

Draft 3.Edited.2018.09.31

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01 August 2018
Dear Ms. Fubbs

Pursuant to the instruction received on 18 September 2018, kindly find the comments on the Copyright Amendment Bill attached.

The comments are limited to the conditions as set-out in the accompanying instructions namely that it should focus on:

- a. the appropriateness of the terminology used in the Bill, when considering the Copyright law terminology currently used in South Africa;
- b. whether the wording of the Bill reflects the policy objectives as agreed to by the Committee (see the memorandum on objects);
- c. where the panel member is legally qualified, whether any of the clauses raises Constitutional concerns; and
- d. whether the clauses that address international treaties, correctly reflect the content of those treaties (it is acceptable for the Bill to have a broader scope than a treaty, but not a narrower one) and will result in South Africa complying with those treaties, once ratified.

It is however pertinent to note that technical wording and policy are difficult to divorce from merits of any clauses. This difficulty has resulted in a very limited assessment of the as it needed to fit the scope of the instructions. The process might have been better served by affording the panel an unlimited scope to review the Bill holistically as some clauses within the Bill have no policy informing them nor have they been debated in parliament, thus the review was without much needed context.

Please do not hesitate to get in contact should the PPC require any further comments.

Yours Sincerely

Wiseman Qinani Ngubo

rightsholders as its primary purpose which is also wholly and collectively owned by the same rightsholders

- (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 or part thereof 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,

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Commented [MOU3]: A clear definition of a Collecting Society is required for the proper functioning of Chapter 1A.

The wording provided aligns the definition with the universally accepted definition which ensures that members own the society whilst ensuring that it operates once granted authority to do so by the relevant authority. It also ensure that collecting societies are organized as non-profits in order to ensure that all benefits derived are afforded to members

Commented [MOU4]: There is a possibility that only part of a work could be regarded as being unidentified. The other parts of the work would then not be considered to be orphaned. This is especially true with musical works which are controlled or owned in parts by many different people

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:

“teaching” means teaching, scholarship or education at all levels – in educational institutions and universities, municipal and State schools, and private schools as well as any educational programmes, adult or otherwise, approved and/ or recognised by the Department of Education. Education outside these institutions, for instance general teaching available to the public but not included in the above categories, should be excluded.

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

‘technological protection measure’—

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

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

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

“ ‘Tribunal’ means the Copyright Tribunal established by section 29;

‘visual artistic work’ means an artistic work as contemplated in paragraph (a) of the definition of ‘artistic work’.”.

Insertion of section 2A in Act 98 of 1978

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

“Scope of copyright protection

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

Commented [MOU5]: In light of the teaching and educational exceptions being introduced, a clear definition of what amounts to teaching/ education is pivotal.

The Berne Convention makes allowances for the educational exceptions provided that the quotation or illustrations are

1. based on works that have already been made available lawfully
2. that their compatible with a fair practice
3. their extent does not exceed that justified by the purpose

A clear definition of what amount to education or educational purposes allows for the evaluation of any act in light of the condition setout in the Convention. Further, the application of any exception will still be required to meet the 3 step test as setout by the Convention. A clear definition will aid in the evaluation of the act in light of that test.

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

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

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

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

(4) No protection shall—

(a) extend to an expression—

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

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

(b) subsist in—

(i) official texts of a legislative, administrative or legal nature or in official translations of those texts; or

(ii) speeches of a political nature, in speeches delivered in the course of legal proceedings or in news of the day that are mere items of press information: Provided that the maker of the speeches referred to in this subparagraph shall have the exclusive right of making a collection of the speeches in question.”.

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

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

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

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

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

Commented [MOU6]: The type of local or international organization which may be prescribed and benefit from this clause needs to be defined or qualified in order to ensure that the purpose of the clause is borne in mind when the organisations are named.

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

“(eA) communicating the work to the public by wire or wireless means;

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

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

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

Insertion of section 6A in Act 98 of 1978

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

“Share in royalties regarding literary or musical works

6A. (1) For the purposes of this section, ‘**royalty**’ means the gross profit made on the exploitation of a literary work or musical work by a copyright owner or a person who has been authorized by the author to do any of the acts contemplated in section 6.

(2) Notwithstanding—

(a) the assignment of copyright in a literary or musical work; or

(b) the authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6,

the author shall have the right to share in the royalty received for the execution of any of the acts contemplated in section 6.

(3) (a) The author’s share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or the person contemplated in subsection (2)(b), or between their representative collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4).

