p>Blind SA (Dr Samtani): If this section is limited to literary works, a blind musician may still be unable to access a format of sheet music that contains graphical musical notations without permission from the rights holder, excluding them entirely from participating in cultural life.</p>	
CLAUSE 24 – SECTION 21 (COMMISSIONED WORK)			
GAUTENG	<p>Section 21</p> <ul style="list-style-type: none"> ▪ Delete clause 24(a) and revert to the current default position and wording in s21(1)(c) of the Copyright Act, 1978, which reads as follows: (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 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. <p>Amend section 21(3) to read as follows: “(3) (a) Any agreement reached between the copyright owner and the author may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorise 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 an agreement between the copyright owner and author does not specify who the copyright owner is, ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do</p>	<p>The proposed amendments are not recommended - The provisions of the Commissioned works as they are now in the Bill create more clarity and protection than before. The proposed amendments are substantive and have a potential to reverse the rights and protections intended in the Bill – they will need further scrutiny before considered.</p> <p>DTIC</p> <p>The commissioned works provision was amended to ensure consistency and rights for authors and a balance with those who commission the work.</p> <p>The provision applies to commissioned work such as taking photograph, painting, drawing of portrait, making sound recording or audiovisual work.</p> <p>It provides that the ownership of any copyright in a commissioned work shall be governed primarily by a contract. Further that the contract shall limit ownership of copyright so that the exclusive right to do or authorise to do in artistic works, audiovisual works or sound recording is limited to acts necessary for the purpose of that commission and nothing beyond.</p> <p>Where the contract does not specify who the copyright owner is, the limited ownership in copyright works shall vest in the person commissioning the work.</p>	

	<p>or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, shall vest in the person commissioning the work, unless 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, after a period of seven years from the date of the commission, approach the Tribunal for an order— (i) where the work is not used by the copyright owner for the purpose of executing any of the acts contemplated in sections 7, 8 or 9, as may be applicable and the copyright owner has, upon request, refused to license the author to use that work to execute any such acts, licensing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the copyright owner; or (ii) where the work is used for the purposes of an act contemplated in sections 7, 8 or 9, as may be applicable, in respect of which the author is the owner of the rights, ordering the copyright owner to make payment of equitable. Remuneration or 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 copyright owner did not use the work; (iii) the public interest in the exploitation of the work; (iv) the purpose for which the work was commissioned; and (v) the consideration received by the author for the commissioned work. (e) Where the work contemplated in subsection (1)(c) is of a personal nature to the copyright owner, the Tribunal may not licence the author to use that work. (f) Any order granted by the Tribunal in terms of subsection (3)(c) shall not be in conflict with a normal</p>	<p>The Commissioned works amendments were seriously considered and debated in parliament. The proposed amendments by the province are substantive and have a potential to reverse the rights and protections intended in the Bill. The changes are extensive and will need further scrutiny before considered. It is recommended that the amendments in the Bill be retained. The commissioned works provisions were informed by challenges with the practices on these works and works not being accessible for use. The abuse of contracts and rights of the author were not sufficiently catered for in the Act. Industry practices informed parliament to strengthen the provisions. The Commissioned works was deliberated extensively in the PC at the time. Measures were added for more protection and certainty for authors and the works not being used. The Tribunal plays an important role.</p>	
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	exploitation of the work or be unreasonably prejudicial to the legitimate interests of the owner of the copyright."		
NORTH WEST	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.	<p>No amendments recommended – the role given to the Tribunal is to address a challenge that authors currently face. Both parties will be able to state their case and the clause includes limitations where the Tribunal cannot allow use of the work by the author.</p> <p>DTIC The role of the Tribunal in commissioning provides more protection for authors.</p> <p>CLSO The Tribunal’s role is limited to where the commissioned work is not used by the person who commissioned it. For example: the Commissioning person may have indicated that the work would be displayed somewhere, giving the author the hope for exposure of their work. Now that is not done. The Tribunal can then consider the facts of the case, hear the arguments of both sides and come to a decision. If the Tribunal allows the author to display the work, the author must then pay a fee for doing so. Paragraphs (d) and (e) give all the factors to consider in this regard – e.g., if the work is of a personal nature, the Tribunal may not allow the use thereof.</p>	
CLAUSE 25: SECTION 22 (REVERSION RIGHT)			
GAUTENG	Reversion Clause: There should also be a clear indication that the reversion does not apply to “beneficiary assignment” given to a regulated CMO.	<p>No amendments recommended – the intention with the clause is to ensure a new contract after the rights bought have been exploited for a period</p> <p>DTIC It is not clear what this comment means. The reversion clause aims to ensure that after the right is exploited, investment recouped, it can revert to the author. Parties can re-contract or renegotiate the agreement. The terminology in this comment seems to be from a foreign jurisdiction. In SA we</p>	

		refer to collecting societies not collective management organisations (CMOs). The Act does not define beneficiary assignment.	
GAUTENG	<p>Section 22 Delete the proviso to section 22(3) so that it reads as follows: (3) No assignment of copyright 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 licensor or, in the case of an exclusive sub-licence, the exclusive sub licensor, as stipulated in Schedule 2.</p> <ul style="list-style-type: none"> ▪ Propose that Section 22(3) be rejected, or as an alternative, that the sections be reconsidered with proper research being conducted on the possibility of balancing of rights. <p>Section 23(b) The 25-year limitation for assignment of rights. This limitation should be deleted as it will do much more harm than good. In theory, it will limit the commercial availability of works, and require any such rights to be re-cleared after 25 years - which in many instances will not be possible.</p>	<p>Proposed amendments not recommended – the reversion right is an important policy decision aimed at protecting authors against abusive contracts</p> <p>DTIC The comment is noted. The suggested amendment by Gauteng is unclear. If it is to delete the reversion right, this is an important policy objective. A contract is not enough to replace this clause. It is also in the US law. The proposed deletion of the reversion right / Reversion right to be ousted by a contract is not recommended. A reversionary right has a potential to create a playing field. It is more than an ordinary contract. The reversion clause is a policy decision based on research and challenges faced by authors when dealing with the assignment of their works. Parties can renegotiate after 25 years. There has been abuses of contracts.</p> <p>The reversion period is 25 years informed by the Copyright Review Commission (CRC) report. The reversion clause is a policy decision based on research and challenges faced by authors when dealing with the assignment of their works. Parties can renegotiate after 25 years. There has been abuses of contracts.</p>	
LIMPOPO	<p>Clause 25 Amendment of section 22 of Act 98 of 1978 Section 22(3) should be deleted as it limits the commercial availability of the work to a period of 25 years from the date of commencement of the agreement. It will mean that applications for the rights to use the work post 25 years would have to start afresh, which may be too difficult.</p>	<p>The reversion period is 25 years informed by the Copyright Review Commission (CRC) report. The period of reversion is informed by a study. In the US it is 35 years, in view of the fact that the period of copyright protection in the US is much longer than in South Africa (i.e., 70 years).</p> <p>The 25 years reversionary right is informed by the Copyright Review Commission report recommendations. This right is not unique to SA. Some countries have the reversionary rights.</p>	
MPUMALANGA	In protecting the performers exclusive rights to revert to him or her after twenty-five (25) years in terms of Section 3A(3)(c), the bodies recommended “shall, subject to a		

