

REPUBLIC OF SOUTH AFRICA

COPYRIGHT AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 40121 of 5 July 2016)*

(The English text is the official text of the Bill.)

(MINISTER OF TRADE AND INDUSTRY)

[B 13—2017]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for the reproduction of copyright work; to provide for the protection of copyright in artistic work; to provide for the accreditation and registration of Collecting Societies; to provide for the procedure for settlement of royalties disputes; to allow fair use of copyright work; to provide for access to copyright works by persons with disabilities; to provide for the protection of ownership of orphan works; to provide for the establishment of the Intellectual Property Tribunal; to provide for the appointment of members of the Intellectual Property Tribunal; to provide for the powers and functions of the Intellectual Property Tribunal; to provide for prohibited conduct in respect of technological protection measures; to provide for prohibited conduct in respect of copyright management information; to provide for management of digital rights; to provide for certain new offences; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 98 of 1978, as amended by section 1 of Act 56 of 1980, section 1 of Act 66 of 1983, section 1 of Act 52 of 1984, section 1 of Act 13 of 1988, section 1 of Act 125 of 1992, section 50 of Act 38 of 1997, section 1 of Act 9 of 2002, section 224 of Act 71 of 2008 and section 3 of Act 28 of 2013

1. Section 1 of the Copyright Act, 1978 (hereinafter referred to as “the principal Act”), is hereby amended—

(a) by the insertion before the definition of “adaptation” of the following definition:

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

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

definition:

“ ‘**audiovisual work**’ means embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which either can be perceived, reproduced or communicated through a device, and includes a cinematographic film;”;

Drafting note: Consequential amendments iro removing the phrase “cinematographic film” from the Act and Bill done in clause 37, and wherever it appears in the Bill

- (c) by the insertion after the definition of “collecting society” of the following definition:

“ ‘**commercial**’ means the obtaining of direct economic advantage or financial gain in connection with a business or trade;”;

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

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

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

“ ‘**copyright management information**’ means information attached to or embodied in a copy of a work that—

(a) identifies the work and its author or copyright owner; or

(b) identifies or indicates some or all of the terms and conditions for using the work or indicates that the use of the work is subject to terms and conditions;”;

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

“ ‘**open licence**’ means a royalty-free, non-exclusive, perpetual, irrevocable copyright licence granting the public permission to do an act for which the permission of the owner of copyright, or the author, is required;

‘**orphan work**’ means a work in which copyright subsists and the owner of a right in that work—

(a) cannot be identified; or

(b) is identified, but cannot be located;”;

- (g) by the insertion after the definition of “performance” of the following definitions:

“ ‘**performer**’ has the meaning ascribed to it in section 1 of the Performers’ Protection Act, 1967 (Act No. 11 of 1967);

‘**person with a disability**’ means a person who has a physical, intellectual, neurological, or sensory impairment and requires an accessible format copy

in order to access and use a work;”;

- (h) by the insertion after the definition of “sound recording” of the following definitions:

“ **‘technologically protected work’** means a work that is protected by a technological protection measure;

‘technological protection measure’—

(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work; and

(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;

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

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

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

Insertion of section 2A in Act 98 of 1978

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

“Scope of copyright protection

2A. (1) Copyright protection subsists in expressions and not—

(a) in ideas, procedures, methods of operation or mathematical concepts;
or

(b) in the case of computer programs, in interface specifications.

(2) A table or compilation which, by reason of the selection or arrangement of its content, constitutes an original work, shall be protected as such by copyright.

(3) The copyright protection of a table or compilation contemplated in subsection (2) does not extend to its content.

(4) No protection shall—

(a) extend to an expression—

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

- (ii) when the particular expression is required by law; or
- (b) subsist in—
- (i) official texts of a legislative, administrative or legal nature or in official translations of those texts; or
- (ii) speeches of a political nature, in speeches delivered in the course of legal proceedings or in news of the day that are mere items of press information: Provided that the maker of the speeches referred to in this subparagraph shall have the exclusive right of making a collection of the speeches in question.”.

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

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

“(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by or under the direction or control of the state or [such] an international [organizations as may be prescribed] or local organisations.”.

Policy: Funded by: The intention is not to own Copyright on things that are indirectly funded. Unless there are instances where the state will fund a work, but not have direct control etc, this phrase can be deleted. The phrase can also be reworded “funded by and under the direction...” but that means that works made under the direction of the state and funded by a donor organisation, will not be included. Unless there are instances where the state will fund a work, but not have direct control, deletion of “funded by” is recommended

Policy concern: Organisations - to remove “prescribed” opens this up to any organisation. Likewise the inclusion of local organisations includes all South African organisations and the consequences may be broader than intended. Need confirmation if local organisations should still be included. (section 21(2) may require a consequential amendment).

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

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

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

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

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

“(g) doing, in relation to an adaptation of the work, any of the acts

specified [in relation to the work] in paragraphs (a) to [(e)] (eA) inclusive.”.

Insertion of section 6A in Act 98 of 1978

5. The following section is hereby inserted in the principal Act after section 6:

“Royalties regarding literary or musical works

6A. An author who transfers copyright in a literary or musical work to another person, shall have the right to claim half of the royalty payable to that other person for the use of such copyright work.”.

Drafting note: In stead of a proviso added to section 6, it is recommended that the example of section 9A be followed iro literary and musical works – the same applies to the clauses below that introduced provisos.

Policy: the portion for royalty to be confirmed – should it be equal? Does “equal” mean 50%, even if the new copyright owner might be jointly owned by more than one person.

Policy concern: The proviso that is now reworded here as section 6A did not provide for a minimum percentage that the author receives even where copyright is not transferred or iro an agreement at the outset.

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

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

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

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

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

“(f) doing, in relation to an adaptation of the work, any of the acts specified [in relation to the work] in paragraphs (a) to [(d)] (dA) inclusive.”.

Drafting note / Policy: A clause has been included to make this also applicable to section 11. Consideration to be given iro whether this should not also apply to sections 9, 10, 11A and 11B – i.e. clauses to be included iro each type of work?

Insertion of section 7A in Act 98 of 1978

7. The following sections are hereby inserted in the principal Act after section 7:

“Royalties regarding artistic works

7A. An author who transfers copyright in an artistic work to another person,

shall have the right to claim half of the royalty payable to that other person for the use of such copyright work.’’

Drafting note: In stead of a proviso added to section 7, it is recommended that the example of section 9A be followed iro artistic works – the same applies to the other clauses that introduced provisos.

Policy: the portion for royalty to be confirmed – should it be equal? Does “equal” mean 50%, even if the new copyright owner might be jointly owned by more than one person.

Policy concern: The proviso that is now reworded here as section 6A did not provide for a minimum percentage that the author receives even where copyright is not transferred.

Resale royalty right regarding artistic works

Drafting note: These sections are moved here from section 9 as we now provide for royalties iro artistic works here.

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

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

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

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

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

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

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

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

(c) the resale or any part of the transaction takes place in the Republic or in any country contemplated in Article 1 of the Berne Convention for the Protection of Literary and Artistic Works; and

(d) the resale of the work is recognisable after the commencement of section 9 of the Copyright Amendment Act, 2017.

(4) A resale royalty right applies whether or not the author was the first

owner of any copyright in the work

Drafting note: The RRR should not apply to artistic work such as architectural and engineering drawings, circuit layouts, commercial logos, and icons for applications. Require a term or a list (if a term is not possible), to exclude these works from artistic work for purposes of RRR

Proof of author

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

(2) If an artistic work—

- (a) is a work of more than one author, the presumption in subsection (1) applies to each co-author of such artistic work; or
- (b) includes indigenous cultural expressions or knowledge the relevant indigenous community is entitled to an equitable share in the resale royalty payable.

Duration of resale royalty right

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

- (a) in which the author concerned died; or
- (b) in the case of more than one author, in which the last of the known authors died.

(2) In the case of an artistic work created by an unknown author—

- (a) the resale royalty right in that work expires at the end of the period of 50 years calculated from the end of the calendar year in which the work was first made available to the public; or
- (b) where the identity of the author becomes known at a later stage, the resale royalty right of that author expires in accordance with the period contemplated in subsection (1).