(4) Where the author and copyright owner, or the person contemplated in subsection (2)(b), cannot agree on the author’s share of the royalty, any party may refer the matter to the Tribunal for an order determining the author’s share of the

Commented [MOU7]: This section introduces the concept of an inalienable right in as far as it limits the exclusive nature of the rights granted by section 6.

The Constitutionality of this cause in as far as it applies to works assigned prior to the commencement of the Bill is doubtful, at best. The application of any piece of legislation is bound to be met with a Constitutional question to answer in that it deems the law to be what it was not. This has been dealt with in case law such as *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue and Another (GNP)* (unreported), case no 7760/2014 of 29 May 2017 where the court averred that the retrospective application of law offends against the principle of legality and the rule of law, which lies at the heart of our constitutional dispensation.

The other challenge that can be levelled against this clause is the fact is goes against the basic principle of copyright being transferable property. Section 22 (1) of the current Act which explicitly states that:

“copyright shall be **transmissible as movable property by assignment, testamentary disposition or operation of law**”
The current clause limits the transmissibility of ones property in what appears to be an arbitrary reason. Copyright owners have the freedom to contract and trade including the right to elect to alienate their property in the event that circumstances are favourable to do so. A blanket limitation of that right without the application of section 36 of the Constitution is unlikely to pass constitutional muster.

Further, the Berne Convention (to which South Africa is a signatory) established the 3 step test in relation to the implementation of exceptions and limitation of copyright. This test is also articulated in the TRIPS Agreement (to which South Africa is a signatory) as well as the WIPO Internet Treaties which South Africa intends to ratify. The test establishes 3 conditions under which any exception or limitation to copyright must be implemented namely;

1. It must be limited to certain special cases
2. Which do not conflict with the normal exploitation of the work
3. Must not unreasonably prejudice the legitimate interests of the author/ rightsholder

As such, in as far as the proposed clause amounts to a limitation of the exclusive right of copyright owners, the limitation would have to be assessed in light of the 3 step test.

royalty.

(5) The agreement contemplated in subsection (3)(a) must include the following:

- (a) The rights and obligations of the author and the copyright owner or the person contemplated in subsection (2)(b);
- (b) the author's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;
- (c) the method and period within which the amount must be paid by the copyright owner, or the person contemplated in subsection (2)(b), to the author; and
- (d) a dispute resolution mechanism.

(6) This section does not apply to—

- (a) a copyright owner who commissioned, or who is the author of, the visual artistic work in question;
- (b) a work created in the course of employment contemplated in section 21(1)(b) and (d); or
- (c) a work where copyright is conferred by section 5 in the state, local or international organizations.

(7) (a) This section applies to a visual artistic work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic work—

- (i) falls within the application of this Act; and
- (ii) is still exploited for profit.

(b) The Minister must prescribe the process to give effect to the application of this section to a work contemplated in paragraph (a).

(c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date of the Copyright Amendment Act, 2019.

Artists Resale Royalty right regarding visual artistic works

7B. (1) The author of a visual artistic work in which copyright subsists or his or her heirs, as may be applicable, must be paid royalties on the commercial resale within the art market of that work.

Commented [MOU9]: The Resale Royalty (otherwise known as the Artists Resale Royalty ARR) is articulated in Article 14 of the Berne Convention. The convention qualifies the application to "original works". This requirement is absent from clause 7B

The preceding section 7 and clause 7A need to be viewed separately from the clauses 7B to 7F. The ARR applies following the first sale and is a remuneration right applied when the work is sold at auctions. The provisions in section 7 and clause 7A on the other hand relate to the protection and limitation of the exclusive rights in artistic works. Also, the provisions of the proposed clause 7A has provisions that fall outside the application of the ARR such as requiring agreements governing the percentage splits whereas the royalty percentages due to the artists in terms of the ARR will be determined by the Minister in consultation with the relevant stakeholders. The underlying policy objectives of each of the clauses is thus fundamentally divergent.

Further, in order to align the clause with the international instrument from which it stems, it should be renamed to the normative Artists Resale Royalty. This will also aid in its application especially if the sale occurs in a foreign country as the availability of the royalty will be readily determinable.

