

ADVICE

on the
COPYRIGHT AMENDMENT BILL, NO 13 OF 2017,
REVISED AS AT 3 SEPTEMBER 2018

for the PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY
OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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EXECUTIVE SUMMARY

The legal issues raised by the Bill and by the process it took to get to this point, are substantial and material, whether from the perspective of compliance with the Constitution, **South Africa's meeting of its obligations under** the international treaties to which it is a party, and the conceptualisation of its provisions arising from the policy considerations that underly it. This advice shows that the Bill has material flaws in all these respects, very few of which can be corrected by mere changes in the wording of the clauses of the Bill.

It has been necessary to consider, not only the Explanatory Memorandum of the Bill, as directed by the Instructions, but also the proceedings of the Portfolio Committee, the SEIAS Report for the Original Bill, and the 2013 Draft National Policy and the comments on it, as well as the CRC Report that preceded them, to identify the underlying policy statements for the numerous provisions in the Bill, to identify for which provisions are no underlying policy statements, and also to identify consequences of those provisions not foreseen by these policy statements. Material omissions, such as the absence of consequential provisions following the introduction of new provisions by the Bill, are also raised in this advice.

The drafting of the Bill has been misdirected in respect of the following, leading to outcomes contrary to policy statements or outcomes not contemplated by policy statements:

- The introduction of the digital rights by Clauses 4, 6, 8 and 10 are the key provisions in the Bill that will assist authors, composers and artists to earn more income from the digital environment. However, **there is no policy statement explaining why the 'digital rights' have not been extended to broadcasts, published editions and computer programmes** (Sections 10, 11A and 11B). Computer programmes are deemed to be literary works under the Berne Convention and the WIPO Copyright Treaty. Section 27 needs to be amended to provide for criminal sanction for copyright infringement **in relation to the new rights of 'communication to the public' and 'making available' where the person knows that the act is infringing and the act is undertaken for his or her financial gain to the prejudice of the copyright owner** - a direct consequential amendment following the introduction of these rights and is an obvious omission.
- The consequence of the application of National Treatment to Sections 6A and 7A is that foreign authors who have authorised rights of use or assigned copyright to South African persons under South African law, will have an unwaivable claim against the South African rightsholders and against South African collecting societies. The same consequence of National Treatment applies to Section 8A in respect of foreign performers in audiovisual works owned by South African copyright owners and/or where South African law applies to the contracting of their performances. There is no policy statement foreseeing this outcome.
- Clause 23(b) is one of the Bill's most serious errors. Originally, the Bill as introduced inserted a 25-year limitation on all assignments of all rights of copyright into Section 22(3). The error is not only perpetuated in the Bill, but exacerbated. An attempt to ameliorate the wide-ranging detrimental impact of the amendment proposed in the

original Bill, has resulted in the Revised Bill removing the formalities for assignments of copyright in relation to artistic works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions and computer programmes. The formalities for assignment are also removed in respect of assignments of literary and musical works that are not between the author and the publisher.

- Clause 22(a) and (c) on contracts for commissioning. All that seemed to have been **required was for the Act to closely define what is meant by the term “commission”** on the evidence of the possible abuse of that term in commerce, to perhaps require the commissioning contract to be in writing (which Clause 22, surprisingly, does not do) and, in the event of photographs, a licence-back of certain rights to the photographer.
- The **new defined term “audiovisual work” is broader than that of the term that it seeks to replace, that of “cinematograph film.”** There is no policy statement supporting the ambit of extending the nature of the copyright work intended to be protected in this way, and no impact assessment determining what other works will be covered, in addition to cinematograph films, by the new term. The change is unnecessary and leads to the risk of errors. For instance, these amendments do not change the terminology in the Registration of Copyright in Cinematograph Films Act, 1977.
- Clause 7 (inserting Sections 7B to 7F). The resale royalty right is not a right of copyright, but a right attaching to the physical works that are subject to this right and subject to those works also qualifying for copyright protection. The provisions must appear in a separate chapter of the Act or even in separate legislation, and be delinked from the copyright provisions. The advice indicates several errors due to this not having been done.
- Clause 24 fundamentally misunderstands the problem relating to orphan works and the potential liability for users that an orphan works provision is meant to resolve. The advice identifies some gaps in the provision.
- Substantive amendments to moral rights in the Act do not come from Clause 21, but **from the new qualifications of moral rights in the various exceptions by the term “in so far as it is practical” where the source and name of the author should otherwise be stated.** In some copyright exceptions, notably quotation, criticism and review, reporting on current events in written form and the exception for persons with a disability, there is no justification to qualify the moral rights in this way. In terms of the Act as it stands, it is obligatory to state the name of the author under the exceptions of quotation, criticism and review, reporting on current events in newspapers and similar media, and illustration for teaching, if it appears on the work. The Bill therefore takes rights away from authors **when compared to authors’ rights under the Act.**

There are no underlying policy decisions in respect of the following:

- Clauses 5, 7 and 9. The extrapolation of recommendations to improve the position of composers of musical works to safeguard their remuneration from needletime rights, across all industry sectors that rely on copyright.
- Clauses 12, 13 (inserting Sections 12B, 12C(1)(b), 12D), 15, 16, 17 and 18. The extrapolation of copyright exceptions, specifically crafted in the current Act for individual copyright works by introducing a generalised set of exceptions applying indiscriminately across all copyright works, with the consequence that the specially crafted exceptions are to be repealed.
- Clause 33 (inserting Section 39(cG). The power granted to the Minister, backed by the **contract override clause, "to prescribe compulsory and standard contractual terms to be included in agreement to be entered into in terms of this Act."** This provision arose from recommendations in respect of the music industry, but the powers of the Minister apply across all sectors of all creative industries.
- **Clause 34. The declaring unenforceable of all contractual terms that "purport... 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,"** compared to the recommendations for improving the contractual position of authors in claiming royalties and negotiating commissioning agreements in the music industry.

(Comment on the preceding four points: The Portfolio Committee appeared to be under the misconception that the extrapolation of provisions intended for a single kind of work and for limited kinds of uses across all copyright works and all uses, is a problem of terminology. This is, however, a matter of substance, where there has been no study or impact assessment of its effects in relation to each other copyright work and other industry sector sought to be regulated. Together, they make up a fundamental flaw of the Bill.)

- Clause 2 (inserting Sections 2A(1)(b), 2A(2) and (3) and 2A(4)).
- Clauses 3 and 22(b). **The declaration by the Minister of "local organisations"** in which copyright for works made under their direction or control, will be vested.
- Clause 13 (inserting Section 12B(6), Clause 26(b) and Clause 28. Provisions permitting parallel importation and reducing the scope of secondary infringement by certain forms of distribution.
- Clause 14. The insertion of the 'panorama exception' was based on incorrect premises and did not take into account provisions that already exist in the Act.
- Clauses 23(b) and (c). The introduction of the terms to be incorporated into licence agreement by statute.

The following are in breach of South Africa's treaty obligations under the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights Agreement, to which South Africa is a party, and/or will obstruct South Africa's accession to the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Beijing Treaty on Audiovisual Performances and/or the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled:

- The entire framework for exceptions in Clauses 13 (inserting sections 12A, 12B, 12C(1)(b) and 12D), 19 and 20 (inserting Sections 19B and 19C), coupled with the contract override provision in Clause 34.
- There is no definitive assessment whether the Act, the relevant provisions of which are Section 23(2), as it stands, and Sections 45 and 45A (neither of which are in operation, despite having been on the statute books since 1978 and 1983 respectively), meets the requirements of WCT in respect of the right of distribution.
- The repeal of Section 23(2)(b) will not be compliant with the WIPO Copyright Treaty and means that South Africa will not be able to ratify the WIPO Copyright Treaty.
- The WIPO Copyright Treaty **requires the 'digital rights' to be extended at least to computer programmes.**
- Clause 11. Section 9A(1)(a)(iv) is contrary to the requirements of Article 14 of the WIPO Performances and Phonograms Treaty.
- Clause 9. Section 8A, to the extent that the acts initiating its grounds for remuneration are more than the acts referred to in Articles 10 and 11 of the Beijing Treaty on Audiovisual Performances, would not be compliant with that Treaty.
- The requirement in Section 22C(3)(c) of concluding bilateral agreements between South Africa and other countries to permit payment of royalties is not compliant with South **Africa's National Treatment obligations under** the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights Agreement **inasmuch as "that country" is** also a member of those treaties.
- Even if South Africa could avail itself of the facility in the Appendix of the Berne Convention, the terms of the compulsory licences in Schedule 2 are not compliant with it. The amendment in Clause 23(b) importing Schedule 2 by reference is neither correct nor compliant with the treaty.
- Clause 20. Section 19D does not include any of the content required by Article 4 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. It therefore fails to meet the conditions for a copyright exception or limitation permitted by the Treaty and, in the circumstances, will not meet compliance with the Berne Convention either.

- This advice does not attempt to answer the question is whether Sections 6A and 7A, insofar as they relate to assignments of copyright, read together with Section 39B, amount to a qualification of the exclusive rights of copyright and, if so, whether that qualification is in compliance with Berne, TRIPs and WCT.

In consequence, South Africa's standing under the United States African Growth and Opportunities Act should also be considered.

The following carry the risk of objection under the Constitution for deprivation of property constrained by Section 25(1) of the Constitution not justified by the limitations clause in Section 36:

- The entire framework for exceptions in Clauses 13 (inserting sections 12A, 12B, 12C(1)(b) and 12D), 19 and 20 (inserting Sections 19B and 19C), coupled with the contract override provision in Clause 34. For illustrative purposes, this advice indicates how certain of these provisions impact on the right of property and how they are not legitimated by the limitations clause.
- Two sets of provisions in the Bill have retrospective effect, namely those introducing the claim that authors of literary, musical, artistic and audiovisual works will have to those works in which they have assigned the copyright before the amendment act comes into force, introduced by Clauses 5, 7 and 9, with Clause 38(2) and the limit of the term of an assignment of copyright by an author of a literary or musical work to 25 years where such an assignment was made before the amendment act comes into force, in Clause 23(b).

The following carry the risk of objection under the Constitution for being limitations on the freedom to trade not justified by Section 22 of the Constitution or the limitation clause in Section 36:

- Clause 33(b) (inserting Section 39(cG)). The power granted to the Minister and backed by the contract override clause to prescribe "compulsory and standard contractual terms to be included in agreements to be entered into in terms of this Act." It applies to all persons who trade in copyright goods, not only to contracts concluded with authors or with copyright owners.
- Clause 34, the contract override clause of general application. It applies to all persons who trade in copyright goods, not only to contracts concluded with authors or with copyright owners. Its impact on the ability to contract is exacerbated by it applying to **the 'fair use' provision and the remnants of the 'fair dealing' exceptions, since whether** those exceptions apply or not are, in the absence of clear precedent, usually determined by the courts after the event.
- Clauses 3 and 22(b). Copyright in works made under the direction or control of local organisations prescribed by the Minister, will be vested in the local organisation declared

by the Minister. This automatic vesting of copyright in prescribed local organisations will apply in circumstances where there is no relationship of employment or a commissioning of the work in return for payment, without there being a condition of some form of remuneration, which is a limitation to trade on authors, composers and artists who make works for local organisations so declared.

- Clause 24 (inserting the application to the orphan works provision to the resale royalty right in Section 22A(1)). It will cause a major impediment to all trading in second-hand goods.
- Clauses 5, 7, 9, 23(b), 23(c) The departure from ordinary rules of contract in circumstances for which there is no underlying assessment or policy statement. All of these provisions will limit the ability of copyright owners to deal with the copyright in works they acquire, notably in composite works that comprise of works with multiple copyrights, and whether that dealing is by way of onward assignment or by licence.

What can be done?

With the term of the current Parliament coming to an end in early 2019, the options as to what can be salvaged from the Bill are very limited. With fundamental mistakes in the revision process, there is not even the opportunity to implement the most important recommendations of the CRC Report, since this would entail drafting of entirely new clauses.

In the writer's opinion, the following steps can be taken to salvage only the most basic and uncontentious elements of the Bill:

FIRST: Immediately obtain expert legal opinion and assistance from WIPO to determine (1) what is required from the Bill to bring the Act in compliance with WCT and the Marrakesh VIP Treaty, and (2) to ratify WCT and to sign and ratify the Marrakesh VIP Treaty.

SECOND: The Executive must decide on ratifying WCT and the Marrakesh VIP Treaties, as is incumbent on it in terms of Section 231 of the Constitution.

THIRD: The Bill proceeds with only the following provisions, to introduce:

- **the 'digital rights' as per clauses 4, 6, 8, 10**, subject to the necessary corrections and addition of necessary consequential amendments (para 10 of this advice)
- the provisions relating to the protection of TPMs and CMI and the consequential amendments relating to infringement, as per clauses 26(a), 27(a), 29, 33(c), 39, subject to the necessary corrections and with only the minimum exceptions needed to make these provisions work (para 25)
- **the "transient and incidental copies" exception currently proposed for Section 12C(1)(a)** in Clause 13, subject to its correction (see para 18) and its incorporation in Section 12 of the Act, with necessary cross-inclusions in the other exception clauses

- **the “format-shifting” exception** (currently proposed for Sections 12A(1)(a)(i) and 12C(1)(b) in Clause 13) only for personal use and from an authorised copy of the work that has been lawfully acquired by the person making the copy under the exception, incorporated in Section 12(1)(a) (see para 17.2 inasmuch as it relates to this exception and para 18)
- **the exclusion from copyright of “ideas, procedures, methods of operation or mathematical concepts”** proposed for Section 2A(1)(a) in Clause 2 as a new Section 2(4) (para 9.1)
- all other provisions that may be directly necessary for South Africa to ratify and implement WCT
- an exception for persons with a disability, to be inserted after Section 19B, that, as related in paras 7 and 19, will comply with WCT and the Marrakesh VIP Treaty.

It is important that a reader not only rely on this executive summary, but that the advice be read in full.

GLOSSARY

the "Act"	the Copyright Act, no 98 of 1978, as amended up to 2011
the "Beijing AVP Treaty"	the Beijing Treaty on Audiovisual Performances, which is not yet in force at the time of writing, to which the Act is to be "strategically aligned"
"Berne"	the Berne Convention for the Protection of Literary and Artistic Works, Paris Act, as amended up to 1979, to which South Africa is bound
"Bill" or "Revised Bill"	the version of the Copyright Amendment Bill, no 13 of 2017, as revised by the Portfolio Committee for Trade & Industry and distributed to the Panel of Experts, including the writer, for expert advice, a copy of which is in Appendix 3, both for the record and for ease of reference
"CIPC"	the Companies and Intellectual Property Commission
the "Constitution"	the Constitution of the Republic of South Africa, Act 108 of 1996
"CMI"	copyright management information
the "CRC Report"	the report of the Copyright Review Commission completed in 2011 and released to the public in 2012
the "Draft Bill"	the Draft Copyright Amendment Bill, 2015, published for comment in the Government Gazette dated 27 July 2015
the "Draft National Policy"	the Draft National Policy on Intellectual Property, 2013, published for comment in Government Gazette no 36816 dated 4 September 2013
"dti"	Department of Trade & Industry, the Government department responsible for drafting the Original Bill
"Marrakesh VIP Treaty"	the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, which has not been signed by South Africa but to which the Act is to be "strategically aligned"
"National Treatment"	The principle elucidated in Berne, TRIPS, WCT, WPPT and the Beijing VIP Treaty that the rights of copyright legislated in a member state must apply equally to the nationals of the other member states. See para 5.10.
"Original Bill"	the Copyright Amendment Bill, no 13 of 2017, as introduced on 16 May 2017
"Performers Protection Amendment Bill"	The Performers Protection Amendment Bill,

	no 24 of 2016, introduced on 2 December 2016
"Portfolio Committee"	the Portfolio Committee for Trade & Industry of the National Assembly of the Parliament of the Republic of South Africa, which has requested this advice
the "Revised Bill"	see "Bill" above
"SACIP"	the Standing Advisory Committee on Intellectual Property provided for in Section 40 of the Act
the "SEIAS Report"	the report entitled <i>Socio-Economic Impact Assessment System (SEIAS) Final Impact Assessment Template (Phase 2) - Copyright Amendment Bill</i> , tabled at the Portfolio Committee meeting on 30 May 2017, a copy of which is in Appendix 6, both for the record and for ease of reference
the "Three-Step Test"	the test formulated for member states of Berne, TRIPs, WCT, WPPT and the Beijing AVP Treaty, as the case may be, for exceptions to copyright (and, where relevant, performers rights and other intellectual property rights), which, although being an elucidation of the same principles, is formulated slightly differently in each of the forementioned Treaties. The context of this advice indicating whether it is the "Three-Step Test" generally or as set out in one of the given Treaties that is being referred to. See paras 4.9-4.14.
"TPM" / "TPMs"	technological protection measure(s)
"TRIPs"	Trade-Related Aspects of Intellectual Property Rights Agreement, to which South Africa is a party
"WCT"	WIPO Copyright Treaty, which South Africa has signed but not ratified, and to which the Act is to be "strategically aligned"
"WIPO"	World Intellectual Property Organization
"WPPT"	WIPO Performances and Phonograms Treaty, which South Africa has signed but not ratified, and to which the Act is to be "strategically aligned"

ADVICE

Introduction

This advice, made by the request of the Portfolio Committee to the individual members of the Technical Panel of Experts it has appointed, is whether the Bill passes Constitutional **muster and is in compliance with South Africa's obligations under international treaties** relating to copyright. Following the direction of the Portfolio Committee, this advice does not comment on decisions on policy underlying the Bill.

The Terms of Reference of the Portfolio Committee, comprised of a Instructions sent in September 2018, appear in Appendix 2. For the sake of the record, the Bill appears in Appendix 3. The **writer's correspondence** with the Portfolio Committee and its Secretariat appears in Appendix 4.

The writer, being employed by a firm of attorneys, has continuously monitored and made various submissions in respect of the Bill and the related Performers Protection Amendment Bill and their antecedents, the Draft Bill of 2015 and the Draft National Policy of 2013, on behalf of various clients. The writer disclosed his interests to the Portfolio Committee, with the consent of his clients, in his CV that he submitted prior to his appointment in December 2017 (Appendix 1).

The instructions state that "is not for panel members to engage on the merits or demerits of the Bill or the policies agreed to by the Committee and that are thus reflected in the Bill. The panel members are requested to ONLY provide inputs on any technical or drafting issues as set out in paragraph 1. Any comment that speaks to the merits of a policy decision will not be considered. The Committee has already engaged the public in this regard and has finalised that process."

This advice therefore only considers legal aspects of the Bill, namely

- what the Instructions refer to as **"the appropriateness of terminology"** – but is actually about the application of legislative intervention intended for certain creative industries and specific uses of specific copyright works, across all copyright works,
- whether the wording of the Bill reflects the policy objectives – for which this advice considers the Explanatory Memorandum of the Bill as well as other underlying statements of policy, to ascertain which provisions have foundation in policy statement and which not, and which provisions do not meet the policy statements,
- Constitutional concerns, and
- whether it will result in South Africa complying with international treaties.

It has been necessary to consider, not only the Explanatory Memorandum of the Bill, as directed by the Instructions, but also the proceedings of the Portfolio Committee, the SEIAS Report for the Original Bill, and the 2013 Draft National Policy and the comments on it as well as the CRC Report that preceded them, to identify the underlying policy statements for the numerous provisions in the Bill, to identify for which provisions are no underlying policy statements, and also to identify consequences of those provisions not foreseen by these

policy statements. Material omissions, such as the absence of consequential provisions following the introduction of new provisions by the Bill, are also raised in this advice.

In the circumstances, it is necessary to make the disclaimer that this advice should not be interpreted that the writer considers that any given provision in the Bill is a good provision or not.

It is noted that the instructions require the members of the Panel to make comments by way of track changes and comments in text boxes on the Bill as appears in the Microsoft Word document accompanying the Instructions. The Instructions also state that the Portfolio Committee **“does not guarantee that a Panel member’s input will be accepted.”**

The legal issues raised by the Bill and by the process it took to get to this point, are substantial and material, whether from the perspective of compliance with the Constitution, **South Africa’s meeting of its obligations under** the international treaties to which it is a party, and the conceptualisation of its provisions arising from the policy considerations that underly it. This advice shows that the Bill has material flaws in all these respects, very few of which can be corrected by mere changes in the wording of the clauses of the Bill.

The Portfolio Committee may choose, as is its right, not to accept this advice. In such an event, the writer contends that this advice must nevertheless be available to anyone in the Legislature or the Executive or the Judiciary who will engage with the Bill once it is presented to the National Assembly for adoption.

1. Identifying the policy decisions that underly the Bill; identifying provisions of the Bill not supported by policy decisions

1.1. Sources of policy decisions

The policy statements underlying the Bill are found in the following, underlying the Original Bill:

- the 2013 Draft National Policy¹ **“as commented on”** (as stated in the Explanatory Memorandum of the Bill) read with its Socio-Economic Impact Assessment System (SEIAS) Report², and the 2015 Draft Bill
- the 2011 CRC Report³

and underlying the Revised Bill:

- the Explanatory Memorandum of the Bill,⁴
- acceptance by the Portfolio Committee of changes proposed in individual submissions⁵
- **political parties’ caucus decisions on flexible exceptions, resolving on a “hybrid model based on ‘fair use’ and ‘fair dealing’” and “grounded in ‘fair use’.”**⁶

The policy statements in each are described in more detail in the immediately following paragraphs, 1.2 to 1.6, and in relation to individual provisions of the Bill in paras 9 to 27 below.

Since the 2013 Draft National Policy is the most proximate policy statement prior to the introduction of the Original Bill, it is dealt with in para 1.2 below before the 2011 CRC Report in para 1.3.

1.2. Sources of policy decisions for the Original Bill: The 2013 Draft National Policy, **“as commented on”**, and the 2015 Draft Bill

The Draft National Policy published for comment in September 2013 covered a broad spectrum of issues relating to intellectual property, but only Chapters 2 and 6 dealt with copyright.

A key principle underlying the Draft National Policy **was that “South Africa should not *per se* join international copyright treaties that may compromise its stance on social and economic developmental goals” and “South Africa should consider carefully**

¹ Government Gazette no 36816, Notice 918 of 2013, 4 September 2013, at https://www.gov.za/sites/default/files/36816_gen918.pdf.

² Reproduced in Appendix 6.

³ The *Copyright Review Commission Report*, 2011, published in 2012, available at <https://www.gov.za/sites/default/files/CRC%20REPORT.pdf>.

⁴ The Explanatory Memorandum appears at the end of the Bill, reproduced in Appendix 3.

⁵ Recounted in para 1.5 below.

⁶ Recounted in para 1.6 below.

before acceding to the WIPO Copyright Treaty.” The sentiment of the document was that even existing treaties to which South Africa is bound (TRIPs is mentioned specifically) allegedly **reduce “access to knowledge-related products in developing countries...”**

This outlook has since changed, as reflected by the statement in the Explanatory Memorandum of the Bill that, **“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.”** The question therefore arises how many of the recommendations of this document that go **contrary to South Africa’s treaty obligations** survive in clauses of the Bill, notwithstanding the change in policy direction in relation to the treaties.

Chapter 6 of the Draft National Policy unapologetically advocates the weakening of copyright, relying on a mistaken statement that flexibilities in copyright given to nations to allow copying in international treaties **are known as ‘fair use’ or ‘fair dealing.’ This is not the case** – Berne and TRIPs have flexible rules in allowing their respective member states to introduce copyright exceptions in their legislation, for **unpermitted and unremunerated exercise of copyright’s exclusive rights by third parties** where these exceptions meet the so-called Three-Step Test. Berne, in addition, allows developing countries to introduce compulsory licences for translations and reprints, **set out in specific terms in Berne’s Appendix. The writer’s advice on the Bill’s provisions meeting** in the Three-Step Test and the requirements for the compulsory licences in the Berne Appendix appear in paras 4 and 6 below.

The same statement in Chapter 6 of the Draft National Policy makes the further mistake that the so-called flexibilities permit countries to allow unpermitted and unremunerated copying for education. This is also not true. Whereas copyright exceptions for specific educational purposes are very common internationally,⁷ these exceptions have to meet the Three-Step Test, just as any other copyright exception.

These mistakes, coupled with the lack of substantive research and impact assessment (see paras 30.8-30.12 below), have **resulted in South Africa’s obligations** under the Three-Step Test ostensibly not having been considered by Government or by the Legislature in devising the numerous copyright exceptions in the Bill. In relation to the advice sought from the Technical Panel of Experts, it is one of the many contributing factors that makes it clear that the Bill is not capable of correction by the mere amendment of certain clauses, **as required by the Portfolio Committee’s** instruction. The underlying flaws in the Bill caused by non-compliance with the Three-Step Test have far deeper implications.

⁷ See the seminal work undertaken by Prof Daniel Seng for WIPO, *Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities* (2017), the latest version of which is at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_5_rev.pdf.

With that background, the 2013 Draft National Policy has the following recommendations:

- (a) ***"To enhance access to copyright materials and achieve developmental goals for education and knowledge transfer."***
"The legislation must provide the maintenance and adoption of broad exceptions for educational research and library uses."

Comments

The term "access" is often used in the sense quoted above to justify copyright exceptions for educational institutions, libraries and persons with disabilities. However, "access" is not a term used in the Act and none of the policy documents spell out what it is intended to mean.

In the writer's view, it becomes clear from the context of the Bill, as read with these underlying policy documents, that the term "access" used here only has relevance in relation to the exclusive rights of copyright (the exclusive right of the copyright owner to authorise reproduction, publication, etc, of the copyright work) and is therefore used in the sense of allowing unpermitted and unremunerated exercises of those rights by third parties by way of copyright exceptions.

In this sense, the term "access" *limits* the exclusive rights of copyright. As explained further in paras 4 and 17 below, to the extent that such provisions allowing "access" do not meet the requirements of Berne and TRIPs, they will be in breach of South Africa's obligations under international law and will also not enable South Africa to implement WCT if it ratifies it.

- (b) ***"South Africa (sic) Internet users must be entitled to fair use rights such as making and distributing copies from electronic source in reasonable numbers for educational and research purposes and using reasonable excerpts in commentary and criticism."***

Comments

The comments under subpara (a) above apply to this item too.

A copyright exception allowing the reproduction of materials simply because they appear on the Internet does not appear in the Bill. That approach is correct.

The Court of Justice of the European Union has recently decided that the reproduction of copyright works simply because they appear on the Internet and where no copyright exception applies, constitutes infringement.⁸

- (c) ***"South Africa ... should not follow the path of the US Digital Copyright Management Act (DCMA) and the EU (database Directive) (sic)⁹ as these instruments are restrictive and, therefore, bad models for copyright legislation of a developing country like South Africa."***

Comments

This unmotivated and unsubstantiated statement probably accounts for the lack in the Bill of enforcement mechanisms coupled with the introduction of the new so-called 'digital rights' of 'communication to the public' and 'making available', even to the point of simple consequential amendments resulting from the introduction of these rights.

This sentence is followed by the incorrect statement that "The DCMA and EU Directive restrict the number of downloads, whether for commercial or personal/research use."

- (d) ***"South Africa must adopt pro-competitive measures under copyright legislation."***

Comments

There is no explanation in Chapter 6 as to what measures are considered under this recommendation. The writer cannot discern any provision in the Bill that flows from this recommendation.

Chapter 2 (p18) contains the following recommendation:

- (e) ***"Contracts between recording companies, promoters, producers and artists should contain the bare minimum condition (sic) as prescribed by the Minister. Should the conditions be too stringent and unfair against the artist, then such contracts must be void."***

⁸ Decision of the Court of Justice of the European Union in *Land Nordrhein-Westfalen v Dirk Renckhoff* (C-161/17) (the 'Cordoba' case). See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-08/cp180123en.pdf>.

⁹ These references are incorrect. "DCMA" is in fact the Digital Millennium Copyright Act, DMCA, which amended the US Copyright Act. The EU Database Directive has no relevance here, and should be a reference to the EU's Electronic Commerce Directive. These statutes contain the notice-and-take down rules and safe harbours for internet service providers in the US and the EU respectively.

Standing of the Draft National Policy

The Draft National Policy never matured to a final policy adopted by Cabinet. It has since been superseded by the *Intellectual Property Policy of the Republic of South Africa Phase 1* (see paras 30.2 and 30.4 below), yet the Explanatory Memorandum for the Bill still states in para 1.2 that **"The Bill is consistent with the Draft National Policy as commented on."**

The Draft National Policy was met with severe criticism from many parties who responded to the consultation.¹⁰ In 2014, the dti commissioned Genesis Analytics to commission an independent regulatory impact assessment on the document, which was completed in 2015.¹¹ This regulatory impact assessment was never made public, nor disclosed to the Portfolio Committee, nor made available to the writer on request (see Appendix 4). In the absence of this regulatory impact assessment, it is not possible to say how comments on the Draft National Policy contributed to the development of the Original Bill. The absence of this regulatory impact assessment from the public deliberations is a material omission in the early development of the Bill.

The Draft Bill, published for comment in July 2015, followed the 2013 Draft National Policy. Since it is not a source for policy decisions, this advice does not devote much attention to the Draft Bill.

In the budget speech for the dti in Parliament on 20 April 2016, the Minister for Trade & Industry announced the imminent introduction of the Copyright Amendment Bill, saying only on the topic, **"When the legislative process is completed, the creative industries, in particular the music sector, will greatly benefit."**¹²

1.3. Sources of policy decisions for the Original Bill: The 2011 CRC Report

On 18 November 2010, the Minister of Trade and Industry, established the Copyright Review Commission (CRC) to assess concerns and allegations about the collecting societies model that is in place for the distribution of royalties to musicians and composers of music. The Commission was instructed to advise and make **recommendations for the Minister's consideration on 19 terms of reference**, resulting in the CRC Report,¹³ completed in 2011 and published in 2012.