Transmission of resale royalty right

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

(2) In the case of a bequest of an artistic work by an author who did not transfer copyright in that work in his or her lifetime, the bequest must be read as including the resale royalty right.

(3) If resale royalties are recovered by a collecting society or an indigenous

community after the death of a holder of a resale royalty right, those resale royalties must be treated as part of the estate of the deceased holder.

(4) A resale royalty right may not be assigned or waived and any assignment or waiver of a resale royalty right is unenforceable.”.

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

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

“Nature of copyright in [cinematograph films] audiovisual works

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

- (a) Reproducing the [film] work in any manner or form, including making a still photograph therefrom;
- (b) causing the [film] work, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
- (c) broadcasting the [film] work;
- (d) causing the [film] work to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the [film] work, and is operated by the original broadcaster;
- (dA) communicating the work by wire or wireless means to the public, so that any member of the public may access the work from a place and at a time chosen by that person;
- (e) making an adaptation of the [film] work;
- (f) doing, in relation to an adaptation of the [film] work, any of the acts specified in relation to the [film] work in paragraphs (a) to [(d)] (dA) inclusive;
- (g) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the [film] work.”.

Insertion of section 8A in Act 98 of 1978

9. The following section is hereby inserted in the principal Act after section 8:

“Royalties regarding audiovisual works

8A. An author who transfers copyright in an audiovisual work to another person, shall have the right to claim half of the royalty payable to that other person for the use of such audiovisual work.”.

Drafting note: Instead of a proviso added to section 8, it is recommended that the example of section 9A be followed iro audiovisual works – the same applies to the other clauses that introduced provisos.

Policy: the portion for royalty to be confirmed – should it be equal? Does “equal” mean 50%, even if the new copyright owner might be jointly owned by more than one person.

Policy concern: The proviso that is now reworded here as section 6A did not provide for a minimum percentage that the author receives even where copyright is not transferred or iro an agreement at the outset.

Amendment of section 9 of Act 98 of 1978, as substituted by section 2 of Act 9 of 2002

10. Section 9 of the principal Act is hereby amended by the substitution for paragraph of the following paragraph:

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

Substitution of section 9A of Act 98 of 1978, as inserted by section 3 of Act 9 of 2002

11. The following section is hereby substituted for section 9A of the principal Act:

“Royalties regarding sound recordings

9A. (1) (a) In the absence of an agreement to the contrary or unless otherwise authorised by law, no person may, without payment of a royalty to the owner of the relevant copyright—

- (i) broadcast[,] a sound recording as contemplated in section 9(c);
- (ii) cause the transmission of a sound recording as contemplated in section 9(d); or [play]
- (iii) communicate a sound recording to the public as contemplated in [section 9(c), (d) or (e) without payment of a royalty to the owner of the relevant copyright] section 9(e).

(aA) Any person who intends to perform an act contemplated in section 9(c), (d), or (e) must, at any time before performing that act, submit a prescribed notice in the prescribed manner to the performer, copyright owner, collecting society, indigenous community or National Trust, as the case may be, of his or her intention to perform that act, and must, in that notice—

- (i) indicate, where practicable, the date of the proposed

performance and the proposed terms and conditions of the payment of a royalty; and

Policy: Why is it left to the user to propose terms and conditions of payment? The dti agrees that it should not be the user who dictates terms and conditions. This could perhaps rather be in accordance with the normal terms of usage for the relevant category of work and the user can propose exceptions if applicable.

Drafting note: It further appears from the way it is worded, as if the copyright owner has no right to refuse consent iro use. That must be corrected.

- (ii) request the performer, copyright owner, collecting society, indigenous community, or National Trust to sign the proposal attached to the notice in question.
- (aB) If the person referred to in paragraph (aA) has failed to submit the required notice to the performer, copyright owner, collecting society, indigenous community, or National Trust before performing an act contemplated in section 9(c), (d), or (e), that person must forthwith—
 - (i) notify the performer, copyright owner, collecting society, indigenous community, or National Trust of such act;
 - (ii) pay the generally applicable licence fees as per the proposal or as published by the copyright owner, the collecting society, indigenous community or the National Trust in respect of that person's category of use; and
 - (iii) pay royalties calculated from the date of first use regardless of whether that date is prior to the coming into operation of the Copyright Amendment Act, 2017.
- (aC) The person contemplated in paragraph (aB)(i) must as soon as is reasonably practicable upon receipt of such notice respond to such proposal.
- (aD) If the person contemplated in paragraph (aB)(i) rejects such proposal, or if that person proposes different terms and conditions to such proposal and the proposal is rejected after negotiations, any party may in the prescribed manner refer the matter to the Tribunal.
- (aE) The Tribunal must adjudicate the matter as soon as is reasonably practicable and, if possible, before the performance which is the subject of the application make an order it deems fit, including, but not limited to, an order that a provisional payment of a royalty must be made into a trust account of an attorney nominated by the person contemplated in paragraph (aB)(i) pending the finalisation of the terms and royalty payable: Provided that such amount shall be paid over to the person contemplated in paragraph (aB)(i) as represents the difference, if any, between the amount determined as the

appropriate royalty and the amount already paid, and any balance must be repaid.

- (b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, indigenous community or National Trust, or between their **[representative]** collecting societies.
- (c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may in the prescribed manner refer the matter to the **[Copyright]** Tribunal **[referred to in section 29(1)]** or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).
- (2)(a) The owner of the copyright, collecting society, indigenous community or the National Trust who receives payment of a royalty in terms of this section shall ensure that [share] such royalty is equally shared between the copyright owner and [with] any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).
- [(b) The performer's share of the royalty shall represent fair and equitable remuneration determined by an agreement between the performer and the owner of copyright, or between their representative collecting societies.**
- (c) In the absence of an agreement contemplated in paragraph (b), the performer or owner may refer the matter to the Copyright Tribunal referred to in section 29(1), or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).]**
- (d) Any payment made by the user of the sound recording in terms of this subsection shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).**

(3) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.'''.

Substitution of section 11 of Act 98 of 1978

12. The following section is hereby substituted for section 11 of the principal

Act:

“Nature of copyright in programme-carrying signals

11. (1) Copyright in programme carrying signals vest the exclusive right to undertake, or to authorize, the—

- (a) direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic;
- (b) communication of the work by wire or wireless means to the public, so that any member of the public may access the work from a place and at a time chosen by that person.”.

Repeal of section 12 of Act 98 of 1978

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

Drafting note: Given that fair use was in fact intended for all works, it was never correctly placed in section 12 (dealing with General exceptions iro literary and musical works). When subsection (1) was substituted in the Bill, it dealt with exceptions from protection iro literary and musical works, which meant that it still fit in section 12.

We cannot now change 12 into a fair use section as it is against the drafting rule of not substituting a section for something that has nothing to do with that section.

The idea is to start with a section dealing with fair use, then exceptions that apply to all and then specific exceptions: This has a nice logic to it and will make the Act read easier. It is proposed that this is done by repealing section 12, inserting 12A as fair use, 12B as specific exceptions applicable to all and then 12C to 12-whatever iro exceptions related to specific works, or as they appear in the Act section 13 etc. See notes below.

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

14. The following sections are hereby inserted in the principal Act after section 12:

“General exceptions from copyright protection

12A. (1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
- (ii) criticism or review of that work or of another work;
- (iii) reporting current events;
- (iv) scholarship, teaching and education;
- (v) comment, illustration, parody, satire, caricature or pastiche;

(vi) preservation of and access to the collections of libraries, archives and museums;

(vii) expanding access for underserved populations; and

Drafting note / Policy: Consider whether the phrase “underserved population” should not be defined. If the interpretation is too broad, it would fall outside the TRIPS exceptions and limitations.

(viii) ensuring proper performance of public administration.

(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—

(i) the nature of the work in question;

(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;

(iii) the purpose and character of the use, including whether—

(aa) such use serves a purpose different from that of the work affected; and

(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and

(iv) the substitution effect of the act upon the potential market for the work in question.

(c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.