- (2)(a) Royalties in respect of visual artistic works shall be payable at the rate prescribed by the Minister, after consultation with the Minister responsible for arts and culture.
- (b) The Minister must, before prescribing the rate referred to in paragraph (a), publish the rate proposed in the *Gazette* and call for written comments by any interested party to be provided within 30 days after publication.
- (c) The Minister may from time to time in the manner contemplated in paragraph (b), amend the prescribed rate contemplated in paragraph (a).
- (3) The seller and the art market professional concerned are jointly and severally liable to pay the royalties contemplated in subsection (1) to the author or his or her heirs as may be applicable.
- (4) The author of a visual artistic work or his or her heirs, as may be applicable, shall be entitled to receive a resale royalty if—
- (a) at the time when the resale is concluded—
- (i) the author is a South African citizen or is domiciled or resident in the Republic or is a citizen of a designated country specified by the Minister in accordance with section 37; 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 domiciled or resident in the Republic or was a citizen of a country specified by the Minister in accordance with section 37;
- (c) the resale or any part of the transaction takes place in the Republic or in any country specified by the Minister in accordance with section 37; and
- (d) the resale of the work is recognisable after the commencement of section 9 of the Copyright Amendment Act, 2019.
- (5) A resale royalty right applies whether or not the author was the first owner of any copyright in the work.

Proof of author

7C. (1) Where a mark or name purporting to identify a person as the author of

Commented [MOU10]: The Resale Royalty Right is a creature created under the Berne Convention to which South Africa is a signatory. The royalty is implemented at the election of each member country. The principle of reciprocity applies to the royalty once it is established meaning it applies to citizens or residents of each country which has elected to introduce the right.

Due to this, there will not be a need for the Minister to specifically name a country wherein the ARR will apply. By the simple application of the law of reciprocity, it will apply in any other country which has elected to introduce.

By illustration, the Minister cannot name a country in which the ARR will apply if that country has not implemented it.

- (f) doing, in relation to an adaptation of the **[film] work**, any of the acts specified in relation to the **[film] work** in paragraphs (a) to [(d)] (dA) inclusive;
- (g) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the **[film] work**.”.

Insertion of section 8A in Act 98 of 1978

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

Share in royalties regarding audiovisual works

8A. (1) A performer shall, subject to the Performers Protection Act, 1967 (Act No. 11 1967), have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8.

(2) (a) The performer's share of the royalty contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the performer and the copyright owner or between their representative collecting societies.

(b) Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4), as the case may be.

(3) Where the performer and copyright owner contemplated in subsection (2)(a) cannot agree on the performer's share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer's share of the royalty.

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

- (a) The rights and obligations of the performer and the copyright owner;
- (b) the performer's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;
- (c) the method and period within which the amount must be paid by the copyright owner to the performer; and
- (d) a dispute resolution mechanism.

(5) (a) This section applies to an audiovisual work where copyright in that work was assigned before the commencement date of the Copyright Amendment

Commented [MOU11]: The Protection of Audiovisual Performers should be done under the auspices of the Performers Protection Act. The inclusion of Performer related matters in the Copyright Legislation will result in a conflation of matters and objectives. AV Performers should be protected as envisioned in the Beijing Treaty of Audio Visual Performers, however this projection should live in the more suitable legislation.

- (iv) make the sound recording available to the public as contemplated in section 9(f).
- (aA) Any person who executes an act contemplated in section 9(c), (d), (e) or (f) for commercial purposes must—
- (i) register that act in the prescribed manner and form; and
 - (ii) submit a complete, true and accurate report to the performer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner, for the purpose of calculating the royalties due and payable by that person.
- (b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, the indigenous community, or [between] their [representative] collecting societies.
- (c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may in the prescribed manner refer the matter to the [Copyright] Tribunal [referred to in section 29(1)] or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).
- (2)(a) The owner of the copyright, collecting society or indigenous community who receives payment of a royalty in terms of this section shall ensure that [share] such royalty is equally shared between the copyright owner and [with] any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).
- [(b) **The performer's share of the royalty shall be distributed equally between the owner of copyright and the performers 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

Commented [MOU12]: Clause 9A is aimed at governing neighbouring rights (needletime). The inclusion of the making available right in the needletime provisions must be viewed in light of the WPPT which governs the right. Unlike the relevant Articles in the WCT, the WPPT does not in fact create a dual communication to the public right which includes the making available right. In fact, very deliberately, the Treaty separate the communication to the public right from the making available right in as far as sound recording are concerned. This is due to the fact that in terms of Article 15 of the Treaty, only the broadcast and the communication to the public are subject to equitable remuneration as contemplated in clause 9A. The making available right is an exclusive right.