¹⁰ Prof Owen Dean, then of Stellenbosch University, wrote "many have expressed concern that the document is incoherent, contains unsubstantiated statements, and also contains incorrect statements on the law. This leads to uncertainty as to what the draft IP Policy means, what it intends to achieve, and the compliance of some of the recommendations with TRIPs." See <http://blogs.sun.ac.za/iplaw/2014/03/04/patents-and-public-health-the-new-frontier/>.

¹¹ Reported on the website of Genesis Analytics at <https://www.genesis-analytics.com/projects/regulatory-impact-assessment-of-intellectual-property-policy-framework>.

¹² 2016 budget speech for the dti at <https://www.gov.za/nso/speeches/minister-rob-davies-trade-and-industry-dept-budget-vote-ncop-201617-20-apr-2016-0000>.

¹³ See footnote 3.

The Explanatory Memorandum to the Bill states in para 1.2 that “The Bill is consistent with ... the recommendations of the Copyright Review Commission (“the CRC”) chaired by retired judge Ian Farlam.”

After hearing extensive testimony and conducting comparative studies of legislation internationally, the Copyright Review Commission made the following recommendations in the CRC Report requiring legislative intervention in amending the Act and the Performers Protection Act:¹⁴

(a) ***“The CRC believes that an overall impact study should be conducted to assess whether it is appropriate for South Africa to ratify and implement the WIPO Internet treaties. See paragraph 4.2.9 of Chapter 4.”***

“The Copyright Act should be amended to adopt the right ‘to communicate the work to the public’ and the ‘making available’ right as two new exclusive rights of copyright owners. The Performers’ Protection Act should also be amended to provide the performers with the right to make their performances available to the public and to create moral right for performers. See paragraph 4.8.2 of Chapter 4.”

Comments

No impact study on South Africa’s accession to WCT and WPPT has been carried out, as recommended in the CRC Report.

The 2013 Draft National Policy, which followed the CRC Report chronologically, counselled against ratifying treaties that were not in South Africa’s interest (see para 1.2 above), from which one can only deduce that the treaties the Draft National Policy was referring to were WCT and WPPT (signed by South Africa in 1997, but never ratified).

The Explanatory Memorandum of the Bill to some extent reverses the position in the Draft National Policy, by stating “The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual Property Organization (“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.” This statement is followed by a statement that “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.”

¹⁴ CRC Report, referenced in footnote 3, at pp. 101-104.

The SEIAS Report is not helpful in explaining this apparent change in course, only saying, in response to the problem of “Inadequate protection to authors and creators of works”, “Provision to offer more protection to authors and creators of works, e.g. incorporation of digital treaties ...” Nowhere in the SEIAS Report are any of the treaties mentioned by name, and nowhere is there any indication that any impact assessment was undertaken about South Africa’s ratification of WCT and WPPT, or its accession to the Beijing AVP Treaty or the Marrakesh VIP Treaty.

Insofar as making the Act “strategically aligned” with WCT and to make it possible for South Africa to ratify WCT, the Bill introduces the so-called digital rights of “communication to the public” and “making available” in respect of literary, musical, artistic and audiovisual works, as well as the right of ‘making available’ for sound recordings,¹⁵ but does not effect the necessary consequential amendments – see para 10 below.

There is as yet no publicly-stated unequivocal commitment from the Executive that South Africa will ratify WCT or WPPT or accede to the Beijing AVP Treaty or the Marrakesh VIP Treaty.¹⁶

- (b) ***“The ‘private use’ exceptions must be expanded and adapted for the digital era to include, for example, format shifting and ensure that the law is in accordance with the expectations of reasonable persons.”***

Comments

This is the only recommendation the CRC Report makes for copyright exceptions, and is implemented in new Sections 12A(1)(a)(i), 12B(1)(i) and 12C(1)(b) by Clause 13 of the Bill. See para 18.1.

- (c) ***“The Copyright Act must be amended to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence. (The drafters of the section must have regard for proposals currently under discussion in the US for an amendment of the section to overcome difficulties encountered in practice.) Such an amendment will go far to relieve the plight of composers whose works still earn large sums of money that are going to the assignees of the composers’ rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken. The period proposed is shorter, based on the fact that the local copyright duration is shorter than the American one. See paragraph 10.12.10 of Chapter 10.”***

¹⁵ The right of ‘communication to the public’ of sound recordings has been in Section 9(e) since 2002.

¹⁶ Section 231(1) of the Constitution states, “The negotiating and signing of all international agreements is the responsibility of the national executive.”

Comments

The Bill's implementation of this recommendation is one of its most serious errors. Instead of introducing a new provision which is meant to be along the lines of Section 203 of the United States Copyright Act,¹⁷ the Bill, as the Original Bill, introduces a 25-year limitation on assignments of all rights of copyright in Section 22(3) of the Act. Section 22(3), however, which deals with the formal requirements for the transfer of copyright by way of assignment. The error is not only perpetuated in the Bill, but exacerbated. An attempt to ameliorate the wide-ranging detrimental impact of the amendment proposed in the Original Bill, has resulted in the Revised Bill removing, in error, the formalities for assignments of copyright in relation to artistic works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions and computer programmes. The formalities for assignment are also removed in respect of assignments of literary and musical works that are not between the author and the publisher.

See paras 3 and 13.

- (d) ***"The ECT Act should be amended to require ISPs to adopt a graduated response for repeat infringers, culminating in the suspension of access services to an individual. See paragraph 4.8.4 of Chapter 4."***

Comments

Although not a recommendation to amend the Act, it is mentioned here since the Bill proposes a *de facto* amendment of the Electronic Communications and Transactions Act, 2002, in relation to notice and take-down provisions in relation to copyright infringements in new Section 28P(1) by Clause 29.

The 2013 *Draft Intellectual Property Policy* in effect countered this recommendation when it stated that "South Africa ... should not follow the path of the US Digital Copyright Management Act (DCMA) ..." (See para 1.4 above.)

This recommendation of the CRC Report does not appear in the Bill.

- (e) ***"The Copyright Tribunal's procedures are cumbersome and its structure ill-suited to deal with the cases likely to come before it. Detailed recommendations are set out in paragraph 3.3.11 of Chapter 3."***
"The CRC recommends amendment of the provisions relating to the Copyright Tribunal. In its opinion, the Tribunal should consist of:

¹⁷ Section 203 of the US Copyright Act is at <https://www.copyright.gov/title17/92chap2.html#203>.

1) a President and a Deputy President, both of whom should be High Court judges appointed by the President of the Republic on the recommendation of the JSC; and

2) three other members appointed by the President of the Republic on the recommendation of the JSC, each of whom has at least **five years'** experience at a high level in industry, commerce, business, public administration education or the practice of a profession.

The sittings of the Tribunal should be held at such places and times as the President of the Tribunal determines. See paragraph 3.3.11 of **Chapter 3."**

"The Copyright Act must be amended to allow rights holders (as well as users) to engage the Copyright Tribunal in disputes about the appropriate tariffs to be applied. At present it is only in respect of needletime that the rights owners (as opposed to the users) are able to do this. This encourages delays. See paragraph 3.3.10 of Chapter 3."

Comments

This recommendation is largely implemented by new Sections 29 and 29A to 29H introduced by Clauses 30 and 31 of the Bill and the repeal of Sections 30-33 of the Act. See para 27 below.

- (f) **"The Copyright Act should be amended to provide for one collecting society for performance rights, one collecting society for sound recording rights, and one collecting society for mechanical rights. All music rights collecting societies (SAMRO, NORM and SAMPRA) should fall within the ambit of the Regulations issued under the Act, and the Registrar should be empowered to supervise all collecting societies. See paragraph 7.4.2.1 of Chapter 7 and **paragraph 6.3.4 of Chapter 6."****

Comments

A clause in the Original Bill purporting to implement this recommendation was removed following a submission by one collecting society in the Public Hearings before the Portfolio Committee on the ground of the Constitutional freedom to associate. See para 1.5.1.

- (g) **"The Copyright Act should be amended to allow the Registrar to take over the administration of any of the collecting societies (SAMPRA, NORM or SAMRO) if he or she has reason to believe that there has been a material breach of the Copyright Act or the Regulations. Currently, the law makes provision for accreditation withdrawal. This is, however, inappropriate because there will be only one collecting society per right and, if accreditation were withdrawn for a collecting society, there would be no back-up for that right. It is, therefore, recommended that **the Registrar's power to withdraw an accreditation of a collecting****

*society be repealed and that he or she be empowered to take over the administration of **such society**. See paragraph 6.3.2 of Chapter 6."*

"The Registrar should be empowered to take the administration of any collecting society under his supervision should he or she be satisfied that such society is run in a manner detrimental to the respective rights holders. See paragraph 7.4.2.2 of Chapter 7."

"The Regulations should recommend the appropriate period for retention of unclaimed royalties. It is recommended that the minimum retention period for unclaimed royalties should be five years and that any unclaimed royalties older than five years may only be used for social-related activities and cultural projects for the benefit of local artists. See paragraph 10.12.2 of Chapter 10."

"As part of the annual returns submitted to the Registrar, all collecting societies within the ambit of his or her jurisdiction should report the total and individual amounts paid to foreign entities via foreign collecting societies or the agencies of foreign publishing houses as well as individual amounts collected from the foreign sources. See paragraph 10.12.3 of Chapter 10."

"The Copyright Act should be amended to provide that where the music usage information is not retained by the background music users, the collecting societies should commission an appropriate statistical sampling survey based on the relevant users' information to determine the appropriate split for the royalty distributions. See paragraph 10.12.4 of Chapter 10."

Comments

These recommendations have been largely implemented in the new Chapter 1A by Clause 25. See para 26.

- (h) ***"The Acts should require certain users to provide full information (to be defined in the Regulations) to collecting organisations so that rights owners entitled to payment can be readily identified. See paragraph 3.3.13 of Chapter 3."***

Comments

These recommendations are implemented only in new Section 9A(1)(aA) in relation to the management of needletime rights. They do not appear in Chapter 1A, relating to the regulation of collecting societies, to be inserted by Clause 25 of the Bill, despite the obligation on collecting societies to distribute royalties in proportion to actual use of work (new Section 22D(2)(a)).

- (i) ***"The Copyright Act must be amended so as to provide for the office of an ombud for the industry, whose functions and operational rules***

should be spelt out in regulations. In this regard, the recommendations made by the MITT should be implemented."

Comments

This recommendation has not been implemented.

- (j) ***"The provisions in the Copyright Act and the Performers' Protection Act that create a statutory licence in respect of needletime do not adequately protect the rights owners and can be (and have been) exploited to create unnecessary delays. The CRC's recommendations to address this problem are set out in paragraph 3.3.6 of Chapter 3."***
"The provisions in the Collecting Society Regulations for payment into an 'escrow' account are unsatisfactory ... [T]hese problems are addressed in the CRC's recommendations set out in paragraph 3.3.6 of Chapter 3."

Comments

These recommendations require an amendment to Section 9A of the Act and the collecting society regulations. The Bill does not fully adopt the recommendations in para 3.3.6 of the CRC Report and adds other compliance provisions.

- (k) ***"The Acts should be amended to provide that needletime be divided equally between the owner(s) of the copyright in the sound recordings and the owner(s) of the neighbouring right to needletime. See paragraph 3.3.8 of Chapter 3."***

Comments

These recommendations are reflected in the amendment to Section 9A(2)(a) by Clause 11.

- (l) ***"Standard recording contracts that are fair to both sides should be drawn up as a matter of urgency, preferably by representatives of the music industry and musicians, and made available to musicians, who should be urged to use them. They should be made available online and be referred to in educational courses for musicians as well as information pamphlets distributed by the dti and the DAC. See paragraph 10.12.5 of Chapter 10."***

Comments

This recommendation has not been implemented, the 2013 Draft National Policy instead proposing contracts with minimum conditions prescribed by the Minister and conditions too stringent and unfair against the artist to be void. The latter

proposals are implemented by the powers of the Minister to prescribe contract terms by regulation in terms of new Sections 39(cG) and 39B introduced by Clauses 33 and 34, but applying to all copyright works and in relation to all uses (not only musical works, sound recordings and needletime - see para 1.7.3 and 1.7.4).

1.4. Sources of policy decisions for the Revised Bill: The Explanatory Memorandum of the Bill, read with its SEIAS Report

The policy decisions in relation to the Bill are sought in its Explanatory Memorandum, specifically its para 1, Background, and para 2, Overview.

The Background and Overview of the Bill are identical to the Background and Overview of the Explanatory Memorandum of the Original Bill, save for (1) the removal of "Collecting Societies will only be allowed to collect for one set of Copyright Rights (Performance, Mechanical and Needle time)" (in respect of which, see para 1.5.1 below) and (2) a reference to a "new structure for the tribunal" in para 2.8 replaced with "the strengthening of the Copyright Tribunal."

The Analysis of the Bill in para 3 of the Explanatory Memorandum, being simply a summary of the clauses of the Bill, is not a source for policy decisions.

The policy statements in the Explanatory Memorandum can be grouped as follows:

(a) *The new so-called 'digital rights' of 'communication to the public' and 'making available'*

- *The Bill "seeks to align copyright with the digital era and developments at a multilateral level."*
- *"a need exists for Intellectual Property ("IP") legislation to be consonant with the ever evolving digital space"*
- *"The Bill deals with the protection of works and rights of authors in the digital environment."*

(b) *'Strategic alignment' to WCT, WPPT, the Beijing AVP Treaty and the Marrakesh VIP Treaty*

- *"The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual Property Organization ("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."*

- *"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."*

(c) *Protection of the economic interests of authors*

- *The Act "is outdated and has not been effective in a number of areas. The creative industry is impacted upon ..."*
- *"a need exists for Intellectual Property ("IP") legislation ... 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."*
- *"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 ... payment of royalties to alleviate the plight of the creative industry."*

(d) **Exceptions for education, research and private study, 'fair use' and other exceptions**

- *The Act "is outdated and has not been effective in a number of areas. ... [E]ducators are hampered in carrying out their duties; researchers are restricted to further developing research ..."*
- *"a need exists for Intellectual Property ("IP") legislation ... to allow reasonable access to education;"*
- *"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 ..."*
- *"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."*

(e) *Exceptions for persons with a disability*

- *The Act "is outdated and has not been effective in a number of areas. ... [P]eople with disabilities are severely disadvantaged by having limited access to copyright works."*
- *"a need exists for Intellectual Property ("IP") legislation to ensure that access to information and resources are available for persons with disabilities"*

- *"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."*

(f) *The Resale Royalty Right*

- *"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."*

(g) *Regulation of Collecting Societies*

- *"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 accredited with the Companies and Intellectual Property Commission ("CIPC")."*

(h) *The Tribunal*

- *"The Bill proposes the strengthening of the Copyright Tribunal."*

(i) *Other:*

- *"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."*
- *"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"*

Comment

The Explanatory Memorandum itself consists of bald statements and indicates no motivation for most of them. Even reorganising the terms of the Explanatory Memorandum in this way leaves them very vague as a record of policy decisions.

Some statements are contradictory. For example, performers and composers cannot benefit from improved exceptions and limitations, since these are unpermissioned and unremunerated uses of their work by third parties.

Some statements are *non sequiturs* – "promoting the progress of science and useful creative activities" (a statement derived from the Copyright Clause of the United States Constitution) does not "protect the economic interests of authors and creators

of work against infringement”. “[P]romoting the progress of science and useful **creative activities**” is the reason why authors and creators should be protected from infringement.

In relation to the unmotivated bald statements in the Explanatory Memorandum, it is not clear whether they are factually correct. For instance, in relation to the **statements supporting what the writer has called “protection of the economic interests of authors”, there is no indication that authors are systemically not being rewarded for assigning the copyright in their works.**

In order to support the policy directions in the Explanatory Memorandum, one has to look at the SEIAS Report, which should have been published with the Original Bill but was not (see para 30.9 below and Appendix 6). The SEIAS Report, being a Phase 2 report, is meant to be the final impact assessment and provide details of the proposed legislation in terms of impact and risks likely to result from implementation. That notwithstanding, the SEIAS Report has no indication of any evaluation of the various problem statements, independent research or impact assessment of the various proposals in the Original Bill.

The impact assessment in para 7 of the SEIAS Report dwells largely on many provisions in the Original Bill which were not proceeded with and removed in the Revised Bill, and provides no economic data or projections.

1.5. Sources of policy decisions for the Revised Bill: Acceptance by the Portfolio Committee of changes proposed in individual submissions

Following various submissions and the oral hearings in the public participation process on the Bill in July and August 2017, the Portfolio Committee revised the Bill in response to the individual submissions in respect of the following items:

1.5.1. Removal of the “one collecting society per right” rule

This rule had been recommended in the CRC Report (see para 1.5(f) above). The rule appeared in the Original Bill, albeit in stricter terms than intended by the CRC Report **(the CRC Report contemplated “mixed” collecting societies; the Original Bill did not.)** The rule was removed from the Bill on the petition of only one collecting society which claimed that the rule would violate the Constitutional right of freedom of association.¹⁸

The CRC Report correctly states that the rule would benefit licensees of **collectively managed rights and that it would follow international trends: “Due to administration problems (consistently voiced by users and interested parties) associated with the multiple collecting societies and the international trends for**

¹⁸ Public hearings Day 2, 3 August 2017, deliberations by the Copyright Bill Sub-Committee 28 March 2018.

both developed and developing countries, the CRC believes that 'one society one right' is the answer for the current situation."

1.5.2. The 'panorama' exception

Following a submission by a civic society non-governmental organisation, the panorama exception was introduced by an amendment to Section 15 of the Act by Clause 14.

1.5.3. The commissioning clause

The Portfolio Committee heard evidence from photographers on practices prevailing in industry relating to commissioning of photographs from photographers, where the photographers were thereafter prevented from displaying photographs that they had taken due to the copyright having vested in the companies that had commissioned them to take the photographs. This resulted in the addition of a new Section 21(3) by Clause 22(c), containing rather complex provisions relating to the negotiation, alternatively determination, of a contract of commission. The new clause would apply to all commissioned works covered by Section 21(1)(c), not only photographs.

None of the above revisions of the Bill were presented for further public comment.

After the hearings, the Portfolio Committee's plan to identify and consider policy issues extracted from its 'technical revised version' of the Original Bill¹⁹ was prematurely halted – see para 30.13.

1.6. Sources of policy decisions for the Revised Bill: Political parties' caucus decisions on flexible exceptions, deciding on a "hybrid model based on 'fair use' and 'fair dealing'"

Following the instruction that parties represented in the Portfolio Committee should obtain decisions from their caucuses on the question of flexible exceptions being based on 'fair use' or 'fair dealing', the ruling party member reported at the meeting on 31 May 2018 that it would support a "hybrid" model permitting both 'fair use' and 'fair dealing' on the basis that in some cases 'fair dealing' is appropriate, in other cases 'fair use' is more appropriate. **It was also decided that the "hybrid model" would be "anchored in 'fair use'."**

This decision followed the presentation of the 'technically revised version' of the Original Bill, in which the words "such as" were inserted before the illustrative list of purposes in Section 12A(1), introduced by Clause 13. This revision, which has a key

¹⁹ Presented at the Portfolio Committee meeting on 18 October 2017 as a revision that had been cleaned of technical errors and had inserted technical inputs from the public by the parliamentary legal advisor and the advisory team from the dti, UCT's Prof Schonwetter and Prof Ncube as experts, and the State Law Advisor.

impact on extending the **scope of the 'fair use' clause, was not presented to the public for comment.**

See paras 2.5 to 2.10 below for analysis of the outcome of this decision in the **context of the expropriative effect of the 'fair use' provision.**

1.7. Observations in relation to policy decisions underlying the Bill

From the sources investigated above, there are no policy statements or policy decisions, much less any supporting evidence, for the following features of the Bill:

- 1.7.1. The extrapolation of recommendations (notably in the CRC Report) to improve the position of composers of musical works to safeguard their remuneration from needletime rights, across all industry sectors that rely on copyright. This extrapolation underlies new Sections 6A, 7A and 8A introduced by Clauses 5, 7 and 9.
- 1.7.2. The extrapolation of copyright exceptions, specifically crafted in the current Act for individual copyright works in Sections 12, 14, 15, 16, 17, 18, 19, 19A and 19B, by introducing a generalised set of exceptions applying indiscriminately across all copyright works (new Section 12B introduced by Clause 13 of the Bill), with the consequence that the specially crafted exceptions are to be repealed (Clauses 12, 15, 16, 17 and 18).
- 1.7.3. The power granted to the Minister in terms of Section 39(cG), inserted by Clause 33 and backed by the contract override clause, Section 39B inserted by Clause 34, "to prescribe compulsory and standard contractual terms to be included in agreement to be entered into in terms of this Act." This provision arose from recommendations in the Draft National Policy in respect of the music industry (see para 1.2(e); this recommendation differed from the CRC Report), but the powers of the Minister apply, without explanation or justification, across all sectors of all creative industries. This intrusive measure is not even mentioned in paras 1 and 2 of the Explanatory Memorandum.
- 1.7.4. **The declaring unenforceable of all contractual terms that "purport... 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" (new Section 39B, introduced by Clause 34; the writer's emphasis)** compared to the recommendations in the 2013 Draft National Policy (see para 1.2(e)) and the SEIAS report that are only in relation to improving the contractual position of authors in claiming royalties and negotiating commissioning agreements.²⁰ The CRC Report had no recommendation that any contractual terms be declared unenforceable and the Overview and

²⁰ Chapter 2 of the Draft National Policy and para 7, Proposal 13, of the SEIAS Report

Background of the Bill's Explanatory Memorandum has no statement on the topic.

1.7.5. The interpretative provisions in new Section 2A(1)(b), 2A(2) and (3) and 2A(4) introduced by Clause 2.

1.7.6. **The declaration by the Minister of "local organisations" in which copyright** for works made under their direction or control, will be vested by Section 5(2), to be amended by Clause 3 and its consequential provision, the amendment to Section 21(2) by Clause 22(b) (see para 12.1).

1.7.7. Provisions permitting parallel importation and reducing the scope of secondary infringement by certain forms of distribution, by Section 12B(6) inserted by Clause 13, the deletion of Section 23(2)(b) deleted by Clause 26(b) and the amendment of Section 28 by Clause 28 (see para 20).

1.7.8. the amendment of Section 22(4) and the introduction of the terms to be incorporated into licence agreement by statute by the insertion of Section 22(8), by Clauses 23(b) and (c) (see para 14).

The list above is made on the assumption that even a basic mention in paras 1 and 2 of the Explanatory Memorandum qualifies as an underlying policy statement. It is possible that deeper analysis might even disqualify some of those.

1.8. The extrapolation of provisions intended for one purpose in relation to one copyright works of one set of copyright works, across all copyright works and for all purposes

The Portfolio Committee appeared to be under the misconception that the many objections by stakeholders to the extrapolation of provisions intended for a single kind of work and for limited kinds of uses across all copyright works and all uses, is a problem of terminology.²¹ The many cases of the extrapolation of the provisions in the Bill from the purpose for which they were actually meant across all copyright works, is actually a case of arbitrary legislative intervention where there has been no study or impact assessment of its effects in relation to each other copyright work and other industry sector sought to be regulated.

A hypothetical analogy with the letting of immovable property could be instructive. If a particular malpractice has become a feature of, say, the short-term letting for residential purposes of apartments in blocks of flats by

²¹ See for instance the report by the Parliamentary Legal Adviser to the Portfolio Committee on 18 August 2017 to the effect that "majority of the concerns raised had to do with broadening the definitions of terminologies so that the Bill could be inclusive of every person" and the public communication by the Chair of the Portfolio Committee on 17 May 2018 that the Technical Panel of Experts would be asked to advise on "the appropriateness of the terminology used in the Bill, to avoid the criticism raised by the public against the terminology used in the Bill as introduced." This misconception is repeated in the Instructions to the Technical Panel of Experts – see Appendix 2.

lessors of these blocks of flats, the malpractice might not, or even could not, be a feature of the letting of individual sectional title apartments for residential purposes, the letting of commercial premises, the letting of industrial premises or the letting of farms, or any form of long-term letting. There would have to be sound justification for legislation to address this one kind of malpractice in short term residential leases of apartments in blocks of flats across all leases of all kinds of immovable property.

To draw the analogy through, the lessees of immovable property are owners of copyright, and just as there are different kinds of immovable property with different structures on them and different uses, there are different kinds of copyright works with different business models attaching to the uses of those works.

These extrapolations of the application of legislative measures, being a core feature of the Bill, as can be seen from paras 1.7.1 to 1.7.4, are not a case of terminology, but of substance, and together make up a fundamental flaw of the Bill.

2. Constitutionality – Concerns that the new copyright exceptions amount to expropriation of property

- 2.1. The sources for policy in respect of introducing **'fair use' at the same time retaining** fair dealing copyright exceptions, as well as the copyright exceptions for education, and libraries, and for the purpose of research, can be found in the 2013 Draft National Policy²² (noting that the comments on the policy, stated to be a contributor to the Bill, have not been disclosed), the Explanatory Memorandum of the Bill and its SEIAS Report.²³ The decisions of the Portfolio Committee **on 'fair use'** followed the decisions of party caucuses, as reported on 31 May 2018.²⁴

No assessment of the economic impact of **'fair use' or** these copyright exceptions has been carried out by Government or by Parliament. (See paras 30.8 and 30.9 below.)

The Portfolio Committee decision on **'fair use'** was that there should be a "hybrid model permitting both **'fair use'** and **'fair dealing'**" on the basis that in some cases **'fair dealing'** is appropriate, in other cases **'fair use'** is more appropriate. It was also decided that the "hybrid model" would be "anchored in **'fair use'**." (See para 1.6 above).

- 2.2. The provisions of the Constitution against which these copyright exceptions must be tested are Section 25 (property) and Section 22 (freedom to trade), read with Section 36 (the limitation of rights clause).

Intellectual property, and therefore copyright, has been recognised by South Africa's courts as a right of property, protected by Section 25(1) of the Constitution.²⁵ In *Moneyweb*,²⁶ the Court expressed the view (without having to decide on it) that a copyright exception is a legislative limitation on a right of property, which has to be tested against the requirements of Section 36.

- 2.3. Some introductory comments are warranted in the light of the intensive debate over **'fair use'** in the public consultations from 2015 onward. It is important to **understand that 'fair use' is a defence to a claim for infringement of copyright,** meaning that no permission from or remuneration to the copyright owner (or, for that matter, authors or performers) **is required in cases where 'fair use' is found.** The **'fair use'** doctrine originates from the United States of America, where a vast

²² albeit on mistaken terms – see the introduction to para 1.3 above.

²³ See para 1.4 above

²⁴ See para 1.6 above

²⁵ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC), para 17 at <http://www.saflii.org/za/cases/ZACC/2005/7.html>; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC), paras 61-63, at <http://www.saflii.org/za/cases/ZACC/2012/29.html>. See also Section 25(4)(b) of the Constitution.

²⁶ *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* 2016 (4) SA 591 (GJ), para 108, at <http://www.saflii.org/za/cases/ZAGPJHC/2016/81.html>.

body of existing case law underlying this doctrine was codified in Section 107 of the US Copyright Act. It is also important to note that 'fair use' in the United States is not inimical with the protection of copyright, since the interest of copyright owners is protected by the context of the legal framework in that country.²⁷ (See paras 2.11.1 and 4.20 below).

The "hybrid solution between 'fair dealing' and 'fair use'", "anchored in 'fair use'"

- 2.4. It is necessary to understand what is meant by the "hybrid solution" adopted by the Portfolio Committee, and whether the fair use and fair dealing and other exceptions that will now stand side-by-side in the Act will in fact be such a "hybrid" solution.

The dti had made a presentation on a "hybrid model" at the Portfolio Committee meeting of 31 May 2018. After the decision was reached, the dti was asked to provide, by the following week, a clearer framework for how the hybrid model would function and how it would be drafted. As appears from the Bill, there was no change in the drafting of Section 12A following this decision, other than to remove "access for underserved populations" from the list of illustrative purposes.

The concept of the "hybrid model" was that it related to the whole of Clause 13, not only the 'fair use' provision in Section 12A, but the general exceptions, including certain 'fair dealing' exceptions in Section 12B, the 'computer use' exceptions in Section 12C and the educational and academic use exceptions in Section 12D. Considering that the "hybrid model" is meant to be based on the model for exceptions set out in the Singapore Copyright Act, the writer is of the opinion that Section 12C(a) should not be included in this "hybrid model" (because it is a necessary consequence of the introduction of the digital rights of 'communication to the public' and 'making available'), but that Section 19C should have been encapsulated within this model due to the overlap of its provisions and certain provisions of Section 12A.

The Bill will remove all the 'fair dealing' provisions from what is now Section 12, as read with Sections 15, 16, 17, 18 and 19A of the Act (all of which are to be repealed and replaced) and to insert them in new Section 12A by Clause 13. However, remnants of 'fair dealing' exceptions remain in the new Sections 12B, 12D and 19C, but only with 'fair dealing' and 'fair practice' removed, leaving behind qualifications like "appropriate" and "justifiable" (namely new Sections 12B(1)(a), 12B(1)(b), 12B(e)(ii) and (iii), 12D(1), 19C(1), and 19C(15)).