Specific exceptions from copyright protection applicable to all works

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

(a) Any quotation: Provided that—

(i) that the extent thereof shall not exceed the extent reasonably justified by the purpose; and

(ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;

Drafting note: “including...” removed, as a summary of a work, is a work in its own right and so a quotation from that, is a quotation. The phrase is accordingly duplicating the concept and the sentence itself appears to be outdated (what about blogs) and confusing.
 “Fair use” (in Act reads “fair practice”) removed as the intention was not to add the requirements for “fair use” to quotations.

- (b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;
- (c) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;
- (d) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;
- (e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—
 - (i) the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;
 - (ii) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; and
 - (iii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture,

address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;

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

- (i) such translation is not done for commercial purposes;
- (ii) such translation is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes only; or
- (iii) such work is translated and communicated to the public for non-commercial public information purposes;

Policy: “public information purposes” need to be made clear. It can be interpreted as that a person can translate a work for instruction purposes and provided it is not for a profit, can translate the whole of the work and make it available for free to the public.

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

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

(i) the reasonable use of such work for the purposes of cartoon, parody, satire, pastiche, tribute or homage; and

(j) the making of a copy of such work by an individual of—

- (i) the individual’s own copy of the work; or
- (ii) a personal copy of the work made by the individual for the individual’s personal use and made for ends which are not commercial.

Policy concern: Consider whether (j) is not open for abuse – i.e. that a person may use this paragraph to make as many copies of the whole of a work for any reason

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

(a) the making of a back-up copy;

(b) time or format-shifting; or

(c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.

(3) The provisions of subsection (1) shall also apply with reference to the

making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.

(4) An authorisation to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.

(5) The provisions of subsection (1)(d) and (e) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

Subsection (5) is the only subsection of section 12 that was not covered by the Bill. I've included it here and adjusted it so that the cross references here now refer to the correct subsections in 12A. Dti to confirm if it is necessary. If necessary, Experts to confirm if it applies to other paragraphs in subsection (1) as well

(6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other transfer of ownership of a transferred original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such transferred original or copy.

Drafting Note: Section 12 B is now included here so that progression of sections are 1. General exception (fair use); 2. Specific exceptions applicable to all works (which includes parallel importation); and 3. General exceptions to specific works.

Policy issue in terms of the system that needs to be used i.e international, national and regional, however from a technical point of view the clause is legally sound. Other jurisdictions such as Chile have used similar wording.

Temporary reproduction and adaptation

12C. (1) Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—

- (a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or
- (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.

Reproduction for educational and academic activities

12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and

academic activities: Provided that the copying does not exceed the extent justified by the purpose.

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

(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society, an indigenous community or the National Trust on reasonable terms and conditions.

Policy concern: Who determines what T&C were not reasonable? Should this not be limited to obtaining a licence before the whole could be incorporated and if the licence is unreasonable, the matter then be referred to the Tribunal for resolution first? The risk of this is that the Tribunal proceedings may delay the accessibility of the works.

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

- (a) where the textbook is out of print;
- (b) where the owner of the right cannot be found; or
- (c) where authorised copies of the same edition of the text book are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.

(5) The right to make copies shall not extend to reproductions for commercial purposes.

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

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

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

- (c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.
- (d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.
- (e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.
- (8) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (5).''.

Drafting note: As 13 A and 13 B deals with specific exceptions to all works, they were inserted as S12C and S12D

Drafting Note: Should section 13 not form part of section 12A as it deals with specific exceptions applicable to all works?

Drafting experts: would it be good drafting to delete section 13 here and transfer it to section 12A? Would that not affect the continuity of the law? It is the same question as iro section 12, except that at least with section 12, we are changing the content from being applicable to literary works only, to being applicable to all works, so it can be justified. Here it would just be moving the same clause to another section.

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

15. Section 16 of the principal Act is hereby amended by the deletion of subsection (1).

Repeal of section 17 of Act 98 of 1978

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

Repeal of section 18 of Act 98 of 1978

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

Repeal of section 19A of Act 98 of 1978

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

Substitution of section 19B of Act 98 of 1978, as inserted by section 18 of Act 125 of 1992

19. The following section is hereby substituted for section 19B of the principal Act:

“General exceptions regarding protection of computer programs

19B. (1) A person having a right to use a copy of a computer program may, without the authorisation of the copyright owner, observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if that person does so while performing any of the acts of loading, displaying, executing, transmitting or storing the program which he or she is entitled to perform.

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

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

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

- (a) used for goals other than those to achieve the interoperability of the independently created computer program;
- (b) given to others except when necessary for the interoperability of the independently created computer program;
- (c) used for the development, production or marketing of a computer program substantially similar in its expression to the program contemplated in subsection (1); or
- (d) used for any other act which infringes copyright.

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

Policy: proposed broadening of this clause is a policy issue. The exceptions under section 12B should perhaps be applicable, especially iro use for educational purposes

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

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

“General exceptions regarding protection of copyright work for libraries, archives, museums and galleries

19C. (1) A library, archive, museum or gallery may, without the authorisation of the copyright owner, use a copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work is not used for commercial purposes.

(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.

(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.

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

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

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

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

(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery.

(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from ageing or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.

(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act, 1997 (Act No. 54 of 1997).

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

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

(11) A library, archive, museum or gallery may reproduce in any format any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for preservation, research or any other legal use.

(12)(a) A library, archive, museum or gallery may make a copy of any copyright work and make it available to another library, archive, museum or gallery or for public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.

(b) A library, archive, museum or gallery contemplated in paragraph (a) may also, for the purposes of that paragraph—

(i) take and show a photograph of such work or show video footage of such work;

(ii) create other images such as paintings of buildings; or

(iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place.

(13)(a) Subject to paragraph (b), a library may supply to any other library a copy of a copyright work in its collection, whether by post, fax or secure digital transmission.

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

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

(a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or

(b) the copyright work, or material protected by related rights, is in the public domain or licensed to the public under an open licence.

(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in sections 12 and 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.

General exceptions regarding protection of copyright work for persons with disability

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

(a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;

(b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and

(c) the activity under this subsection must be undertaken on a non-profit basis.

(2)(a) A person with a disability, or an organisation that serves persons with disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the owner of the copyright work, reproduce the work for personal use.

(b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.

(3) A person with a disability or an organisation that serves persons with disabilities may, without the authorisation of the copyright owner export to or import from another country any copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person or organisation.

(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.’’.

Amendment of section 20 of Act 98 of 1978, as substituted by section 19 of Act 125 of 1992

21. Section 20 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) Notwithstanding the transfer of the copyright in a **[literary, musical or artistic work, in a cinematograph film or in a computer program]** work, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorizes the use of his or her work in a sound recording or [cinematograph film or a television broadcast] audiovisual work or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.

(2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2, **[and]** except that, for the purposes of the provisions of the said Chapter, the author shall be deemed **[to be]** to have the right to complain of infringement of the provisions of this section, rather than the owner of the copyright in question.’’.

Policy concern: Subsection (2) is worded in such a way that it takes away the rights of the copyright owner, without any clear policy rationale for this.

Drafting note: Subsection (3) and (4) did not make sense as the moral right cannot lapse on the death of the author. It remains in perpetuity.

(5) is redundant as sections 12 and 12A says that the name of the author must be mentioned – so it confirms that moral rights must be protected.

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

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

“(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of **[a cinematograph film]** an audiovisual work or the making of a sound recording and pays or agrees to pay for it in money or money’s worth, and the work is made in pursuance of that commission, **[such person shall, subject**

to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4] the ownership of any copyright subsisting in the work shall be governed by contract: Provided that in the absence of a valid contract, ownership shall vest in the person commissioning the work and the author of the work shall have a licence to exercise any right which by virtue of this Act would otherwise be exercisable exclusively by the owner.”.

Drafting note: The provision has been technically improved where there is an absence of a contract.

The scope and application of this clause and its consequences are for policy discussions. The concern is that the proviso in practice results in 2 “copyright owners”, so an exclusively commissioned painting can in other words be re-printed (copies made) by the author and sold. That could not be the intention.

“Valid” – should this not rather read “if the contract does not provide for ownership...”

“Shall be governed” – The proviso governs what happens if there is no contract, which is actually no non-compliance of the law. This seems to be contradictory.