This is pertinent in light of the way in which the recording business operates currently. The ability to license the making available right exclusively is single most important way in which producers of sound recordings are able to generate revenue. In 2017, digital revenues amounted to 54% of all recording industry revenue on the back of a 45.5% growth in Subscription streaming which is licensed via the exclusive making available right. This is also crucial in light of the fact that due to technology, more and more performers are becoming producers in their own right. As the ability to record music becomes more accessible, performers are becoming SMEs in their own right. The ability for these new entrepreneurs to be capacitated to monetise their works in the best way possible becomes an imperative.

Thus clause 9A(1)(iv) must be removed. Failure to do so will also ensure that South Africa fall foul of the requirements of WPPT thus preventing the country from acceding.

Commented [MOU13]: There currently exists an industry agreement which allows for the distribution of the income received 50/500 between the producer and the performers. In order to align with the policy objectives, it is opined that this be clearly encapsulated within this clause and not subject to an agreement. Needletime should be shared equally between the producer and performers.

referred to in section 29(1), or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).]

- (d) Any payment made by the user of the sound recording in terms of this subsection shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).

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

(4) (a) Any person who intentionally fails to register an act as contemplated in subsection (1)(aA)(i), or who intentionally fails to submit a report as contemplated in subsection (1)(aA)(ii), shall be guilty of an offence.

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

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

Repeal of section 12 of Act 98 of 1978

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

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

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

"General exceptions from copyright protection

Commented [MOU14]: User reporting obligations were dealt extensively in the CRC report and this was identified as a problem affecting ALL collecting societies. Thus the proposed clauses should be applicable to all collecting societies and to all collectively managed rights including those granted in terms of sections 6, 7, 8 and as per the Performers Protection Act.

Commented [MOU15]: The introduction of general exceptions within the Bill requires a more extensive impact assessment. The SEIAS report does not cover any objections raised by the stakeholders, in fact it states that the stakeholders had accepted the policy issues despite how contentious these provision proved to be. This showcases a fatal flaw in the report.

In addition, the introduction of the general exceptions as currently articulated seems contrary to the policy objective which is to ensure the protection of authors and copyright owners in the digital environment.

The introduction of deterrent penal provisions in the form of statutory damages for those who claim fair use but are subsequently found to fall short, would aid in adjusting the unnecessary burden currently placed on the authors by these clauses.

Further, the Berne Convention (to which South Africa is a signatory) established the 3 step test in relation to the implementation of exceptions and limitation of copyright. This test is also articulated in the TRIPS Agreement (to which South Africa is a signatory) as well as the WIPO Internet Treaties which South Africa intends to ratify. The test establishes 3 conditions under which any exception or limitation to copyright must be implemented namely;

1. It must be limited to certain special cases
2. Which do not conflict with the normal exploitation of the work
3. Must not unreasonably prejudice the legitimate interests of the author/ rightsholder

As such, the introduction of these clauses must be evaluated in light of this test. Without any provisions to make the clauses less burdensome on copyright owners, the provisions would not be seen to be unreasonably prejudicial to their interests.

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

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
 - (ii) criticism or review of that work or of another work;
 - (iii) reporting current events;
 - (iv) scholarship, teaching and education;
 - (v) comment, illustration for educational purposes, parody, satire, caricature, cartoon, tribute, homage or pastiche;
 - (vi) preservation of and access to the collections of libraries, archives and museums; and
 - (vii) ensuring proper performance of public administration.
- (b)** In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
- (i) the nature of the work in question;
 - (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
 - (iii) the purpose and character of the use, including whether—
 - (aa) such use serves a purpose different from that of the work affected; and
 - (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
 - (iv) the substitution effect of the act upon the potential market for the work in question.
- (c)** For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.

Commented [MOU16]: Not ALL illustration would or should fall under the educational exceptions envisioned in the Bill's Policy objectives. The additional wording allows for the specific illustration that is sought to be an exception whilst striking the balance sought by the Policy objectives.

Further

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) it is of a work which has already been lawfully made available to the public;
 - (ii) it is compatible with fair practice
 - (iii) the extent thereof shall not exceed the extent reasonably justified by the purpose; and
 - (ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;
- (b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;
- (c) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;
- (d) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the author of the lecture, address or other work so reproduced shall have the

Commented [MOU17]: The current wording of the Act and the Bill fall short of the 3 requirements set out in the Berne Convention. In as far as 'quotation' is concerned

The additional requirements align the exception with the specified requirements as set out within the Berne Convention. The Convention affords countries the ability to determine the applicability of the exception provided that the conditions added are considered.