²⁷ At the Charles Clark Memorial Lecture in 2017, Judge Pierre Leval, the US' foremost copyright jurist and a judge on the U.S. Court of Appeals Second Circuit, said to an audience of authors and publishers, "Fair use is not your enemy; it is solicitous of your rights." See <https://www.internationalpublishers.org/copyright/copyright-news/512-charles-clark-memorial-lecture-2017-veteran-copyright-frenemies-trade-genteel-blows-over-fair-use>.

- 2.5. The proposal at the 31 May 2018 meeting of the Portfolio Committee indicated **that the idea was that 'fair use' would be applied for one set of circumstances, and 'fair dealing' in another set of circumstances. However,** this is not what the Bill says. Sections 12A and Sections 12B, 12C(b), 12D and 19C respectively are not mutually exclusive for different circumstances. There is, for example, no proviso to the 'fair use' clause that says under what circumstances a person can rely on 'fair use' and in what circumstances a person can rely on the other copyright exceptions. Any person who carries out an act in relation to a copyright work covered by the exclusive rights without permission would be able to rely on both.

Clause 13 therefore does not meet this explanation of the "hybrid solution."

- 2.6. At the 6 June 2018 meeting of the Portfolio Committee, its Legal Advisor informed the Committee that the **"hybrid model" was like the 'fair dealing' clause in Singapore:** "It gave a list of exceptions and it had a specific clause that gave a list of how to determine whether the use was fair. That was the Singapore model. The difference was that Singapore's legislation started off with a flexible provision and then gave lists for permitted uses. The Bill also used the same four factors found in the Singapore legislation to determine "fair use", including reference to the nature, the amount, and purpose of the work and effect on the potential market for the work. The Committee had decided to work from the Singapore model and, in summary, the Bill was in line with Singapore's legislation, except that the South African Bill refers to "fair use" in the exceptions section and Singapore uses the term "fair dealing" in the exceptions sector. The effect was the same." (Source: the summary of the Parliamentary Monitoring Group.)

Section 35 of the Singapore Copyright Act²⁸ allows 'fair dealing' for any purpose, except for a few purposes specifically excluded. The writer concurs that, in the case of Singapore, calling the exception 'fair dealing' or 'fair use' is simply semantics. However, Singapore has five factors, not four, in its 'fair dealing' test, and the fifth factor of 'commercial availability'²⁹ is part of the critical balance between the interests of copyright owners and consumers of copyright works.

It was as a result of this advice that the writer took the step of contacting the **Portfolio Committee to point out that Singapore's exception had five factors for its test, not four.** This was countered by advice that the Committee could simply decide which to put in and which to take out, advice which, in **the writer's** opinion, is wrong, for reasons set out in paras 2.11-2.13.³⁰

Suffice to conclude that Clause 13 is not the model in Singapore.

²⁸ See <https://sso.agc.gov.sg/Act/CA1987#pr35->.

²⁹ 'Commercial availability' is the easy reference to the terminology "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price."

³⁰ The exchange is recorded in Appendix 4.

At the time of writing this advice, the Government of Singapore has made no public pronouncement whether the fifth factor is going to be removed or not, and no bill to amend Section 35 has been made public. Information given to the Portfolio Committee in the dti presentation dated 7 June 2018 that Singapore and Australia were **"currently amending their legislation to fair use models"** was **incorrect, and the explanation given by the dti's Ms Meshendri Padayachy in reply on 14 June was similarly off the point, confusing the 'fair use' factors with the 'fair use' purposes.**

- 2.7. The other part of the **"hybrid model"** was said (at the Portfolio Committee meeting on 5 June) to include the other exception clauses, notably new Sections 12B, 12C and 12D, since they each contained a list of exceptions. This explanation relates to form and not to substance, and, if this is a correct record of it, is actually irrelevant. The fact remains, as stated in para 2.5 **above, that the 'fair use' clause, Section 12A, the general exceptions, Section 12B, and the exceptions for specific purposes in Sections 12C and 12D, are all co-extensive.** Also, as stated above, the new sections that should have been considered as forming part of the hybrid model with Section 12A were Sections 12B, 12C(b), 12D and 19C. In fact, Sections 12A and 12B are specifically extended by cross reference³¹ to Section 19C in Section 19C(15).
- 2.8. At the Portfolio Committee meeting of 14 June 2018, Ms Meshendri Padayachy **said that the "hybrid" approach was already in the Bill, from which one infers that, considering there were only two significant changes between the Original Bill and the Revised Bill in this respect, the 'fair use' clause proposed in the Original Bill was already the "hybrid model."** Therefore, when **news of the "hybrid model"** created an expectation amongst stakeholders that it would mean a new approach to the exceptions, they were subsequently disappointed. In reality, the decision of the 31 May 2018 meeting amounted to only applying nomenclature to a set of provisions of the Bill that, to all material intents and purposes, remained unaltered.
- 2.9. One therefore has to arrive at the conclusion that Clause 13 is not **a "hybrid model", because:**
- a) **the 'fair use' clause** in the Bill is imbalanced against copyright owners in favour of consumers of copyright works due to the lack of a fifth factor of commercial availability or some other balancing mechanism, and
 - b) **the 'fair use' clause and the other copyright exceptions which form part of the totality of the "hybrid model"** as described in the proceedings of the Portfolio Committee, are co-extensive, meaning that there will be many situations where both can be relied upon, despite statements in the Portfolio Committee **supporting the "hybrid model" saying otherwise.**

The result is a 'fair use' clause which has, as a result of (1) the legal context into which it is introduced, (2) provisions with the Bill that

³¹ With an error – "sections 12 and 12A", where there will no longer be a Section 12.

interact with it, and (3) its own terms, an impact which goes far beyond **the relative impact of the 'fair use' provision in the United States**.

Put in another way, if the nomenclature "hybrid model" for this provision suggests some form of compromise, it does **not**; the 'fair use' clause proposed in the Bill is in reality 'fair use' on steroids', overreaching into the exclusive rights of copyright in a manner which has significant consequences in its undermining of the exclusive rights of copyright.

This conclusion, together with other factors, is relevant in determining whether the new copyright exceptions in Clauses 13 and 19 meet Constitutional muster.

*Brief comparative **analysis of existing 'fair use' and 'fair use'-like provisions as to the balance between copyright owners and consumers of copyright works***

2.10. The balance between copyright owners and consumers of their copyright works does not seem to have been taken into account in the deliberations, apart from a bald statement claiming that the Bill upholds this principle in para 2.2.1 of the Explanatory Memorandum. Indeed, by the dti and the Portfolio Committee not taking into account any evidence of the normal business practices in relation to copyright works (see para 30.11 below), it is hard to see how the Portfolio Committee could have considered this balance.

2.11. Mechanisms balancing the interests of copyright owners and the consumers of their products are features in the 'fair use' and 'fair use'-like provisions in countries that have them, whether within the clauses themselves or extraneously. These are briefly described below.³²

2.11.1. United States: Section 107 of the US Copyright Act is a codification in 1978 of, and therefore dependant on, case law going back to 1841. Being a common law country, courts in the United States has the practice of being bound by the precedents set by earlier decisions in the same or superior courts. This enables the courts to develop the law, yet maintain some level of certainty. The United States Copyright Office has developed a *Fair Use Index* out of the decided case law.³³ **In the United States, 'fair use' cases are often described as being "fact-specific", in determining what the defendant's conduct with the copyright work was in order to be able to argue that the conduct was 'fair use' or an infringement. Big 'fair use' cases often result in** many interest groups wanting to be admitted as *amici curiae*, since the decision of a higher court, being precedent-setting, has the same impact on practices with copyright works as

³² This comparative analysis does not mean that adopting any of the provisions discussed here in the Bill *verbatim* will mean that the Bill would be compliant.

³³ See the US Copyright Office website at <https://www.copyright.gov/fair-use/> and <https://www.copyright.gov/fair-use/fair-index.html>. With South Africa only having one decided case on a 'fair dealing' exception, South Africa does not have the case law to support such a resource.

legislation. There is also a substantive downside for being unsuccessful with a **'fair use' defence, namely the risk of considerable statutory damages, meaning that a 'fair use' defence will not be considered lightly.**

2.11.2. Singapore: **The fifth factor of 'commercial availability' discussed above is the** balancing factor in Singapore and has its origin in the fair dealing exception for research and private study in Australia. The fifth factor is deliberately part of the test so as not to hamper normal exploitation of the work or to unreasonably prejudice the legitimate interests of the rightsholder, as meant in the second and third steps of the Three-Step Test.

2.11.3. Israel: **The 'fair use' provision in Israel's law is argued to be less 'open' than** its counterpart in the United States, **with the equivalent of the term "such as"** having a more restrictive meaning, limiting purposes permitted under the test to purposes more closely related to the illustrative purposes. The provision also authorises the responsible minister to clarify the conditions under which certain uses are deemed lawful, thereby seeking to reduce uncertainties surrounding the application of fair use. Guidelines are being devised for the education sector.

2.12. Section 12A has, as has now been seen, none of these balancing mechanisms. As a result, there is no incentive for consumers of copyright works to evaluate the risks of undertaking unpermitted acts in respect of copyright works, since the consequences for them would be no worse than if they had obtained the permission and paid the remuneration in the first place.

On the contrary, the replacement of **"for the following purposes"** in the Original Bill with **"for purposes such as the following"** in the Revised Bill, has resulted in an **extreme broadening of acts that will be permitted by the 'fair use' clause.** The *ejusdem generis* rule of interpretation will apply in interpretation of the purposes (which would not have been **the case with the 'fair use' clause in the Original Bill**) and, considering the diverse illustrative purposes, **the 'fair use' purposes arising** out of the revision could come to mean just about anything. In this context, it is important to note that the illustrative purposes include markets that are entirely legitimately commercially served by various copyright industry sectors, such as education and Government. This broadening of the scope of the **'fair use' clause is**, according to the advice given to the Portfolio Committee on 6 June 2018, in fact the intention.

Coupled with **the 'fair use' clause in Section 12A are extensive copyright exceptions** in Sections 12B, 12C(b), 12D and 19C, which not only overlap with purposes specified in Section 12A, but contain provisions which are remnants of the earlier **'fair dealing' exceptions and are co-extensive with Section 12A.** This means that a defendant in a copyright infringement case **could rely in his or her defence on 'fair use' as well as a specific exception, even** an exception that is adjudicated simply by reference to the defendant's act being **"appropriate" or "justifiable"**, as the case may be.

The adaptation of the current 'fair dealing' and 'fair practice' provisions in Section 12 of the Act by replacing those **terms with concepts like "appropriate" and "justified"**, means that those copyright exceptions in new Sections 12B(1)(a), 12B(1)(b), 12B(e)(ii) and (iii), 12D(1), 19C(1), and 19C(15) will no longer be judged by an objective and balanced test of fairness, but by the requirements of **the person relying on the exceptions, whose case of "appropriateness" and "justifiability" will override the exclusive rights of copyright and the interests of the copyright owner.**

Another observation about Section 12B is that, by replacing Sections 12, 15, 16, **17, 18 and 19A of the Act, the careful application of the Act of the existing 'fair dealing' provisions to specific works**, will now apply to all works. For instance, in the Act, (1) the quotation exception does not apply to an artistic work (how would **one "quote" an artistic work without reproducing it in full?**), published editions or computer programmes, (2) the research and private study exception does not apply to cinematograph films and sound recordings, (3) the reproduction exception in favour of broadcasters does not apply to cinematograph films. Sections 12A(1)(a)(i) (for research and private study, which also has a format-shifting exception), 12B(1)(a) (quotations) and 12B(1)(c) (reproductions by broadcasters) now apply across the board, an example of the extrapolation of principles applying to certain copyright works being made to apply to all copyright works, something for which there is no supporting policy statement (see para 1.7.2).

The situation is exacerbated by the contract override provision in Section 39B **introduced by Clause 34 that 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 ..., such term shall be unenforceable."** This clause, which has no basis in any policy decision underlying the Bill (see para 1.7.4 above), will in effect tie the hands of any person trading with copyright works, whether that person is the copyright owner or acts with the authority of the copyright owner.

Indeed, it will not even become possible to settle infringement cases disputed on the basis of a copyright exception, because any term of settlement by a defendant undertaking not to continue with certain conduct, will be unenforceable. It seems certain that consent orders made under Section 173 of the Companies Act, 2008, with CIPC in relation to alleged infringements and sent to the Tribunal for confirmation in terms of new Section 29H(d), will be affected by the same provision. Every infringement case where a defence is based on a copyright exception will have to be decided by a court of law or, in terms of the Bill, possibly by the Tribunal.³⁴

- 2.13. Considering (1) **the emphasis on 'users' rights' introduced in the Original Bill,**
(2) provisions introduced by Clauses 13, 20 and 34, identified in para 2.12,

³⁴ New Sections 29(2)(f) and 29H(a) and (b) inserted by Clause 31.

(3) other provisions, specifically Clauses 26(b) and 28 (see para 20 below), and (4) the omissions in giving full effect to the insertion of the new digital rights for copyright owners (see para 10 below), one can only conclude that the effect of the Bill will be:

- to weaken copyright³⁵ so that copyright will cease to be practically enforceable in South Africa,
- that copyright will cease to apply altogether for certain consumers of copyright goods, namely educational institutions, Government, libraries, archives, museums and galleries, and the people that they serve,
- to benefit persons not specifically identified by the purposes set out in Section 12A and who will become to be beneficiaries of the 'fair use' provision as a result of the insertion of "such as" in the Revised Bill and the resultant open application of the *eiusdem generis* rule in its interpretation. These persons will no doubt be technology companies whose business models rely on being able to reproduce copyright works without the need for permission or remuneration.³⁶

These consequences of adoption of the Bill will be real, yet there is no policy statement supporting any of these effects. **These are clearly not "limited circumstances" relating to the "the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty", as proclaimed in para 2.7 of the Explanatory Memorandum.**

These effects stand in stark contrast to the policy statements about supporting authors and performers and modernising the Act for the digital age.

Evaluation of the impact of the Bill against the property clause in the Bill of Rights in the Constitution

2.14. The amendment to Section 5(2) by Clause 3 and its corollary amendment to Section 21(2) by Clause 22(b), under which copyright in works made under the direction or control of local organisations prescribed by the Minister, will amount to an expropriation of copyright from authors, composers and artists who make works for organisations declared by the Executive, without there being a condition of compensation. These arrangements will apply precisely in cases where there is no employment relationship or commissioning agreement in return for money or

³⁵ Perhaps symbolically, the first substantive clause of the Bill, the new Section 2A introduced by Clause 2, states what will *not* be protected by copyright.

³⁶ Such as in *Google Books* case, a decision of the United States Court of Appeals for the Second Circuit, *Authors Guild, Inc. v. Google Inc.*, No. 13-4829-cv(2d Cir. Oct. 16, 2015). At the Charles Clark Memorial Lecture in 2017, speaking with Judge Pierre Leval (see footnote 27 above), former General Counsel for the U.S. Copyright Office, Jon Baumgarten, said that Google's systematic, mass copying of books was 'very far outside the sense, spirit, design and intendment of fair use as I have known and practiced it for over forty years' and that the *Google Books* decision overly expanded the margin to freely copy others' works – a precedent that could potentially do significant harm to rightsholders in the digital age. See <https://www.internationalpublishers.org/copyright/copyright-news/512-charles-clark-memorial-lecture-2017-veteran-copyright-frenemies-trade-genteel-blows-over-fair-use>.

money's worth (Section 21 of the Act), leaving these authors, composers and artists worse off than they are under the current Act. Such an outcome will amount to a deprivation of property from authors, composers and artists who, but for this provision and the declaration by the Minister, would have owned the copyright in the works concerned.³⁷

2.15. The copyright exceptions referred to in para 2.12, coupled with the contract override clause referred to there that makes those exceptions inviolable by contract, having the consequences spelt out in para 2.13, will necessarily result in the deprivation of property of copyright owners. This deprivation of property could even be described as a transfer of control over those rights to institutions that will benefit from those copyright exceptions.³⁸

2.16. **Following the Constitutional Court's decisions in *Laugh It Off* and *Opperman*** confirming that intellectual property rights are property rights protected by Section 25(1) of the Constitution,³⁹ then, following the comments in *Moneyweb*⁴⁰ (the only decision of the South African courts on the topic), the enquiry must be made whether copyright exceptions in the Bill amount to a deprivation of property rights guaranteed by Section 25(1) of the Constitution and, in that case, being a limitation of rights by a law of general application, has to be tested against Section 36 of the Constitution. The enquiry has to be made **whether "the limitation [i.e. each copyright exception proposed in the Bill] is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."**

2.17. The analysis **of testing the 'fair use' clause and the copyright exceptions in the** context of the Bill and the South African legal framework against the requirements of the Bill of Rights has not been undertaken by the dti or the Portfolio Committee.

Considering the limited nature of the instruction, it cannot be up to the members of the Technical Panel of Experts to undertake this work in respect of each

³⁷ See footnote 25 above, referencing the Constitutional Court decisions in the *Laugh It Off* and *National Credit Regulator v. Opperman* cases that have confirmed that intellectual property rights are property rights protected by Section 25(1) of the Constitution.

³⁸ This topic has been the subject of much controversy. See for instance the report on the Charles Clark Memorial Lecture in 2016, where the keynote speaker, Prof Michael Fraser, Professor of Law at the University of Technology Sydney and Chairman of the Australian Copyright Council, said "Google and Facebook provide marvellous services, and consumers are attracted to them because they provide great value. But when they try to control ownership of IP and copyright in particular – and we see *Google Books* turning copyright on its head ..., then I think that's a threat to our individual liberty and it diminishes us as citizens." - <https://www.internationalpublishers.org/copyright/copyright-news/403-a-conversation-with-professor-michael-fraser>.

³⁹ See footnote 25 above, referencing the Constitutional Court decisions in the *Laugh It Off* and *Opperman* cases.

⁴⁰ See footnote 26 above reporting on the comment in *Moneyweb*.

copyright exception. This advice has a limited analysis based on the face value of a number of these provisions. Whereas some of the new exceptions might not have an expropriative effect or, if they do, meet the test in Section 36 of the Constitution, this advice indicates that a number of them that do have an expropriative effect do not pass this test.

2.18. The most egregious copyright exceptions in the Bill amounting to deprivations of property that will not meet the test of Section 36 are in those cases where the copyright owner has made the copyright works available in South Africa for purchase or another form of legitimate acquisition by consumers, such as by way of licensing, in which case they can be considered neither reasonable nor justified. Those are:

- 2.18.1. **The 'fair use' provision in Section 12A, inasmuch as it does not contain any balancing provisions referred to in para 2.12 above, and its purposes extend to those that are entirely legitimately commercially served by various copyright industry sectors, such as education and Government.**
- 2.18.2. **The remnant of the 'fair dealing' exception for quotation in Section 12B(1)(a)(i) inasmuch as it is defined by the third party's purpose and not 'fair practice', leading to substitution of the copyright work.**
- 2.18.3. The exception allowing reproduction by broadcasters in Section 12B(1)(c), inasmuch as it relates to cinematograph films.
- 2.18.4. The exception allowing any reproduction in the press, broadcast of communication to the public of articles in the press where the right thereto has not been expressly reserved in Section 12B(1)(e)(i) (which also is not compliant with Article 5(2) of Berne).
- 2.18.5. The translation exception in Section 12B(1)(f).
- 2.18.6. The exceptions for education purposes in Section 12D(1) and (3), 12D(2), 12D(4), 12D(6),⁴¹ 12D(7) (in reality a transfer of control over affected copyright works to libraries at educational institutions).
- 2.18.7. The library exceptions in Sections 19C(3) (complicated by the uncertain **meaning of the term "access"**), 19C(4), 19C(5)(b) (insofar as it relates to placing works reproduced for preservation on publicly accessible websites) and 19C(9), all as read with Section 19C(1).

These provisions are dealt with in greater detail in para 17 below.

The provisions above must be understood in the context of the legal framework where the copyright owner will be powerless to enforce rights of copyright where the provision is relied on by a third party to justify its acts with the copyright work that he or she undertakes without permission or remuneration (see para 2.12).

In the writer's opinion, less restrictive measures could have been taken to address those of the purposes behind these provisions where shortcomings had been

⁴¹ Section 12D(6) should be covered by the quotation exception. Its import is to legitimise plagiarism. See para 17.7 below.

identified by investigation and research (such as the CRC Report), and that it is not necessary to undermine the entire copyright system (para 2.13 above) to achieve that result.

The writer is of the considered opinion that all the above-referenced provisions constitute a deprivation of property that do not pass the test of permitted limitations of the right to property afforded by Section 36 of the Constitution. The same provisions will likely also cause South Africa to be in breach of its obligations under Berne and TRIPs for non-compliance with the Three-Step Test (see para 4 below).

Evaluation of the impact of the Bill against the clause guaranteeing the freedom to trade in the Bill of Rights in the Constitution

2.19. **A number of the Bill's provisions impact on the ability of** willing parties engaged in trade to contract freely. These are:

- 2.19.1. The power granted to the Minister in terms of Section 39(cG), inserted by Clause 33(b) and backed by the contract override clause, Section 39B inserted by Clause 34, to prescribe "compulsory and standard contractual terms to be included in agreements to be entered into in terms of this Act." It applies to all persons who trade in copyright goods, not only to contracts concluded with authors or with copyright owners.
- 2.19.2. Section 39B inserted by Clause 34, the contract override clause of general application, which has already been mentioned. It applies to all persons who trade in copyright goods, not only to contracts concluded with authors or with copyright owners. Its impact on the ability to contract is exacerbated by it **applying to the 'fair use' provision and the remnants of the 'fair dealing'** exceptions, since whether those exceptions apply or not are, in the absence of clear precedent, usually determined by the courts after the event.
- 2.19.3. The amendment to Section 5(2) by Clause 3 (with its consequential amendment of Section 21(2) by Clause 22(b)) to the effect that copyright in works made under the direction or control of local organisations prescribed by the Minister, will be vested in the local organisation declared by the Minister. This automatic vesting of copyright in prescribed local organisations will apply in circumstances where there is no relationship of employment or a commissioning of the work in return for payment, without there even being a condition of some form of remuneration, which is a limitation to trade on authors, composers and artists who make works for local organisations so declared.
- 2.19.4. The application to the orphan works provision to the resale royalty right in Section 22A(1) by Clause 24, which will cause a major impediment to all trading in second-hand goods (see para 22.3).
- 2.19.5. The departure from ordinary rules of contract in circumstances for which there is no underlying assessment or policy statement, notably in Sections 6A and 7A to be inserted by Clauses 5 and 7 (Clause 8A introduced by Clause 9 is actually a matter for the Performers Protection Amendment Act) (see para 11

below) and implied terms for licences in Section 22(4) amended by Clause 23(b), Section 22(8) inserted by Clause 23(c) (see para 14 below), and the time limitation on assignments of copyright by authors of literary and musical works in Section 22(3) by Clause 23(b) (inasmuch as it is a mistaken application of the recommendations of the CRC Report; see para 13 below). All of these provisions will limit the ability of copyright owners to deal with the copyright in works they acquire, notably in composite works that comprise of works with multiple copyrights, and whether that dealing is by way of onward assignment or by licence.

- 2.20. These limitations will not only impact on the kinds of contracts which are the mischief that the Bill seeks to regulate, namely unfair exploitation of authors and performers (it being reiterated that, under the related policy statements, these were to be directed at practices in the music industry), but will also impact on contract terms which are entirely legitimate and common in all industry sectors that trade in copyright goods. By placing these limitations on the freedom to contract for terms which are otherwise legitimate, the question is whether this limits all trade in copyright-protected goods and as such becomes a limitation on the freedom of trade guaranteed by Section 22 of the Constitution.

Whereas the practice of a trade may be regulated by law in terms of Section 22, the provisions set out above amount to a wholesale replacement of existing business practices, whether legitimate or, in the cases found in the CRC Report, illegitimate. **In the writer's considered opinion**, these measures amount to far more than regulation of a trade and are therefore not legitimised by the second sentence of Section 22 of the Constitution.

- 2.21. As in the case with the exceptions, the analysis of whether these limitations are in fact limitations on the freedom to trade and, if so, whether they meet the test of Section 36 of the Constitution, has not been undertaken by the dti or the Portfolio Committee. Considering the limited nature of the instruction, it cannot be up to the members of the Technical Panel of Experts to undertake this work.

- 2.22. **In the writer's opinion, less restrictive measures**⁴² could have been taken to address those of the purposes behind these provisions where shortcomings had been identified by investigation and research (such as the CRC Report), and that it is not necessary to undermine all freedom to contract in all copyright industry sectors.

⁴² To underscore the point about alternative measures, para 5 below describes the obligation under National Treatment in relation to the unwaivable rights by authors to a royalty in new Sections 6A, 7A and 8A, that non-South African authors will also benefit from these provisions. Non-South African authors will, as a result, have claims against South African copyright owners. This was clearly not the intention of the policymakers.

3. Constitutionality – Retrospective effect of certain provisions relating to the unwaivable rights by authors to a royalty and the 25-year limit on assignments of copyright already made, and their compliance with the Bill of Rights

- 3.1. Two sets of provisions in the Bill have retrospective effect, namely those introducing the claim that authors of literary, musical, artistic and audiovisual works will have to those works in which they have assigned the copyright before the amendment act comes into force, in Sections 6A, 7A and 8A, introduced by Clauses 5, 7 and 9, with Clause 38(2) (referred to in this para 3 as the “authors’ royalty provisions”), and the limit of the term of an assignment of copyright by an author of a literary or musical work to 25 years where such an assignment was made before the amendment act comes into force, in the Section 22(3), as to be amended by Clause 23(b).
- 3.2. It is understood that the purpose of these clauses is to be restorative, in other words, to come to the aid of South African authors who have in the past, before the amendment act comes into operation, made such assignments of copyright in literary, musical and artistic works and of audiovisual works that they have made to their detriment. These provisions are intended to have the effect of providing relief to authors, composers and artists who have found themselves in this predicament as a result of not having been fairly remunerated for their work.
- 3.3. However, the authors’ royalty provisions apply to assignments of copyright in *all* literary, musical, artistic and audiovisual works, and the 25-year limit on assignments applies to all literary and musical works assigned to producers, irrespective of whether the mischief complained of apply to a given case of an assignment of copyright or not.

By way of illustration, these provisions will also apply to a case where the author was overpaid for the assignment of copyright, in a case where the copyright owner suffered a loss in investing in the copyright work, and in cases where the copyright owner has not yet recouped the investment made in the copyright work by reference to the amount of the advance paid to the author (a common practice in the literary and publishing industry).

- 3.4. The impact of these provisions is that authors of these works will gain rights in copyright works that they had previously divested, at the expense of the current owner of the copyright, whose rights will first be impacted upon by an obligation to pay a royalty which did not exist before the amendment act comes into force, and then deprived of the copyright in the work altogether when the 25-year limit expires.
- 3.5. Although there is no legal bar against legislative provisions that are retrospective, retrospective provisions that interfere with rights under the Bill of Rights, such as Section 25(1) of the Constitution, are subject to constitutional challenge.

3.6. Noting the court decisions that intellectual property, including copyright, are property for the purpose of Section 25(1) of the Constitution,⁴³ **the authors' royalty provisions and the 25-year limit on assignments in respect of assignments undertaken before the amendment act comes into operation will amount to a deprivation of such property.**⁴⁴

3.7. The indiscriminate impact of these retrospective provisions, going far beyond the stated policy statements, amount to an arbitrary legislative measure. This is even more so because the current copyright owner, who will be liable for the royalty **under the authors' royalty provisions or who stands to be divested of the copyright** in the work due to the 25-year limit on assignments, may well be a successor-in-title who had no control or influence over the terms of the original assignment of copyright.

It is not understood how the intervention by the Minister by prescribing regulations for process **in relation to the authors' royalty provisions** will ameliorate the impact of these provisions. The establishment of a process to undertake a deprivation of property is still a deprivation of property.

3.8. It has already been noted that the 25-year limit on assignments by the amendment to Section 22(3) is a mistaken application of the recommendations of the CRC Report, and that the revision of Clause 23(b) in the Bill mistakenly removes the formalities for the assignment of copyright from most assignments.⁴⁵ A further flaw is that the clause does not take chains of title into account, namely the fact that the copyright in a work that has been assigned, can be on-assigned in separate transactions all happening at future dates, for an unlimited number of times until the copyright term comes to an end.

3.9. This deprivation of existing property rights by the Bill, which will become a limitation of rights by a law of general application, has to be tested against Section **36 of the Constitution, namely whether "the limitation is reasonable and justifiable** in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve **e the purpose."**

3.10. This advice shows⁴⁶ that the **authors' royalty provisions and the 25-year limit on assignments** have consequences that were entirely unintended, when compared to the policy statements underlying the Bill and assuming their accuracy. These

⁴³ See footnote 25 above, referencing the Constitutional Court decisions in the *Laugh It Off* and *Opperman* cases.

⁴⁴ See *Jordaan v. Tshwane City* 2017(2)SA295(GP) relating to legislation imposing liability for past arrear rates on immovable property on the current owner despite the current owner not having incurred the liability.

⁴⁵ In para 1.3(c) above.

⁴⁶ Paras 5, 11 and 13.

provisions were not the right ones to achieve those policy objectives, and the writer believes that there are other solutions which could have been adopted for those historical cases where injustice was identified. Solutions to remedy these injustices do not need to impact on the Constitutional rights of all copyright owners who obtained their rights by assignment. On that basis alone, namely that there are less restrictive means to achieve the purpose, the expropriate nature of the retrospective provisions **of the authors' royalty provisions and the retrospective** effect of the 25-year limit on assignment fail to qualify under Section 36, and that they are likely in contravention of Section 25(1) of the Constitution.