Amendment of section 22 of Act 98 of 1978

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

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

“(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law: Provided that copyright owned by, vested in or under the custody of the state may not be assigned.”;

(b) by the substitution for subsections (3) and (4) of the following subsections, respectively:

“(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing and signed by or on behalf of the assignor, the **[licensor]** licensor or, in the case of an exclusive **[principal act]** sub-licence, the exclusive **[sub- licensor, as the case may be]** sub-licensor, as stipulated in Schedule 2: Provided that assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment.

Policy concern: The CRC recommends an amendment to the legislation to allow for automatic reversion of assigned rights after 25 years from the date of assignment. the dti supports this and the assignment period should not be less than 25 years. The CRC states that the assignees should be able to recoup their investment within the first 20 years. To provide the artists or their heirs with an opportunity to reduce the level of losses arising as a result of the desperate circumstances referred to in the report. However, the concern is that this clause limits the rights of authors / copyright owner to assign for less than 25 years: propose that this reads “up to 25 years”

(4) A non-exclusive licence to do an act which is subject to copyright may be **[written or oral]** verbal or in writing, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted **[by contract]** verbally or in writing, or an electronic equivalent thereof, shall not be revoked, either by the person who granted the licence or his or her successor in title, except as the contract may provide, **[or by a further contract]** by a further contract or by operation of law.”; and

(c) by the substitution for subsection (8) of the following subsection:

“(8) Unless otherwise prohibited from doing so, a licensee may grant a sub-licence for the doing of any act that falls within the terms of the licence, including any implied term, without the consent of the original licensor.”.

Insertion of section 22A in Act 98 of 1978

24. The following section is hereby inserted in the principal Act after section 22:

“Assignment and licences in respect of orphan works

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

(2) Before making an application in terms of subsection (1), the applicant must publish his or her intention to make such application by notice in the *Gazette* in English and one other official language, as well as in two daily newspapers having general circulation throughout the Republic in any official language.

(3) An application in terms of subsection (1) must be made in such form as may be prescribed and must be accompanied by copies of the published advertisement contemplated in subsection (2) and such fee as may be prescribed.

(4) When the Commission receives an application in terms of subsection (1), the Commission may, after holding such inquiry as may be prescribed, grant to the applicant a licence to perform any act which is subject to copyright, subject to subsections (5) and (6) and the payment of a royalty.

(5) A licence issued in terms of subsection (4) is non-exclusive and is subject to such terms and conditions as the Commission may determine.

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

(a) Conducted a search of the database of the register of copyright maintained by the Commission that is available to the public through either the internet or any other means relevant to identifying and locating a registered copyright owner;

(b) conducted a search of reasonably available sources of copyright

ownership and ownership information and where appropriate, licensor information;

- (c) conducted a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert assistance;
- (d) conducted a search using any other database available to the public, including any database that is available to the public through the internet; and
- (e) undertaken actions that are reasonable and appropriate in terms of the facts relevant to the search, including—
 - (i) actions based on facts known at the start of the search and facts uncovered during the search;
 - (ii) actions directed by the Commission; and

Drafting note: Here and in other matters, words and phrases are used that are from IPLAA. If IPLAA is not operational at the time that this Amendment Act becomes operational, we may have to include transitional provisions for those terms that are from IPLAA

- (iii) the review of any records not available to the public through the internet that are known to be useful in identifying and locating the copyright owner.

(7) Where a licence is granted in terms of subsection (4), the Commission may direct the applicant to deposit the amount of the royalty determined in a particular account so as to enable the owner of the copyright in the work or, as the case may be, his or her heirs, executors or legal representatives to claim such royalty at any time.

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

(9) Any person who can adduce evidence for the purposes of proving that he or she is the owner of copyright in an orphan work, may have the copyright work returned to him or her with a claim in law to recover any royalties that accrued to the copyright work after such return.’’.

Policy concerns:

(8) – Why the limit of 5 years, and what happens to the money after 5 years? The dti indicates that it was not the intention to expropriate moneys by placing this limit on recovery – a copyright owner should always be able to recover royalties – propose the 5 year limit be deleted.

(9) - This is not sound in law. The orphan work did not change owners. It is still the owner's. He / She was just not known. The owner cannot be required to recover something that belongs to him / her already. Propose this is replaced with “...must be entered onto the database of the register of copyright referred to in subsection (6)(a) and may for the period during which the owner of copyright was unknown, recover royalties as contemplated in subsection (8).”

Insertion of Chapter 1A in Act 98 of 1978

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

“CHAPTER 1A

COLLECTING SOCIETIES

Registration and accreditation

22B. (1) Any person who intends to act as a representative collecting society in terms of this Chapter must apply to the Commission in the prescribed manner and form for registration and accreditation.

(2) A collecting society that has been registered and accredited by the Commission to administer rights on behalf of—

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

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

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

(4) The Commission shall not register and issue a registration certificate to any applicant unless the Commission is satisfied that the applicant—

(a) is able to ensure adequate, efficient and effective administration relating to collection of royalties;

(b) is able to comply with any condition for accreditation and the relevant provisions of the Companies Act, 2008 (Act No. 71 of 2008), the Broad-Based Black Economic Empowerment Act, 2013 (Act No. 46 of 2013), and any other applicable legislation; and

(c) has adopted a constitution meeting the prescribed requirements.

(5) A registration certificate issued in terms of this section is valid for a period not exceeding five years and, unless it is suspended or cancelled, may be renewed in the prescribed manner on such terms and conditions as may be determined by the Commission.

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

(7) If there is no collecting society for a right referred to in sub-section (6), the Commission may provide such assistance as may be necessary to assist in the formation of a collecting society.

Administration of rights by collecting society

22C. (1) Subject to such terms and conditions as may be prescribed—

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

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

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

(3) A collecting society may—

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

Drafting concern: “discrimination” refers to national treatment. Can this be reworded to better reflect the intention?

Drafting note: Subsections (2) and (3) swapped to ensure a better flow of the section

Control of collecting society by performers, or copyright owners

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

- (a) collect and distribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c);
- (b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the purpose of distribution of the royalties to the performers or copyright owners; and
- (c) provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner.

(2) Royalties distributed among the performers or copyright owners shall, as far as may be possible, be distributed in proportion to the actual use of their works.

Drafting note: Community Trust deleted as the workings of the National Trust and collection by indigenous communities is dealt with by IPLAA

Submission of returns and reports

22E. (1) A collecting society shall submit to the Commission such returns and reports as may be prescribed.

(2) The Commission may call for a report and specific records from a collecting society for the purposes of satisfying the Commission that—

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

Suspension and cancellation of registration of collecting society

22F. (1) The Commission may issue a compliance notice or apply to the Tribunal for an order to institute an inquiry into the affairs of a collecting society, if the Commission is satisfied that the collecting society is being managed in a

manner that contravenes the registration conditions of that collecting society or is managed in a manner detrimental to the interests of the performers or copyright owners concerned.

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

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

(4) The Commission shall be responsible for the administration and discharge of the functions of the collecting society contemplated in subsection (3) during the period of suspension or cancellation of the registration of that collecting society following the order of the Tribunal: Provided that the Tribunal may, on application by the Commission, appoint any suitable person to assist the Commission in the administration and discharging of the functions of that collecting society.”.

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

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

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

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

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

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

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

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

Amendment of section 27 of Act 98 of 1978, as amended by section 11 of Act 52 of 1984, section 3 of Act 61 of 1989 and section 24 of Act 125 of 1992

27. Section 27 of the principal Act is hereby amended by the addition of the following subsection:

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

(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertise for sale or hire, a technological protection measure circumvention device if—

(i) such person knows, or has reason to believe, that that device will or is likely to be used to infringe copyright in a work protected by a technological protection measure;

(ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or

(iii) such person knows or has reason to believe that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by a technological protection measure;

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

(c) circumvents such technological protection measure when he or she is not authorised to do so,

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

Policy consideration: Confirm whether section 27 covers the new rights provided for in the bill, especially RRR and the Royalty provisions in the new sections 6A, 7A and 8A

Amendment of section 28 of Act 98 of 1978, as substituted by section 12 of Act 52 of 1984 and amended by section 25 of Act 125 of 1992

28. Section 28 of the principal Act is hereby amended—

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

“(2) This section shall apply to any copy of the work in question made outside the Republic [which if it had been made in the Republic would be an infringing copy of the work], if the making of such copy constituted an infringement of copyright in the country in which the work was made.”; and

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

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

Insertion of sections 28O to 28S in Act 98 of 1978

29. The following section is hereby inserted in the principal Act after section 28N:

“Prohibited conduct in respect of technological protection measures

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

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

(a) such other person intends to use the service to circumvent an effective technological protection measure; or

(b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright in a technologically protected work.