The additional wording ensures alignment with how the exception is coached in the Treaty

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Commented [MOU18]: The 3 step test articulated above is applicable to all exceptions.

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

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

(3) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.

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

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

(6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other assignment of ownership of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy provided it was obtained with the permission of the owner.

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 are 3 step test as well as excluding adaptation and allowing the exceptions only for 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

Commented [MOU19]:

Commented [MOU20]: There is a need to interpret this exception in light of the 3 step test as well as recent developments in other similar jurisdictions.

The Berne Convention (to which South Africa is a signatory) established the 3 step test in relation to the implementation of exceptions and limitation of copyright. This test is also articulated in the TRIPS Agreement (to which South Africa is a signatory) as well as the WIPO Internet Treaties which South Africa intends to ratify. The test establishes 3 conditions under which any exception or limitation to copyright must be implemented namely:

- 4. It must be limited to certain special cases
- 5. Which do not conflict with the normal exploitation of the work
- 6. Must not unreasonably prejudice the legitimate interests of the author/ rightsholder

Therefore, the private copying exception that are being introduced have to be done in light of these 3 steps. As currently articulated, the exceptions would fall foul of the 3rd step as there is no mitigation of the harm or prejudice to the rightsholders interests. To achieve the balance required by the 3-step test, many other jurisdictions couple such personal copying exceptions with a Private Copying Levy. Without such a system, the legitimate interests of the author are most certainly unduly prejudiced.

A cautionary lesson can be taken from the UK which recently dealt with the introduction of such exceptions in light of the 3-step test (as articulated in the European Union Directive 2001/29 which was the EU implementation of the WIPO Internet Treaties)) sans a private copying levy. The introduction of such exception was found to fall foul of the required balance in as much as it failed to provide for compensation (levy) in that that unreasonably prejudiced the legitimate interests of rightsholders

Commented [MOU21]: All limitation and exceptions must assessed in light of the Berne as well as the TRIPS agreements (to which South Africa is a signatory) and the 3 step test found therein. This test is also articulated in the TRIPS Agreement (to which South Africa is a signatory) as well as the WIPO Internet Treaties which South Africa intends to ratify.

The test establishes 3 conditions under which any exception or limitation to copyright must be implemented namely:

- 1. It must be limited to certain special cases
- 2. Which do not conflict with the normal exploitation of the work
- 3. Must not unreasonably prejudice the legitimate interests of the author/ rightsholder

In as far as the transient copies fail to account for this test, it shall fall short. Further, in the EU Directive in which the this clause was borrowed, adaption or modification is expressly excluded. The EU tapered the introduction of this exception by expressly including the 3 step test as well as limiting it to intermediaries who do not modify the information.

When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightsholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

mobile devices, as long as there is no independent, economic significance to these acts.

The application of Section 1 above shall be subject to the following conditions:

1. It must be limited to certain special cases.
2. Which do not conflict with the normal exploitation of the work
3. Must not unreasonably prejudice the legitimate interests of the author/ rightsholder

Reproduction for educational and academic activities

12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose.

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

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

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

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

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

Commented [MOU22]: The application of the 3 step test as articulated in the exceptions detailed above is also relevant here.

Given that certain academic activities are within the normal exploitation of some works, it is difficult to see how the current limitations will be allowable.

transmission in a diffusion service] another work, if—

(i) such **[inclusion] use** is merely by way of background, or incidental, to the principal matters represented in **[the film, broadcast or transmission]** that other work; or

(ii) the artistic work so used, is situated in a public place.

(b) The copyright in an artistic work shall not be infringed by the issue to the public of copies, or the communication to the public of anything, whose making was by virtue of this subsection not an infringement of the copyright.”.

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

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

Repeal of section 17 of Act 98 of 1978

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

Repeal of section 18 of Act 98 of 1978

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

Repeal of section 19A of Act 98 of 1978

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

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

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

“General exceptions regarding protection of computer programs

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

(2) The authorization of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to

Commented [MOU23]: The WCT makes provision for the protection of computer programmes thus in as much as this protection is limited, the 3 step test is applicable.

obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:

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

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

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

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

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

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

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

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

(2) A library, archive, museum or gallery may lend a copyright work

Commented [MOU24]: The current reading of the clause appear to transfer the exclusive rights that would otherwise be carried by rightsowners and grantem to libraries, museums and archives. There is no clear indication as to the policy behind this provision and thus the evaluation of it in terms of the 3 step test is limited.