	<p>written agreement to the contrary, [shall] be valid for a period of up to twenty-five (25) years from the date of commencement of that agreement, in the case of a sound recording, where after the exclusive rights contemplated in subsection (1) reverts to the performer". The Committee noted, however, that this provision requiring a written agreement, has already been covered in Clause 3A(3)(c).</p>	<p>The parties can renegotiate their agreements. "The CRC believes that the Copyright Act must be amended to provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights. Such an amendment will help relieve the plight of composers whose works still earn large sums of money, which are going to the assignees of the composers' rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken. Page 5 of the CRC Report</p>	
CLAUSE 26: SECTION 22A (ORPHAN WORKS)			
GAUTENG	<p>Section 22A is totally impractical. It should be rewritten to allow the use of orphan works, for at least educational, research, and non-commercial purposes relating to orphan works needs to be revised. The process is impractical and costly, and few if any rightsholders who have in fact abandoned their works, are likely to know to claim from the proposed fund. That the use of orphan works that are anonymous, under pseudonyms or where right holders are untraceable, should be permitted in Section 22A, under fair practice, and/or addressed under fair use in Section 12A.</p>	<p>No amendments recommended – the provisions are necessary and were based on an international example DTIC The orphan works provision is going to ensure works that cannot be identified or located are traced. This procedure will empower the Commission. It is similar to the one in the UK. The orphan works provisions are necessary and were considered during the National Assembly process. The protection of orphan works is of significance due to the wealth of the creative works, an orphan work is whereby the owner cannot be located, is unknown, or is deceased and therefore the work cannot be used in terms of Copyright as permission of the holder of copyright is required in the situation of an orphan work this cannot be established. The intention was to establish a procedure to allow access to the work and to collect any royalties that may be due to the copyright owner. Other protections are included in the provision.</p>	
KWAZULU-NATAL	<p>It is advanced by other interested parties that the new Section 22A of the Act as introduced by Clause 26 and the definition of "orphan works" by Clause 1(i) of the Copyright Bill should be rejected. Composers Authors and Publishers Association submitted that the orphan works regime should not apply in respect of musical works.</p>	<p>Orphan works can apply to any works. The musical works can be lost or not be located. Other jurisdictions recognize that musical works can be orphan works.</p>	
MPUMALANGA	<p>The union submitted that there must be exceptions of orphan works where the rightsholders are untraceable, defunct or have abandoned their copyright work.</p>		

NORTHERN CAPE	In respect of orphan works, the licensing process will not be applicable for the music industry and must be addressed per sector in the Bill.	Orphan works provision is beneficial and will create certainty on the use of such works. The provision provides a process for the Commission, user and holders of rights (author and copyright owner). There could be contractual arrangements between the copyright owner or user or author depending on the circumstance. Orphan works should be provided for.	
NORTH WEST	The new orphan works provision in the Act does not benefit anyone and will impose a legal risk for the CIPC. 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 is 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.		
WESTERN CAPE	The definition of "orphan work" should add the word "cannot reasonably be identified". The risks of the amendments on the industry should have been studied by means of a socio-economic study.		
CLAUSE 27 – CHAPTER 1A (COLLECTING SOCIETIES)			
NORTHERN CAPE	Artists are being disadvantaged by government bureaucracies in respect of collecting societies and it is requested that the Minister cannot dictate engagements among the contractual participants. Furthermore, artists require collecting societies to account to them as well.	No amendments recommended – a stricter regime for collecting societies is required. No engagements will be dictated. The Minister’s prescripts will relate to minimum terms, which is accepted in contract law. DTIC The Bill provides for the regulation of collecting societies in chapter 1A. The Bill also addresses contracts that can facilitate the agreements between parties by providing for minimum terms of contracts, ensuring protection of the vulnerable parties in the contractual agreements. A new author may be vulnerable and not know his or her right when entering an agreement. On SAMRO, the Bill does not deal with issues of access to specific existing collecting societies in terms of location and access to their services and their proximity to the public.	•
NORTHERN CAPE	Bigger city artists have easier access to South African Music Rights Organisation (SAMRO) but not in rural areas like the Northern Cape. The Bill must provide for protection of these rural areas if SAMRO's reach cannot assist in such areas.		
NORTH WEST	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.		

	<p>This could improve transparency and accountability, which has been a major issue in South Africa.</p>	<p>The regulation of collecting societies in the Bill is an important milestone. It will close the existing challenges with the regulation of collecting societies. The current practices of some of the collecting societies are concerning but that should not deter the establishment of a clearer legislative framework for them.</p> <p>Collecting Societies must all be regulated and this should be understood as policy stance. Unregulated Collecting Societies do not account and this is problematic to the industry. They will be required to be accredited.</p> <p>CLSO</p> <ul style="list-style-type: none"> • The Bill provides a much stricter regime for collecting societies (clause 27) and this will extend to rural areas as collecting societies. • The only “dictate” will be iro minimum contractual terms. This is for the protection of authors. • The new section 22D states that “A collecting society is subject to the control of the authors, performers or copyright owners whose rights that collecting society administers”. It further requires that collecting society to “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” – i.e., collecting societies (clause 27) will now be required to regularly report to authors (New 22D), as well as to the Commission (new 22E). • The Bill provides for extensive regulation of Collecting societies going forward to ensure transparency and accountability. See clause 27 inserting a chapter on collecting society. Collecting societies will only be allowed to collect for their registered members with reporting duties to these etc., 	
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		and all collecting societies have to be accredited with the Companies and Intellectual Property Commission	
NORTHERN CAPE	A Performers' Tribunal is requested to enable performers to claim their royalties.	No amendment recommended – the Copyright Tribunal will deal with these matters DTIC The Copyright Tribunal is intended to deal with both Bills, for authors and performers. The Copyright Tribunal will provide a cost-effective mechanism to address disputes on the copyright legislation. The strengthened Copyright Tribunal will ensure access to dispute resolution mechanism for the creators who have no access to legal avenues.	
NORTHERN CAPE	Streaming platforms/social media is becoming very prevalent affecting collecting societies and creatives represented very negatively. The Bill must be aligned to ensure that the intended participants receive the royalties.	No amendments recommended – The Bill already provides for this DTIC A separate approach is not recommended for social media only. The Bill provides protections and rights that can create an environment on how the social media plays into the market. The other risk is that with the pace of technology changes, some changes may become redundant and they may require constant updating of the law. Streaming platforms challenges currently in place are not as a result of the Bill. The measures provided in the Bill such as contract provisions, clarity on royalties, dispute resolution, regulation of collecting societies, will ensure that authors or performers receive their royalties and other rights in the Bill.	
SECTION 22C (ADMINISTRATION OF RIGHTS BY COLLECTING SOCIETY)			
GAUTENG	Section 22C It is suggested that the clause simply read that remittance of royalties is subject to a reasonable and valid agreement between the foreign CMO and the local one.	No amendment recommended - already provided for in the Bill. DTIC The section 22C proposed amendment, is in a way already provided for in section 22C (3). The wording used is collecting societies in the SA context. The agreement is important in	