4. Treaty compliance – ‘Fair use’, new copyright exceptions, coupled with contract override: compliance with Berne, TRIPs, WCT, WPPT and the Beijing VIP Treaty

4.1. South Africa is a member of both Berne and TRIPs.

South Africa became a member of TRIPs with effect from 1 January 1995 and thereby bound itself to all the provisions of Berne that are relevant for this advice. South Africa is therefore bound to TRIPs and Berne in terms of Section 231(5) of the Constitution. Under Section 231(5), as read with Sections 1(c) and 2 of the Constitution relating to its supremacy, these international agreements are also binding on the Legislature, a consequence which is directly relevant in the development of legislation to the extent that the international agreements place obligations on South Africa in respect of what terms of such legislation may contain.

The legal effect of South Africa’s membership of Berne is complex. South Africa deposited its own instrument of accession to Berne in 1928, but that instrument was a “**declaration of continued application**” following the accession by the United Kingdom on the part of itself and all of its colonies in 1887.

The material provisions of Berne referred to in this advice are in Articles 1 to 21 and the Appendix. These provisions were introduced to Berne by its Paris Act in 1971. **South Africa’s accession to the Paris Act in 1975 “do not apply to Articles 1 to 21 and the Appendix.”⁴⁷**

South Africa’s obligations to Berne’s Articles 1 to 21 and the Appendix came about in an indirect manner, by South Africa’s membership of the World Trade Organisation (WTO) and its accession to TRIPs taking effect from 1 January 1995. Article 9 of TRIPs states that members of the WTO will comply with Articles 1 to 21 and the Appendix of Berne. This means that since 1995, South Africa is bound to all other members of the WTO that it will comply with the Paris Text of Berne.

The purpose of adopting **the Act in 1978 was to bring South Africa’s copyright law** in line with the Paris Act of Berne, without South Africa having acceded to the substantive provisions of Articles 1 to 21 and the Appendix.

4.2. The Explanatory Memorandum indicates that it wants to have the Act “strategically aligned” with other treaties on copyright and that South Africa will be able to accede to them, with WCT, WPPT and the Beijing AVP Treaty being specifically mentioned. There is no unequivocal policy statement that South Africa actually undertakes to accede to the latter treaties,⁴⁸ and the overall impact study on

⁴⁷ The record of South Africa’s membership of Berne is on WIPO’s website at http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1026C.

⁴⁸ A useful reference work on Berne, WCT and WPPT is the *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, WIPO publication No. 891 (E), 2003

ratification of WCT and Berne recommended by the CRC Report has not been undertaken.

- 4.3. This para 4 **considers whether the 'fair use' provision and the new copyright exceptions** in Sections 12A, 12B, 12C, 12D, 19B and 19C introduced by Clauses 13, 19 and 20,⁴⁹ as read with other provisions in the Bill with which they interact, notably the contract override clause in new Section 39B by Clause 34, and the legal framework into which these provisions are inserted, mean that South Africa will meet its existing obligations under Berne and TRIPs and whether these provisions would be compliant with WCT, WPPT and the Beijing AVP Treaty if South Africa were to accede to them.

In order to consider compliance and the alignment of these provisions in the Bill with the treaties, it is first necessary to consider the principles of international law on the interpretation of treaties, the objects and purposes of these treaties, and then to consider the obligations of their member states in crafting copyright exceptions and limitations, which obligations are set out in the so-called Three-Step Test detailed below.⁵⁰

This paragraph also looks at whether the Bill meets the requirement of WCT in respect of the right of distribution and in respect of **the fact that the 'digital rights' have not been extended to computer programmes**. It also considers whether the requirements of WPPT have been met with the amendments to Section 9A in respect of **the 'digital rights' for sound recordings**.

- 4.4. Articles 31 and 32 of the Vienna Convention of Law of Treaties (the "Vienna Convention")⁵¹ set out the rules on the interpretation of international treaties:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(the "WIPO Guide and Glossary"), at http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

⁴⁹ Other considerations apply to the disability exception, Section 19D inserted by Clause 20, which also relates in part to the Marrakesh VIP Treaty.

⁵⁰ Paras 4.4 to 4.23 and 6.3 have their origin in the work of Dr. Mihály J. Ficsor, former Assistant Director General of WIPO, *Conflict of the Canadian legislation and case law on fair dealing for educational purposes with the international norms, in particular with the three-step test* (2018), adapted with permission of the author. The writer is deeply indebted to Dr Ficsor for being able to rely on his work for these sections of this advice.

⁵¹ The Vienna Convention was signed on 23 May 1969, and entered into force on 27 January 1980. Although South Africa is not a party to the Vienna Convention, it considers itself bound to it. See the statement on the website of the Department of International Relations & Cooperation at <http://www.dirco.gov.za/chiefstatelawadviser/general.html>.

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

In, principle, these interpretation rules of the Vienna Convention do not apply to Berne since its last act, the Paris Act, was adopted in 1971 (and an insubstantial amendment in 1979), before the Vienna Convention entered into force. However, the rules are still relevant and applicable for two reasons: first, they are generally regarded as a codification of the customary rules of interpretation of treaties and, secondly and more importantly, because the substantive provisions of Berne, including its Appendix, have been included by reference as integral parts of TRIPs⁵² (in that case, without the provisions on moral rights) and WCT adopted in 1994 and 1996 respectively, after the entry into force of the Vienna Convention.

4.5. The object and purpose (the objective) of Berne are determined in the only substantive paragraph of its Preamble in this way:

The countries of the Union, being equally animated by the desire *to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works...* **[have agreed as follows]:**
[Emphasis added.]

This means that the object and purpose of Berne — which in accordance with Article 31.1 of the Vienna Convention must be taken into account for the interpretation of its provisions, including those on possible

⁵² See Article 9.1 of TRIPs and Article 1(4) of the WCT.

exceptions and limitations – **is to protect authors' rights**⁵³ as effectively as possible. **The public interest of protecting "as effective as possible" protection of authors' rights has always been balanced with other public interests. It has taken place through "permitting" the performance of acts covered by authors' rights as exceptions and limitations confined – limited**⁵⁴ – to certain special cases provided that the relevant conditions prescribed in Berne are fulfilled.

If not only the object and purpose but also the context of Berne, in particular the way in which exceptions are provided in it, is taken into account (under Article 31.1 of the Vienna Convention it must be taken into account), it may be seen that the theory of so-called "user rights" is not only an unknown concept in Berne's text, but it also contradicts its spirit and letter.

In the context of Berne (and thus also of TRIPs and the WCT, into which its relevant provisions have been included by reference), the protection of the exclusive rights of authors is the main objective and rule and the exceptions to and limitations of those rights are just as they are called: limited exceptions and limitations.

- 4.6. The object and purpose of TRIPs do not differ in substance; just it contains further guarantees for effective protection – namely, through detailed provisions on the obligations to enforce intellectual property rights, including copyright, and by extending the efficient WTO dispute settlement mechanism to these rights, foreseeing trade sanctions against those WTO Members which may violate their obligations under the Agreement.

The object and purpose of TRIPs is indicated, in the first paragraph of its Preamble, in this way:

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade; [*Hereby agree* as follows]

Thus, the basic object and purpose are to regulate the protection and enforcement of intellectual property rights in an effective and adequate manner. At the same time, it is also stated in Article 7 of TRIPs, that this should be done in a balanced way. The balance is ensured through duly determined exceptions and limitations to be interpreted and applied under the control of the Three-Step Test.

⁵³ The emphasis is on the protection of authors' right as also in the case of Article 27(2) of the Universal Declaration of Human Rights on authors' rights as human rights. However, the second sentence of Article 2(6) of Berne clarifies that the rights protected also apply to successors-in-title of authors such as their heirs and as publishers on the basis of contracts concluded with the authors.

⁵⁴ As also quoted and discussed below, Article 13 of the TRIPs Agreement on „Limitations and Exceptions" begins in this way: „Members shall *confine* limitations or exceptions to exclusive rights to special cases..." [Emphasis added.]

- 4.7. The object and purpose of the WCT is stated in its Preamble in the same way as in Berne:

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible, [Have agreed as follows]

The need for balancing of interests is confirmed in the Preamble by:

[r]ecognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

In this preamble paragraph, reference is made to “the *rights* of authors and the larger public *interests*” (emphasis added); that is, authors’ *rights* granted under WCT are to be balanced with *interests*. This is relevant in view of Bill’s numerous references in its copyright exceptions to terms such as “users”, “use” and “access.”

It is also indicated clearly in this preamble paragraph that what is needed and foreseen is not shifting, but maintaining the balance existing under Berne. Certain aspects of public interests – **namely, “education, research and access to information”**– are specifically referred to in the preamble paragraph. It is exactly with respect to these interests that Berne *permits* certain specific limitations and exceptions. The text of the paragraph itself underlines this in clarifying that what **is meant is a balance “as [already] reflected in the Berne Convention.”** It is quite obvious that the WCT Diplomatic Conference did not intend to change the concept and nature of balancing of interests always present in Berne.⁵⁵

- 4.8. A new concept introduced by WCT, in addition to confirmation of the old principle **of balancing of the protection of authors’ “rights”** with other public “interests” in the form of exceptions and limitations, is reference to *the public interest of an “effective and adequate protection” of copyright* by:

[e]mphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

This clarification identifies the public interest justifying „effective and adequate” protection of authors’ rights (protection served through the provision of *rights* balanced through *exceptions to and limitations* in limited special cases under duly determined conditions in recognition of *other public interests*).

⁵⁵ It is to be noted that an agreed statement concerning Article 10(2) of WCT confirms the principle of “unchanged balance,” since it reads as follows: “It is understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

- 4.9. The Three-Step Test for the applicability of exceptions to and limitations of copyright was introduced at the Stockholm revision conference in 1967 and became part of the Paris Act of Berne in 1971. The Three-Step Test introduced in 1971 is set out in Article 9(2) of Berne as conditions for the application of exceptions to and limitations of the right of reproduction as follows:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works *in certain special cases, provided that* such reproduction *does not* conflict with a normal exploitation of the work *and does not* unreasonably prejudice the legitimate interests of the author.

(Emphasis added to highlight the structure of the provision.)

The Three-Step Test offers both flexibility and determines the limits beyond which national laws are not allowed to go in establishing exceptions and limitations to the exclusive right of reproduction.

- 4.10. Article 13 of TRIPs has extended the test to all exceptions to and limitation of the exclusive rights under copyright:

Limitations and Exceptions

Members shall *confine* limitations or exceptions to exclusive rights *to certain special cases which do not* conflict with a normal exploitation of the work *and do not* unreasonably prejudice the legitimate interests of the right holder.

(Emphasis added to highlight the structure of the provision.)

This provision is basically the same as in Article 9(2) of Berne, but it also **emphasizes the limited (“confined”) nature of the special cases. Article 13 appears** after all the other provisions of TRIPs on copyright. Therefore, it goes without **sayings that the expression “limitations or exceptions to exclusive rights” means** any exceptions or limitations to any exclusive rights to be protected under TRIPs, including those which follow from the obligation of complying with Berne; that is:

- a) to all the specific *exceptions* to the right of reproduction (under Articles 10, 10*bis* and 11*bis*(3) of Berne) and the so-called **“minor exceptions” to the right** of public performance;
- b) to all the specific limitations (under Article 11*bis*(2) and 13(1) of Berne); and
- c) to any possible exceptions to, or limitations of, the exclusive right of rental not covered by Berne but provided, for certain categories of works, by TRIPs.

- 4.11. In WCT, the Three-Step Test was also extended to all exceptions and limitations; both (i) to those which are specifically provided in Berne in certain specific cases; and (ii) to any possible exceptions to or limitations of those rights which have been newly recognized under WCT.

The rights newly recognized by WCT rights were the right of distribution (which may also be considered to be an indispensable corollary of the right of

reproduction) and the exclusive right of (interactive) making available to the public (which, in the case of copyright may also be regarded as a combination of the existing right of communication to the public and the right of distribution). These are the so-called 'digital rights' that the Bill intends to incorporate in the Act (see para 1.4(a) above).

Article 10 of WCT provides as follows:

(1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 10(2) of WCT refers to limitations or exceptions provided for in Berne. This does not allow any interpretation other than that the second and third criteria of the Three-Step Test must be taken into account also for the application of the specific exceptions and limitations provided in WCT.

4.12. In 2000, the Three-Step Test was interpreted by two WTO dispute settlement panels; first, in a patent case (not relevant to this advice) and then in a copyright case⁵⁶ (see para 4.14 below). The panel reports have confirmed that the test is a workable and effective means to establish and maintain due balance of interests.⁵⁷

4.13. The continued adequacy of the test – also in view of new technological, business method and social developments – has been confirmed in WPPT and the Beijing AVP Treaty.⁵⁸

4.14. The titles of Article 13 of TRIPs and the relevant provisions of WCT and WPPT refer to **"Limitations and Exceptions."** In accordance with the ordinary meaning of the words, an "exception" means that the given acts are exempted from the application of the right concerned (no authorization is needed and there is no obligation to pay remuneration), while a "limitation" means that, although the right is applicable, it is limited in a certain way (an exclusive right is limited to a mere right to remuneration or to a compulsory license).⁵⁹

⁵⁶ WT/DS160/R of 15 June 2000 (*United States — Section 110(5) of US Copyright Act*) (the "WTO Copyright Report"). Index page for this case on the WTO website is https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm.

⁵⁷ The copyright panel determined on the basis of Article 13 of TRIPs, the scope of exceptions to performing rights in a broader manner than what is generally the case, e.g., under European copyright laws.

⁵⁸ Article 16 WPPT and Article 13 of the Beijing AVP Treaty.

⁵⁹ See the definitions under the title „Exceptions and limitations" in *WIPO Guide and Glossary*, pp. 286-287.

The ordinary meaning of the terms “limitations” and “exceptions” themselves show that the rule is that the rights granted in the treaties must be protected and that they may only be limited and exceptions may only be applied to them in certain specific cases provided that the further conditions under the three-step test are fulfilled too. As quoted above, the TRIPs Agreement also stresses that the limitations and exceptions must be *confined (limited)* in the way determined in Article 13. This quite clearly indicates that, under the Agreement, exceptions and limitations may only be applied if they fully correspond to the three criteria of the test. Therefore, the Copyright Panel has stated this at the very beginning of its analysis of the test:

It may be noted at the outset that Article 13 *cannot have more than a narrow or limited operation*. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was *not intended to provide for exceptions or limitations except for those of a limited nature*.⁶⁰
[Emphasis added.]

Structure of the Three-Step Test

- 4.15. The Three-Step Test, in all its manifestations in Berne, TRIPs, WCT, WPPT and the Beijing AVP Treaty, starts with a basic condition, namely that an exception or limitation may be applied only in – must be confined to – *certain special cases*. The two additional conditions determine how exceptions and limitations must be confined. First, they *must not conflict with a normal exploitation* of (the rights in) works. Second, even if there is no such conflict, they *must not unreasonably prejudice the legitimate interests of the owners of rights*.

Although this kind of step-by-step application of the test clearly follows from the text of the relevant provisions themselves, and from their negotiation history (the so-called “preparatory work”), **it is also explicitly confirmed in the form of an agreed statement presented by the Chairman of Main Committee II of the 1967 Stockholm Diplomatic Conference dealing with the revision of the Berne Convention (and approved by the Committee unanimously) where the “mother of three-step test provisions” – Article 9(2) – was adopted.** It reads as follows:

*“If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.”*⁶¹
(Emphasis added)

⁶⁰ WTO Copyright Report, para. 6.97.

⁶¹ See *Records of the Intellectual Property Conference of Stockholm, June 11 to 14, 1967*, WIPO, 1971 (hereinafter: *Records of the Stockholm conference*), pp. 1145-1146.

The WTO Copyright Report stated:

The principle of effective treaty interpretation requires us to give a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of the conditions to "redundancy or inutility".⁶² *The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed.*⁶³

The three conditions of the Three-Step Test

- 4.16. The first condition of the Three-Step Test is that an exception or limitation may only be applied in "certain special cases." There has always been agreement that this criterion means that the scope of application of an exception or limitation must be duly limited; it must not result in a general open-ended exemption from the obligation to protect copyright. The really substantial criterion determining the *special* nature of the test is that there should be a *sound legal-political justification for the application of an exception or limitation*. Thus, the criterion of "special case" is both of a quantitative and of a qualitative-normative nature – in other words: "How broad is the scope of the case?" and, "How important is it?" This follows from the very objective of the test – namely, due balancing of interests.
- 4.17. The second criterion is that an exception or limitation must not conflict with "a normal exploitation of (the rights in) the works." "Exploitation" means extraction of the economic value of rights. "Normal exploitation" is both an empirical and a normative concept. It means "all forms of exploiting a work which [has], or likely to acquire, considerable economic or practical importance."⁶⁴ The reference to possible future forms of exploitation may be regarded in itself as a normative – rather than a mere empirical – criterion. The meaning of the word "conflict" is also quite clear, and the documents of the negotiation history further clarify it in the sense that an exception or limitation "should not enter into economic competition with [the rights in the] works."⁶⁵
- 4.18. It is the third step where the fine tuning of an adequate balance of interests may take place. An exception or limitation may cause certain prejudice to the legitimate interests of owners of rights (interests to obtain remuneration to recoup their creative and financial investments with reasonable profit that may guarantee sustainable creation of works), but it must not be of an unreasonable nature. The principle of reasonable proportionality should prevail.⁶⁶

⁶² (Footnote in the original text) Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, p. 23.

⁶³ WTO Copyright Report, para. 6.97.

⁶⁴ See *Records of the Stockholm conference*, p. 112.

⁶⁵ See *Records of the Stockholm conference*, p. 112. For further analysis, see *WIPO Guide and Glossary*, pp. 58-59.

⁶⁶ For further analysis, see *WIPO Guide and Glossary*, pp. 59-60.

Application of the Three-Step Test for specific exceptions and limitations allowed under Berne

- 4.19. The provisions of Article 13 of TRIPs, Article 10 of the WCT, Article 16 of the WPPT and Article 13 of the Beijing AVP Treaty make it clear that the Three-Step Test must control not only the introduction of possible new exceptions and limitations where these treaties (or the underlying Berne, as provided in its Article 9(2)) allow it, but – at least as regards the second and third criteria of the test – also the application of the specific exceptions and limitations permitted under Berne (**Articles 10, 10bis, 11bis(2) and (3) and 13(1) and the “minor exceptions” to the right of public performance**).

In this respect, the Three-Step Test applies as an interpretation tool for the exceptions and limitations specifically provided in Berne. In October 1996, a **document was published by WIPO on “Implications of the TRIPs Agreement on Treaties Administered by WIPO” prepared in accordance with the decision of the WIPO General Assembly.**⁶⁷ The document expressed this interpretation-tool nature of the Three-Step Test as provided in Article 13 of TRIPs in this way:

“None of the limitations and exceptions permitted by the Berne Convention, if correctly applied, conflicts with the normal exploitation of the work and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder... Thus generally and normally, there is no conflict between the Berne Convention and the TRIPs Agreement as far as exceptions and limitations are concerned.”⁶⁸

[Emphasis added.]

‘Fair use’, ‘fair dealing’ and the Three-Step Test, and its application to the Bill

- 4.20. ‘Fair use’ and ‘fair dealing’ are not recognized as specific legal concepts under Berne, TRIPs and the WCT. They are not alternatives to the Three-Step Test.⁶⁹

When reference is made to ‘fair use’, usually the **‘fair use’ doctrine in the United States** comes to mind. Under the fair use doctrine – codified in section 107 of the US Copyright Act in 1978 – the most relevant “special cases” are identified in a non-exhaustive manner.⁷⁰ Four criteria⁷¹ are listed which should be taken into

⁶⁷ *Implications of the TRIPs Agreement on Treaties Administered by WIPO*, 1996, p. 3, on WIPO’s website at http://www.wipo.int/edocs/pubdocs/en/wipo_pub_464.pdf.

⁶⁸ *Implications of the TRIPs Agreement on Treaties Administered by WIPO*, pp. 22-23.

⁶⁹ The statement in Chapter 6 of the 2013 Draft National Policy referred to in the introduction in para 1.2 above, is therefore completely incorrect and no foundation for policy seeking treaty-compliant exceptions and limitations in the Bill.

⁷⁰ “[P]urposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”

⁷¹ The second sentence of section 107 reads: “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

account to determine whether or not, in a given case, a fair use defence to copyright infringement is applicable. However, section 107 is derived from, and is inseparably linked to, an extremely rich and complex case law, and it is only along with that case law that it is meaningful. On the one hand, it is a statutory codification of the criteria of 'fair use' as developed by the US courts for many decades and, on the other hand, the well-established case law is indispensable to guarantee – along with the other statutory provisions in the Copyright Act – that the US copyright law is in accordance with the international copyright provisions and, in particular, with the cumulative conditions of the Three-Step Test. It has to be borne in mind that the United States only acceded to Berne in 1989, by which **time that nation's case law on 'fair use' was already well-developed.**

'Fair dealing' is a more widespread concept since it is applied in a greater number of countries with common law tradition. It differs from 'fair use' in that the scope **of possible "special cases" is determined in an exhaustive manner, while the establishment of fairness is left to the courts.**

4.21. The Bill, in Clause 13, introduces **certain purposes in the 'fair use' clause, Section 12A, which do not appear in the US 'fair use' provision, nor in the current 'fair dealing' provisions of the Act,** namely:

- "personal use, including the use of a lawful copy of the work at a different time or with a different device education"
- "scholarship, teaching and education"
- "illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche"
- "preservation of and access to the collections of libraries, archives and museums"
- "ensuring proper performance of public administration."

4.22. There is no indication that either the dti or the Portfolio Committee took the **Three-Step Test into account in developing and adapting the 'fair use' provision** and the new copyright exceptions, together with their expanded application as a result of the contract override clause.

The SEAIS Report does not mention the Three-Step Test as a factor in assessing these provisions of the Original Bill. Nowhere is the normal exploitation of copyright works by copyright owners (the second step) mentioned; as a result of this failure, prejudice to copyright owners, and whether or not that prejudice is unreasonable or not (the third step) cannot even be evaluated. Indeed, apart from reciting the provision that would eventually be taken up in Clause 13, there is

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- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work."

no motivation for the bulk of these additions to the subject matter of 'fair use', compared to the US provision.⁷²

This failure, in itself, is already an indication that the entire framework of copyright exceptions introduced in the Bill, especially what has been **described as the "hybrid model grounded in fair use" comprising Sections 12A, 12B, 12C(1)(b), 12D, 19B and 19C** introduced by Clauses 13, 19 and 20, has not been measured against the Three-Step Test, thereby resulting in a material risk of South Africa coming into conflict with its obligations under Berne and TRIPs.

In the remaining part of this para 4, **specific 'fair use' purposes and copyright exceptions** in the Bill are compared against the Three-Step Test, which, in the absence of any research by or for the drafters of the Bill and the constraints of this advice, are illustrative only.

4.23. The Bill's application of 'fair use' to "education" and "teaching", and implications of the Three-Step Test

The educational market has always been a legitimate market for copyright goods, served by copyright owners and persons acting with their authorisation. Having said that, copyright exceptions to the right of reproduction for certain specified educational purposes have always been granted since the establishment of the international copyright system with the adoption of Berne in 1886. Under Berne, and therefore also under TRIPs and WCT into which its relevant provisions have been included by reference, a specific exception is provided in Article 10(2) for illustration for teaching:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

On the basis of Article 9(2) of Berne, Article 13 of TRIPs and Article 10 of the WCT other exceptions (free uses) or limitations (allowing uses but against payment of remuneration) may also be applied subject to the conditions of the Three-Step Test.

On the other hand, "education" is not an allowable fair dealing purpose traditionally, having only been introduced in Canada in circumstances that are very

⁷² The only points in the SEIAS Report where this is dealt with are in statements that "the CIPC might incur costs in employing staff that will deal with applications for fair dealings and uses" and that "the CIPC would need to put in place systems and processes for the administration of copyright works for fair use," both of which are incorrect in material respects.

contentious.⁷³ **“Education”** is a much broader concept than **“teaching”** and it is an even less suitable candidate to be recognized, without any further criteria, as a **limited “special case” in the sense in which it is provided as the first condition of the Three-Step Test.**

In the US, through adequate interpretation and application of the scope of allowable uses and the four basic factors,⁷⁴ real balance seems to have been achieved between efficient protection of copyright and limited exceptions in **relation to “teaching.”** This is due to the way the US Congress prepared and **adopted the provisions on fair use in section 107 with “teaching (including multiple copies for classroom use)” listed among allowable uses.**

The scope of the term **“teaching”** (but not its meaning) became more precisely determined in the Stockholm Act on Berne. The report of Main Committee II of **the revision conference contains a definition of “teaching” in the form of a kind of agreed statement in the following way:**

The wish was expressed that it should be made clear in this Report that the word **“teaching” was to include teaching at all levels** – in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the public but not included in the above categories, should be excluded.⁷⁵

The exception under Article 10(2) of Berne may only **be applied “to the extent justified by the purpose.”** The text of paragraph (2) determines the purpose of the exception clearly: **“utilization... by way of illustration... for teaching.”** The basic meaning of **“illustration,”** in the context of teaching, seems to have the meaning of explaining something by offering examples. It also suggests that there should be appropriate proportionality between what is supposed to be illustrated and the illustration. From this in itself, certain limitations follow regarding the permissible purposes and extent of this free use.

As regards the **requirement of compatibility with “fair practice,”** the records of the 1967 Stockholm revision conference do not contain any specific indication what may be regarded fair. However, also in this case, the Three-Step Test under Article 9(2) of the Convention is a reliable basis to determine the limits of the scope of this exception, the more so because it was adopted by the same Diplomatic Conference.

The Bill takes none of this into account. **By including “illustration” with “parody, satire, caricature, cartoon, tribute, homage or pastiche” in Section 12A(1)(a)(v), it no longer is linked to “teaching”, as is the case in the US provision.** This drafting

⁷³ Ficsor, *Conflict of the Canadian legislation and case law on fair dealing for educational purposes with the international norms, in particular with the three-step test* (2018), at paras 8.3-8.5.

⁷⁴ See, for instance, *American Geophysical Union v. Texaco, Inc.*, 60 F.3rd 913 (2d Cir. 1995).

⁷⁵ See *Records of the Stockholm conference*, p. 1148.

has serious implications for copyright in artistic works, in that a person illustrating his work (say, a book or a website page) with an artistic work of another without **permission or reward could now be permitted by 'fair use' under Section 12A.**

This example shows how material parts of Section 12A inserted by Clause 13 of the Bill do not meet the Three-Step Test.

4.24. **Application of 'fair use' to "preservation of and access to the collections of libraries, archives and museums", and implications of the Three-Step Test**

It is hard to understand how 'fair use' coupled with its criteria to be taken into account to determine whether or not (whether either the four factors under the test in the United States or the five factors in Singapore), can ever be a basis for a copyright exception for preservation of copyright content without permission. Either, after consideration of treaty obligations and national law, a policy decision is taken to pass a copyright exception to allow libraries – at least after determining which libraries should qualify for this benefit – to digitize the whole of their respective collections in the interest of preservation, or not; the 'fair use' criteria should be immaterial.

This provision in Section 12A(1)(a)(vi) is clearly a misapplication in the drafting following the *Hathi Trust* case allowing US libraries to digitize their holdings for certain purposes benefiting visually impaired persons considered to be 'fair use' in the United States.⁷⁶ **The Court's finding of 'fair use'** related to the object of the digitization exercise and its transformative nature, not the act of digitization itself.

It is the purpose of "access to" that is extremely problematic. Either "access" is not an act covered by one of the exclusive rights of copyright, in which case no exception is necessary, or it is, in which case, if the conditions for it exist, a copyright exception must be provided. As indicated in para 1.2(a) above in relation to the Draft National Policy, and confirmed by the context in which this term appears in the Bill and by para 10 of the SEIAS Report, "access" is meant to describe acts of reproduction and other acts reserved to the copyright owner under the exclusive rights. Therefore, to the extent that the term "access to" in Section 12A(1)(a)(vi) allows unbridled acts of unpermissioned and unremunerated reproduction, the provision is in conflict with the 'fair use' factors in Section 12A(1)(b) – and should therefore not even be part of an illustrative purpose for 'fair use' - and in conflict with the second and third steps of the Three-Step Test.

4.25. **Application of 'fair use' to "proper performance of public administration", and implications of the Three-Step Test**

"Proper performance of public administration" is extremely vague and broad as a purpose for a 'fair use' defence to copyright infringement. Government is a

⁷⁶ *Authors Guild, Inc. v. Hathi Trust* 755 F.3d87 (2d Cir. 2014), a decision of the United States Court of Appeals for the Second Circuit.

legitimate market for copyright goods. In the premises, this ground does not even **meet the first test of a “special case” under the Three-Step Test.**

4.26. Application of the Three-Step Test to specific copyright exceptions in Sections 12B, 12C(1)(b), 12D, 19B and 19C introduced by Clauses 13, 19 and 20 of the Bill

As mentioned above, nowhere in the documentation backing the Bill, notably the SEIAS Report, has any case been made out that any of the numerous individual copyright exceptions introduced by Clauses 13, 19 and 20 if the Bill meet the conditions of Berne or TRIPs, or any of the other treaties, and especially the Three-Step Test.