(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.

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

(5) A technological protection measure shall be deemed to be effective if the use of the work is controlled by the exclusive licensee or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

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

Exceptions in respect of technological protection measure

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

circumvention device to perform any of the following:

- (a) An act permitted in terms of any exception provided for in this Act; or
- (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).

(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—

- (a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or
- (b) if the copyright owner has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.

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

- (a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and
- (b) purpose for which the services of such other person has been engaged.

Policy concern: Are the provisions of (2) and (3) (the process), not too onerous? (1) in any event allows the circumvention. This is not something that is a normal requirement.

Enforcement by Commission

28Q. The Commission must enforce this Act by—

- (a) performing all the relevant functions contemplated in section 187 of the Companies Act in respect of this Act;
- (b) referring matters to and appearing before the Tribunal; and
- (c) dealing with any other matter referred to it by any person, Tribunal or any other regulatory authority.

Prohibited conduct in respect of copyright management information

28R. No person may—

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

Exceptions in respect of copyright management information

28S. The prohibition in section 28R does not apply if a person—

- (a) is authorised by the performer or copyright owner to remove or modify the copyright management information;
- (b) does not know and has no reason to believe that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work; or
- (c) does not know or has no reason to believe that the copyright management information has been removed or modified without the authority of the performer or copyright owner.”.

Substitution of heading of Chapter 3 of Act 98 of 1978

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

“[COPYRIGHT TRIBUNAL] REGULATORY AND ENFORCEMENT AGENCIES”.

Substitution of section 29 of Act 98 of 1978, as amended by section 26 of Act 125 of 1992

31. The following section is hereby substituted for section 29 of the principal Act:

“Establishment of Tribunal

29. (1) There is hereby established a juristic person to be known as the Intellectual Property Tribunal, which—

- (a) has jurisdiction throughout the Republic;
- (b) is independent and subject only to the Constitution and the law; and
- (c) must perform its functions impartially and without fear or favour.

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

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

(a) have regard to international developments in the intellectual property arena; and

(b) consult any person, organisation or institution with regard to any matter within its jurisdiction.

(3) The Tribunal consists of a chairperson, deputy chairperson and not less than nine members appointed by the Minister, on a full-time or part-time basis.”.

Insertion of sections 29A to 29S in Act 98 of 1978

32. The following sections are hereby inserted in the principal Act after section 29:

“Functions of Tribunal

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

(2) The Tribunal may—

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

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

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

(d) adjudicate any application or referral made to it by any person, institution or regulatory authority where the dispute can only be directly referred to the Tribunal in terms of this Act and such dispute relates to intellectual property rights; and

(e) settle disputes relating to payment of royalties or terms of agreements entered into as required by this Act or agreements entered into in order to regulate any other matter in relation to intellectual property rights.

Appointment of members of Tribunal

29B. (1) The Minister must appoint as members of the Tribunal persons who have adequate and appropriate qualifications and experience in economics, law, commerce or public affairs.

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

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

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

(4) The Minister, in consultation with the Minister of Finance, must determine the remuneration, allowances, benefits and other terms and conditions of employment of members of the Tribunal.

Qualifications for appointment

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

- (a) not be subject to any disqualification set out in subsection (2); and
- (b) have submitted to the Minister a written declaration stating that he or she is not disqualified in terms of subsection (2).

(2) A person may not be appointed or continue to be a member of the Tribunal, if that person—

- (a) is an office-bearer of any political party, political movement or political organisation;
- (b) has or through a related person acquires a personal financial interest that may conflict or interfere with the proper performance of the duties of a member of the Tribunal;
- (c) is disqualified in terms of section 69 of the Companies Act from serving as a director of a company;
- (d) is subject to an order of court holding that person to be mentally unfit or disordered;
- (e) has been found in any civil or criminal proceedings by a court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonourably, in breach of a fiduciary duty or of any other offence for which such person has been sentenced to direct imprisonment without the option of a fine;
- (f) has been removed from a position of trust; or
- (g) has at any time found to be in contravention of this Act.

Terms of office of members of Tribunal

29D. (1) Each member of the Tribunal, including the chairperson and deputy chairperson, serves for a term of five years which may be renewed only once for a further period of five years.

The chairperson may, on one month written notice addressed to the Minister—

(a) resign from the Tribunal; or

(b) resign as chairperson, but remain as a member of the Tribunal.

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

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

Removal or suspension of members of Tribunal

29E. The Minister may, at any time, remove or suspend a member of the Tribunal from office if such a member—

(a) becomes subject to any of the disqualifications referred to in section 29C(2);

(b) repeatedly fails to perform the duties of the Tribunal;

(c) due to a physical or mental illness or disability becomes incapable of performing the functions of the Tribunal;

(d) is found guilty of a serious misconduct; or

(e) engages in any activity that may undermine the integrity of the Tribunal.

Conflict and disclosure of interest

29F. (1) A member of the Tribunal may not represent any person before the Tribunal.

(2) If, during a hearing in which a member of the Tribunal is participating, it appears to the member that the matter concerns a financial or other interest of the member contemplated in section 29C(2)(b), the member must—

(a) immediately and fully disclose the fact and nature of such interest to the chairperson, deputy chairperson and the presiding member at that hearing, as the case may be; and

(b) withdraw from any further involvement in that hearing.

(2) A member must not—

(a) make private use of or profit from confidential information obtained as a result of performing his or her official duties as a member of the Tribunal; or

(b) divulge any information referred to in paragraph (a) to a third party, except as required and as part of the official functions as a member of

the Tribunal.

Proceedings of Tribunal

29G. (1) The chairperson is responsible for managing the case files of the Tribunal, and must, taking into account the complexity of a matter, assign the matter to—

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

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

- (a) ensure that at least one member of the panel is a person with suitable legal qualifications and experience; and
- (b) designate a member of the panel to preside over the proceedings of the Tribunal.

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

- (a) direct that the hearing of that matter proceed before the remaining members of the panel, subject to the requirements of subsection (2)(a);
or
- (b) terminate the proceedings before that panel and constitute a new panel which may include any member of the original panel and direct the new panel to conduct the hearing afresh.

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

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

(6) A decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court and is binding subject to review or appeal to a High Court.

Hearings before Tribunal

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

- (a) in an inquisitorial manner;
- (b) as expeditiously as possible;

(c) as informally as possible; and

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

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

(a) evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;

(b) the proper conduct of the hearing requires it; or

(c) for any other reason that would be justifiable during proceedings in a High Court.

Right to participate in hearing

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

(a) The Commission;

(b) the applicant, complainant and respondent; and

(c) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Tribunal, such interest is adequately represented by any other person participating at the hearing.

Powers of member presiding at hearing

29J. The member of the Tribunal presiding at a hearing may—

(a) direct or summon any person to appear before the Tribunal at any specified time and place;

(b) question any person under oath or affirmation;

(c) summon or order any person to—

(i) produce any book, document or item necessary for the purposes of the hearing; or

(ii) perform any other act in relation to this Act; and

(d) give direction prohibiting or restricting the publication of any evidence adduced during a Tribunal hearing.

Rules of procedure

29K. Subject to the rules of procedure of the Tribunal, a member of the Tribunal

presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case and the requirements of the applicable provision of this Act.

Appeals and reviews

29L. (1) A participant in a hearing before a single member of the Tribunal may appeal against the decision of that member to a full panel of the Tribunal.

(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may—

- (a) apply to the High Court to review the decision of the Tribunal; or
- (b) appeal to the High Court against the decision of the Tribunal.

Interim relief

29M. (1) Any person may apply at any time, whether or not a hearing has commenced, to the Tribunal for an interim order in respect of the matter before the Tribunal.