		managing the arrangements between collecting societies and the Bill encourages those arrangements.	
SECTION 22F (SUSPENSION AND CANCELLATION OF ACCREDITATION OF COLLECTING SOCIETY)			
GAUTENG	<p>Section 22F</p> <ul style="list-style-type: none"> ▪ Rewording subsection (5) as follows <p>Following the suspension or the cancellation of the accreditation of any Collective Management Organisation, the Commission shall as soon as reasonably practicable, convene an emergency meeting of the members during which members shall elect a suitable person to be responsible for the administration and discharging of the functions of that Collective Management Organisation.</p> <p>(6) The person so elected shall be skilled in one or more of the following (a) Collective management and general administration of rights under this Act; (b) business rescue, administration, or liquidation; or (c) other skills deemed appropriate by the Commission and Tribunal.”</p>	<p>The proposed amendment is not recommended – the Bill already provides for an independent and transparent process</p> <p>DTIC</p> <p>The process in the Bill provided in section 22F(5) is objective and independent and takes into account the relevant skills required.</p> <p>Leaving this to members may complicate matters and there could be other consequences and further potential disputes. The Act does not have to be too prescriptive on meetings and operational matters.</p> <p>The process outlined in the Bill is independent and transparent.</p>	
CLAUSE 29: SECTION 27 (OFFENCES)			
GAUTENG	<p>Propose a new subsection (5A) of section 27</p> <p>This is extremely problematic as infringement of copyright should not be dependent on whether or not a use is for commercial purposes. Whether a use is for commercial purposes or not, the copyright owner has the exclusive right to authorise the usage of the work. As Slomowitz AJ observed in the Video Parktown North case, the essence of copyright as a right of ownership is that the copyright owner has an exclusive right “to do what he pleases” with the subject-matter of the copyright. Submit that this provision be rejected and that the phrase “and for commercial purposes” must be removed.</p>	<p>No amendment required – the subsection does not depend on activities being commercial</p> <p>DTIC</p> <p>Recently offences on digital rights were added that will deter circulation of works online. This remedy is on section 27(5A). This will apply for commercial and non-commercial purposes. This was amended in the National Assembly. It is possible the comment was made on the previous version of the Bill already addressed.</p>	
GAUTENG	Sections 27(5B) and 28(O)	1. Proposal for civil remedies not recommended – the matters are serious	

	<p>Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures.³⁸ This requires that ss 27(5B) and 28(O) be amended.</p> <p>Delete ss 27(5B) and 28O and insert in its place: “Section 23A Subject to s 28P any person who, at a time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—</p> <p>(a) intentionally circumvents that effective technological protection measure in order to infringe copyright when that person is not authorized to do so; or</p> <p>(b) 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 and knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure.</p> <p>or (c) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure when they know that the service will, or is likely to be used, by that other person to infringe copyright in the work; is deemed to have infringed copyright in the work which infringement is actionable under s 24.”</p> <p>Section 27(5B) seeks to impose criminal liability for engaging in uses that Parliament expressly authorises subject to certain exceptions.</p> <p>Extend the ambit of the clause to every lawful use but retain the reference to exceptions to ensure clarity.</p> <p>Amended clause Insert the words “by law”, resulting in</p>	<p>DTIC</p> <p>Given the seriousness of online infringements and the need to deter the behaviours that infringe on copyright, also to address the concern that SA laws on intellectual property are not strong on infringements of copyright and on enforcement, the criminal sanctions must be retained. This will send the message of the seriousness of the law on these matters.</p> <p>CLSO</p> <p>The Act provides for civil remedies. These existing and proposed offences are for serious contraventions. The question is if such an action for non-commercial purposes, is a serious enough problem to criminalise it as the sanction is “a fine or to imprisonment for a period not exceeding three years, or to both a fine and such imprisonment”.</p> <p>2. Agree with proposed amendments related to intention: The intention to circumvent must be clear – see font in blue</p> <p><u>“(5B) 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—</u></p> <p><u>(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—</u></p> <p><u>(i) knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure;</u></p> <p><u>or</u></p> <p><u>(ii) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure;</u> or</p>	
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	<p>the amended clause reading as follows: “(a) An act permitted by law, including in terms of any exception provided for in, or prescribed under, this Act; or [...]”.</p>	<p><u>(iii) knows that the service contemplated in subparagraph (ii), which they know will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;...”</u></p> <p>Exceptions in respect of technological protection measures 28P. (1)(a) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following: <u>(a) An act permitted by law, including in terms of any exception provided for in, or prescribed under, this Act; or...”</u></p>	
<p>GAUTENG</p>	<p>Insert the following as a new section 27(4A):</p> <p>(4A) Any person who- (a) distributes, sells, offers to sell, makes, causes to be made, or has in his or her possession, any machine, equipment or contrivance; or (b) creates, causes to be created, distributes, sells, offers to sell or has in his possession any software, shall be guilty of an offence.</p> <p>Insert the following as a new s27(4B): (4B) Any person who, without the consent of the owner, distributes in public for commercial purposes, by way of rental, lease, hire, loan or similar arrangement or who makes available for download from, or viewing from, a which copyright subsists shall be guilty of an offence.</p> <p>Insert the following as a new s27(4C): (4C) Any person who, without the authority of the owner of the copyright-</p>	<p>The proposals are not recommended for inclusion in the Bill</p> <ul style="list-style-type: none"> - The proposed (4A)’s wording will result in every person owning a device or cellphone committing an offence. It is possible that wording is missing from the proposal; - The proposed (4B) and (4C)(a) are already provided for in (5A) - The proposed (4C)(b) will require research and policy development, as well as an impact assessment especially as it will affect the right to privacy (search and seizures). It will also require a public participation process. <p>CLSO</p> <ul style="list-style-type: none"> - (4A) (a) and (b) do not seem to be complete. Every person in South Africa who owns a cellphone, has in their possession some machine or equipment or software. It is not clear what (4A) intends to criminalise. - (4B) and (4C)(a) are already provided for in subsection (5A) - Par (b)’s rationale is not clear. Why 5? How will this be enforced? What will be achieved by making this an offence? 	

	<p>(a) distributes an infringing work for any purpose to such an extent that the owner of the copyright in that work is prejudicially affected, or</p> <p>(b) stores more than five different infringing works on an electronic storage device; shall be guilty of an offence.</p>	<p>Is the intention to go into houses to check electronic devices? A criminal offence must be enforceable to be effective. Furthermore, is this the kind of offence that a person should be sent to prison for? The sanction for all these offences is proposed to be a fine or 3 years' imprisonment. These existing and proposed offences are thus for serious contraventions. Recommend that <u>possession</u> of infringing material be considered in a next amendment so that the impact of criminalizing v civil remedies may be considered. None of the other criminal acts involve possession of an infringing copy only ((2) is iro a product that can be used to make infringing copies). With chat apps and social media many people may have infringing content on their cell phones without even knowing that they do. The impact of making this an offence thus needs to be carefully considered</p>	
<p>NORTH WEST</p>	<p>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.</p> <p>It is suggested to amend the said section as follows <i>"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—</i></p> <p><i>(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></p>	<p>The proposed amendments are not recommended</p> <ul style="list-style-type: none"> - The terminology used in the Bill is correct. - Deletion of the enabling requirement will result in strict liability, which should be avoided in criminal sanctions. - The proposed insertion is a duplication – it is already provided for. <p>DTIC Section 27 (5B) was considered extensively. The bar is set high to deter those who contravene the Act.</p> <p>CLSO</p> <ul style="list-style-type: none"> - The subsection does not require that the device is in fact used. - The correct terminology here is “infringe” – copyright is infringed. - Deleting this phrase will result in strict liability, which is far more prejudicial. This sentence requires that the person 	

	<p><i>(i) Know that the device or service will, or is likely to be used to [infringe] circumvent copyright in a work protected by an effective technological protection measure.</i></p> <p><i>(ii) Provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure</i></p> <p><i>(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.</i></p> <p><i>(b) publishes information [enabling or assisting any other person to circumvent an effective technological protection measure] with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure <u>with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic;</u> or</i></p> <p><i>(c) circumvent such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence.</i></p>	<p>must have been enabled to circumvent a TPM. The intention to incite is not sufficient.</p> <ul style="list-style-type: none"> - This insertion is a duplication of the sentence before it and is thus not recommended. 	
<p>NORTHERN CAPE</p>	<p>Fines also need to be stipulated for example: a minimum fine of R5 000 or maximum fine of 1 % of Companies/Producers' annual turnover, in the case of non-compliance issues.</p>	<p>The proposed amendment is not recommended.</p> <ul style="list-style-type: none"> - Legislative drafting guidance from the Department of Justice is to not include monetary amounts as the value of money reduces over time. Stating an imprisonment term allows a court to estimate the appropriate monetary amount by using the Adjustment of Fines Act. - Turnover is already included in the Bill <p>DTIC Fines do not have to be stipulated in the Bill. They can be left to the relevant authorities.</p> <p>CLSO</p>	