The same provisions identified above that the writer contends will amount to an unconstitutional deprivation of property,⁷⁷ will not meet the second or third steps of the Three-Step Test:

- 4.26.1. **The remnant of the ‘fair dealing’ exception for quotation in Section 12B(1)(a)(i) inasmuch as it is defined by the third party’s purpose and not ‘fair practice’, leading to substitution of the copyright work.**
- 4.26.2. The exception allowing reproduction by broadcasters in Section 12B(1)(c), inasmuch as it relates to cinematograph films.
- 4.26.3. The exception allowing any reproduction in the press, broadcast of communication to the public of articles in the press where the right thereto has not been expressly reserved in Section 12B(1)(e)(i) (which, by requiring formalities as a condition for copyright protection, is also is not compliant with Article 5(2) of Berne).
- 4.26.4. The translation exception in Section 12B(1)(f) (also noting that in terms of the Article 2(3) of Berne, the protection of a translation of a work cannot prejudice the copyright in the original work and that in terms of Article 8 of Berne, copyright expressly includes the exclusive right of making and of authorizing translation).
- 4.26.5. The exceptions for education purposes in Section 12D(1) and (3), 12D(2), 12D(4), 12D(6), 12D(7) (in reality a transfer of control over affected copyright works to libraries).
- 4.26.6. The library exceptions in Sections 19C(3) (complicated by the uncertain **meaning of the term “access”**), 19C(4), 19C(5)(b) (insofar as it relates to placing works reproduced for preservation on publicly accessible websites) and 19C(9), all as read with Section 19C(1).

These provisions are dealt with in greater detail in para 17 below. As a general observation, the qualification in relation to these copyright exceptions that the excision of acts done for **“commercial” purposes** (as defined in the Bill, and as appears in new Sections 12D and 19C) from these exceptions, is irrelevant to the determination of the second and third steps of the Three-Step Test.

⁷⁷ Para 2.18 above.

The exclusive right of 'distribution' under WCT

4.27. The Bill's repeal of Section 23(2)(b) of the Act

The copyright owner's right of distribution in terms of the Act is called a secondary right of copyright, since it appears, not under the exclusive rights, but under the infringement provisions in Section 23(2) of the Act.

Article 6 of WCT requires copyright owners to be vested with the exclusive right of **distribution, defined as the right to authorise "the making available to the public of the original and copies of their works through sale or other transfer of ownership."**

Since the overall impact study on South Africa's ratification of WCT recommended by the CRC Report has not been undertaken, there is no definitive assessment whether the Act, the relevant provisions of which are Section 23(2), as it stands, and Sections 45 and 45A (neither of which are in operation, despite having been on the statute books since 1978 and 1983 respectively), meets the requirements of WCT in respect of the right of distribution. To undertake this exercise falls outside the scope of this advice.

Clause 26(b) repeals Section 23(2)(b) of the Act, which is one of the distribution rights, stating that it is an act of infringement to sell, let or by way of trade offer or exposes for sale or hire an article if, to the knowledge of the infringer, the making of that article constituted an infringement of that copyright.

There is neither a policy statement nor a motivation for the repeal of Section 23(2)(b) in the Explanatory Memorandum, the Draft National Policy or the CRC Report, or in the proceedings of the Portfolio Committee. The repeal of Section 23(2)(b) will not be compliant with WCT and means that South Africa will not be able to ratify WCT, despite the policy statements to the contrary.

The 'digital rights' in relation to computer programmes under WCT

4.28. Extending the 'digital rights' to computer programmes and compliance with WCT

There is no policy statement explaining why the 'digital rights' have not been extended to broadcasts, published editions and computer programmes (Sections 10, 11A and 11B). Computer programmes are deemed to be literary works under Berne and WCT, and **WCT therefore requires the 'digital rights' to be extended at least to computer programmes.**

The inclusion of the 'digital right' of 'making available' in relation to sound recordings under the 'needletime' provisions and implications under WPPT

4.29. The inclusion of the 'making available' right for sound recordings as a remuneration right in Section 9A and compliance with WPPT

The Bill introduces the 'digital right' of 'making available' for sound recordings, but, by inserting it into the 'needletime' provision in Sections 9A(1)(a)(iv) by Clause 11 immediately converts that right from an exclusive right to a remuneration right. Section 9A(1)(a)(iv) is contrary to the requirements of Article 14 of WPPT.

WPPT treats the 'digital rights' of 'communication to the public' and 'making available' as two distinct rights in relation to sound recordings, with the former being a remuneration right and the other being an exclusive right. The 'communication to the public right' in respect of sound recordings already forms **part of the "needle-time" regime** in terms of Section 9A(1)(a) of the Act, as read with Section 9(e). This is consistent with the manner in which this right is dealt with under WPPT in Article 15(1).

Under the WPPT, the making available right is an exclusive right provided for in Article 10 in respect of performers and in Article 14 in respect of producers of sound phonograms (i.e. sound recordings). Article 14 of the WPPT states:

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Conclusion

The only conclusion that can be reached from this para 4 is that not only does the Bill place South Africa at risk of being non-compliant with its existing obligations under Berne and TRIPs, but that, despite the statements to the contrary in the Explanatory Memorandum, the Act, as to be amended by the Bill, will not make the Act compliant with the requirements of WCT, WPPT and the Beijing AVP Treaty.

5. Treaty compliance – Unwaivable right of authors and performers to a royalty, coupled with contract override; distributions by collecting societies to foreign rightsholders: meeting compliance with Berne, TRIPs, WCT, WPPT and the Beijing AVP Treaty

- 5.1. South Africa became a member of TRIPs with effect from 1 January 1995 and thereby bound itself to all the provisions of Berne that are relevant for this advice. South Africa is therefore bound to TRIPs and Berne in terms of Section 231(5) of the Constitution. Under Section 231(5), as read with Sections 1(c) and 2 of the Constitution relating to its supremacy, these international agreements must also be given binding **effect on South Africa's legislation** to the extent that they place obligations on South Africa.
- 5.2. The treaties relating to copyright, Berne, TRIPs and WCT, all recognise the ability of authors to authorise the undertaking of acts governed by the exclusive rights and to assign the copyright in their works, but are silent in relation to the terms of such authorisations and assignments.

Specifically, these treaties do not deal with the question of remuneration arising from authorisations to undertake the acts which are subject to the exclusive rights of copyright or arising from assignment. This is a subject dealt with by domestic law, typically under contract, but rights of contract can of course be the subject of domestic legislation – formalities for contracts and minimum standards for consumer contracts being well-known examples.

From this one concludes that member states of the treaties are free to regulate the terms of authorisations and assignments in respect of copyright – as the Act does, with formalities for assignments and exclusive licences (ironically due to be largely repealed by the Bill – see para 13) – but the treaties still contain certain confines which have to be respected.

- 5.3. Sections 6A and 7A, introduced by Clauses 5 and 7, import the right of authors of literary, musical and artistic works to royalties arising from (1) their authorisations under the exclusive rights of copyright and (2) arising out of acts undertaken or authorisations given by assignees of their copyright.

Section 8A, introduced by Clause 9, imports the right to royalties arising out of the same uses of audiovisual works by performers who appear in those audiovisual works.

In terms of Section 39B introduced by Clause 34, "To the extent that a term of a contract ... purport (*sic*) to renounce a right or protection afforded by this Act, such term shall be unenforceable." **This provision renders the authors and performers' respective** rights to a royalty unwaivable.⁷⁸

⁷⁸ In terms of Section 39B and its exclusion of "open licences" from the ambit of its contract override provisions, authors could waive their royalty rights only if they make their works available under an "open licence", "a

- 5.4. In the case of Sections 6A and 7A, where the literary, musical or artistic works have been assigned, these new rights are exercisable against the copyright owner of the work concerned based on the terms of a contract which would have been settled with the assignment of the copyright, irrespective of whether the copyright owner was a party to that contract or not. This means that the obligation for the royalty follows the copyright, somewhat like a mortgage bond over immovable property, except that, unlike a mortgage bond, this obligation is not registered on a public record and it can never be settled.

The duration of the right is not expressly spelt out. Since it is a right that cannot be waived and there are no provisions for its assignment, one assumes that it is linked to the lifetime of the author or the performer, as the case may be. The underlying policy statements only refer to the situation of the author or performer while he or she is still alive, so an express provision to this effect would have been welcome.

- 5.5. The situation in Section 8A is somewhat different, since it relates to performers whose performances are fixed in an audiovisual work, as opposed to authors, but **here, too, the performers' rights will be an obligation attaching to** the copyright in the audiovisual work, one which can never be settled. The remuneration of performers in audiovisual works is dealt with in the Beijing AVP Treaty and is dealt with separately below.

Do the rights of authors in terms of the new Sections 6A and 7A in respect of copyright that they assign impact on the exclusive rights of copyright under Berne, TRIPs and WCT?

- 5.6. The question is whether Sections 6A and 7A, insofar as they relate to assignments of copyright, read together with Section 39B, amount to a qualification of the exclusive rights of copyright and, if so, whether that qualification is in compliance with Berne, TRIPs and WCT. This advice will not attempt to answer this question. The Legislator will have to take into account that these provisions introduce a novel concept into copyright law that place limitations on the exclusive rights of copyright, and would be well advised to take full legal opinion on this question before proceeding with Sections 6A and 7A.

royalty-free, non-exclusive, perpetual, irrevocable" permission to the public to undertake all acts of copyright in respect of that work, thereby in effect renouncing their copyright entirely. This underscores the argument that the Bill, as a whole, undermines the exclusive rights of copyright and places open licences at the apex of copyright in South Africa. See paras 2.13 and 17.9.

Do the rights of performers in audiovisual works in terms of the new Section 8A meet the requirements of WPPT and the Beijing AVP Treaty?

- 5.7. Until the Performers Protection Amendment Bill, 2016, is finalised, there will be the open question whether the new Section 8A will create a right of remuneration for audiovisual performers which is in addition to the rights of remuneration that performers will have in terms of the Performers Protection Act, as amended.

In the writer's view, Section 8A should not even be in the Bill. Rights of remuneration for performers of audiovisual works should be dealt with in the Performers Protection Amendment Bill.

- 5.8. The Beijing AVP Treaty allows member states to provide for remuneration of performers in audiovisual works by way of "royalties or equitable remuneration" in relation to the rights of "making available, "broadcasting" and "communication to the public":

Article 12(3). national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

Article 10. Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 11(1). Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.

There is no basis in the Beijing AVP Treaty to allow remuneration arising from the exercise of any of the exclusive rights of copyright. Inasmuch as the Beijing AVP Treaty is there to create a balance between performers on the one hand and producers and their successors-in-title and persons acting under their respective authority on the other, it may well be argued that providing performers with rights of remuneration in respect of acts that are in excess of the grounds set out in the Beijing AVP Treaty is to the detriment to the rights that producers have under it. On this basis, Section 8A, to the extent that the acts initiating its grounds for remuneration are more than the acts referred to in Articles 10 and 11, would not be complaint with the Beijing AVP Treaty.

The consequences of National Treatment under Berne, TRIPs, WCT, WPPT, the Beijing AVP Treaty on the unwaivable rights of authors and performers to a royalty under Sections 6A, 7A and 8A

- 5.9. The consequences of the obligations under National Treatment, to which South Africa is bound under Berne and TRIPs, and which also appear in WCT, WPPT and the Beijing AVP Treaty, do not seem to have been considered in devising Sections 6A, 7A and 8A or their predecessors in the Original Bill (which were provisos to the exclusive rights). This reinforces the need to have the overall impact study done on accession to the treaties recommended in the CRC Report before the Bill is processed any further.
- 5.10. Under National Treatment, the rights of copyright legislated in South Africa must apply equally to the nationals of other treaty countries as it does to nationals of South Africa. The obligations of National Treatment are spelt out in the treaties as set out below.

Article 5(3) of Berne:

[W]hen the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

The obligation of National Treatment in Article 5(3) of Berne is imported by reference into WCT by its Article 3.

Article 3(1) of TRIPs:

Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement.

The agreed statement on the meaning of the term “protection” states that the term “shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.”

Article 4(1) of WPPT:

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the

exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

Article 4(1) of the Beijing AVP Treaty:

Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty.

- 5.11. With Sections 6A and 7A applying to rights created where an author owns the copyright and assigns it, then, under National Treatment, those rights must apply equally to South African authors and to authors of all treaty countries, currently those who are members of Berne and TRIPs. The consequence of the application of National Treatment to Sections 6A and 7A is that foreign authors who have authorised rights of use or assigned copyright to South African persons under South African law, will have an unwaivable claim against the South African rightsholders and against South African collecting societies (in terms of the new Section 22D(1)(b) and (c) and 22D(2)(b) inserted by clause 25 specifically naming authors as beneficiaries of collecting society distributions in addition to copyright owners).

The same consequence of National Treatment applies to Section 8A in respect of foreign performers in audiovisual works owned by South African copyright owners and/or where South African law applies to the contracting of their performances.

There is no policy statement foreseeing this outcome. The policy statements are clearly aimed at protecting the interests of South African authors and performers. The Explanatory Memorandum clearly only speaks of benefiting **South African authors and performers: "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."**

The linking of the right to a royalty to the rights of copyright results in this unforeseen consequence being inescapable and not something that can be corrected by making changes to these provisions. Another solution should have been found to protect South African authors and performers.

The consequences of National Treatment under Berne, TRIPs, WCT, WPPT, the Beijing AVP Treaty on limiting distributions by collecting societies to collecting societies in other member states

- 5.12. New Section 22C(3)(c) places a limitation on the payment by collecting societies (which will now have to register in terms of the Bill) of royalties meant for foreign rightsholders to collecting societies in other countries, namely:

(3) A collecting society may (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 country and the Republic.

Inasmuch as **“that country” is a member of the Berne Convention or TRIPs**, this additional requirement in Section 22C(3)(c) of concluding bilateral agreements between South Africa and other countries to permit **payment of royalties is not compliant with South Africa’s National Treatment obligations under those treaties.**

5.13. The CRC Report noted cases where certain foreign countries did not accord South African composers and performers of musical works the same remunerative rights in respect of the broadcast of sound recordings as were granted in South Africa, notably the United States. One wonders whether the new Section 22(3)(c) was drafted to address this problem. It is noted that WPPT allows for reservations by member states for these circumstances (Article 21 in respect of the rights of remuneration from broadcasts and communications to the public). The recommendation of the CRC Report in this regard should have been explored **further before resorting to a solution that does not comply with South Africa’s treaty obligations:**

[S]ound recordings that were made in countries such as the USA, which do not recognise needletime rights, will not be granted that right in South Africa. These performers and producers of sound recording should not be compensated for the use of their works by the radio stations and other public users. In line with the legal principles set out above, the CRC recommends non-payment for needletime rights where sound recordings from countries that do not recognise such rights were broadcast, played or communicated to the public.

5.14. The latest development in the United States is the passage of the Music Modernization Act through both houses of Congress last week, on 25 September 2018, with bipartisan support.⁷⁹ The Act, which provides for royalties on streaming music for composers and music publishers, is expected to be passed into law in the very near future. With the United States adopting practices in relation to remunerating uses of music and sound recordings that align more with the practices of its fellow members of Berne, one of the problems with reciprocity **in remunerating uses of music that underlay the CRC Report’s recommendation** reported in para 5.13 and therefore possibly also the ill-advised Section 22C(3)(b) of the Bill, is being removed.

⁷⁹ Report in *Variety* at <https://variety.com/2018/music/news/music-modernization-act-president-trump-signature-1202957780/>.

6. Treaty compliance – Compulsory licences in Schedule 2 of the Bill: compliance with the Berne Appendix

- 6.1. Schedule 2 of the Bill, the compulsory licences for translation and reprints introduced by Clause 35, find their origin in the Appendix to Berne, which are special rules that can only be availed by developing countries. Noting the deviations of Schedule 2 from the explicit text of the Appendix and its cross-referencing from the amended Section 23(3) of the Act (which is meant to deal with the formalities of assignments and exclusive licences) by Clause 23(b), it is clear that the origin of Schedule 2 was not something the drafters of the Bill had in mind.
- 6.2. If South Africa is a developing country as meant in Berne and it has met the requirements of Berne to avail itself of the facility made available in the Berne Appendix, then having the compulsory licences compliant with the terms of the Appendix would be unobjectionable. However, it is not clear that South Africa qualifies and, even if it does, the terms of the amended Section 23(3) and Schedule 2 would not be compliant with the Berne Appendix or with the standards set by Berne under the Three-Step Test.
- 6.3. The background to the Berne Appendix is the recognition that certain developing countries are not yet in the position of being able to fulfil some of the minimum obligations of Berne. The rules about compulsory translation and reprint licenses in the Appendix of Berne were made on the understanding that they are at a level of protection that is lower than what is determined as a minimum in the international treaties.
- 6.4. The Appendix and the related provisions in Berne were adopted in 1971 in the Paris Act – they did not exist before then. Article 21 of Berne incorporates the **Appendix as “special provisions regarding developing countries.”** To make use of the possibilities offered by the Appendix, the developing country must make a corresponding declaration to the Director General of WIPO under Article 28(1)(b). Only one such declaration was in effect by 1996, a declaration by Thailand.⁸⁰
- 6.5. **South Africa’s entitlement to avail itself of the benefits of the Appendix is complex** and for which separate legal opinion must be sought before proceeding with Schedule 2 (albeit after some adaptation of the Bill – see para 6.6 immediately below).

South Africa’s accession to the 1971 Paris Act in 1975 “did not apply to Articles 1 to 21 and the Appendix.”⁸¹ However, the purpose of the Act in 1978 was to bring

⁸⁰ *Implications of the TRIPS Agreement on Treaties Administered by WIPO*, 1996, at para 18. Available on WIPO’s website at http://www.wipo.int/edocs/pubdocs/en/wipo_pub_464.pdf.

⁸¹ See Berne Notification No 64, *Accession of the Republic of South Africa to the Paris Act (1971) (with the exception of Articles 1 to 21 and the Appendix)* at http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_64.html.

South Africa's copyright law in line with the Paris Act of Berne, without South Africa having acceded to its substantive provisions at that time.⁸²

South Africa's accession to Articles 1 to 21 and the Appendix happened in an indirect manner, by South Africa's membership of the World Trade Organisation (WTO) and its accession to TRIPs taking effect from 1 January 1995. Article 9 of TRIPs provides that members of the WTO will comply with Articles 1 to 21 and the Appendix of Berne. Within the WTO, South Africa self-identifies as a "developing country", one of the benefits of which status is that it has a longer transition period within which to fully implement terms of international agreements, albeit that such a self-declared status could be open to dispute by other WTO members. However, even on the basis of being a developing country in the WTO, the grace period for delaying implementation of TRIPs under its transitional provisions in Article 65 has long passed.

It therefore still has to be seen whether South Africa qualifies to make a notification in terms of Article 28(1)(b) of Berne in order to avail itself of the benefits of the Appendix and, as a result, introduce the compulsory licences for translations and reprints.

- 6.6. Schedule 2 therefore has no bearing on the formalities for an exclusive licence. Accordingly, the amendment to Section 23(3) of the Act by Clause 23(b) importing Schedule 2 by reference is neither correct nor compliant with Berne.

A comparison between the Berne Appendix and Schedule 2 indicates material departures between what is allowed for developing countries under the Appendix, eg:

Compulsory licences for translations in Part A –

- for "any other language" (para 2(1)(c)) compared to "language is in general use" in the Appendix,
- for "use by readers located in the Republic" (para 2(1)) compared to "only for the purpose of teaching, scholarship or research" in the Appendix
- translations sent under the licence may be sent abroad (para 4(2)), contrary to para IV(4)(a) of the Appendix.

Compulsory licences for reprints in Part B –

- the making of the reprint outside South Africa (para 4(2)), contrary to para IV(4)(a) of the Appendix,
- extension of the licence to audiovisual works (para 5), contrary to the Appendix, since the facility is only available for the reproduction of literary and artistic works.

Therefore, even if South Africa could avail itself of the facility in the Berne Appendix, the terms of the compulsory licences in Schedule 2 are not

⁸² Dean, OH, *Handbook of South African Copyright Law*, 2012, pp. xiii and xiv.

compliant with it. The terms of the compulsory licences in Schedule 2 are therefore also not compatible with South Africa's obligations under Berne.

7. Treaty compliance – Exception for persons with a disability: compliance with the Marrakesh VIP Treaty

- 7.1. The Explanatory Memorandum states that “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.”
- 7.2. Copyright exceptions and limitations for the benefit of persons with a disability can be formulated as “special case” under the Three-Step Test. Copyright exceptions for people that are blind or otherwise visually disabled or have a physical impairment that inhibits reading in respect of literary and artistic works, may be legislated under the Marrakesh VIP Treaty.

The direct benefits of accession to the Marrakesh VIP Treaty are that member states can pass into domestic law the kind of copyright exceptions contemplated by the treaty without having to measure them against the Three-Step Test (the Marrakesh VIP Treaty having been formulated with due regard to the Three-Step Test), and member states can benefit from importing accessible format copies made, without the permission of the copyright owner, in other member states under the auspices of the treaty. In addition, members which are also members of WCT can participate in the export of accessible format copies.

- 7.3. It is possible to have a single exception for all kinds of disabilities that is compliant with the Marrakesh Treaty, as Section 19D, introduced by Clause 20 of the Bill, seeks to do,⁸³ but then, inasmuch as beneficiaries of the exception in the Bill are not beneficiaries under the Marrakesh VIP Treaty and the works covered by the exception are more than literary and artistic works, the exception has to be compliant with the Three-Step Test, the first step being to ensure that the “other” disabilities being catered for are each a “special case.” For a country that seeks to accede to the Marrakesh VIP Treaty, developing such a single exception needs far more effort than developing an exception or limitation that is compliant only with that treaty.
- 7.4. The Explanatory Memorandum (at paras 1.2-1.3) states that the Bill is “strategically aligned” with the Marrakesh VIP Treaty and that its amendment of the Act will allow South Africa to accede to that treaty. The Bill proposes a single exception, but its terms meet neither the Three-Step Test nor the Marrakesh VIP Treaty, as is shown below.
- 7.5. The beneficiary under the exception in Section 19D is “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.” This definition,

⁸³ This is allowed by Article 10(3) of the Marrakesh VIP Treaty. Examples of a single exception can be found in Sections 31A to 31F of the UK Copyright, Designs and Patents Act 1988, and Sections 113E and 113F and related provisions in the Copyright Act of Australia.

although it includes beneficiaries under the Marrakesh VIP Treaty, goes far beyond that scope and, to the extent that it does so, means that its extended scope has to be tested for whether its component parts **qualify as a “special case” under the Three-Step Test**. It is likely that that definition will include persons who are not considered as disabled in common parlance, certainly including more persons than those, say, entitled to social grants from Government due to suffering from a **disability**. **The definition has the further problem of being part of a ‘circular definition’, dependent on the definition of “accessible format copy” which, in turn, is dependant on the definition of the definition of “person with a disability.”**

- 7.6. Section 19D is does not include any of the content required by Article 4 of the Marrakesh VIP Treaty, since the right to make accessible format copies for persons with a disability **is open to “any person or organisation serving the disabled”**, whereas the treaty limits that act to **“authorized entities” and “a primary caretaker or caregiver” acting on behalf of a Beneficiary**, in terms of Article 4. It therefore fails to meet the conditions for a copyright exception or limitation permitted by the Marrakesh VIP Treaty and, in the circumstances, will not meet compliance under the Three-Step Test either.

Also, Section 19D permits export of accessible format copies under circumstances where, with South Africa as a non-member of the Marrakesh VIP Treaty, could result in the South African exporter of the accessible format copy and his or her counterpart in the importing country being held liable for infringement.

- 7.7. The simplest and quickest solution would have been for the Bill to have had a copyright exception for the benefit of visually impaired persons that is compliant with the Marrakesh VIP Treaty and either to extend it to specific cases of disability **that would meet the “special case” step of the Three-Step Test**, or to develop another exception for persons with other disabilities. This, together with ratification of WCT would have enabled South Africa to participate fully in the exchange of accessible format copies under the treaty.

It bears mentioning that not only do the policy statements require South Africa to adapt the Act to bring it in line with the Marrakesh VIP Treaty, but that stakeholders who commented on it in the public participation process were, to the **best of the writer’s knowledge, unanimously** supportive. South African stakeholders are active participants in WIPO’s Accessible Books Consortium, which facilitates the distribution of accessible format copies under the treaty and promotes capacity for **“born accessible” content**.⁸⁴ It is advised that the relatively simple steps needed to draft compliant amendments for the Bill be undertaken, to the benefit of visually impaired persons and persons with other disabilities in South Africa.

⁸⁴ See the website of the Accessible Books Consortium at <http://www.accessiblebooksconsortium.org/portal/en/index.html>.

8. Treaty compliance – Bill meeting compliance with AGOA

- 8.1. South Africa is a beneficiary of the United States African Growth and Opportunity Act (AGOA), which significantly enhances **South Africa's** market access to the US. The protection of intellectual property rights is an important prerequisite for AGOA eligibility in terms of Section 104(a)(1)(C)(ii):

(1) (A country that) has established, or is making continual progress toward establishing-- (C) the elimination of barriers to United States trade and investment, including by--

- (i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;
- (ii) the protection of intellectual property

AGOA also has a measure in Section 104(b) to ensure ongoing compliance:

If the President determines that an eligible ... country is not making continual progress in meeting the requirements described in subsection (a)(1), the President shall terminate the designation of the country made pursuant to subsection (a).

Whether a beneficiary country meets the criteria is determined solely by the United States, since AGOA is not a reciprocal agreement.

- 8.2. To the extent that the Bill could be considered by the United States as an undoing of existing intellectual property protection, South Africa will place its beneficiary status under AGOA in jeopardy under Section 104 of AGOA.
- 8.3. The Bill has already been the subject of a report in the most recent annual review of country eligibility for benefits under AGOA. In a submission dated 1 August 2018, the International Intellectual Property Alliance reported on the Bill, stating:

As drafted, many provisions of the 2017 Bill lack clarity, create unnecessary burdens on rights holders, and/or fall short of needed reforms. Moreover, adoption of this bill would place South Africa out of compliance with the AGOA eligibility criteria regarding **intellectual property**. **If the 2017 Bill were adopted, South Africa's copyright** framework would not provide adequate and effective protection and enforcement of intellectual property...

These provisions are inconsistent with South Africa's international obligations under the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") and the WTO TRIPs Agreement. For example, certain provisions far exceed the scope of exceptions and limitations permitted under those agreements. Further, these provisions are incompatible with the WPPT, which South Africa has stated it intends to ratify. Finally, as indicated above, the incompatibility of these provisions with a healthy, sustainable and fair digital marketplace for creators, both domestic and foreign, run afoul of the AGOA eligibility criteria to provide adequate and effective protection and enforcement of intellectual property.

The writer is not aware whether the US Trade Representative intends taking action in response to this submission if the Bill is passed into law.

9. Specific provisions – Introductory and interpretational provisions as to the applicability of copyright

Section 2A introduced by Clause 2

- 9.1. Section 2A(1)(a) has policy backing with the Bill's intended 'strategic alignment' with WCT, since it is a repeat of Article 2 of WCT. Section 2A(1)(a) is better placed as a new Section 2(4).
- 9.2. There is no policy backing for removing "interface specifications" from copyright protection in terms of Section 2A(1)(b) and the Bill gives no indication what is meant by it.

Section 2A(1)(b) may be intended to reflect the outcome of the US case *Oracle v. Google* in the United States District Court for the Northern District of California in 2016, holding that Google's copying of Oracle's Java application programming interface to create Google's Android operating system was 'fair use'. Since the introduction of the Original Bill, the United States Court of Appeals for the Federal Circuit, has held, in March 2018, that **this copying was not 'fair use.'**⁸⁵ In that sense, Section 2A(1)(b) is out of step with international standards and therefore conflicts with the policy statement in para 2.1 of the Explanatory Memorandum.

- 9.3. Section 2A(2) and (3) contains already-settled principles of copyright law and there is no policy backing for introducing them. Their introduction would actually indicate that the Legislature intends changing already settled law. There is the additional concern that, in its attempt at codifying the existing law, its provision is imprecise, unnecessarily rendering it unclear whether components of tables or compilations (such as anthologies of poems or short stories) are still subject to copyright protection or not because they happen to be part of a compilation.
- 9.4. Section 2A(4)(a) excludes from copyright expressions that are defined in terms that are so vague to render the provision ineffective, save to allow defendants in legitimate cases of infringement to raise spurious points of dispute. In order to determine **whether an "expression" qualifies for copyright protection, regard should always be had to whether it is a work in the first place and then whether it is original** (Section 2(1)). There is no policy statement backing this exclusion.
- 9.5. Section 2A(4)(b) already appears in Section 12(8) of the Act. The case has been made in this advice (para 1.7.2) that there is no underlying policy statement to repeal Sections 12, 14, 15, 16, 17, 18, 19, 19A and 19B. If the repeal is not proceeded with, the content of Section 12A(4)(b) would be preserved in Section 12(8) of the Act.

⁸⁵ *Oracle America, Inc. v. Google LLC*, Nos. 2017-1118, 2017-1202 (Fed. Cir. Mar. 27, 2018).

10. Specific provisions – Introduction of the exclusive rights of ‘communication to the public’ and ‘making available’

Section 6(eA) and (eB) introduced and Section 6(g) amended by Clause 4

Section 7(dA) and (dB) introduced and Section 6(f) amended by Clause 6

Section 8(dA) and (dB) introduced and Section 8(f) amended by Clause 8

Section 9(e) amended and Section 9(f) introduced by Clause 10

Section 9A(1)(a)(iv) introduced by Clause 11

Sections 10, 11A and 11B not amended

10.1. The introduction of the digital rights by Clauses 4, 6, 8 and 10 are the key provisions in the Bill that will assist authors, composers and artists to earn more income from the digital environment.