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

- (a) there is *prima facie* evidence that the allegations may be true;
- (b) an interim order is reasonably necessary to—
 - (i) prevent serious, irreparable damage to that person; or
 - (ii) prevent the purposes of this Act from being frustrated;
- (c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and
- (d) the balance of convenience favours the granting of the order.

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

- (a) the date of the conclusion of a hearing into the matter before the Tribunal; or
- (b) six months after the date of the issue of the interim order extension of that order in terms of subsection (4).

(4) If an interim order has been granted and a hearing into that matter has not been concluded within six months after the date of that order, the Tribunal may, on good cause shown, extend the interim order for a further period not exceeding six months.

Orders of Tribunal

29N. In addition to the powers in terms of this Act and the Companies Act, the Tribunal may make any appropriate order in relation to a matter brought before it, including—

- (a) declaring particular conduct to constitute an infringement of this Act and as such prohibited;
- (b) interdicting conduct which constitutes an infringement of this Act;
- (c) imposing an administrative fine in terms of section 175 of the Companies Act, with or without the addition of any other order in terms of this Act;
- (d) confirming a consent agreement in terms of section 173 of the Companies Act as an order of the Tribunal;
- (e) condoning any non-compliance of its rules and procedures on good cause shown;
- (f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;
- (g) suspending or cancelling the registrant's registration or accreditation subject to any such terms and conditions the Tribunal deems fit; or
- (h) any other appropriate order required to give effect to a right contemplated in this Act or any other relevant legislation.

Witnesses

29O. (1) Every person giving evidence at a hearing of the Tribunal must answer any relevant question.

(2) The law regarding a witness's privilege in a criminal case in a court of law applies to a person giving evidence at a hearing of the Tribunal.

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

Costs

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

(2) If the Tribunal—

- (a) has not made a finding against a respondent, the member of the Tribunal presiding at the hearing may award costs to the respondent and against a complainant who referred the complaint to the Tribunal; or
- (b) has made a finding against a respondent, a member of the Tribunal

presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint to the Tribunal.

Appointment of staff of Tribunal

29Q. The Chairperson or any delegated member of the Tribunal may—

- (a) appoint staff and enter into an agreement with or hire independent contractors to assist the Tribunal in carrying out its functions; and
- (b) in consultation with the Minister and the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of members of staff of the Tribunal or those contracted or hired to assist the Tribunal.

Finances

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

- (a) money appropriated by Parliament;
- (b) any fees or fines payable in terms of this Act or any relevant legislation;
- (c) income derived from investment and deposit of surplus money in terms of subsection (2); or
- (d) other money accruing from any source.

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

- (a) on a call or short-term fixed deposit with any registered bank or financial institution in the Republic; or
- (b) in an investment account with the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).

Reviews and reports to Minister

29S. (1) The Minister may, at any time, conduct an audit review of the performance by the Tribunal of its functions.

(2) In addition to any other reporting requirement set out in this Act or any other legislation, the Tribunal must report to the Minister annually on its performance and activities as required by the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) As soon as practicable after receiving a report of a review contemplated in subsection (1), or after receiving a report contemplated in subsection (2), the

Minister must transmit and table a copy of the report in Parliament.”.

Repeal of sections 30, 31, 32, 33 and 36 of Act 98 of 1978

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

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

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

- (a) by the deletion of the word “and” at the end of paragraph (cD);
- (b) by the insertion of the following paragraphs after paragraph (cE):
 - “(cF)prescribing rules regulating the processes and proceedings of the Tribunal;
 - (cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;
 - (cH) prescribing permitted acts for circumvention of technological protection measures contemplated in section 28B after due consideration of the following factors:
 - (i) The availability for use of works protected by copyright;
 - (ii) the availability for use of works for non-profit archival and educational purposes;
 - (iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or
 - (iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;
 - (cI) prescribing royalty rates or tariffs for various forms of use;
 - (cJ) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;
 - (cK) prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a collecting society;
 - (cL) in consultation with the Minister responsible for communication, prescribing the local music content for broadcasting;”; and
- (c) by the addition of the following subsection, the existing section becoming

subsection (1):

“(2) Before making any regulations in terms of subsection (1), the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”.

Insertion of section 39B in Act 98 of 1978

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

“Unenforceable contractual term

39B. (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.

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

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

(b) settlement agreements; or

(c) terms of service licences.”.

Policy concern: Further discussion on (b) and (c) in terms of settlement agreements and terms of service licences needed. These paragraphs allows the exclusion of protection afforded by the Act by way of a licence or settlement agreement.

Insertion of Schedule 2 in Act 98 of 1978

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

“Schedule 2

(Section 22(3))

Part A Translation Licences

Application of provisions in Part A

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

Application for licence to translate copyright work

2. (1) Any person may, subject to item 4, apply to the Tribunal for a licence to make a translation of the work (hereinafter in Part A referred to as “the licence”) into—

(a) any language that is an official language within the Republic;

(b) a foreign language that is regularly used in the Republic; or

(c) any other language.

for use by readers located in the Republic.

(2) Any person may apply to the Tribunal for a licence to translate a work in order to convert the work into a usable or analogous form of reproduction.

(3) No licence shall be granted until the expiration of the following applicable periods, commencing from the date of first publication of the original work:

(a) One week where the application is for a licence for translation into an official language;

(b) three months where the application is for a licence into a foreign language in regular use in the Republic; and

(c) one year where the application is for a licence for translation into any language contemplated in subitem (1)(c).

Granting of licence

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

(a) no translation of the work into the language in question has been executed by or with the authorisation of the copyright owner or that any previous editions in that language are out of print; and

(b) the applicant for the licence—

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

(ii) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail or electronic mail sent a copy of his or her application contemplated in item 2(1), to the principal place of business of the publisher whose name appears on the copyright work;

(2) Where the copyright owner of the work in question is known and can be located, no licence shall be granted unless he or she has been given an opportunity to be heard.

(3) Where—

(a) the one week period referred to in item 2(3)(a) applies, no licence shall be granted until the expiration of a further period of two days;

(b) the three months period referred to in item 2(3)(b) applies, no licence shall be granted until the expiration of a further period of two weeks;
or

(c) the one year period referred to in item 2(3)(c) applies, no licence shall be granted until the expiration of a further period of three months.

calculated in accordance with subitem (4).

(4) The further periods contemplated in subitem (3) shall be computed from the date on which the requirements mentioned in subitem (1)(a) and subitem and subitem (1)(b)(i) are fulfilled or, where the identity or the address of the copyright owner is unknown from the date on which the applicant also complies with the requirements mentioned in subitem (1)(b)(ii).

(5) If, during any of the said further periods, a translation into the language in question of the work is published in printed or analogous form of reproduction by, or with the authorisation of, the copyright owner, no licence shall be granted.

(6) For works composed mainly of illustrations, a licence shall only be granted if the conditions stipulated in subitem (1) have been fulfilled.

(7) No licence shall be granted when the copyright owner has withdrawn all copies of the work from circulation.

Scope and conditions of licence

4. (1) Any licence granted under this Part shall—

(a) be for the purpose of teaching ; or

(b) be for training, scholarship or research.

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

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

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

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

(d) both the sending of the copies abroad and their subsequent distribution to the recipients are without any commercial purpose; and

(e) the government of the foreign country to which the copies are sent, has agreed to the receipt or distribution, or both, of the copies in that country.

(3) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the Republic and copyright owners in the country of the copyright owner.

(4) If the licensee is unable, by reason of currency regulations, to transmit the compensation to the copyright owner he or she shall report the fact to the Tribunal who shall make all efforts to ensure that such transmittal is in internationally convertible currency or its equivalent.

(5) As a condition of maintaining the validity of the licence, the translation must be correct for such use and all published copies must include the following:

- (a) The original title and name of the copyright owner of the work;
- (b) a notice in the language of the translation stating that the copy is available for distribution only in the Republic or in accordance with item 4(2); and
- (c) if the translated work was published with a copyright notice, a reprint of that notice.

(6) The licence shall terminate if a translation of the work in the same language allowed by the licence, is published—

- (a) with substantially the same content as the original publication under the licence;
- (b) by or with permission of the copyright owner; and
- (c) in printed or analogous form of reproduction in the Republic at a price reasonably related to the price normally charged in the Republic for comparable works.