		<p>The guidance from the Department of Justice is to not provide a sum of money when drafting legislation, but rather to only provide a term of imprisonment. This is because money loses its value – if a term of imprisonment is provided, the Adjustment of Fines Act, 1991 (Act No.101 of 1991) can be used to determine the Rand value that equates to that prison term. The Adjustment of Fines Act, allows a court, by the use of a simple ratio, to determine the maximum fine permissible for various statutory offences punishable by a fine. The wording of (as an example) “guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year or to both a fine and such imprisonment” is standard wording used in criminalizing provisions. This read with section 92(1) of the Magistrates' Courts Act and the Adjustment of Fines Act ensures that monetary penalties do not become ineffective due to the devaluation of the Rand. It is obvious that a fine of R100,00 that was determined 10 years ago does not have the same deterrence today. This standard phrase also ensure that it is not necessary to frequently amend legislation to ensure that fines keep pace with the depreciation of the Rand. The phrase is used in all recent legislation where no exceptional circumstances exist to determine a fine that is above the monetary jurisdiction of a district or magistrates’ court (see for example section 51 of the RICA (Act 70 of 2002)). According to a statute search the wording referred to above or similar wording where no specific fine is prescribed appears on 299 places in the Statute book.</p> <p>As for turnover, the Act does indicate 10% of turnover.</p>	
<p>NORTH WEST</p>	<p>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</p>	<p>No amendment recommended – the penalties may be strict but are required as deterrent DTIC Penalties for juristic persons were considered. Although the penalties are considered disproportionate, they are applicable.</p>	

	<p>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.</p> <p>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 .</p>	<p>The penalties were strengthened to ensure adherence to the law and to deter certain practices.</p> <p>This is an important amendment that serves a policy rationale. The non- reporting is a serious issue that has impacted on many performers whose works is played on radio or television or any medium for commercial purposes without any compensation. There are series played repeatedly on television and actors have indicated that they are not paid for those works.</p> <p>The CRC found: music usage information (music log sheets)- It was noted that music log sheets are kept mainly by broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able accurately to distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties. For essential music users, the CRC believes that the legislation should be amended to make it compulsory for them to retain music usage information records. -page 77</p> <p>The reporting requirements are necessary to provide certainty on payments of royalties for commercial usage.</p> <p>The reporting provisions have a rationale and they address the challenges with royalties. This impacts the music and audiovisual sector.</p> <p>The reporting and recordal of commercial uses were introduced to address the policy gap of lack of royalty payments and no mechanism to ensure the use of works of performances for commercial purposes are addressed.</p> <p>Parliament extensively debated the sanctions and penalties and decided to retain them in the Bill as provided.</p>	
CLAUSE 30: SECTION 28			
NORTH WEST	Section 23(2) of the Act sets the standard for determining copyright infringement by importation. The Bill does not	No amendment recommended – there is no conflict between the sections CLSO	

	<p>amend section 23 (2). The Bill's amendment of section 28 brings it into conflict with section 23(2).</p>	<p>I am not sure that I agree. Section 28's amendment is more in the nature of providing clarity – Section 23(1) indicates that infringement is doing an act without authorization of the Copyright owner (the Act uses the phrase “without licence” of the owner) that the Copyright owner may do or authorize someone to do.</p> <p>Section 23(2) then list a few specific acts (all related to importing works without authority) that would constitute infringement if the work in question would have been infringing on rights if it was made in the country. The new section 28(2) actually just repeats the thinking in section 23(2) in that it says works will be regarded as prohibit goods for purposes of importing (28(1)) if the copy of that work was made without authorization of the copyright owner.</p> <p>Section 28(5) just indicates this prohibition on importing goods will also apply to an exclusive licensee If the making of the copy in question was without authorization.</p> <p>I do not see a conflict.</p>	
<p>CLAUSE 31: INSERTION OF SECTIONS 28O, 28P, 28Q, 28R AND 28S (TECHNOLOGICAL PROTECTION MEASURES AND COPYRIGHT MANAGEMENT INFORMATION)</p>			
<p>NORTH WEST</p>	<p>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.</p>	<p>No amendment recommended – The Bill already makes provision for this DTIC</p> <p>The Bill has various remedies on the digital environment. It provides technological protection measures, offenses on the digital rights, offenses on TPMs and penalties. It criminalises the prohibited conducts.</p> <p>In addition, the Bill provides for the copyright management information. This is information embodied in a copy of a work that identifies the work or copyright owner or 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.</p>	

		This forms part of the technological protection measures, has prohibited conduct in respect to the information and imposes penalties for tampering with this information as offenses.	
SECTION 28P - EXCEPTIONS IN RESPECT OF TECHNOLOGICAL PROTECTION MEASURES			
GAUTENG	<p>Section 28P (1) The wording of s 28P (1) is too narrow to achieve its objective. We propose a minor amendment to rectify this. Technological protection measures can prevent people including people with disabilities, learners and artists from engaging in lawful uses of works permitted by the Act.</p> <ul style="list-style-type: none"> ▪ Submit that it is enough to retain s 28P (1) that exempts the utilisation of circumvention for the purposes of exceptions and limitations that are in the Act. With this recommendation, read with the in-built conditions in s 19D, our rights will continue to be realised without negatively affecting copyright owners. <p>Section 28P (2) should be deleted in view of the Blind SA ConCourt ruling. ▪ Once the CAB is signed, it will enable various legislative updates in the Dept. of Sports, Arts and Culture, the National Digitisation Policy, and Open Data & Cloud Policy to proceed. To date the Copyright Act has stymied their progress. ▪ Authors and creators will benefit from the above exceptions too. The Bill also gives them more control over their works, reversion of rights (can be renegotiated), better moral rights and contractual protection. Conflicts with the Constitutional Court ruling of 21 September 2022 relating to people with disabilities and should be deleted from the Bill to prevent the perpetuation of the unfair discrimination.</p>	<p>Agree with the proposed amendments – wording proposed 0 see font in blue:</p> <p>Exceptions in respect of technological protection measures</p> <p><u>28P. (1)(a) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following:</u></p> <p><u>(a) An act permitted by law, including in terms of any exception provided for in, or prescribed under, this Act; or...</u></p> <p>...</p> <p><u>[(2)] (Delete in full)</u></p> <p><u>[(3)] (2) 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—..."</u></p> <p>DTIC The Constitutional court judgement is taken into account. The section 28P(2) is recommended to be deleted. The suggestion is supported.</p> <p>CLSO Agree with the proposed amendments – proposed wording above</p>	
NORTHERN CAPE	Clause 31 Section 28P:	<p>No amendment recommended – the sections referred to have been repealed by the Cybercrimes Act</p> <p>DTIC</p>	