However, apart from the introduction of the new ‘digital rights’, there are no provisions in the Bill that support the policy statement in para 2.4 of the **Explanatory Memorandum** that “The Bill deals with the protection of works and rights of authors in the digital environment.” **The very serious concern remains** that these new digital rights will be difficult to enforce in the online environment and that the local legal framework does little to enable infringement of these rights to be combated. This state of affairs is a direct result of the Portfolio Committee having worked on the **‘technically revised version’** of the Original Bill, which also had no such provisions.

In the circumstances, the only way to give these rights the best possible effect is to make the necessary consequential amendments to the Act that arise from **introducing the ‘digital rights’ and to** cut back on the exceptions to copyright and to TPMs and CMI, provisions which, as have already been indicated, result in material questions about deprivation of the rights of property of copyright owners under the Constitution and are in conflict with **South Africa’s treaty obligations**.

10.2. There is **no policy statement explaining why the ‘digital rights’ have not been** extended to broadcasts, published editions and computer programmes (Sections 10, 11A and 11B). Computer programmes are deemed to be literary works under Berne and WCT, and WCT therefore **requires the ‘digital rights’ to be extended at** least to computer programmes.

10.3. Section 27 needs to be amended to provide for criminal sanction for copyright **infringement in relation to the new rights of ‘communication to the public’ and ‘making available’** where the person knows that the act is infringing and the act is undertaken for his or her financial gain to the prejudice of the copyright owner.⁸⁶ It is a direct consequential amendment following the introduction of these rights and is an obvious omission.

⁸⁶ Section 107(2A) and related provisions of the United Kingdom Copyright Patents and Designs Act may be instructive; at <http://www.legislation.gov.uk/ukpga/1988/48/section/107>. Section 132AC of the Australian copyright Act considers all forms of infringement (including of the ‘digital rights’ and offence if the infringements occur on a commercial scale and result in prejudice to the copyright owner: http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca1968133/s132ac.html).

- 10.4. The cross referencing in Section 8(f) to be amended by Clause 8 is incorrect – the reference to (dA) should be to (dB).
- 10.5. There is **no reason why the words “in relation to the work” in each of Sections 6(g) and 7(f) should be deleted.** (Analogous wording in Section 8 has been retained by Clause 8.)
- 10.6. **The Bill introduces the ‘digital right’ of ‘making available’ for sound recordings, but, by inserting it into the ‘needletime’ provision in Sections 9A(1)(a)(iv) by Clause 11 immediately converts that right from an exclusive right to a remuneration right, contrary to the requirements of Article 14 of WPPT.**

WPPT treats the **‘digital rights’ of ‘communication to the public’ and ‘making available’** as two distinct rights in relation to sound recordings, with the former being a remuneration right and the other being an exclusive right. The **‘communication to the public right’** in respect of sound recordings already forms **part of the “needle-time” regime** in terms of Section 9A(1)(a) of the Act, as read with Section 9(e). This is consistent with the manner in which this right is dealt with under WPPT in Article 15(1).

Under the WPPT, the making available right is an exclusive right provided for in Article 10 in respect of performers and in Article 14 in respect of producers of sound phonograms (i.e. sound recordings). Article 14 of the WPPT states:

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

The **‘making available right’ in respect of sound recordings** extends to the digital and / or online copying of sound recordings (or the so-called **“distribution through reproduction through transmission”**), and **distribution by means of “fixed copies that can be put into circulation as tangible objects”**. In essence it is the digital and online equivalent of the right of manufacturing and selling physical records, and **therefore not a right that can be included in the ‘needletime’ regime.**

11. Specific provisions – Unwaivable right by authors of literary, musical and artistic works and the unwaivable right of performers in cinematograph films to a royalty

Section 6A introduced by Clause 5

Section 7A introduced by Clause 7

Section 8A introduced by Clause 9

Section 9A amended by Clause 11

Section 39(cI) inserted by Clause 33(b)

Clause 38

- 11.1. Sections 6A, 7A and 8A found their origin in provisions of the Original Bill that, by way of provisos, qualified the exclusive rights of copyright. These provisos were correctly abandoned in its revision. However, these very detailed new provisions, that will have a significant impact on all industries that rely on copyright works, were never put up for public comment.

The duration of the right is not expressly spelt out. Since it is a right that cannot be waived and there are no provisions for its assignment, one assumes that it is linked to the lifetime of the author or the performer, as the case may be. The underlying policy statements only refer to the situation of the author or performer while he or she is still alive, so an express provision to this effect would have been welcome.

The commentary on these sections in this advice indicate that the Portfolio Committee did not fully appreciate the consequences of trying to benefit authors, composers and artists within this framework. The debate in the Portfolio Committee seemed to focus on the classic case of an author, composer or artist who makes a single copyright work. However, very many works in the trade that are protected by copyright are composites of multiple works. The arguments supporting unwaivable rights of authors to a royalty provisions fail to accommodate the simplest forms of aggregation of copyright works, such as illustrations – artistic works – appearing next to literary works in published editions. Most complex are cinematograph films (using the terminology of the current Act) which collect literary, artistic, musical works and sound recordings, together with the cinematograph film itself.

It is already indicated in para 5 above that these provisions, if meeting all other requirements relating to the Constitution and of Berne and TRIPs, will, by virtue of the principle of National Treatment, also benefit foreign authors, composers, artists and performers, who will then have claims against South African copyright owners. This is a consequence clearly unintended by the drafters of the Bill, who wanted to protect the economic interests of South African authors, composers, artists and performers by these provisions.

Being new sections in an amendment bill, they were required by Rule 286(4)(c) of the *Rules of the National Assembly* (9th Edition) to be approved by the National Assembly, yet the order paper dated 5 September 2018 and the resolution dated

11 September 2018 do not refer to them.⁸⁷ Therefore, as at the date of this advice, the position is that there has been no public participation on these provisions, nor has the National Assembly given the Portfolio Committee permission to introduce them.

In para 1.7.1 above, it is indicated that there is no policy statement supporting these provisions, which is an extrapolation from solutions intended for the music industry. In para 2.19.5, it is questioned whether these provisions will be a justifiable limitation on the freedom of trade of copyright owners who obtain their rights by assignment, to deal with copyright works. In para 3 above, the advice is that the retrospective provisions in each of Sections 6A, 7A and 8A do not pass Constitutional muster.

Clauses 5, 7, 9 and 38(2) must be withdrawn and a new solution found to improve the position of South African authors, composers and artists.

- 11.2. In the light of the International Arbitration Act, 15 of 2017, the provisions in Section 9A relating to arbitration will have to be reviewed in the context of foreign composers, performers and copyright owners who rely on this provision.
- 11.3. The repeal of Section 9A(1)(b) by Clause 11 removes certainty on the part of persons exercising needletime uses that payments under Section 9A constitutes full settlement of the single equitable remuneration required by Article 15 of WPPT.
- 11.4. The penalties imposed by offences under the new Section 9A(4) come across as very arbitrary and do not take into account the nature of the circumstances under which infractions of the registration requirements under Section 9A(1)(aA) can apply.

⁸⁷ Parliament of the Republic of South Africa, *Announcements, Tablings and Committee Reports, Wednesday 5 September 2018*, at <https://www.parliament.gov.za/storage/app/media/Docs/atc/cca6a8b8-6a97-4605-9e70-19c7b44be439.pdf> on pp.3-5.

12. Specific provisions – First ownership of copyright vesting in persons other than the author in the case of a work made for the State, an international organisation, a national organisation and in the case of a work made pursuant to it being commissioned by a third party

Section 5(2) replaced by Clause 3

Section 21(2) inserted by Clause 22(b)

Section 39(2) inserted by Clause 33

Section 21(1)(c) amended by Clause 22(a)

Section 21(3) inserted by Clause 22(c)

Section 22(1) amended by Clause 23(a)

12.1. Section 5(2) and Section 21(2)

There is no policy decision underlying determination of “local organisations” which will become vested with the copyright in works made under their “direction or control” in situations not governed by an employment contract or in relation to commissioned works, with payment of the author, composer or artist (unlike employment or commissioning) not even being a condition. Declaration of a local organisation by the Minister will remove prescribed “local organisations” from all the Act’s provisions relating to works made in the course and scope of employment and under commission, leaving authors, artists and composers of such works worse off than under the current Act.

There is no statement supporting this change in the Explanatory Memorandum, the SEIAS Report, the Draft National Policy or the CRC Report.

12.2. Sections 21(1)(c) and 21(3)

With the arrangement between a person commissioning a qualifying work under Section 21(1)(c) and the author or artist now defaulting to the terms of an agreement to be negotiated or determined in accordance with certain standards, one wonders why Section 21(1)(c) was not simply repealed.

The Explanatory Memorandum does not address the issue at all, and the SEIAS Report seems to be directed towards the complaints by photographers that they are not able to make reproductions of, publish, etc, the photographs that they make. The complaints referred to in the SEIAS Report were supported by the arguments of photographers made during the oral hearings in August 2017.

Sections 21(1)(c) and 21(3) address none of these points, and the Portfolio Committee seems to have misdirected itself in making the revisions that it did, principally because it did not appreciate that a commission is a contract. A contract of commission results from an offer by a person who wishes to have a specific work commissioned for **payment of money and money’s worth and which** accepted by the author. All that seemed to have been required was for the Act to **closely define what is meant by the term “commission” on the evidence of the** possible abuse of that term in commerce, to perhaps require the commissioning

contract to be in writing (which Clause 22, surprisingly, does not do) and, in the event of photographs, a licence-back of certain rights to the photographer.

To the extent that these amendments would go broader than applying to photographs, there is no policy statement underlying them.

12.3. Section 22(1)

With the earlier amendment of Section 5(2) and the earlier version of the orphan works clause of the Original Bill having undergone substantial revision by removing the direct role of the State, the amendment of Section 22(1) by Clause 23(a) is superfluous and must be removed.

There is no statement supporting this amendment in the Explanatory Memorandum, the SEAIS Report, the Draft National Policy or the CRC Report.

13. Specific provisions – 25-year limit on assignments of copyright

Section 22(3) amended by Clause 23(b)

- 13.1. Section 22(3) of the Act prescribes the formalities for the transfer of copyright by assignment of copyright and for the granting of exclusive licences. These formalities are that assignments and exclusive licences must be in writing and signed by or on behalf of the copyright owner. It is the fundamental existing protection for authors, composers and artists who are not in employment and who are not commissioned to make works in the circumstances described in Section 21 of the current Act. As formalities prescribed by statute for these transfers of property and exclusive contracts, they also protect all copyright owners.
- 13.2. The amendment of Section 22(3) by Clause 23(b) is an incorrect implementation of the recommendation in the CRC Report to introduce a reversion right for composers of musical works. The reversion right was meant to be based on Section 203 of the United States Copyright Act.⁸⁸

Instead, **the Bill's implementation of the CRC Report's** recommendation is one of its most serious errors. The provision corresponding to Clause 23(b) in the Original Bill introduced a 25-year limitation on all assignments of all rights of copyright into Section 22(3). The error is not only perpetuated in the Bill, but exacerbated. An attempt to ameliorate the wide-ranging detrimental impact of the amendment proposed in the Original Bill, has resulted in the Revised Bill removing the formalities for assignments of copyright in relation to artistic works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions and computer programmes. The formalities for assignment are also removed in respect of assignments of literary and musical works that are not between the author and the publisher.

- 13.3. What was required was a loose-standing section, which would correctly appear after Section 22 (perhaps as a Section 22A), based on Section 203 of the United States Copyright Act. This text, although serving as a useful basis, would need to be significantly reworked to fit in to the South African legal framework and to align it with the recommendations of the CRC Report.
- 13.4. There is no policy statement in the Explanatory Memorandum, the SEIAS Report, the 2013 Draft National Policy or the CRC Report that justifies, or assesses the impact of, having a reversionary right apply to any works other than musical works.

⁸⁸ Section 203 of the US Copyright Act is at <https://www.copyright.gov/title17/92chap2.html#203>.

14. Specific provisions – Specific requirements for contracts relating to copyright (including licences), Ministerial regulation of contractual terms and blanket contract override

Definition “open licence” in Clause 1

Section 22(4) amended by Clause 23(b)

Section 22(8) inserted by Clause 23(c)

Section 39B inserted by Clause 34

Section 39(cG) inserted by Clause 33(b)

Section 39(2) inserted by Clause 33(c)

- 14.1. The power granted to the Minister in terms of Section 39(cG), inserted by Clause 33(b) and backed by the contract override clause, Section 39B inserted by Clause 34, to prescribe compulsory and standard contractual terms to be included in **agreement to be entered into in terms of this Act” goes far beyond the “bare minimum condition[s]” for contracts required in the** Draft National Policy, and this intrusive measure is not even mentioned in paras 1 and 2 of the Explanatory Memorandum. The Constitutionality of this provision is questioned in para 2.19.1 above and this is a provision where recommendations in respect of the music industry have been extrapolated, without explanation or justification (see para 1.7.3), across all sectors of all creative industries.

Considering that this intrusive measure is backed only by a bare statement that its **purpose is “to ensure that artists do not die as paupers due to ineffective protection”, it the writer considers that it is necessary for an impact assessment to** be undertaken across all copyright industries whether or not underpayment of authors for their work is systemic, whether such underpayment is due to the fault of **“the Copyright system” and whether the anecdotes of impoverishment can be** related thereto or to other causes before any such far-reaching and intrusive legislative measures are even considered.

- 14.2. Section 22(4) deals with formalities for licences of copyright by contracting parties.

Proposal 8 of the SEAIS Report, in contemplating regulations relating to sub-licensing, costs for sub-licensing and **“shortened licensing process and reduced licensing costs”, seems to have some form of statutory licensing in mind, that** does not exist in Section 22(4). (The comments in para 6 above on the compulsory licences in Schedule 2, which already state that, as they are, are not compliant with Berne, show that the link between Schedule 2 and Section 22(3) is incorrect. If the SEIAS Report contemplated a link of Schedule 2 with Section 22(4), that would have been equally incorrect.)

But for this incorrect reference in the SEIAS Report, there is no policy statement underlying the amendment of Section 22(4) and the introduction of the terms to be incorporated into licence agreement by statute by the insertion of Section 22(8), by Clauses 23(b) and (c).

14.3. Section 22(8) is a new provision importing implied terms in licences by statute.
There is no policy statement underlying its introduction.

15. Specific provisions – Definition of “audiovisual works” and related provisions

Definition “audiovisual work” in Clause 1

Section 8 amended by Clause 8

Clause 36

The new defined term “audiovisual work” is broader than that of the term that it seeks to replace, that of “cinematograph film.” There is no policy statement supporting the ambit of extending the nature of the copyright work intended to be protected in this way, and no impact assessment determining what other works will be covered, in addition to cinematograph films, by the new term.

The expansion of the protected work by the new “audiovisual works” will have a material impact on not only the kind of work covered by copyright protection, but on works that may be subject to the provisions of the ‘commissioning’ clause in Section 21(1)(c) where the copyright vests in the person making the commission.

The change of definition of the established term “cinematograph films” is unnecessary and leads to the risk of errors. For instance, these amendments do not change the terminology in the Registration of Copyright in Cinematograph Films Act, 1977, an Act which is entirely dependant on the Act in respect of the definition of “cinematograph films.”

The change in definition comes about from the 2015 Draft Bill that mistakenly attempted to make changes in relation to the Performers’ Protection Act, 1967, in the Copyright Act. This approach is no longer being proceeded with, and the amendment of these definitions is therefore an unnecessary complication which need not be undertaken. In that case, all insertions of “audiovisual work” by this Bill must be replaced with “cinematograph film.”

The only substantive provision in the Bill relating to “audiovisual works” is the new Section 8A, which is about the protection of performers. As a result, this provision should be moved to the Performers Protection Amendment Bill (see para 5.7)

16. Specific provisions – Resale royalty right

Definitions “art market professional”, “visual artistic work” in Clause 1

Sections 7B to 7F introduced by Clause 7

The “resale royalty right” is more commonly known internationally as the “artists’ resale right.” “Artist resale royalty” is the term used in para 2.6 of the Explanatory Memorandum. The naming of this right results from an incorrect name “resale of royalty right” given in the Original Bill, where the right was incorrectly made to apply to all artistic works.

The resale royalty right is not a right of copyright, but a right attaching to the physical works that are subject to this right and subject to those works also qualifying for copyright protection. In other words, it is a right relating to the trading in goods, not a right relating to reproduction, adaptation, etc, of works that have already been made, and this right, by definition, applies in circumstances where the control over distribution no longer applies.

The resale royalty right, including the definition that defines the products to which it applies (now called a “visual artistic work”) and the other definitions relating to these provisions, should therefore be dealt with in a separate chapter of the Act or even in separate legislation. Its inclusion immediately after the section granting exclusive rights to all artistic works is bound to lead to confusion.

The policy statement in the Explanatory Memorandum about the introduction of the resale royalty right contains no motivation, but the SEIAS Report does deal with it, although there is no indication of an impact assessment. The limiting of the scope of the right to “visual artistic works” is a step in the right direction, resolving the bulk of the substantive objections to these provisions made during the public hearings in August 2017, but the definition of “visual artistic works” still does not make it clear that the concept that is being identified is a physical product, as opposed to a species of copyright work.

With the resale royalty right not being a right of copyright:

- new Sections 7B(5) and 7E(2) are irrelevant,
- new Section 7B(4)(d), having no understandable meaning and in any event not having any relationship to Clause 9 of the Bill, has to be reconsidered and probably removed,
- the linkage of the duration of the right of works on unknown authors to “the calendar year in which the work was first made available to the public” in Section 7D(2)(a) is irrelevant,
- there is no basis for introducing it in the orphan works provision (Section 22A(1), inserted by Clause 24) - in any event, the due diligence requirements that require finding the copyright owner have no bearing on finding the beneficiary of the resale royalty right.

The consequential amendment of Section 37 allowing the Minister to designate other countries for application of the resale right, has not been made. Again, such a provision would be best suited in a separate chapter or even separate legislation regulating the resale royalty right.

The errors highlighted above mean that the entire section has to be reconceptualised. Aspects to be considered, which have not been raised in the Portfolio Committee's deliberations on the topic due to them being confined to the 'technically revised version' of the Original Bill, are whether the right should only apply to the lifetime of the author and whether this is a right that can, in practice, only be managed by collective management by a regulated collecting society.

These deficiencies are not capable of correction by a mark-up and the whole provision needs to be reconsidered.

17. Specific provisions – Copyright exceptions generally, namely instances where exclusive acts for the copyright owner may be undertaken by third parties without permission of or remuneration to the copyright owner:

Introduction of ‘fair use’, general exceptions applying to all copyright works, exceptions in relation to computer programmes, exceptions for educational institutions, exceptions for libraries, museums, archives and galleries, read with the blanket contract override provision

Definition “commercial” in Clause 1

Definition “open licence” in Clause 1

Section 12B inserted by Clause 13

Section 12 repealed by Clause 12, Section 16 repealed by Clause 15, Section 17 repealed by Clause 16, Section 18 repealed by Clause 17, Section 19A repealed by Clause 18

Section 12A inserted by Clause 13

Section 12D inserted by Clause 13

Section 19B replaced by Clause 19

Section 19C inserted by Clause 20

Section 39B inserted by Clause 34

17.1. Subject to the overriding consideration that Section 12A(1) is in conflict with South Africa’s treaty obligations (see para 4 above) and, coupled with other related provisions in the Bill, will amount to a deprivation of property that needs to be considered under the Constitution (see para 2 above), there are the following detail items to consider:

- The revision of Section 12A incorporating the words “for purposes such as”, a material change that expands its impact far beyond the scope of the Original Bill, was never put up for public comment.
- The words “or the performance of that work” are out of context in the Act, which does not deal with performances.
- The words “including the use of a lawful copy of the work at a different time or with a different device” are out of place and on the face of it do not even need an exception. (Para 18 below deals with having a specific exception for ‘format shifting’.)
- Some of the provisions come across more as examples of what could be covered by ‘fair use’ (eg “parody, satire, caricature, cartoon, tribute, homage or pastiche” and “preservation of the collections of libraries, archives and museums”) and are therefore more appropriate for guidelines than purposes for ‘fair use’.
- There is no basis for removing the moral rights of authors (by Section 12A(1)(c) in all cases of ‘fair use’ by qualifying the obligation to name the source and author with “to the extent reasonably practicable and appropriate”.
- The sub-clause numbering is wrong since there is no Section 12A(2).

17.2. As a general rule, exceptions for teaching, education, libraries, museums, government uses, format-shifting, should only apply in relation to copies of the work that have been lawfully acquired by the beneficiary of the exception. There should never be such exceptions permitting unpermissioned and unremunerated

acts with infringing copies or copies that have not been lawfully acquired, otherwise the risk is that it will interfere with legitimate normal exploitation and unreasonably prejudice the rightsholder, contrary to second and third steps of the Three-Step Test.

There are cases where having **“a lawfully acquired copy” of the work is not** a requirement, such as quotation, criticism and review, reporting of current events, **but then these exceptions are limited by considerations of ‘fair practice’ or the four** factors of the fair use test and/or by a limited quantity of the content that can be reproduced.

In order to determine whether a case qualifies as a special case under the Three-Step Test, it is often necessary to identify the beneficiary of the exception by way of some form of qualification, notably educational institutions and libraries in the case of exceptions for educational and library uses. It is expected that beneficiary educational institutions will be recognised by some standard, preferably be registration as such in terms of legislation, and that beneficiary libraries are open to the public during normal office hours and not-for-profit.

It is in this context that the term “access” (cited in para 1.2(a) above in the context of uses of copyright works for education, research and private study, libraries, etc) comes about. Neither the term “access” nor the term “use” is terminology used or defined in the Act. The term “use” is sometimes used as a ‘shortcut’ term to describe actions undertaken by third parties that are subject to a copyright owner’s exclusive rights of copyright, in general the act of reproduction or adaptation.

- 17.3. **“Access”, in the context of “access to information”, is a politically loaded term capable of many meanings.⁸⁹ Publishers, for instance, would argue that “access” is the availability of locally-produced copyright works for the public good purposes mentioned. “Access” could also mean an action that does not involve an act that is subject to the exclusive rights of copyright, like reading a book in a library. In the WCT, “access” is used in the definition of the making available right⁹⁰ as a description of a potential action that could be taken by a recipient in response to the action of making available. However, in the context of both the Original Bill and the Revised Bill, as implied by their Explanatory Memoranda, “access” can only mean unpermissioned and unremunerated reproductions and adaptations of copyright works and their distribution by means of copyright exceptions.⁹¹**

This advice concludes (in para 4 above) that most of the copyright exceptions **allowing unpermissioned and unremunerated “use” and “access” do not** meet

⁸⁹ On the other hand, the term “accessible format copy” is an internationally recognised term stemming from the Marrakesh VIP Treaty.

⁹⁰ WCT Article 8.

⁹¹ Especially in Clause 13: Section 12A(1)(a)(vi) and 12D(2) in Clause 13, Section 19C(3), (5)(b) and (7) in Clause 20.

South Africa's obligations under Berne and TRIPs, and that they will obstruct South Africa's **ratification of WCT and WPPT** and accession to the Beijing AVP Treaty and the Marrakesh VIP Treaty.

- 17.4. The qualification of the exception for translations in Section 12B(1)(f) by **"commercial purposes"** does not make it a special case, as demanded by the Three-Step Test, and the making of such translations may well result in prejudice to the copyright owner or unreasonable interference in the exploitation of the work being translated.
- 17.5. **The "not commercial" qualification for the personal use copy exception in Section 12B(1)(i) and (2)** similarly does not resolve the problems it will have with the Three-Step Test, since it does not relate to making a copy from a non-infringing copy that has been lawfully acquired. Also, there is a cross-referencing error in Section 12B(2).
- 17.6. The provisions of clause 12B(3) applying all the copyright exceptions in Section 12B(1) to adaptations are vague – adaptations made by the beneficiary of the exception or by other people? adaptations that are infringements of the original works under the provisions of Section 2(3) of the Act? - and have no place in an exception. It seems to be an unwarranted extrapolation of the extension of exceptions in Section 12(9), (10) and (11) of the Act, thereby confirming that Section 12B must not be proceeded with.
- 17.7. The reproduction needs and tests for educational uses (instruction and learning) and academic uses (private research and study) are different, but both appear in Section 12D.

The substitutive effect of coursepacks has to be considered for the kind of exception contemplated in Section 12D(2), since this is not about originally-written and compiled materials which does not need to rely on existing third-party copyright content. To the extent that coursepacks are simply compilations of extracts from copyright works, their compilation must be licensed by the copyright owner, otherwise it would be an interference with legitimate exploitation of the works, as enshrined in the Three-Step Test.⁹²

Section 12D(4) is not only to the prejudice of the copyright owner, but it will lead to substitutional effect in the market for textbooks (by replacing textbooks on a given topic that are on offer in South Africa with copies of textbooks that are out

⁹² The extent to which the inclusion of copyright-protected content in electronic course packs, or e-reserves, is 'fair use' in the United States is the subject of a long-running and ongoing dispute between academic publishers and Georgia State university. With Georgia State having removed 6 700 infringing copies from their e-reserves after the publishers initiated their action ten years ago, in 2008, there is still an outstanding dispute about approximately 100 extracts in the university's e-reserves.

The United States Court of Appeals for the 11th Circuit gave direction on how 'fair use' standards are to be applied. See *Cambridge University Press and others v. Patton et. al* Nos. 12-14676 & 12-15147 at <http://media.ca11.uscourts.gov/opinions/pub/files/201214676.pdf>.

of print or only available from overseas). The prejudicial nature of this is exception is **not saved by the qualification excluding “commercial purposes”** in Section 12D(5). There is also no policy statement supporting the legitimisation of making copies of textbooks in these circumstances.

Section 12D(6) has the surprising effect of legitimising **plagiarism**: “Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission...”, with no citation of the author required at all (in that Section 12D(8) does not apply to this exception). This exception has no foundation in any policy statement.

Section 12D(7) has no foundation in policy statements and has no basis in international standards. It in effect amount to libraries and unknown third parties (para (d)) taking over control of copyright in final published editions of works in terms of actions imputed to authors, which are rights that the authors cannot give. It also does not take into account the reality that journal articles are mostly multi-authored works, with authors often based in different countries.

- 17.8. Section 19C is extremely poorly drafted, providing for exceptions for actions that are not even restricted by copyright and also extremely broad exceptions that go way beyond the objects set out in the policy statements **supporting “access”** to works in the collection of libraries. **The qualification “lawful access” is not** sufficient to ameliorate the harm that these exceptions will cause. All of these exceptions have to be evaluated against the Three-Step Test.

For example, in Section 19C(4), provided that **the term “a user” is replaced with “a patron of the library” and it is confirmed that only the singular applies, there is no** activity in that section restricted by copyright, and therefore no exception is necessary. However, placing Section 19C(4) where it is could invite misinterpretation in such a way it can turn libraries, archives, museums and galleries into cinemas where they play films without permission or remuneration so long as they do not charge the patrons for it (even though the limited definition of **“commercial” would entitle them to fund their showings by advertising revenue**). Therefore, where there is no act limited by copyright, there is no room for Section 19C(4).

Section 19C(5) in making preserved works open to the public on a website is a ‘communication to the public’ and substitutes the offerings of the same works offered with the authority of copyright owners. (The normal standard is the act of viewing the work on computer terminals on the premises of the library.)

There seems to be no basis on which galleries, which are by and large commercial enterprises engaged in the business of selling artworks, can qualify to benefit under these copyright exceptions.

19C(15) confirms the exceptions in 19C will be co-extensive **with the 'fair use' defence in Section 12A and the general exceptions in Section 12B, contrary to the understanding about the "hybrid model."** The section has an incorrect cross-reference to Section 12, that does not exist.

- 17.9. Section 39B, in the context of **a blanket provision enabling persons to rely on 'fair use' and extensive copyright exceptions, whether justified or not,** runs counter to the statement in the CRC Report, in para 5.1.18, that members of the public should be encouraged to respect copyright law. As demonstrated above, there is no policy statement or impact assessment supporting this outcome.

A curious implication of Clause 39B, also something having no basis in any of the **policy decisions set out above, is that due to the exclusion of "open licences" from the ambit of the contract override clause, "open licences"**⁹³, not exclusive rights, have become the most important factor in considering copyright protection in the **Bill. If an "open licence" applies to a copyright work then, in terms of the Bill,** consideration of the exclusive rights and everything that flows from them, whether licences or infringement actions, becomes of secondary importance.

⁹³ "Open licences" are "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" – new definition in Section 1.

18. Specific provisions – Copyright exceptions for digital uses:

Exception for transient or incidental copies as part of a technological process, format shifting

Section 12C inserted by Clause 13

18.1. Section 12C contains two unrelated exceptions. Section 12C(1)(b), an exception to “adapt the work to allow use on different technological devices” (also known as the ‘format-shifting exception’) **does not belong under the heading “transient or incidental copies” and should be dealt with under the main exception** – it already appears (albeit with the drafting not being sufficiently precise) **in the ‘fair use’** clause, Section 12A(1)(a)(i) and in Section 12B(1)(i) and (subject to checking a cross-referencing error) Section 12B((2).

The ‘format-shifting exception’ can only apply to copies of works lawfully obtained by the person exercising the exception, not to other copies and certainly not to infringing copies, and has to be qualified in this way.