(7) Any copies of the work already made before the licence terminates may continue to be distributed until stocks are exhausted.

Licence for broadcasting organisation

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

- (a) The translation is made from a copy made and acquired in accordance with the laws of the Republic;
- (b) the translation is for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialised technical or scientific research to experts in a particular profession only;
- (c) broadcasts are made lawfully and are intended for recipients in the Republic;
- (d) sound or visual recordings of the translation may only be used by broadcasting organisations with their headquarters in the Republic; and
- (e) all uses made of the translation are without commercial purpose.

(2) A broadcast contemplated in subitem (1) includes a broadcast made through the medium of lawful sound or visual recording, made for the sole

purpose of such broadcast.

(3) A licence may also be granted to a domestic broadcasting organisation under all of the conditions provided in subitem (1) to translate any text incorporated in an audiovisual work that was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Part B Reproduction Licences

Application of provisions in Part B

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

Application for licence to reproduce and publish copyright work

2. (1) Any person may, subject to item 4, apply to the Tribunal for a licence to reproduce and publish a particular edition of the work in printed or analogous forms of reproduction (hereinafter in Part B referred to as “the licence”).

(2) No licence shall be granted until the expiration of the following applicable periods, commencing from the date of first publication of the particular edition of the work:

- (a) Three years for works of technology and the natural and physical sciences including mathematics;
- (b) seven years for works of fiction, poetry, drama and music, and for art books; and
- (c) five years for all other works.

Granting of licence

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

- (a) no distribution by, or with authorisation of, the copyright owner of copies in printed or analogous forms of reproduction of that particular edition has taken place in the Republic to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the Republic or that, under the same conditions, such copies have not been on sale in the Republic for a continuous period of at least six months; and
- (b) the applicant for the licence—
 - (i) has requested, and unreasonably been denied, authorisation from the copyright owner; or
 - (ii) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail or electronic mail sent a copy of his or her application

contemplated in item 2(1), to the principal place of business of the publisher whose name appears on the copyright work.

(2) Where the copyright owner is known and can be located, no licence shall be granted unless he or she has been given an opportunity to be heard.

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

(4) Where the seven-year or five-year periods referred to in paragraphs (b) and (c) of item 2(2) apply and where the identity or the address of the copyright owner is unknown, no licence shall be granted until the expiration of six months calculated from the date on which the copies of the application referred to in subitem (1)(b)(ii) have been mailed.

(5) If, during the period of six or three months referred to in subitem (3) or (4), any distribution or sale as contemplated in subitem (1)(a) has taken place, no licence shall be granted.

(6) No licence shall be granted if the copyright owner has withdrawn all copies of the edition which is the subject of the application from circulation.

(7) Where the edition which is the subject of an application for a licence under this Part is a translation, the licence shall only be granted if the translation is in a language required by _____, or was made with the authorisation of, the copyright owner.

Scope and condition of licence

4. (1) Any licence under this Part shall—

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

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

- (a) all copies reproduced are to be sent to the prospective licensee in one or more bulk shipments for distribution exclusively in the Republic;
- (b) the contract between the prospective licensee and the establishment doing the work of reproduction shall—
 - (i) include a stipulation regarding delivery and distribution as contemplated in paragraph (a); and
 - (ii) provide a guarantee by the establishment engaged for doing the work of reproduction that the work of reproduction is lawful in the country where it is done;
- (c) the prospective licensee may not entrust the work of reproduction to an establishment created to reproduce copies of works in respect of which a licence has already been granted under this Part;
- (d) the licence is non-exclusive; and
- (e) the licence is transferable.

(2) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the Republic and copyright owners in the Republic.

(3) If the licensee is unable, by reason of currency regulations, to transmit the compensation to the copyright owner, he or she shall report the fact to the Tribunal who shall make all efforts to ensure such transmittal in internationally convertible currency or its equivalent.

(4) As a condition of maintaining the validity of the licence, the reproduction of that particular edition must be accurate and all published copies must include the following:

- (a) The title and name of the owner of the work;
- (b) a notice in the language of the publication stating that the copy is available for distribution only in the Republic; and
- (c) if the edition which is reproduced bears a copyright notice, a reprint of that notice.

(5) The licence shall terminate if—

- (a) copies of an edition of the work in printed or analogous form of reproduction are distributed in the Republic in connection with systematic instructional activities, at a price reasonably related to that normally charged in the Republic;
- (b) by or with the authorisation of the copyright owner; and
- (c) such edition is in the same language and is substantially the same in content as the edition which was published under the licence.

(6) Any copies of an edition of the work already made before the licence terminates may continue to be distributed until stocks are exhausted.

Licence for audiovisual works

5. Under the conditions provided in this Part, a licence may also be granted—

- (a) to reproduce in audiovisual form a lawfully made audiovisual work, including any protected work incorporated in it if that audiovisual work was prepared and published for the sole purpose of being used in connection with systematic instructional activities; and
- (b) to translate any text incorporated in that audiovisual work into a language generally used in the Republic.”.

Amendment of certain expressions in Act 98 of 1978

37. The principal Act, save for sections 26(9) and 43, is hereby amended by the substitution for the expressions “cinematographic film” and “film” where it appears in the Act, of the relevant expressions of “audiovisual work” and “work” respectively.

Drafting note: Experts to confirm that these consequential amendments iro cinematograph film correctly reflects the definitions and sections:

This clause will impact on definitions of “author”; “copy”; “dramatic work”; “infringing copy”; “literary work”; “performance”; “photograph”; “reproduction”; “sound recording”; section 1(2); 1(5)(b) and (d); 2(1)(d); 3(2)(b); 4(1)(e); 5(4); 7(c); 15(1); 15(3); 26(6); 26(10); 28E(1)(b), (e), (f), (g), (i); 28H(2)(b); 37(1)(a);).

Is it correct to exclude the change iro S26(9) and s43 – i.e. in ss 26(9) and 43 it remains cinematograph film?

Short title and commencement

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

MEMORANDUM ON THE OBJECTS OF THE COPYRIGHT AMENDMENT BILL

1. BACKGROUND

- 1.1 The Copyright Amendment Bill (“the Bill”) seeks to align copyright with the digital era and developments at a multilateral level. The existing Copyright Act, 1978 (Act No. 98 of 1978) (“the Act”), is outdated and has not been effective in a number of areas. The creative industry is impacted upon; educators are hampered in carrying out their duties; researchers are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. For this reason, a need exists for Intellectual Property (“IP”) legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with disabilities; and to ensure that artists do not die as paupers due to ineffective protection. The latter is supported by the experience of the power imbalance, vulnerabilities and abuse taking place in the music industry which Government was called to address.
- 1.2 The Bill is consistent with the Draft National Policy as commented on and the recommendations of the Copyright Review Commission (“the CRC”) chaired by retired judge Ian Farlam, and is linked to the National Development Plan (“NDP”), in that it seeks to ensure consistency and coherence in aligning the approach of various Government Departments to IP matters. The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual Property Organisation (“WIPO”) digital treaties namely the WIPO Copyright Treaty (“WCT”); the WIPO Performance and Phonograms Treaty (“WPPT”); the Beijing Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The alignment is for purposes of ensuring effective governance, social protection, employment creation and reduction of inequalities.
- 1.3 The amendment of the Act means that South Africa will be able to accede to international treaties and conventions which require domestic legislation to be consistent with international imperatives.

2. OVERVIEW OF BILL

- 2.1 The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. It is also envisaged that the proposed legislation will reward and incentivise authors of knowledge and art. Various sectors within the South African Copyright regime are dissatisfied. Ranking highest are local performers and composers, who have not benefitted due to the lack of access to the Copyright system. (CRC report 2011). Thus, the Bill aims to make copyright consistent with the digital era, developments at a multilateral level, international standards and introduce improved exceptions and limitations into Copyright law. The Bill also aims to enhance access to and use of copyright works, to promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creative industry.
- 2.2 The objectives of the Bill are—
- to develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa;
 - to address the licensing of copyright works or material in relation to commissioned work to facilitate commercial exploitation by any person so licensed.
- 2.3 The Bill introduces provisions which deal with matters pertaining to Collective Management. Collecting Societies will only be allowed to collect for their registered members, and all Collecting Societies have to be registered with the Companies and Intellectual Property Commission (“CIPC”). Collecting Societies will only be allowed to collect for one set of Copyright Rights (Performance, Mechanical and Needle time).
- 2.4 The Bill deals with the protection of works and rights of authors in the digital environment.
- 2.5 The Bill provides for the availability of accessible format copies of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind but to other disabilities such as learning disabilities, dyslexia etc.