	<p>The removal of reference to Electronic Communications and Transactions Act (ECTA) cannot be endorsed for the following reasons:</p> <ul style="list-style-type: none"> i) Artists predominantly use on-line platforms such as Tik Tock/Facebook, Twitter etc; ii) Sections 54 and 55 of the ECTA regulates the registration of critical databases that is part of the Minister's responsibility; iii) Critical data is defined in the ECTA as "data that is declared by the Minister in terms of section 53 to be of importance to the protection of the national security of the Republic or the economic and well-being of its citizens; iv) Critical database means "a collection of critical database in electronic form from where it may be accessed, reproduced or extracted"; and v) All content whether it be music or literature and so forth will not be protected should the ECTA be removed from this Bill. It will also open up the industry to cybercrime activity for perpetrators. <p>Therefore, all references to the Electronic Communications and Transactions Act, 2002 (hereinafter "ECTA") should be retained within this Bill as the removal thereof will be prejudicial to the industry in terms of all on-line platforms utilised in the industry.</p> <p>The ECTA will protect the use of all content and copyright and cannot be viewed as an exception in respect of technological protection measures.</p> <p>During the COVID-19 pandemic, the value of on-line platforms (example: Teams, Zoom etc) was discovered and were utilised in our country and throughout the world. The judiciary also engaged in such platforms in the pursuit of justice.</p>	<p>The ECTA was repealed in some sections hence it was removed.</p> <p>CLSO</p> <p>The sections referred to iro the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002) have since been deleted by the Cybercrimes Act, 2020 (Act No. 19 of 2020). The protection is thus still afforded – it is just housed in another Act and retaining the reference to the Electronic Communications and Transactions Act is void as the sections are no longer effective. It is not necessary to include the reference to the other Act – in fact it is recommended to not do so as it causes this type of interpretation challenge when the other Act is amended. That other Act applies regardless of whether a reference is made to it or not.</p>	
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	These on-line platforms are also subject to the ECTA. Our world has evolved into an "electronic age" which we need to embrace by means of electronic commerce (regulated by ECTA). The fourth industrial revolution is proof thereof.		
SECTION 28Q: ENFORCEMENT BY COMMISSION			
GAUTENG	Section 28 Q - Enforcement by Commission 28Q. The Commission must enforce this Act by— Delete s28Q.	The proposed deletion is not recommended – the section empowers the Commission to enforce the Act and the role of the regulator is key in enforcing the Act DTIC Section 28Q is important to empower the Commission to take enforcement action where necessary in its capacity and in terms of the copyright Act. It is unclear what the problem is with the role of the Commission. It should be retained. Removing their powers will take away an important part of the Act because the role of the regulator is key in enforcing the Act. Section 28Q provides enforcement powers of the Commission is important to enforce the Bill, therefore should not be deleted.	
CLAUSE 33 – SECTIONS 29A, 29B, 29C, 29D, 29E, 29F, 29G AND 29H (TRIBUNAL)			
SECTION 29A (FUNCTIONS OF TRIBUNAL)			
GAUTENG	Insert a new s29A(2)(g) that reads as follows: "(2) The Tribunal may - ... (g) set aside or vary a copyright assignment or copyright licence agreement, or a term of such an agreement, if that agreement or term is unfair, unreasonable, or unjust. A term will be unreasonable, unfair and/or unjust if- (i) it is excessively one-sided in favour of any person, including the author of the work which is the subject of the agreement; (ii) the terms of the agreement are so adverse to one party (including the author) as to be inequitable; or (iii) the agreement was subject to a term or condition, the fact, nature, and effect of which was not drawn to the attention of the party	The proposed amendment is not recommended – the Bill sufficiently provides for the powers of the Tribunal – there should be a level of discretion allowed DTIC The Tribunal should not be dictated in terms of how to exercise its mandate in this much detail. It should have discretion in its application of the law. The Bill provides for the contractual standards and those rights should be viewed as protection to authors and copyright owners.	

	prejudiced thereby in a clear and satisfactory manner prior to entering into the agreement."		
SECTION 29H (ORDERS OF TRIBUNAL)			
GAUTENG	Orders of Tribunal: Section 29H(c): "(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;" Delete s29H(c).	Proposed amendment not recommended – this is important to empower the Tribunal to deal with disputes DTIC The Tribunal should be empowered to impose fines. Tribunals have such powers. It will be important that this Tribunal is well empowered to deal with various disputes and come up with orders that will ensure redress. It is recommended that the subsection 29H(c) be retained.	
CLAUSE 35 – SECTION 39 (REGULATIONS)			
FREE STATE	There is a concern that the bill is using a one size fits all approach on the payment of royalties.	No amendments recommended – The Bill provides for all types of royalties. It is also proposed (see above) that equitable remuneration be included in the Bill. DTIC The amendment is recommended regarding accommodating other forms of remuneration: The CAB introduces and, in some respects, strengthens the royalty provisions. The Department recognizes that industries prefer to address issues of remuneration differently. The Bill provides for various types of royalties. It is recommended it make allowance for other royalties by including the words 'or equitable remuneration)' on royalties. CLSO “(c) prescribing royalty rates or tariffs for various forms of use;” The regulation clause can be amended to provide more directions to the Minister, for example that the Minister must prescribe such after considering the needs of the different sectors	

FREE STATE	The Ministers' powers to prescribe procedure for the conduct of Tribunal hearings and collecting societies is SUPPORTED .	Noted. No amendments required	
FREE STATE	However, the powers to prescribe the minimum standards for contracts is NOT SUPPORTED The Minister may rather prescribe the guidelines on the Minimum standards of contracts. Regardless of the type of contract, if any of these 5 elements is not met, the contract may not be enforceable: a) offer b) Acceptance c) Consideration d) Competency e) Mutuality -	<ul style="list-style-type: none"> - The proposals to remove the power of the Minister to prescribe in relation to terms of a contract are not recommended. The purpose is to ensure protection for vulnerable parties who do not have a strong negotiating base when entering into agreements. - However, the following amendments are proposed to ensure that the Bill is clear on the nature of what the Minister may include in regulations (an option is provided iro wording) – see font in blue: <p><u>“(cG) prescribing [compulsory and] standard contractual terms reflecting rights or protection afforded by this Act, [to] that must be included in agreements to be entered in terms of this Act;</u></p>	
GAUTENG	Clause 35(b) Section 39 (C g) Delete proposed sub-section (cG).		
GAUTENG	Clause 35(b) Section 39(c) Delete proposed sub-section (c). Insert a new s29A(2)(g) as set out in the row above. (“(2) The Tribunal may - ... (g) set aside or vary a copyright assignment or copyright licence agreement, or a term of such an agreement, if that agreement or term is unfair, unreasonable, or unjust. A term will be unreasonable, unfair and/or unjust if- (i) it is excessively one-sided in favour of any person, including the author of the work which is the subject of the agreement; (ii) the terms of the agreement are so adverse to one party (including the author) as to be inequitable; or (iii) the agreement was subject to a term or condition, the fact, nature, and effect of which was not drawn to the attention of the party prejudiced thereby in a clear and satisfactory manner prior to entering into the agreement.”)	<p>Or</p> <p><u>(cG) prescribing [compulsory and] the standard [contractual terms to be included in] elements for agreements to be entered in terms of this Act, to ensure that rights or protection afforded by this Act are duly provided for;</u></p> <ul style="list-style-type: none"> - To avoid a one size fits all approach iro royalties, it is also recommended that the regulations related to royalties is limited to Resale Royalty Right as recommended by the Farlam Commission. Proposed amendment: <p><u>(c) prescribing royalty rates or tariffs for [various forms of use] resale royalty rights;...”</u></p>	