18.2. **The “transient or incidental copies” exception in Section 12(1)(a) cannot apply to adaptations of works. The term “other lawful use” is unclear** – here again is a case where the term “use” has potentially broad consequences, yet it is not a precise technical term, nor is it commonly used in the Act.

18.3. Section 12C has some layout errors:

- There is a subsection (1) with no (2).
- **The words “as long as there is no independent, economic significance to these acts” should have related to both paragraphs (a) and (b), not only to (b). These words are critical to complete the “transient or incidental copies” exception.**

19. Specific provisions – Exception for persons with a disability

Definitions “accessible format copy”, “person with a disability” in Clause 1

Clause 19D inserted by Clause 20

These provisions have been commented on exhaustively in para 7 above. These provisions need to be replaced with provisions that are compliant with the Marrakesh VIP Treaty.

Since the purpose of the exception is to make copyright works available to persons with **a disability, there can be no justification for limiting the authors’ moral rights in the making of accessible format copies to indicating the source and name of the author “in so far as it is practicable.”** The indication of the source and the name of the author on the accessible format copy must be obligatory. (See also para 23 on moral rights.)

20. Specific provisions – ‘Exhaustion’ of rights, permitting parallel importation and reducing the scope of secondary infringement by certain forms of distribution

Section 12B(6) inserted by Clause 13

Section 23(2)(b) deleted by Clause 26(b)

Section 28 amended by Clause 28

- 20.1. There is no underlying policy statement for any of the provisions legitimising **unlimited parallel importation and the “international exhaustion of rights”** in the Explanatory Memorandum, the SEIAS Report, the 2013 Draft Intellectual Property Policy or the CRC Report. Its consequences will have a significant economic impact on local industries, opening the doors to a flood of copyright goods produced cheaply in other countries, the economic effect of which has not been assessed.
- 20.2. It has already been shown in para 4.27 that the deletion of Section 23(2)(b) by Clause 26(b) will mean that South Africa will not be able to ratify WCT.
- 20.3. Section 12B(6) is a sample of poor drafting, by **incorporating the term “exhaust”,** a term used in the United States copyright legislation, but not in the Act, and the **terminology “rights of distribution and importation locally and internationally” with** no link to the exclusive rights of copyright or the rights of the copyright owner in case of infringement.

21. Specific provisions – ‘Panorama’ exception

Section 15 amended by Clause 14

The motivation **underlying the Portfolio Committee’s decision to introduce the ‘panorama exception’** was entirely questionable. It came about from one submission, in which a photograph of the bust of Nelson Mandela outside Parliament and a photograph of the Voortrekker Monument were presented, with the argument that the former needed **copyright clearance and the latter not, which in turn led to a statement that “the legacy of colonialism as represented in apartheid-era images is problematic especially as it can survive in the public space but post-apartheid images cannot.”**

The simple answer is that taking a photograph of a work of architecture, such as of the Voortrekker Monument in Pretoria or the Apartheid Museum in Johannesburg, is, in terms **of the definition of “copy” in the Act**, not a reproduction. Nevertheless, the ‘panorama exception’ was agreed to, in terms that were even broader terms than proposed.

The writer is of the view that the rationale for this amendment was based on incorrect premises and did not take into account provisions that already exist in the Act. As a result, the policy underlying this amendment is questionable to say the least.⁹⁴

This amendment was not opened to public comment.

⁹⁴ In a supreme irony, the panorama exception was based on incorrect perceptions about copyright legislation somehow preserving apartheid-era images, but not post-apartheid images, yet the Bill and underlying policy did not identify provisions in the Act that may well have had its origin in apartheid-era policies, namely Sections 45 and 45A (which are not in force).

22. Specific provisions – Orphan works

Definition “orphan work” in Clause 1

Section 22(1) amended by Clause 23(a)

Section 22A inserted by Clause 24

22.1. Section 22A and its underlying definition, in essence the same provision as in the Original Bill (except for the replacement of “copyright author” with “copyright owner”), fundamentally misunderstands the problem relating to orphan works and the potential liability for users that an orphan works provision is meant to resolve.

A work that is truly orphan will never have a copyright owner who reappears and claims royalties for unpermissioned uses of his or work. Simply put, if there is no plaintiff, there is no claim.

The problem arises when a work has been *misidentified* as an orphan work, acts governed by the rights of copyright in respect of that work have been undertaken by the defendant without permission, and a plaintiff later appears and claims royalties and damages.

The purpose of an orphan rights provision enables an intended user to claim immunity from such claims on the basis that the user has first carried out the requisite diligent search and has deposited the amount of a reasonable royalty so that it would be available for the copyright owner to claim in the event that the latter reappears. There should be no obligation on a user to avail himself or herself of such a facility.

22.2. With this background, Section 22A has the following deficiencies:

- The licensee has no indemnity from claims by the copyright owner after having obtained the licence in terms of Section 22A. The claim of the copyright owner must be limited to the collection of the royalties kept aside for him or her in terms of Section 22A(8).
- The procedure **should be entirely voluntary**. A sentence using the word “must”, as in Section 22A(1), is therefore inappropriate.
- Section 22A has no provision as to how money collected by the Commission in terms of Section 22A(4) and (7) is kept, or what happens to it if the copyright owner never appears.

The last point indicates that Section 22A does no more than impose a tax or other form of levy. If that is so, the process for adopting Section 22A, namely under Section 77 of the Constitution for a money bill, have not been followed.

The provisions of the Canadian Copyright Act relating to unlocatable copyright owners is instructive for a revision of Section 22A.⁹⁵

⁹⁵ Information from the Canadian Copyright Board at <https://cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html>.

- 22.3. With the resale royalty right not being a right of copyright, there is no basis to provide for the resale royalty right under the orphan works clause. The inclusion in the revision of the resale royalty right in the orphan works provision has an impact on trade in artworks and second-hand goods that is so radical, that the clause should at the very least have been re-advertised for public comment and to a far broader range of stakeholders than those on the Portfolio Committee mailing list.
- 22.4. With the earlier version of the orphan works clause of the Original Bill having undergone substantial revision by removing the direct role of the State, the amendment of Section 22(1) by Clause 23(a) is superfluous and must be removed.
- 22.5. Section 22A(6)(a) and (9) refer to a register of copyrights, that does not exist. It appears that a register of orphan works is intended, in which case this should be provided for in Section 22A.

23. Specific provisions – Moral rights

Section 20 amended by Clause 21

Sections 12A(1)(c), 12B(1)(a)(ii), (b) and (e), and 12D(8) inserted by Clause 13 and Section 19D(4) inserted by Clause 20

23.1. None of the policy statements necessitate an amendment of authors' moral rights.

As a result, but for the replacement of "cinematograph film" with "audiovisual work" (which itself is advised against), there is no need to amend Section 20.

23.2. The substantive amendments to moral rights in the Act do not come from Clause 21, but from the new qualifications of moral rights in the various exceptions by the term "in so far as it is practical" where the source and name of the author should otherwise be stated. In some copyright exceptions, notably quotation, criticism and review, reporting on current events in written form and the exception for persons with a disability, there is no justification to qualify the moral rights in this way.

In terms of the Act as it stands, it is obligatory to state the name of the author under the exceptions of quotation, criticism and review, reporting on current events in newspapers and similar media, and illustration for teaching, if it appears on the work. The Bill therefore takes rights away from authors when compared to authors' rights under the Act.

24. Specific provisions – Compulsory licences for reproducing works unavailable in South Africa and translation of works into South African indigenous languages

Section 22(3) amended by Clause 23(b)

Schedule 2 inserted by Clause 35

These provisions have been commented on in para 6 above.

25. Specific provisions – Protection of technological protection measures (TPMs) and copyright management information (CMI)

Definitions “copyright management information”, “technologically protected work”, “technological protection measure”, “technological protection measure circumvention device” in Clause 1

Sections 28O to 28P inserted by Clause 29

Sections 28R to 28S inserted by Clause 29

Section 27(5A) inserted by Clause 27(a)

Section 39(cH) inserted by Clause 39

Section 39(2) inserted by Clause 33(c)

Section 23(1)(b) and (c) inserted by Clause 26(a)

The provisions that will allow civil action for infringement arising from removing or overriding TPMs or tampering with CMI (Section 23(1)(b) and (c) inserted by Clause 26(a)) need to be reworded substantially in order to make them actionable at the instance of copyright owners. In conceptualising these provisions, it may be better to have them as discrete infringement provisions in Sections 28O and 28R.

By the same token, the criminal provisions relating to devices that circumvent TPMs (Section 27(5A) inserted by Clause 27(a)) are not related to copyright infringement and should also appear as discrete provisions of Section 28O.

The penalties imposed by offences under the new Section 27(5A) come across as very arbitrary and do not take into account the nature of the circumstances under which infractions can apply or the relationship between the fine based on turnover and the monetary gain of the offender.

26. Specific provisions – Regulation of collecting societies

Chapter 1A (Sections 22B to 22F) inserted by Clause 25

Section 39(cI), (cJ) and (cK) inserted by Clause 33(b)

Section 39(2) inserted by Clause 33(c)

26.1. This Bill omits requiring of licensees of registered collecting societies to keep records of their uses of licensed material and report on them to the licensing collecting society. This information is critical for calculating distributions to rightsholders and is needed to enable collecting societies to meet the obligations they will assume under Section 22D(2)(a). Such a provision should appear in Section 22C.

26.2. The rule of “one collecting society per right” had been recommended in the CRC Report (see para 1.5(f) above). The rule appeared in the Original Bill, albeit in stricter terms than intended by the CRC Report (the CRC Report contemplated “mixed” collecting societies; the Original Bill did not.) The rule was removed from the Bill on the petition of only one collecting society which claimed that the rule would violate the Constitutional right of freedom of association.

The CRC Report correctly states that the rule would benefit licensees of collectively managed rights and that it would follow international trends: “Due to administration problems (consistently voiced by users and interested parties) associated with the multiple collecting societies and the international trends for both developed and developing countries, the CRC believes that ‘one society one right’ is the answer for the current situation.”

Case law in the European Union recognises the unique role of collecting societies and therefore permits one society per country administering a given right or set of rights, notwithstanding competition law.⁹⁶

⁹⁶ Decision of the Court of Justice of the European Union in the *Czech Spa case, Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s* (C-351/12). The Court held that the territorial monopoly granted to a collecting society constitutes a restriction on the freedom to provide services, but that the restriction in question is justified since it is appropriate and necessary for the effective management of intellectual property rights. See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/cp140023en.pdf>.

27. Specific provisions – New Tribunal

Definition “Tribunal” in Clause 1

Section 29 replaced by Clause 30

Sections 29A to 29H inserted by Clause 31

Section 39(cF) inserted by Clause 33(b)

Section 39(2) inserted by Clause 33(c)

Sections 30, 31, 32 and 33 repealed by Clause 32

Section 28Q inserted by Clause 29

It is not entirely clear whether the Tribunal is meant to adjudicate copyright disputes or not. **The provisions allow the Tribunal to make orders to prevent infringement of “the Act”, as opposed to infringement of copyright.** The SEAIS Report states (in para 10) that the Tribunal will preside over disputes in IP matters, including potential disputes brought **by copyright owners and on “fair dealings” and educational institutions, archivists, libraries, museums and galleries, which can only be on the basis of exceptions.** An amendment to these provisions clarifying this key role would be welcome.

Assuming the Tribunal will adjudicate copyright disputes, then, due to the key role that the Tribunal will play in determining infringement and thereby interpretation of the many new exceptions, the Bill must not be brought into operation before the Tribunal is set up and ready to commence operations, for which the appointments under Section 29(2) and **(3) (as to be amended) must be made and the Minister’s regulations on proceedings** issued under Section 29D.

28. Offences and penalties

Section 27(6) amended and Section 27(9) inserted by Clause 27(b)

- 28.1. The penalties imposed by offences under the new Section 9A(4) come across as very arbitrary and do not take into account the nature of the circumstances under which infractions of the registration requirements under Section 9A(1)(aA) can apply.
- 28.2. The penalties imposed by offences under the new Section 27(5A) and the amendment of Section 27(6) come across as very arbitrary and do not take into account the nature of the circumstances under which infractions can apply or the relationship between the fine based on turnover and the monetary gain of the offender.

29. Transitional provisions

Clause 37

The fact that the Intellectual Property Laws Amendment Act, Act 28 of 2013, has not been brought into operation after 5 years, with no final decision on its fate, compels the need for transitional provisions which are necessarily imperfect, even clumsy.

As a result, the following provisions are all incorrect, despite Clause 37:

- the cross references to Act 28 of 2013 in the headings of Clauses 1 and 33,
- the references to **"community protocol"** in Clause 1(d), **"National Trust"** in Clause 1(f) and **"traditional work"** in Clause 1(i)
- new Section 7C(2)(b) introduced by Clause 7.

30. Record and implications of the development of the Bill - What can be done?

30.1. It could be said that the Original Bill was a 'poisoned chalice' that Parliament was handed which, in terms of the National Assembly's Constitutional mandate to adopt, reject or amend legislation, it did not have many options available to cure. However, with the Portfolio Committee's decisions to continue by revising it, defects of the Original Bill were perpetuated and even exacerbated.

As a result, at this juncture, nearly 14 months after the end of the public hearings on the Original Bill, the Revised Bill and the process that has led to it remain **fundamentally flawed in that, in the writer's opinion, the Bill risks not meeting** Constitutional muster for the reasons set out in this advice.

30.2. In order to examine the reasons for this situation, it is necessary to recount the conceptualisation and development of the Bill. Important milestones in the development of the Bill were the following:

- Delegation of musicians visits former President Zuma to raise concerns about the collecting societies model for the distribution of royalties to musicians and composers of music. This led to the Minister of Trade and Industry establishing the Copyright Review Commission under the chair of Judge Farlam in 2010.
- Completion of the CRC Report in 2011. It was released to the public in 2012.
- Publication by the dti of the Draft National Policy in September 2013, followed by a comment period and a Regulatory Impact Assessment in 2014, completed in 2015.
- Publication by the dti of the Draft Bill for public comment in 2015, followed by written submissions and a conference for stakeholders at Birchwood Hotel, Boksburg, on 27 August 2015.
- Introduction of the Performers Protection Amendment Bill to the National Assembly in December 2016.
- Introduction of the Original Bill to the National Assembly in May 2017, followed by a briefing by the dti to the Portfolio Committee with the SEIAS Report on 30 May 2017.
- The Portfolio Committee calls for public comment on the Original Bill in the form of written submissions in July 2017, followed by oral hearings in August 2017. During the oral hearings, following numerous complaints about material flaws in the Original Bill, the Chair of the Portfolio Committee makes it clear that it has the power to amend it and asks participants for text proposals.

- The Portfolio Committee sets about creating a **‘technically revised version’** of the Original Bill, appointing a Sub-Committee to support revision on 15 August 2017. **The ‘technically revised version’ of the Original Bill was completed** by the time of the Portfolio Committee meeting on 18 October 2017. The Portfolio Committee and its Sub-Committee uses the **‘technically revised version’** as the basis for further deliberation. The Sub-Committee is initially tasked to work on defined policy areas distilled from the **‘technically revised version’**, a proposal for which was made at the Portfolio Committee meeting on 13 March 2018, but abandons that process and the Portfolio Committee and the Sub-Committee start a section-by-section deliberation on 25 April 2018.
- The dti, represented by its Director-General, on 18 August 2017, advises the Portfolio Committee to consider the Original Bill in two phases, to enable dealing with the CRC Report recommendations as a matter of priority, with the other provisions needing more consultation. The Portfolio Committee rejected this advice.
- The dti, represented by its new Deputy Director-General for the Consumer and Corporate Regulation Division, noting the numerous public submissions, on 18 April 2018 suggested to the Portfolio Committee a phased approach to amending the Act, with the recommendations of the CRC Report being dealt with first and the **remaining “bigger” issues** being dealt with in a later phase. This suggestion was rejected by the Portfolio Committee at its meeting on 31 May 2018.
- After referral to the caucuses of the parties represented on the Portfolio Committee on the issue of **‘fair use’**, the Portfolio Committee resolved to adopt a **“hybrid model based on ‘fair use’ and ‘fair dealing’ ”** at its meeting on 31 May 2018.
- In May 2018, the *Intellectual Property Policy of the Republic of South Africa Phase 1* was adopted by Cabinet, following an extensive consultation phase.⁹⁷ This policy superseded previous drafts on the topic,⁹⁸ therefore also the 2013 Draft National Policy, reciting only that the amendment of the Act was the **subject of a “existing initiative” and that it would be subject to “monitoring and evaluation” in respect of certain policy goals (see para 30.4).**
- In July 2018, the Portfolio Committee issued a limited consultation on selected clauses of the revision existing at that time.
- In September 2018, the Portfolio Committee issued another public consultation on one new clause in the revision.

⁹⁷ Published in Government Gazette no. 41870 Notice 518 of 2018, 31 August 2018, at https://www.gov.za/sites/default/files/41870_gen518_0.pdf.

⁹⁸ Government Gazette no. 41064, Notice 636 of 2017, 25 August 2017, at https://www.gov.za/sites/default/files/41064_gen636.pdf, on the cover page.

- On 5 September 2018, the Portfolio Committee instructed that the Revised Bill be sent to the Technical Panel of Experts for consideration. The Panel members received the instructions on 10 and 11 September, with the request that their respective opinions be completed by 26 September, later extended to 1 October (Appendix 4).

A record of events in the development of the Bill that the writer is aware of, is presented as a chronological timeline in Appendix 5.

An immediate impression from the timeline relating to events in the public participation process is one of relatively short periods given for public comments, both by the dti and by the Portfolio Committee, which invariably had to be extended, and meetings with stakeholders called at very short notice.

30.3. The Original Bill as a 'users' rights' bill

The Original Bill had provisions that, amongst others, implied that "users" (ie third parties who reproduce, etc, copyright works) would be entitled to a share in the royalties that their "uses" create, amongst many inexplicable provisions of the Bill. The concept of 'users' rights' is limited to Canada, where it is a characterisation by the Supreme Court of Canada of the entitlement by third parties to act under exceptions as their rights,⁹⁹ and has no place in South African law. ('Users' rights' is, however, not a feature of the Canadian copyright legislation.) In this respect, the drafters of the Original Bill completely misunderstood the 'users' rights' concept, and in effect placed the right of third parties to "use" copyright works paramount, above the exclusive rights of copyright.

The explicit 'users' rights' provisions were removed in the 'technically revised version' that preceded the Bill (see para 30.2 above), but its underlying philosophy remained in its numerous copyright exceptions, which remained largely untouched. This explains why the Bill still contains so many references to "use", "users" and "access", terminology which is imprecise and, with the exception of Section 9A introduced in 2002, did not appear in the Act.

30.4. Conflict between the *Intellectual Property Policy of South Africa Phase 1* and the 2013 Draft National Policy

The draft of the *Intellectual Property Policy of the Republic of South Africa Phase 1* was published for comment in August 2017, contemporaneously with the public hearings on the Original Bill. As noted in para 30.2 above, this policy was going to repeal all prior policies, which would have included the 2013 Draft National Policy. The *Intellectual Property Policy of the Republic of South Africa Phase 1* was adopted by Cabinet in May 2018.¹⁰⁰ This raises the question as to how much of

⁹⁹ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

¹⁰⁰ Footnotes 97 and 98.

the 2013 Draft National Policy **"as commented on" is still** current and capable of being relied upon as a policy statement supporting the Bill.

The 2018 Policy contains a reservation in respect of limited items dealt with in the Bill, namely:

Several legislative initiatives have commenced ... prior to the formulation of the IP Policy. ... copyright-related issues are most pertinent. It is proposed therefore that these constitute the issues that will be subject to monitoring and evaluation.

The following themes are covered in the existing initiatives:

Copyright and related issues, including:

- IP & creative industries, access to knowledge – libraries and archives/ disabled persons/ copyright exceptions and limitations/ digital technologies,
- IPRs in the digital age...¹⁰¹

Does the reservation mean that the provisions of the Bill must be re-evaluated in accordance with the terms of the new Policy? In the light of the recounting in this para 30 of material shortcomings in the process in developing the Bill, certain provisions of the Bill not passing Constitutional muster and **the Bill's** failure to comply with Treaties to which South Africa is already bound, the writer submits **that the answer must be "Yes."**

30.5. Standing Advisory Committee on Intellectual Property not consulted

Section 40 of the Act obliges the Minister for Trade and Industry to appoint an advisory committee, referred to as the Standing Advisory Committee on Intellectual Property (SACIP), which may make recommendations to the Minister in regard to any amendments to the Act. SACIP was not consulted on the Original Bill or the 2015 Draft Bill. The writer understands that the terms of the appointment of the respective current members of SACIP¹⁰² have now lapsed and that no replacements have been appointed.

30.6. Original Bill not referred to NEDLAC

The Original Bill was not referred to NEDLAC prior to its introduction to the National Assembly for the process contemplated by Section 5 of the NEDLAC Act, 1994, contrary to indications by the Minister for Trade & Industry in February 2016, that the dti would do so. NEDLAC, being a forum where Business is represented with Government and Labour, would have been an ideal forum for creative and copyright-reliant industry sectors to set out how they rely on copyright, thereby providing a fact-based input for the Original Bill appearing in a NEDLAC report, both for further consideration by the dti and for deliberation in Parliament. This did not happen.

¹⁰¹ *Intellectual Property Policy of the Republic of South Africa Phase 1*, referenced in footnote 97, at p.216.

¹⁰² List of members on the dti website at https://www.thedti.gov.za/business_regulation/SACIP.jsp.

The engagement with the dti hosted by NEDLAC on 22 August 2016 resulted only as an opportunity for stakeholders from Business to make comments to the dti, as they had done with the 2015 Draft Bill, none of which were seemingly taken into account for the Original Bill.

30.7. Failure to take legal opinion on whether South Africa is a “developing country” as meant in the Berne Appendix

Schedule 2 of the Bill has its origin in Berne’s **Appendix**. The Appendix is a concession in that treaty for the benefit of developing countries, allowing compulsory licences for translations and reprints on terms that would otherwise not meet the requirements of the Three-Step Test. It is not clear whether South Africa qualifies under the provisions of the Appendix and its obligations under TRIPs, and legal opinion should have been obtained before proceeding with Schedule 2 (see para 6 above).

30.8. Absence of Regulatory Impact Assessment

The Original Bill was not submitted by the dti for an interdependent regulatory impact assessment before introduction to the National Assembly. This was **contrary to an undertaking by the dti’s Mr Macdonald Netshitenzhe made at a conference of stakeholders at the Birchwood Hotel, Boksburg, on 27 August 2015 as part of the public consultation on the Draft Bill.** The contract for a regulatory impact assessment was put out for tender, but the tender was never awarded. Ostensibly the reason for not proceeding with a regulatory impact assessment was the introduction of the Socio-Economic Impact Assessment System in October **2015, alluded to in the keynote speech by the dti’s Ms Meshendri Padayachy at the annual general meeting of the Publishers Association of South Africa on 30 August 2016.**

30.9. The SEIAS Report

The Socio-Economic Impact Assessment System (SEIAS) was established as a procedure to facilitate consistent assessment of the socio-economic impact of **policy initiatives, legislation and regulations** “in response to concerns about the failure in some cases to understand the full costs of regulations and especially the **impact on the economy.**” **From 1 October 2015, Cabinet Memoranda seeking approval for draft policies, Bills or regulations must include an impact assessment that has been signed off by the SEIAS Unit of the Department of Planning Monitoring and Evaluation.**¹⁰³

¹⁰³ Website of the Department of Planning Monitoring and Evaluation, *Socio Economic Impact Assessment System* (SEIAS), at <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx>.

There are Guidelines¹⁰⁴ setting out the purpose of SEIAS reports on proposed legislation and the subject matter they must cover, requiring **“two fundamental approaches to evaluating the impact of a new rule”, namely technical analysis and participatory research through consultation with stakeholders.** The SEIAS applies to **“to be amended primary legislation.”**

Although the SEIAS assessment is managed by the drafters of the policy, the Guidelines recommend outside expertise for complex cases. Stakeholders, too, should be consulted in the development of a SEIAS assessment. An FAQ, **“Stakeholders just lobby for their own interests – why should I listen?”** is answered **“Stakeholders generally know more about their conditions and the likely impact of a proposal than government officials. If drafters simply ignore their inputs, they often come up with erroneous estimates of the cost of new measures. The time spent in consultation should be viewed as participatory research. If the stakeholders appear to have exaggerated views, then more academic research should be used to check them.”**

The Guidelines require Government departments to publish the draft final assessment with the policies, legislations or regulations when it goes for public comments and consultation, unless it can provide sound reasons not to, which will generally relate to security and confidentiality.

The dti did undertake SEIAS assessments on both the Original Bill and the Performers Protection Amendment Bill. Having read both assessments, in the **writer’s opinion, there are numerous indications in both that no independent research was undertaken on the economic impact of the legislation.** Neither assessment contains any economic data or any economic projections following implementation of the legislation – something that should have been dealt with in para 14 of the SEIAS Report. On the contrary, both assessments come across as a **‘check-the-box’ report about stakeholders the dti had spoken to, described in vague, anonymised terms.** The conclusions in the SEIAS Report on the Original Bill amounted to very generalised statements of questionable accuracy, some of which was largely repeated in the Explanatory Memorandum of the Bill).

A material inaccurate statement, relevant to one of the key provisions of the Bill, is **found in the table in para 6 of the SEIAS Report, where “Authors and publishers” - as stakeholders who were claimed to be consulted - are said to “support the ‘fair use’ provision.”** This statement has been contested by the Publishers Association of South Africa as being a material misrepresentation.¹⁰⁵

¹⁰⁴ The Guidelines can be downloaded from the website of the Department of Planning Monitoring and Evaluation at <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf>.

¹⁰⁵ PASA submission of 17 July 2017 at p.10.

The dti did publish the SEAIS assessment for the Performers Protection Amendment Bill,¹⁰⁶ but, contrary to the requirement of the SEIAS Guidelines, did not publish the SEIAS Report for the Original Bill.¹⁰⁷ In neither case was the public alerted by Parliament to the SEAIS assessments for the public consultations on either bill.

It is beyond the scope of this advice to analyse the SEAIS report beyond what has been said about it so far.

The SEIAS has already been criticised in public for the inadequacy of a number of reports produced under it, including the SEAIS assessment of the Liquor Bill, a product of the Consumer and Corporate Regulation Division, the same department of the dti responsible for the Original Bill. After the Liquor Bill was referred to NEDLAC, noting **"widespread dissatisfaction with the impact assessment ... because it did not quantify any of the likely effects of the controversial measures on jobs, advertising revenue and the industry"**, NEDLAC commissioned an independent socio-economic impact assessment.¹⁰⁸

30.10. Effect of Government not availing itself of available procedures and resources to develop the Original Bill

With (1) the absence of following the SEIAS Guidelines in any meaningful way in compiling the SEIAS Report, (2) the failure to consult SACIP as contemplated by Section 40 of the Act, (3) not referring the Original Bill for deliberation by NEDLAC, and (4) the failure to make available the independent regulatory impact assessment undertaken by Genesis Analytics, the Original Bill was introduced to Parliament without the benefit of expert advice and material facts that would enable Government and the Legislature to consider the impact of the legislation.

These factors, with others, manifested themselves in the material flaws in the Original Bill and, with other factors, in the deliberations in Parliament leading to the Revised Bill, where these flaws were perpetuated by working on a **'technically revised version'** of the Original Bill, and new flaws were added. These are described in the comments of this advice on the individual provisions of the Bill, below.

¹⁰⁶ On the dti website at http://www.dti.gov.za/parliament/2016/Performers_Protection_Amendment_Bill_SEIAS_Report.pdf.

¹⁰⁷ The SEAIS Report was put on the website of the Parliamentary Monitoring Group, an NGO, where they were available to subscribers of their service only. The writer is a subscriber. Since the SEAIS Report is not of public record at the time of writing, it is reproduced in Appendix 6 in terms of section 12(8)(a) of the Act.

¹⁰⁸ Reported in *Business Day* "Why Nedlac wants a new study to quantify cost of liquor bill" <https://www.businesslive.co.za/bd/national/2017-09-18-why-nedlac-wants-a-new-study-to-quantify-cost-of-liquor-bill/>. See also *Business Day* at <https://www.businesslive.co.za/bd/opinion/columnists/2016-09-07-leon-louw-helping-the-government-make-informed-decisions/>.

30.11. Industry efforts to present to the Portfolio Committee on the needs of creators and industry for revision of the Act not responded to

In response to the introduction of the Original Bill, numerous stakeholders from industry, notably the Copyright Alliance, an overarching body representing a number of creators associations, copyright industry sectors, collecting societies and legal professionals, petitioned the Portfolio Committee to be able to demonstrate to them in a workshop how copyright underlies the basis of the music and literary industries, and what the needs of creators and industry are for a revision of the Act (letter of 7 July 2017). Although the Copyright Alliance presented at the public hearings in August 2017, their offer to present a workshop on industry practices was not responded to.