- 2.6 The Bill introduces an Artist Resale Royalty. This resale right means that an artist could be entitled to a royalty even when their work is resold.
- 2.7 Scope is left for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty. Limited circumstances have been provided for in this regard. Furthermore, this provision stipulates the factors that need to be considered in determining whether the use of a copyright amounts to fair use.
- 2.8 The Bill proposes a new structure for the tribunal that will settle disputes in the area of all domains of IP. The current Tribunal process takes long to settle disputes and was found to be ineffective by the CRC in providing speedy redress to copyright owners. There is clear justification to follow the route taken in respect of the Companies, Trade Marks and Competition Tribunals which are good examples in this regard. This will be a Tribunal to deal with all IP matters.

3. ANALYSIS OF BILL

- 3.1 Clause 1 of the Bill proposes the insertion into the Act of a range of new definitions necessitated by certain amendments embodied in the Bill.
- 3.2 Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.
- 3.3 Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for State ownership of copyright funded by the State.
- 3.4 Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.5 Clause 5 of the Bill proposes an amendment to section 7 by providing for communication to the public of an artistic work by wire or wireless means, including internet access.

- 3.6 Clause 6 of the Bill proposes an amendment to section 8 of the Act by providing for communication to the public of an audiovisual work by wire or wireless means, including internet access.
- 3.7 Clause 7 of the Bill proposes an amendment to section 9 of the Act providing for communication to the public of a sound recording by wire or wireless means, including internet access. Furthermore, by providing for a person who intends to broadcast, cause transmission of or make any work available to the public, to give the author, collecting society or indigenous community a notice in the prescribed manner of his or her intention to perform such acts, indicating where practicable, the date of the proposed performance, proposed terms and conditions for the payment of royalties and requires the copyright owner, collecting society or indigenous community to sign the proposal attached thereto.
- 3.8 Clause 8 of the Bill proposes the substitution of section 9A of the Act. It embodies a variety of additions and amendments pertaining to the payment of royalties in respect of intellectual property rights.
- 3.9 Clause 9 of the Bill proposes the insertion into the Act of sections 9B to 9F, providing for the resale, duration, assignment or waiver of royalty rights. It also provides for authors to enjoy the inalienable resale royalty right on the commercial resale of his or her work of art, subsequent to the first transfer by the author of such work of art.
- 3.10 Clause 10 of the Bill proposes an amendment to section 12, providing for fair dealings and uses of copyright work.
- 3.11 Clause 11 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection and section 12B providing for the first sale or transfer of ownership of copyright to exhaust the rights of distribution and importation locally and internationally in respect of the transfer of the original or copy.
- 3.12 Clause 12 of the Bill proposes the insertion of sections 13A and 13B in the Act providing for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process.
- 3.13 Clause 13 of the Bill proposes an amendment to section 16 of the Act,

providing for the deletion of subsection (1).

- 3.14 Clauses 14 and 15 proposes the repeal of sections 17 and 18 of the Act, respectively.
- 3.15 Clause 16 of the Bill proposes the repeal of section 19A of the Act.
- 3.16 Clause 17 of the Bill proposes an amendment to section 19B of the Act by providing that the person having a right to use a copy of a computer program shall be entitled, without the authorisation of the copyright owner, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he or she does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to do.
- 3.17 Clause 18 of the Bill proposes the insertion of sections 19C and 19D into the Act by providing general exceptions regarding protection of copyright work for archives, libraries, museums and galleries, also exceptions regarding protection of copyright work for persons with disability.
- 3.18 Clause 19 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author.
- 3.19 Clause 20 of the Bill proposes an amendment to section 21 of the Act by providing for the ownership of any copyright subsisting in the work between the person commissioning the work and the author who executes the commission.
- 3.20 Clause 21 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned.
- 3.21 Clause 22 of the Bill proposes the insertion into the Act of a new section 22A, making provision for assignment and licences in respect of orphan works.
- 3.22 Clause 23 of the Bill proposes the insertion of a new Chapter 1A into the Act

and provides for the registration and regulation of Collecting Societies.

- 3.23 Clause 24 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright, omits to pay the author of the copyright work a royalty fee as and when the copyright work is used and omits to pay the author of artistic work royalty fees as and when the artistic work is sold as prescribed by the Act.

- 3.24 Clause 25 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author.

- 3.25 Clause 26 of the Bill proposes amendments to section 28 of the Act, which provides for the copying of a work to constitute an infringement of copyright, if such copying would have constituted infringement in the country in which the work was made.

- 3.26 Clause 27 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, 28S in the Bill providing for prohibited conduct in respect of technological protection measures; exceptions in respect of technological protection measures; and prohibited conduct in respect of copyright management information and exceptions.

- 3.27 Clause 28 of the Bill proposes an amendment to the heading in Chapter 3 of the Act [Copyright Tribunal] by replacing it with the heading “Regulatory and Enforcement Agencies”.

- 3.28 Clauses 29 and 30 of the Bill propose the insertion of sections 29A to 29S into the Act, which provide for, amongst others, the establishment of the Intellectual Property Tribunal; its functions; appointment of its members; qualifications for such appointment; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal.

- 3.29 Clause 31 of the Bill proposes the repeal of sections 30, 31, 32, 33 and 36 of the Act.

- 3.30 Clause 32 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst

others to the procedure for the conduct of Tribunal hearings and relating to Collecting Societies.

- 3.31 Clause 33 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purport to renounce a right or protection afforded by the Act will be unenforceable.
- 3.32 Clause 34 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.
- 3.33 Clause 35 of the Bill provides for the short title and commencement.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

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

5. FINANCIAL IMPLICATIONS FOR STATE

Any financial requirement will be accommodated within the existing budget.

7. PARLIAMENTARY PROCEDURE

Tagging

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

- 7.2. The Bill must be considered against the provisions of the Constitution relating

to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.

- 7.3 The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of **Tongoane and Others v Minister of Agriculture and Land Affairs and Others**¹. The Constitutional Court in its judgment stated as follows:

“[58] What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ‘in substantial measure fall within a functional area listed in schedule 4’. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This ‘involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.’” (footnote omitted).

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”

- 7.4 In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.
- 7.5 The Act regulates copyright. In terms of section 2 of the Act, and subject to the provisions of the Act, the following works, if they are original, are eligible for copyright, namely literary works, musical works, artistic works, audiovisual works, sound recordings, broadcasts, program-carrying signals, published editions and computer programs.

¹ 2010 (8) BCLR 741 (CC)

- 7.6 The Bill, amongst others things, seeks to provide for certain exceptions in respect of infringement of copyright for educational purposes, e.g. the new section 13B [clause 12 of the Bill] which regulates the making of copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose. “Education at all levels, excluding tertiary education” is a functional area listed in Schedule 4 to the Constitution. The Bill also proposes general exceptions regarding protection of copyright work for archives, libraries, museums and galleries. “Archives other than national archives”, “Libraries other than national libraries” and “Museums other than national museums” are functional areas listed in Schedule 5 to the Constitution. The question is whether or not the abovementioned provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4 or 5. The purpose of the Bill is to regulate copyright and not to regulate any matter falling under the functional areas in question. The Constitutional Court, in paragraph 71, stated the following with regard to the test for tagging:

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

The subject matter of the Bill is the regulation of copyright in the Republic and does not impact on matters that substantially affect the provinces.

- 7.7 Since none of the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4 or 5, the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

Referral of Bill to House of Traditional Leaders

- 7.8 According to section 18(1) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), “(a)ny parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.”.

- 7.9 Indigenous works will in terms of the Act be eligible for the payment of royalties. An “indigenous work” means a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community. The Bill provides for the registration of collecting societies to administer rights on behalf of copyright owners or authors. Since the Bill pertains to “customs of traditional communities” it would be necessary to refer the Bill to the House of Traditional Leaders.