GAUTENG	<p>Sections 39(cG), (cl), (cj) and 39B(1) of the Copyright Amendment Bill, which sidestep the democratic process and extend Ministerial powers to mandate standard and compulsory contractual terms in private contractual arrangements, be deleted.</p> <p>Keeping clauses that ensure that future earnings on past contracts are shared with musicians and performers in the form of fair royalties, ensure that future contracts guarantee fair royalties for musicians and performers</p> <p>The Bill should afford parties the contractual freedom to determine their affairs as they see fit, all whilst ensuring that there is some measure of protection for the most vulnerable. This can be achieved by codifying the “boni mores” standard without necessarily dictating how the commercials of every contractual relationship. Instead of dictating commercial terms, the Bill should rather seek that every contractual relationship entered into by authors and copyright owners should be “objectively reasonable.</p>	<p>DTIC</p> <p>On the other types of royalties’ rates, the concern was that there was uncertainty around them. At some point the matter was subject of court. However further consideration is that it may be best to leave other rates to market forces instead of prescribing them. The royalty rates to be prescribed can be only the resale royalty right. The other royalty rates for other uses can be removed.</p> <p>The RRR is a Berne convention royalty, in article 14ter. The rates of the royalty can be regulated by the state. An example is the Moroccan law. The Berne convention also addresses the role government can play on this royalty rate.</p> <p>CLSO</p> <p>There is no chapter 2 right to “freedom to contract”. Contracts are interpreted by our courts with reference to the Chapter 2 rights and our courts are moving towards preferring fairness when interpreting contracts. The provisions of the Bill are aimed at ensuring more fairness when contracting.</p> <p>Section 22 provides: “Freedom of trade, occupation and profession.—Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”</p> <p>Even if argued that these contracts underpin the practicing of a trade (etc.), the constitution still allows that to be regulated by law.</p> <p>Many contracts have prescribed formalities and terms:</p> <ul style="list-style-type: none"> • Surety agreement; • Sale of immovable property; • Even in common law: a valid agreement to buy and sell must contain – identification of the parties, an offer, an acceptance, a product, a price, agreement of minds, competency to contract. 	
GAUTENG	<p>Section 39(c) The broad ministerial power.</p> <p>This provision should be deleted, as it will have a chilling effect on investment. It is an extreme form of regulation and creates great uncertainty for existing and prospective productions.</p> <p>Recommend the conduct of a full economic impact assessment, as well as an objective expert study of alternative legislative approaches with reference to other jurisdictions.</p>		
MPUMALANGA	<p>That there must be contractual flexibility, as well as recognising the sectors specificity and market practices regarding contractual provisions would help rightsholders to recoup investment in development, production, marketing and distribution, to finance new</p>		

	films and television content; and ensure appropriate and efficient distribution to the marketplace	These are all required terms of a contract in terms of law	
NORTHERN CAPE	Artists are being disadvantaged by government bureaucracies in respect of collecting societies and it is requested that the Minister cannot dictate engagements among the contractual participants.	Farlam Commission – CRC report: “the dti is urged to draw up standard contracts between performers and record companies that are fair to both sides and that parties to such agreements are encouraged to use. See Chapter 10, paragraph 10.12.5”	
NORTHERN CAPE	There cannot be a one-size fit all approach when determining royalties and it should not be dictated by the Minister. The different sectors should be taken into account when determining royalties.	Clause 35, Section 39(cG): “prescribing compulsory and standard contractual terms to be included in agreements” – i.e., not ALL the terms will be prescribed. The purpose is to provide protection to the vulnerable party to the contract. A similar exercise is done in clauses 5 (s6A(5)), 7 (S7A(5)) of CAB and 3 (section 3A(3)) in PPAB by setting out the terms that MUST be included in an agreement such as terms of payment and choosing a dispute resolution mechanism (CAB only).	
NORTH WEST	<p>According to clause 35(b)(cG) amending section 39 of the Act, the Minister 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.</p> <p>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</p>	<p>Clause 35, section 39(cI): “prescribing royalty rates or tariffs for various forms of use;”</p> <p>Discretionary to make regulations – i.e., where it is necessary to provide protection and ensure best practice is followed in South Africa. For example, iro music, South Africa has the lowest tariffs globally. SAIPPL proposed that this should be iro Resale Royalty Rights only - The Department will further advise on the rationale for this requirement</p> <p>Both paragraphs (cG) and (cI) are discretionary – “may make regulations” and will be subject to a public consultation process and rules applicable to delegated legislation - Minister is not given a blank cheque.</p> <p>(Section 39(c) provides for remuneration and allowances of members of the advisory committee and is not being amended. Re standard terms – see discussion above)</p> <p>Neither constitute a delegation of plenary powers – both paragraphs deal with operational matters that may need to change fast and are thus ideal to be situated in regulations.</p>	

	several provisions which deprive artists and producers of their freedom to contract and extend Ministerial power to regulate secluded contractual deals.	However, the following proposed amendments may address the fears that the minister may interfere with contractual freedom and limits royalty rates to the applicable sector: (cG) prescribing [compulsory and] standard contractual terms <u>reflecting rights as set out in this Act, [to] that must be included</u> in agreements to be entered in terms of this Act; ... (cl) prescribing royalty rates or tariffs for [various forms of use] <u>resale royalty rights</u> ;	
WESTERN CAPE	<p>Impermissible Delegation of Legislative Power to the Minister:</p> <ul style="list-style-type: none"> • The Bill may provide an impermissible delegation of legislative power to the Minister as it confers substantial discretionary powers on the Minister without any oversight from the NCOP. The Bill also includes a blanket contract override clause and grants the Minister powers to lay down compulsory contract terms, limiting the freedom to contract, which is unworkable. • The Bill grants extensive powers to the Minister, such as Clause 7B, which could lead to arbitrary and subjective decision-making <p>The Bill is too prescriptive in terms of the contents of agreements between parties, the fixing of prescribed royalties, etc. This seems to remove some freedoms protected under the Bill of Rights in the Constitution and may result in this Bill being successfully challenged in the relevant court.</p>		
GAUTENG	<p>Clause 35 (c) Section Amend s39(3) to read as follows: "(3) Before making any regulations in terms of subsection (1) or (2), the Minister must publish the proposed regulations for public comment for a period of not less than <u>60</u> days.</p>	<p>The proposed amendment is not recommended – where the topic of the regulations require it, a longer period may be provided. This will however not always be the case and will delay non-contentious matters.</p> <p>DTIC</p> <p>It is recommended that this remain like other regulations which is 30 days to put regulations for public participation. The Department does at times given the nature of the policy issue, advertise for 45 days or longer. This does not have to be prescribed in the law. Publication for 30 days is standard practice and can be extended even by public request. It is</p>	

		recommended that this not be amended.	
NORTH WEST	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 28P, and section 28P has no reference to permitted acts "as prescribed". It is therefore proposed that the current provisions regarding TPMs and exceptions in section 28P as they do not comply with international treaties be revised and be replaced with the treaties compliant text.	<p>No amendments recommended – this concern was in fact corrected in the D Bill. It is further submitted that the exceptions do comply with treaties and the three-step test CLSO</p> <p>I suspect the legislature was considering an old version of the Bill. This was corrected in the D Bill.</p> <p>The reference to 28P is not iro what must be prescribed. The reference to 28P is in respect of the technological protection measures that are discussed in 28P.</p> <p>It is submitted that section 28P does comply with international treaties. As the definitions and the sections are worded, they provide a very careful balance between rights of copyright owners and users.</p> <p>The public’s response to a previous amendment proposal, showed that the current wording in the D Bill is a balanced approach and compliant with treaties. Wording attempting more protection resulted in unintended consequences, including iro consumer law, competition law and other security related breaches. In South Africa, the imaginative reconfiguration of diverse components to adapt or repair a system to suit local needs and conditions will be prohibited: Foreign giants will decide what is and is not permissible in respect of the digital technologies that South Africans depend upon.</p> <p>Unless a nexus with infringement is clear these 3 freedoms are compromised:</p> <ul style="list-style-type: none"> • “the freedom to arrange our conduct to our own benefit rather than that of the shareholders of the companies whose products we purchase (to use the product as the consumer wants to); 	