(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 authorised entity, beneficiary person or an organization that serves persons with disabilities- may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

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

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

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

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

Commented [MOU25]: These provisions are an extension of the exceptions granted in terms of the Marrakesh Treaty. The additions made are aimed at aligning the clause more closely to the Articles of the Treaty.

However, in as far as the other forms of disabilities are concerned which fall outside the purview of the treaty an individual assessment of each under the 3 step test would be required. It is not probable that many other disabilities not catered for under the Marrakesh treaty would pass the 3 step test, however the assessment of each separately would be required.

Commented [MOU26]: New definitions for "authorized entity" and "beneficiary person" are required to enable the effective functioning of this clause in line with the Policy objectives

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

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

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

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

Insertion of section 22A in Act 98 of 1978

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

“**Licences in respect of orphan works**”

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

(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.

Commented [MOU27]: This clause seeks to redress a crucial element of our past which saw the assignment of copyright under the most unfavourable of circumstances. Such a clause therefore ensures that where such an unfortunate assignment has occurred, the author has a change for redress 25 years later. However, in light of clause 6A, the need for a reversion would not be needed. Thus it is opined that the Bill should retain the reversion and remove 6A as its application is questionable. The reversion is a more acceptable way to limit assignment of copyright.

Commented [MOU28]: In a bid to align with the policy objectives, it is crucial that monies stemming from the use of orphan works, or prescribed royalties be directed toward social cultural activities. The use of orphan works is currently possible via blanket licences, thus the ease of use as a stated objective in the memorandum, is already accounted for. With all collecting societies being regulated, the administration of monies flowing from such blanket licences can be better managed. As highlighted above in relation to the suspensions of a society, the Commission is the correct body to administer these works. The Commission should task Collecting Societies with the job of running social and cultural activities aimed at improving the cultural and creative industries under the supervision of the Commission. The Societies must be required to draft and implement CSI plans that aim to achieve these cultural activities once approved by the Commission.

- (c) only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that collecting society and the foreign equivalent collecting society they intend to distribute to, country and the Republic.

Control of collecting society by authors, performers or copyright owners

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

- (a) collect and distribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) and subsection (2);
- (b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the purpose of distribution of the royalties to the authors, performers or copyright owners; and
- (c) provide to each author, performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that author, performer or copyright owner.

(2) Royalties distributed among the authors, performers or copyright owners shall—

- (a) as far as may be possible, be distributed in proportion to the actual use of their works; and
- (b) be distributed to the author, performer or copyright owner as soon as possible after receipt thereof, but no later than five years from the date on which the royalties were collected.

(3) Where the collecting society, for whatever reason, is unable to distribute the royalties within five years from the date on which the royalties were collected, that collecting society shall—

- (a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and

Commented [MOU30]: The current wording of this clause goes against the principal of national treatment found in all the international instruments South Africa has entered into (Berne & TRIPS) as well as those South Africa intends to ratify.

The international treaties were developed and drafted in order to ensure that countries need not enter into separate and individual reciprocal agreements. This is due to the difficulty in ensuring that all the necessary reciprocals are signed as well as the difficulty of aligning different legal systems.

(5) ~~Following the suspension or the cancellation of the accreditation of any collecting society, the Commission shall as soon as reasonably practicable, convene an emergency meeting of the members during which members shall elect a suitable person to be responsible for the administration and discharging of the functions of that society. The Commission shall be responsible for the administration and discharge of the functions of the collecting society contemplated in subsection (3) during the period of suspension or cancellation of the accreditation of that collecting society following the order of the Tribunal: Provided that the Tribunal may, on application by the Commission, appoint any suitable person to assist the Commission in the administration and discharging of the functions of that collecting society.”.~~

Commented [MOU31]: Given the fact that the Commission will oversee the functioning of societies, it is thus Constitutionally unsound for it to also have the ability to usurp the very same function it seeks to oversee. This will effectively make the Commission the judge, jury and executioner of all matters concerning the society during the time which it is responsible for the administrative function of the society. Societies are not owned or run on behalf of the administrators, but rather it is the members who own the society. Thus, the suspension of the operations of the society prejudices the members and any regulation must be for the benefit and at the behest of said members. During the period which the Commission is in charge of administering the Society, members will effectively not have a regulatory body to ensure the Commission accounts to them. Further since the administration will be premised on legislation rather than a member orientated MOI, the members will effectively have no control over the running and functioning of their own company during such period. Effectively resulting in the Commission usurping the members powers in respect of the society.

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

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

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

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

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