		<ul style="list-style-type: none"> the freedom of third parties to offer accessories, consumables, services and repair for the products we own; and <p>the freedom of auditors to uncover and publicise defects in the products we rely on (they are threatened that any disclosure could jeopardise the TPM).” (Doctorow)</p>	
CLAUSE 36 – SECTION 39B (UNENFORCEABLE CONTRACTUAL TERM)			
GAUTENG	<p>Section 39B</p> <p>Delete proposed s39B and replace it with a new s29A(2)(h) which reads as follows: "29A(2) The Tribunal may - ... (h) declare unenforceable a term of a contract which unfairly prevents or restricts the doing of any act which by virtue of this Act would not infringe copyright or which serves to renounce a right or protection afforded by this Act in circumstances where the party that enjoys the protection has not been adequately compensated for the benefit to the other contracting party of that renunciation."</p> <ul style="list-style-type: none"> This section is overly broad and should either be removed in its entirety or reframed for clarity and to ensure that there are no negative consequences for creators in the value chain. 	<p>The proposed amendments are not recommended – the Bill must provide stronger protection to vulnerable parties to a contract. The proposed wording adds an administrative burden on the vulnerable party.</p> <p>DTIC</p> <p>The provision on unenforceable contracts is aimed at ensuring adherence to the Act. Where the rights provided in the Act are violated, the contract becomes unenforceable. This is additional protection provided to right holders.</p> <p>The proposed wording is noted however adds an extra process which is an administrative burden on the aggrieved party who may be an author and prescribes how the remedy should be exercised. This may hinder immediate redress sought.</p> <p>It is recommended that section 39B be retained in the Bill.</p>	
CLAUSE 40 - SHORT TITLE AND COMMENCEMENT			
GAUTENG	<p>Clause 40</p> <p>Amend clause 40 as follows: "Short title and commencement 40. (1) This Act is called the Copyright Amendment Act, 2023, and comes into operation on a date fixed by the President by proclamation in the Gazette, which date shall be not less than 24 months after the date on which the President assented to the Act."</p>	<p>The proposed amendments are recommended, especially to provide for the provisions dealing with the Blind SA judgment. See proposed amendments in blue:</p> <p>40. (1) This Act is called the Copyright Amendment Act, 2017, and comes into operation [on a] 24 months from the date of publication in the Gazette, or an earlier date fixed by the President by proclamation in the Gazette.</p> <p>(2) The definitions for ‘accessible format copy’, ‘authorized entity’ and ‘person with a disability’ contained in</p>	

		<p><u>section 1 come into operation upon the date of publication in the Gazette.</u></p> <p><u>(3) Section 19D comes into operation upon the date of publication in the Gazette.”</u></p> <p>DTIC Comment is noted. The Copyright reforms have been long overdue. Rights will be available from the onset for persons with disability. Provision will be recommended for phased operationalisation of the Bill.</p> <p>CLSO Committee to decide. It is possible to do this amendment. If Parliament wants the Act to come into operation upon publication, there is no need to add the sentence from “... and comes into operation...”. However, giving this power to the President normally indicates that something may have to happen before the Act can come into operation. It is however recommended that clause 22 – section 19D comes into operation immediately. Propose one of the following two amendments:</p> <p>Short title and commencement 40. [(1)] 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.]</p> <p>Short title and commencement 40. (1) 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.</p> <p><u>(2) The definitions for ‘accessible format copy’, ‘authorized entity’ and ‘person with a disability’ come into operation upon the date of publication in the Gazette.</u></p> <p><u>(3) Section 19D contained in clause 22 comes into operation upon the date of publication in the Gazette.</u></p>	
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SCHEDULE 2			
NORTH WEST	<p>The Bill proposes to introduce Schedule 2 into the Act by amending section 22(3) of the Act in the following terms: <i>"(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"</i></p> <p>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.</p>	<p>No amendment recommended – section 22(3) is the correct reference</p> <p>DTIC</p> <p>Section 22 is about the assignment and licences in respect of copyright. Subsection 3 provides for the reversionary right and the related licences including the agreement. Schedule 2 provides for licences and their application. Section 22(3) is not introducing schedule 2. These are two separate sections of the Act. Section 22(3) has referenced Schedule 2, but not as an introduction of a provision.</p> <p>CLSO</p> <p>Section 22(3) does deal with exclusive licenses, which includes translation licenses. The fact that S22(3) also deals with formalities does not mean that the reference to the section in Sch 2 is incorrect. Section 45 deals with regulations and is thus not appropriate.</p>	
NEW MATTERS (NOT EXPLICITLY PROVIDED FOR IN THE BILL, OR NOT INCLUDED AT ALL)			
PIRACY			
EASTERN CAPE	<p>The NCOP should consider introducing meaningful enforcement mechanisms or remedies against piracy in the online environment. Artists, especially musicians fall victims of piracy</p>	<p>This proposed amendment is not recommended – there is already provision in the Bill to guard against piracy.</p> <p>Any proposals for new additions will require policy development: research, consultations and an impact assessment. It will also require a public participation process.</p> <p>DTIC</p> <p>The Bill addresses digital rights. They are in line with international treaties-WCT, WPPT and Beijing Treaty. The world has evolved and digitization is upon us. This is not the Bill. Piracy is an ongoing challenge taking place currently. The Bills have some measures to address the digital infringements.</p> <p>They include remedies on technological protection measures.</p>	
FREE STATE	<p>The bill must make sure that artists are capacitated and empowered with 4th Industrial Revolution and be able to benefit in economy through digital.</p> <p>The bill must include information in the prevention of online piracy as it exploits the work of the artists. To protect investments, it is important for the bill to consider online piracy as the bill is silent on this issue.</p>		
KWAZULU-NATAL	<p>Absence of effective legal remedies to combat online copyright infringement</p>		

	Some of the stakeholders advanced that the Copyright Amendment Bill does not have effective remedies that would help right holders to combat piracy and other infringement in the online environment.	And technological management information. Recently offences on digital rights were added that will deter circulation of works online. This remedy is on section 27(5A). This will apply for commercial and non-commercial purposes. It has been debated if these measures are sufficient, in which case, future avenues for piracy will be explored but will require a new process. A new provision on piracy specifically is not encouraged. We need to address existing measures in the Bill and perhaps other related laws in the interim. This will require a new process and further consultations.	
MPUMALANGA	A concern about the digitisation of the recorded music industry was raised. The stakeholders have complained that the introduction of digitisation contributed to loss of revenue as a result of piracy and infringement. The stakeholders argued that proving actual damages is difficult because of the intangible nature of the interest so protected.	The CAB also provides for stronger penalties for natural persons, and extends penalties to firms which may also be found guilty of infringements. Other related laws include the Counterfeit Goods Act and the Cybercrimes Act, 2020 that assists with these matters.	
NORTHERN CAPE	Consequences for Internet piracy should be addressed in the Bill as well.	CLSO The protection set out in the Act and Bill applies to any form of publication, and thus includes social media and all internet platforms – including piracy. With the speedy development of technology, it may not be advisable to specify platforms, not even generically. As the Bill stands, its wording is applicable to newspapers in print and online, to CDs and streaming etc. Additional proposals: A new subject to the Bill. Would recommend that this is dealt with in a subsequent amendment	
NORTH WEST	Failure to introduce a website blocking remedy will continue to be a material oversight in the Bill. The on line 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 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. ... 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.		
NORTHERN CAPE	Streaming platforms/social media is becoming very prevalent affecting collecting societies and creatives represented very negatively. The Bill must be aligned to ensure that the intended participants receive the royalties.		
STATUTORY DAMAGES			
GAUTENG	Statutory Damages: In terms of the current legislation, authors and copyrights owners are afforded three remedies namely, interdict, delivery-up and damages. Digital exploitation of music has spotlighted the shortcomings of each of these remedies thus necessitating additional remedies to be prospected. This can be achieved by bolstering these criminal sanctions with statutory damages. Further, it would serve to discourage professional pirates who would now feel the financial pinch each time they are found to have been infringing copyright. The Bill must clearly state the application of the test to each and every encroachment or exception to the exclusive rights afforded to rightsholders.	<p>The proposed amendments are not recommended. Civil action and a form of statutory damages are already provided. Any proposals for new additions will require policy development: research, consultations and an impact assessment. It will also require a public participation process.</p> <p>DTIC</p> <p>Given the format of the remedy in the SA context, it is an approach that will require further assessment before included in the Bill. It requires a new process of consultations.</p> <p>Section 24 of the 1978 Copyright Act sets out civil remedies. A copyright holder can recover damages from an infringer, alternatively the rights holder may choose to recover a reasonable royalty.</p> <p>Section 24(3) of the Act thus introduced an additional category of damages, a species of statutory damage. The petition is thus incorrect when it states that South African copyright law does not include statutory damages because it has done so since 1978. A rights holder need not elect between damages and reasonable royalties at the outset. It is only once infringement has been proved that the appropriate remedy is determined.-</p> <p>Andrew Rens</p>	
MPUMALANGA	The stakeholders were of the view that copyright infringements must not only be limited to criminal law, but authors and copyright owners must be empowered to defend their own property. It is suggested that this can be achieved by bolstering criminal sanctions with statutory damages (financial).		

		<p>In addition to a claim for damages or a reasonable royalty, and statutory damages, a rightsholder can obtain injunctions, which are referred to as interdicts in South African law, seizing infringing copies, and prohibiting an infringer from making or distributing copies.-Andrew Rens</p> <p>CLSO</p> <p>A new subject to the Bill. Would recommend that this is dealt with in a subsequent amendment</p>	
ARTIFICIAL INTELLIGENCE			
GAUTENG	<p>Section 2</p> <p>Insert a sub-section in S2A, the clause that deals with what can be copyright, that states: 2A (3) (a) Copyright extends only to the products of a natural person’s skill, effort and creativity.</p>	<p>This proposed amendment is not recommended – it will require policy development: research, consultations and an impact assessment. It will also require a public participation process.</p> <p>DTIC</p> <p>Although the recommendation is progressive and taking into account current technological trends and developments on artificial intelligence and copyright, it is a new area that has not been tested and may have unintended consequences for South Africa.</p> <p>It is recommended that this inclusion not be considered at this stage and in this legislative process.</p> <p>CLSO</p> <p>(It appears the intention is to oust copyright in products produced by an AI (“natural” person). I would caution against such an inclusion as this is an unknown area and may have implications e.g., a company or natural person that owns the AI may wish to claim copyright in that work as owner of the AI. If such a claim is possible in another country, but not in SA, that may prejudice our own enterprises.)</p> <p>A new subject to the Bill. Would recommend that this is dealt with in a subsequent amendment</p>	

		If inserted, recommend that it is inserted as subsection (5) or worked into subsection (1). The subject matter is not the same as the current subsection (3).	
INTERNET SERVICE PROVIDERS			
GAUTENG	<p>Section 24</p> <ul style="list-style-type: none"> Insert the following as a new s24(1D) under the heading "Action by owner of copyright for infringement": "(1D) Without derogating from the generality of subsection (1), the High Court may, upon application by a copyright owner who has reasonable grounds to believe that their copyright is or may be infringed by a person situated in or outside the Republic of South Africa, grant an order which it deems appropriate including the following relief– (a) a person enabling or facilitating the infringement of copyright, or whose service is used by another person to infringe copyright, to cease such enabling or facilitating activity or disable that person's access to its service for the infringing purpose; (b) a person hosting or making available an online location, service or facility situated in or outside the Republic of South Africa which is used to infringe copyright or which enables or facilitates the infringement of copyright, to disable access to such online location, service or facility as replaced, amended or moved from time to time; and/or (c) an internet service provider to prevent or impede the use of its service to access an online location, service or facility situated in or outside the Republic of South Africa that is used to infringe copyright as replaced, amended or moved from time to time." <p>Insert the following associated definitions in s1: "'Internet Service Provider' means any person providing information system services." "'Information System Services' includes the provision of connections, the</p>	<p>This proposed amendment is not recommended – it will require policy development: research, consultations and an impact assessment. It will also require a public participation process.</p> <p>DTIC The amendment in section 24 is a new amendment that was not in the Bill before. It is recommended it be addressed in the next legislative process. It is not described in terms of context. The new amendments of internet service provider, is a new amendment. It is recommended that this amendment be considered in the next legislative process. The inclusion may have unintended consequences.</p> <p>It is recommended that the suggested section 28 U on the automated takedown by Internet Service Providers be addressed in the next legislative process. It may have unintended consequences.</p> <p>CLSO A new subject (section not being amended) to the Bill. Would recommend that this is dealt with in a subsequent amendment</p>	

	operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service".		
GAUTENG	Section 28 U Insert the following as a new s28U under the heading "Automated takedown by Internet Service Providers" "An Internet Service Provider shall implement automated takedown forms that allow verified owners of copyright works the ability to remove infringing live streaming data immediately.		
SOCIAL MEDIA			
NORTHERN CAPE	The Bill should be explicit on protection of all works on social media.	<p>No amendment recommended. Although the Bill may not use the words “social media”, protection is provided for.</p> <p>DTIC A separate approach is not recommended for social media platforms only. The Bill provides protections and rights that can create an environment on how the social media plays into the market. Streaming platforms challenges currently in place are not as a result of the Bill. The measures provided in the Bill such as contract provisions, clarity on royalties, dispute resolution, regulation of collecting societies, will ensure that authors or performers receive their royalties and other rights in the Bill.</p> <p>CLSO The protection set out in the Act and Bill applies to any form of publication, and thus includes social media and all internet platforms. With the speedy development of technology, it may not be advisable to specify platforms, not even generically. As the Bill stands, its wording is applicable to newspapers in print and online, to CDs and streaming etc.</p>	

PERIOD OF COPYRIGHT PROTECTION		
NORTHERN CAPE	<p>The use of an artist's work following their departure should be 75 years not 50.</p> <p>The Committee further also recommends that the years following which an artist's works can be used following their departure should be increased to 70 years.</p>	<p>This proposed amendment is not recommended – it will require policy development: research, consultations and an impact assessment. It will also require a public participation process.</p> <p>DTIC</p> <p>The duration of copyright protection has not been an amendment in the Bill. This will require a new process.</p>
PUBLIC DOMAIN		
NORTH WEST	<p>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.</p>	<p>This proposed amendment is not recommended – sufficient protection is provided for in the Bill</p> <p>DTIC</p> <p>It is unclear what is meant by public domain. Is it online or when the work put/ made available to the public in any form. The entire Bill aims to protect and provide rights to engage in the public and amongst rightsholders.</p>