This offer did not take place in a vacuum. Firstly, there was the realisation that the Bill was being processed with no real information being supplied in the Original Bill and its underlying documents as to what creative and copyright industry **sectors do and how they rely on copyright. Secondly, advocates for the 'users' rights' positions had held a workshop with Parliament on 5 December 2016, and the informational workshop for the Portfolio Committee organised by the UCT IP Policy Unit on 28 June 2017 included the topic of "Creators' Rights v. Users' Rights'. Considering that 'users' rights' are not a feature of South African law and that what was meant to be an informational academic presentation was in fact a lobby for "robust exceptions and limitations", was of great concern to rightsholders. In the end, the Copyright Alliance did not get 'equal time' from the Portfolio Committee.**

In response to the lack of impact assessment on the Bill, with the undertaking made by the dti at the Birchwood Hotel meeting in August 2015 not having been met and the SEAIS assessment having fallen short in this regard, the Publishers Association of South Africa commissioned PwC to undertake an impact assessment on **only the 'fair use' provision and the extensive exceptions for education in the Original Bill**, and presented the report to Parliament during the oral hearings in August 2017.¹⁰⁹ This impact assessment foresaw that the Bill would "would impose significant negative consequences on the South African publishing industry" and its findings were not contradicted during the course of the deliberations on the Bill. Judging from there having been no material change in those provisions from the **'technically revised version'** of the Original Bill, completed in October 2017, and the Revised Bill, one can only conclude that the findings of the PwC impact assessment were not taken into account by the Portfolio Committee.

¹⁰⁹ The PwC impact assessment report can be found on PASA's website at <http://publishsa.co.za/file/1532283880bpc-pwcreportoncopyrightamendmentbill-31july2017.pdf>.

30.12. Portfolio Committee not taking expert legal advice and commissioning support from WIPO during the course of the deliberations

The Portfolio Committee recognised that the Original Bill was laden with errors, and following the oral hearings, they resolved to amend the Original Bill.

The Portfolio Committee's plan was only to engage the Technical Panel of Experts at the end of the process for advice on Constitutionality and treaty compliance, not during the course of the deliberations on revision of the Bill.

WIPO offers support to countries which are member states of the WIPO Convention¹¹⁰ to advise and prepare them for accession to the treaties that it administers.¹¹¹ Such support was not obtained in the development of the Bill, with an official of WIPO only being appointed to the Technical Panel of Experts in order to give advice on treaty compliance on the completed Revised Bill.

As appears from paras 4, 5 and 6 of this advice, the Bill fails to comply with, or otherwise to cater for the consequences of, Berne and TRIPs in material respects. Yet, basic treaty principles, like the Three-Step Test and National Treatment, were never raised in the course of the deliberations after the public hearings in August 2017. The members of the Portfolio Committee were clearly concerned about preserving creative industries and having a balanced approach in respect of **legislating copyright exceptions, but their deliberations on 'fair use' and copyright exceptions** would only have been of benefit if they had on a continuous basis tested the provisions of the Bill that they were deliberating against these obligations under international law.

30.13. Deliberation on policy considerations abandoned by the Portfolio Committee

The Portfolio Committee and its Sub-Committee used **the 'technically revised version'** of the Original Bill as the basis for further deliberation. The Sub-Committee was **initially tasked to work on defined policy areas distilled from the 'technically revised version', a proposal for which was made at the Portfolio Committee meeting on 13 March 2018**, but abandoned that process. The Portfolio Committee and the Sub-Committee started a section-by-section deliberation on revised versions of the Bill from 25 April 2018.

The absence of a discussion of policy items was telling. That absence, together with the omission of input from creative and industry sectors (see para 30.11 above), resulted in amendments being undertaken in respect of the **'technically revised version'** and later versions based on hardly any evidence at all, with no independent research or impact assessments in respect of any of these changes.

¹¹⁰ Convention Establishing the World Intellectual Property Convention – see WIPO's website at <http://www.wipo.int/treaties/en/convention/>.

¹¹¹ These treaties include Berne, WCT, WPPT, the Beijing AVP Treaty and the Marrakesh VIP Treaty, but not TRIPs. The list of treaties administered by WIPO can be found at <http://www.wipo.int/treaties/en/>.

30.14. Consequences of the Bill not meeting policy imperaturs and of its development lacking research and impact assessment

Copyright is an extremely complex subject and its intangible exclusive rights are the legal basis for all creative industries, generating income and employment for thousands of people.¹¹² Adapting the delicate balance in the relationship between authors and performers, the producers and publishers who invest in their works and the consumers of their works requires an in-depth understanding of the numerous industry sectors that depend on copyright, collective management of copyright, copyright law itself and the legitimate needs of the market.

This advice has demonstrated that material provisions of the Bill conflict with international treaties, namely Berne and TRIPs, to which South Africa is bound, and international treaties, namely WCT, WPPT, the Beijing AVP Treaty and the Marrakesh VIP Treaty, to which the intention is that the Act should be **"strategically aligned."** Material provisions of the Bill are also at least questionable insofar as compliance with the Constitution is concerned.

This advice has also demonstrated that the Bill has departed from the original intentions to benefit South African composers and performers, instead resulting in a number of consequences unforeseen by the policy statements and in many respects taking rights away from them that they have under the current Act.

The reasons for these consequences are clear, deriving both from the Original Bill and the development of the revised Bill.

With the Original Bill and its development, there was:

- no economic data made available to the decision-makers on the value of the creative and copyright industry sectors in the country or the impact on them once it is passed into law
- outside the findings of the CRC Report and, possibly, the unreleased Genesis Analytics regulatory impact assessment, no real research into the needs of industry and the market that it serves, with the SEIAS Report not meeting the **standards set by Government's own internal procedures,**
- **no consideration in the course of its drafting, of South Africa's commitments** under Berne and TRIPs in relation to copyright, or under WCT, WPPT, the Marrakesh VIP Treaty and the Beijing AVP Treaty; statements that it will comply, being unmotivated and shown to have no substance
- no discernible policy consideration and no substantiation for provisions of the Bill outside those recommended by the CRC Report
- legislating on material and substantive items for which there are no underlying policy decisions at all

¹¹² WIPO's latest statistics for South African copyright-based industries are set out in a report compiled in 2011, at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf.

- a failure to consider whether the 'orphan works' provision needed to be processed as a money bill
- overreach to the prejudice of creators and copyright industries in the development of copyright exceptions and other limitations on authors and copyright owners, unchecked by advice on limitations under the Constitution and by international law, leading to a situation of legislation being processed against the risk of legal action being taken against the Bill on Constitutional grounds or action against South Africa in the World Trade Organization or under bilateral agreements with intellectual property clauses, like AGOA, on the ground that the Original Bill does not comply with South Africa's obligations under Berne and TRIPs (see para 4 below).

The Revised Bill, not having been substantially reworked after the August 2017 hearings, but instead being based on a **'technically revised version'** of the Original Bill and the Portfolio Committee having on two occasions rejected the advice of the dti to excise problematic provisions from the Bill, inherited these flaws and perpetuated them, in that the Portfolio Committee did not:

- interrogate the policy (or lack of it) underlying the many provisions of the Original Bill proceeded with in the revision
- commission an impact assessment and did not act on uncontradicted impact assessments undertaken by stakeholders
- **apply Parliament's own procedures for public participation and the insertion of new sections by way of an amendment bill in respect of Clauses 5, 7 and 9**
- consider the effect of the Constitution on material provisions of the Bill, namely **the 'fair use' provision and the copyright exceptions**, or follow procedures relating to public participation for material changes to these provisions **(especially the 'fair use' provision)** and to **consider whether the 'orphan works' provision caused the Bill to become a money bill**
- **consider South Africa's commitments under the international treaties to which it is bound and which it will undertake in other international treaties in which the Bill it states the Act will be aligned, noting that the Bill, as shown in para 4 below, is not compliant.**

The events recounted here and their consequences create a serious concern that the Bill, originated in unsubstantiated perceptions and the preferences of its drafters, in applying terms across-the-board that do not take into account how the various creative industry sectors operate, and culminating in its not providing real benefit of the authors and performers it was meant to benefit in the first place, will not meet the standards set for the legislative process **by South Africa's Constitution.**

30.15. What can be done?

With the term of the current Parliament coming to an end in early 2019, the options as to what can be salvaged from the Bill are very limited. With fundamental mistakes in the revision process, there is not even the opportunity to implement the most important recommendations of the CRC Report, since this would entail **drafting of entirely new clauses**. **In the writer's opinion, the following steps can be taken to salvage only the most basic and uncontentious elements of the Bill:**

30.15.1. Immediately obtain expert legal opinion and assistance from WIPO to determine (1) what is required from the Bill to bring the Act in compliance with WCT and the Marrakesh VIP Treaty, and (2) to ratify WCT and to sign and ratify the Marrakesh VIP Treaty.

30.15.2. The Executive must decide on ratifying WCT and the Marrakesh VIP Treaties, as is incumbent on it in terms of Section 231 of the Constitution.

30.15.3. The Bill proceeds with only the following provisions, to introduce:

- **the 'digital rights' as per clauses 4, 6, 8, 10**, subject to the necessary corrections and addition of necessary consequential amendments (para 10)
- the provisions relating to the protection of TPMs and CMI and the consequential amendments relating to infringement, as per clauses 26(a), 27(a), 29, 33(c), 39, subject to the necessary corrections and with only the minimum exceptions needed to make these provisions work (see para 25)
- **the "transient and incidental copies" exception currently proposed for Section 12C(1)(a) in Clause 13**, subject to its correction (see para 18) and its incorporation in Section 12 of the Act, with necessary cross-inclusions in the other exception clauses
- **the "format-shifting" exception (currently proposed for Sections 12A(1)(a)(i) and 12C(1)(b) in Clause 13)** only for personal use and from an authorised copy of the work that has been lawfully acquired by the person making the copy under the exception, incorporated in Section 12(1)(a) (see para 17.2 inasmuch as it relates to this exception and para 18)
- **the exclusion from copyright of "ideas, procedures, methods of operation or mathematical concepts"** proposed for Section 2A(1)(a) in Clause 2 as a new Section 2(4) (see para 9.1)
- all other provisions that may be directly necessary for South Africa to ratify and implement WCT
- an exception for persons with a disability, to be inserted after Section 19B, that, as related in paras 7 and 19, will comply with WCT and the Marrakesh VIP Treaty.

BIBLIOGRAPHY

Dean, Prof Owen H., *Handbook of South African Copyright Law*, Service 14, 2012

Articles:

Ficsor, Mihály J., *Conflict of the Canadian legislation and case law on fair dealing for educational purposes with the international norms, in particular with the three-step test*, 2018, available for download from his blog Copyright See-Saw at <http://www.copyrightseesaw.net/en/papers>

Karjiker, Prof Sadulla, and Dean, Prof Owen H., *Full comments: Copyright Amendment Bill 2018*, 22 July 2018, at <http://blogs.sun.ac.za/iplaw/2018/07/22/full-comments-copyright-amendment-bill-2018/>

News and other media reports:

International Publishers Association, *Michael Fraser: powerful social forces are attacking copyright*, 2016, at <https://www.internationalpublishers.org/copyright/copyright-news/403-a-conversation-with-professor-michael-fraser>.

International Publishers Association, *Charles Clark Memorial Lecture 2017: Veteran copyright frenemies trade polite blows over 'fair use'*, 2017, at <https://www.internationalpublishers.org/copyright/copyright-news/512-charles-clark-memorial-lecture-2017-veteran-copyright-frenemies-trade-genteel-blows-over-fair-use>.

Cases:

South Africa -

Jordaan v. Tshwane City 2017(2)SA295(GP), at <http://www.saflii.org/za/cases/ZAGPPHC/2016/941.html>.

Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC), at <http://www.saflii.org/za/cases/ZACC/2005/7.html>

Moneyweb (Pty) Ltd v Media 24 Ltd and Another 2016 (4) SA 591 (GJ), at <http://www.saflii.org/za/cases/ZAGPJHC/2016/81.html>

National Credit Regulator v Opperman 2013 (2) SA 1 (CC), at <http://www.saflii.org/za/cases/ZACC/2012/29.html>.

Court of Justice of the European Union –

Land Nordrhein-Westfalen v Dirk Renckhoff (C-161/17)

Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s (C-351/12)

United States of America –

American Geophysical Union v. Texaco, Inc. 60 F.3rd 913 (2d Cir. 1995)
Authors Guild, Inc. v. Google Inc. No. 13-4829-cv(2d Cir. Oct. 16, 2015)
Authors Guild, Inc. v. Hathi Trust 755 F.3d87 (2d Cir. 2014)
Cambridge University Press and others v. Patton et. al Nos. 12-14676 & 12-15147
Oracle America, Inc. v. Google LLC Nos. 2017-1118, 2017-1202 (Fed. Cir. Mar. 27, 2018)

Canada –

CCH Canadian Ltd v Law Society of Upper Canada [2004] 1 SCR 339

Proceedings of Parliament:

Parliamentary Monitoring Group reports on the proceedings of the Portfolio Committee on Trade & Industry and its Sub-Committee on the Copyright Amendment Bill. Index at <https://pmg.org.za/bill/705/>.

Reports, Studies and Policy Statements:

Copyright Amendment Bill, no 13 of 2017, at https://www.gov.za/sites/default/files/B13-2017_Copyright_170516.pdf (referred to in this advice as the “Original Bill”)

Copyright Review Commission Report, 2011, at <https://www.gov.za/sites/default/files/CRC%20REPORT.pdf> (referred to in the advice as the “CRC Report”)

Department of Planning, Monitoring and Evaluation, *Socio-Economic Impact Assessment System (SEIAS) Guidelines*, May 2015, at <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/SEIAS%20Documents/SEIAS%20guidelines.pdf>.

dti, *Draft National Policy on Intellectual Property*, 2013, Government Gazette no 36816, Notice 918 of 2013, 4 September 2013, at https://www.gov.za/sites/default/files/36816_gen918.pdf (referred to in the advice as the “Draft National Policy”)

dti, *Intellectual Property Policy of the Republic of South Africa Phase 1*, 2018, Government Gazette no. 41870 Notice 518 of 2018, 31 August 2018, at https://www.gov.za/sites/default/files/41870_gen518_0.pdf.

PwC, *The expected impact of the ‘fair use’ provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry*, July 2017, at <http://publishsa.co.za/file/1532283880bpc-pwcreportoncopyrightamendmentbill-31july2017.pdf>.

Seng, Prof Daniel, *Updated Study and Additional Analysis of Study on Copyright Limitations and Exceptions for Educational Activities*, 2017, at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_5_rev.pdf.

WIPO, *Implications of the TRIPs Agreement on Treaties Administered by WIPO*, 1996, at http://www.wipo.int/edocs/pubdocs/en/wipo_pub_464.pdf

WIPO, *Guide to the Copyright and related Rights Treaties administered by WIPO and Glossary of Copyright and Related Rights Terms*, 2003, at http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

Note: The documents at the hyperlinks given in this advice were all last accessed by the writer on 1 October 2018.

LIST OF APPENDECES

APPENDIX 1: Curriculum Vitae, André Myburgh, presented to the Portfolio Committee December 2017

APPENDIX 2: Terms of Reference given by the Portfolio Committee to the Technical Panel of Experts in relation to the expert advice sought

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APPENDIX I

CURRICULUM VITAE
ANDRÉ MYBURGH

presented to the Portfolio Committee December 2017

CIRRICULUM VITAE - ANDRE MYBURGH, B.Comm. LL.B. (Stell.)

for the Portfolio Committee on Trade & Industry, Parliament of the Republic of South Africa, in relation to the panel of experts to advise on the Copyright Amendment Bill, 2017

Professional contact details

Foreign Counsel
Lenz Caemmerer, Attorneys and Notaries
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CH-4010 Basel
Switzerland



Personal / Professional Qualifications

South African citizen, resident in Fribourg, Switzerland
B.Comm. LL.B., University of Stellenbosch, 1978-1982.
Attorney and Notary Public, Pretoria, South Africa, 1987
(resigned from the roll of practising attorneys in South Africa, 2007)
Trade Mark Practitioner with the South African Institute of Intellectual Property Lawyers,
exam-qualified 1987, subsequently admitted as a Fellow
Solicitor of England and Wales, 2008 (non-practising)

Work history

2011 to present

Lenz Caemmerer, Attorneys and Notaries, Basel, Switzerland
- Foreign Counsel

2010 to 2011

Independent consultant for commercial and intellectual property law cases, based in Switzerland.

2008 to 2010

Hodler & Emmenegger, Berne, Switzerland
- Foreign Counsel

1989 to 2007:

Fairbridge Arderne & Lawton Inc, Cape Town, South Africa
- Partner in Intellectual Property and Commercial Departments from 1991

1985 to 1989

Spoor & Fisher, Pretoria, South Africa
- articled clerk from 1985, practising attorney from 1987

Summary of relevant work experience at Lenz Caemmerer

Practice focuses on international copyright law consultancy and advice, as well as support for enforcement of rights in complex cases.

- Retainer and long-term appointments:
Copyright law adviser for:
 - Dramatic Artistic and Literary Rights Organisation (Pty) Ltd, DALRO, Johannesburg, South Africa (since 2010)
 - Publishers Association of South Africa, PASA, Cape Town, South Africa (since 2011)External counsel for:
 - the International Association of Scientific Technical and Medical Publishers, STM, the Hague, Netherlands and Oxford, England (since 2011)
 - the International Publishers Association, IPA, Geneva, Switzerland (since 2016).
- South African legislative consultations:
 - Intellectual Property Laws Amendment Bill and the draft regulations for the Act (2010-2014)
 - Draft National Policy on Intellectual Property and its regulatory impact assessment (2013-2014)
 - Draft Copyright Amendment Bill (2015)
 - Indigenous Knowledge Systems Bill (2015 to date)
 - Cybercrimes and Cybersecurity Bill (2015 to date)
 - Draft Intellectual Property Consultative Framework (2016) and Draft Intellectual Property Policy Phase I (2017)
 - Copyright Amendment Bill and Performers Protection Amendment Bill (2016 to date)In respect of each of these consultations, advised or assisted with written submissions for one or more of DALRO, PASA, STM, IPA and also the Motion Pictures Association, MPA and the International Federation of Film Producers Associations, FIAPF.
- WIPO Standing Committee on Copyright and Related Rights, SCCR:
Attended every session since 2012, representing STM and IPA.
Subject matter dealt with in these sessions has included conclusion of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, and deliberations of the international protection of broadcasting organisations, exceptions and limitations for libraries, archives and museums, exceptions and limitations for education, exceptions and limitations for persons with other disabilities, and the artists' resale right.
- WIPO General Assemblies, WIPO Advisory Committee on Enforcement and WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore:
Attended occasional sessions since 2012.
- Copyright law reviews in:
 - United Kingdom (various consultations, including the Hargreaves report and the Government response, 2012-2014, and topics such as copyright management organisations, extended collective licensing, since 2015)
 - United States (various consultations since 2013, on specific topics such as mass digitization by libraries, safe harbours, technical protection measures and moral rights)

- Copyright law reviews (continued) in:
 - European Union (various consultations since 2011, including on specific topics, such as orphan works, out-of-commerce works, copyright management organisations and licensing, and the general copyright review for the Digital Single Market)
 - Canada (2011-2013)
 - Australia (various consultations since 2012)
 - Netherlands (science and research exceptions, 2014-2015)
 - Nigeria (2015 to date)
 - Singapore (2016 to date)
 - Japan (2016 to date)
 - Turkey (2016 to date)Wrote or supported submissions for STM, IPA and local publishers associations.
- WIPO Accessible Books Consortium, ABC, reorganised following the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*:
Support publishing industry representatives on the ABC Board, which includes the IPA and PASA, 2017.
- Fordham IP Conference, New York, USA and Cambridge, England:
Attended in 2013, 2015 and 2017.
Lenz Caemmerer was a sponsor in 2015 and 2016.

Membership of Professional Bodies

Fellow of the South African Institute of Intellectual Property Lawyers (SAIIPL)
Overseas Member of the UK Institute of Trade Mark Agents (ITMA)
Licensing Executives Society (LES). Director of South African chapter in 2007.
International Bar Association until 2007.
International Trademarks Association until 2007.

Publications

- Trade publications and newspaper articles

“Reassurances about fair-use benefits ring hollow to publishers”
Business Day, Tiso Blackstar Group, 24 August 2017

“Copyright: Has ‘fair use’ become unauthorised use that is fair in the eye of the beholder?”
IP Briefs, South African Institute of Intellectual Property Lawyers, March 2017

“The Traditional Works Bill”
The South African Artist, Hodnett Advertising, January 2013

“Copyright for Visual Artists”
The South African Artist, Hodnett Advertising, November 2012

“Owning and Managing Copyright of Visual Artists”
The South African Artist, Hodnett Advertising, September 2012

“Legal developments in the protection of plant-related traditional knowledge: An intellectual property lawyer’s perspective of the international and South African legal framework”
South African Journal of Botany, Elsevier, Oct 2011

“Privacy and Piracy in the digital world”
Without Prejudice, Gleason Publications, November 2010

“Lessons from a town like Alice”
Without Prejudice, Gleason Publications, September 2010

- Article in peer-reviewed journal

“Legal developments in the protection of plant-related traditional knowledge: An intellectual property lawyer’s perspective of the international and South African legal framework”
South African Journal of Botany, Elsevier, October 2011

December 2017

APPENDIX 2

TERMS OF REFERENCE GIVEN BY THE PORTFOLIO
COMMITTEE TO THE TECHNICAL PANEL OF EXPERTS IN
RELATION TO THE EXPERT ADVICE SOUGHT



Instructions to Technical Panel of Experts on the Copyright Amendment Bill

1. The purpose of the panel is to advise the Committee on any technical or drafting issues pertaining to the Committee's amendments to the Copyright Amendment Bill. This 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.
2. Please note that the intention is not for panel members to engage on the merits or demerits of the Bill or the policies agreed to by the Committee and that are thus reflected in the Bill. The panel members are requested to **ONLY** provide inputs on any technical or drafting issues as set out in paragraph 1. Any comment that speaks to the merits of a policy decision will not be considered. The Committee has already engaged the public in this regard and has finalised that process.
3. The final draft Bill is attached for your input.
4. Although it is envisaged that Panel members would work separately, there is no limitation on having discussions and assisting each other on one or more of the above areas based on your technical strengths and expertise.
5. Inputs should be submitted in writing as follows:
 - a. Please provide all inputs within the Bill using track changes. If you limit yourself to the requirements in paragraph 1, this should be sufficient for you to make the required inputs.
 - b. If you feel it necessary to explain a change proposed, or wish to express a view on constitutionality or a shortcoming in respect of a treaty provision, please provide that input either in a comment, or in a box under the relevant subsection/paragraph.
6. Please note that the Committee will give due consideration to all inputs that comply with the requirements set out in paragraphs 1 and 5; however, the Committee does not guarantee that your input will be accepted. Should you wish to attend the meeting at which all inputs will be discussed, kindly inform the committee secretaries, Tenda Madima and Andre Hermans, accordingly.
7. Panel members must submit their inputs for the Committee's consideration by Friday, 28 September 2018, via email to the committee secretaries at tmadima@parliament.gov.za and ahermans@parliament.gov.za.



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OF THE REPUBLIC OF SOUTH AFRICA

COMMITTEES SECTION

Portfolio Committee on Trade and Industry

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8. Please forward any queries on the process or the policies to the committee secretaries.
9. The Committee wishes to extend its gratitude to all panel members for assisting it in passing a technically correct Bill.

APPENDIX 3

VERSION OF THE COPYRIGHT AMENDMENT BILL, NO 13 OF
2017, REVISED UP TO 3 SEPTEMBER 2018, THE SUBJECT OF
THIS ADVICE

REPUBLIC OF SOUTH AFRICA

COPYRIGHT AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75) and redrafted by
the Portfolio Committee on Trade and Industry; 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 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 in respect of orphan works; to strengthen the powers and functions of the Copyright 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 definitions:

“ ‘art market professional’ includes—

(a) an auctioneer or auction house;

(b) the owner or operator of an art gallery;

(c) the owner or operator of a museum;

(d) an art dealer; or

(e) a person otherwise involved in the business of dealing in artworks;

‘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;”;

- (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 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—

(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—

(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;”; 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)] (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 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 literary or musical 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 literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that literary or musical 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.’’.

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 paragraphs:

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

(dB) 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;’’; 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)] (dB) inclusive.’’.

Insertion of section 7A, 7B, 7C, 7D, 7E and 7F in Act 98 of 1978

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

“Share in royalties regarding visual artistic works

7A. (1) For the purposes of this section, ‘royalty’ means the gross profit made on the exploitation of a visual artistic work by a copyright owner or a person who has been authorized by the author to do any of the acts contemplated in section 7, but does not include profit made on the commercial resale of a visual artistic work contemplated in section 7B.

(2) Notwithstanding—

(a) the assignment of the copyright in a visual artistic work; or

(b) the authorization by the author of a visual artistic work of the right to do any of the acts contemplated in section 7,

the author shall have the right to share in the royalty received for the execution of any of the acts contemplated in section 7.

(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), as the case may be.

(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 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.

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.

(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 a visual 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 a visual artistic work—

(a) is a work of more than one author, the presumption in subsection (1) applies to each co-author of such visual 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 a visual artistic work or his or her heirs, as may be applicable, 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 a visual 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 a visual artistic work by an author who did not assign 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.

Application of resale royalty right

7F. (1) Sections 7B, 7C, 7D and 7E apply to a visual artistic work that was made before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic work falls within the application of this Act.

(2) The resale royalty right only applies to a commercial resale made after the commencement date of the Copyright Amendment Act, 2019.’’.

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 to the public by wire or wireless means;

(dB) 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;

(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:

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 Act, 2019, if that audiovisual 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.''

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—

- (a) by the substitution for paragraph of the following paragraph:
 - “(e) communicating the sound recording to the public by wire or wireless means[.];”; and
- (b) by the addition after paragraph (e) of the following paragraph:
 - “(f) making the sound recording available to the public by wire or wireless means, 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 authorized 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); or
 - (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 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.

(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

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, 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.

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) 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 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 purposes;
- (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; and
 - (i) the making of a personal copy of such work by an individual for the individual's personal use and made for ends which are not commercial.
- (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.

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 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 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 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).''.

Amendment of section 15 of Act 98 of 1978, as amended by section 2 of Act 13 of 1988 and section 13 of Act 125 of 1992

14. Section 15 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) The copyright in an artistic work shall not be infringed by its **[inclusion]** use in **[a cinematograph film or a television broadcast or 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 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 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 copy of —

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

(b) 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 or the indigenous community concerned 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 a 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 a 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 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.

(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 organization that serves persons with disabilities may, without the authorization 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 organization.

(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]** assignment 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.’’.

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—

(a) 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, subject to subsection (3), be governed by agreement between the parties.”;

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

“(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international or local **[organization]** organization concerned, and not in the author.”; and

(c) by the addition after subsection (2) of the following subsection:

“(3) (a) The agreement contemplated in subsection (1)(c) may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorize any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission.

(b) Where the agreement contemplated in subsection (1)(c) does not specify who the copyright owner is, limited ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorize any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to such rights as may be necessary for the purpose of the commission.

(c) The author of a work contemplated in subsection (1)(c) may approach the Tribunal for an order—

(i) where the work is not used by the person who commissioned the work for the purpose commissioned, licencing the author to use that work for such purpose, subject to a fee determined by the Tribunal payable to the person who commissioned the

work; or

(ii) where the work is used for a purpose other than that for which it was commissioned, ordering the person who commissioned the work to make payment of royalties to the author for such other use.

(d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the following:

(i) The nature of the work;

(ii) the reason why, and period for which, the person who commissioned the work did not use the work; and

(iii) public interest.

(e) Where the work contemplated in subsection (1)(c) is of a personal nature to the person who commissioned the work, the Tribunal may not licence the author to use that work.’’.

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 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- licensor, 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.

(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

(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 at any time 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 must submit his or her details for registration on 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

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 accreditation.

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

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

(b) performers or copyright owners, or on behalf of an organization representing performers or copyright 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 an accreditation certificate, consult with any person and may grant such accreditation and issue an accreditation certificate on such terms and conditions as may be determined by the Commission.

(4) The Commission shall not accredit or issue an accreditation certificate to any applicant unless the Commission is satisfied that the applicant—

(a) complies with the requirements for accreditation and such requirements as may be prescribed;

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

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

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

(5) An accreditation 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) If there is no collecting society for a right, the Commission may provide such assistance as may be necessary to assist in the formation of a collecting society.

(7) (a) Any person who at the commencement of the Copyright Amendment Act, 2019, is acting as a representative collecting society in terms of this Chapter must, within 18 months of the commencement of the Copyright Amendment Act, 2019, apply to the Commission in the prescribed manner and form for accreditation.

(b) The person contemplated in paragraph (a) may continue to act as a representative society pending such accreditation subject to any—

(i) conditions that the Commission may instruct it in writing to comply with; and

(ii) finding of the Commission related to such application for accreditation.

(8) (a) Subject to subsection (7), any person who intentionally gives him or herself out as a representative collecting society in terms of this Chapter without having been accredited, commits an offence.

- (b) A person convicted of an offence in terms of paragraph (a), is liable on conviction to a fine or imprisonment for a period not exceeding five years.

Administration of rights by collecting society

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

(a) a collecting society or indigenous community may accept from a performer, copyright owner or indigenous community or another collecting society of rights, exclusive authorization 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 or indigenous community or other collecting society of rights may withdraw such authorization without prejudice to the right of the collecting society or indigenous community 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 or indigenous communities 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 organization administering rights corresponding to rights that it administers under this Act;

(b) entrust rights administered by it in the Republic to such foreign society or foreign organization to administer in that country: Provided that no such collecting society, foreign society or foreign organization shall permit any discrimination in respect of the terms of a licence or the distribution of royalties collected; and

- (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 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
- (b) upon demand by the performer or copyright owner, or their authorized

representatives, pay over the royalties together with the interest earned on the investment contemplated in paragraph (a).

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 accreditation 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 accreditation of collecting society

22F. (1) For purposes of this Act, ‘compliance notice’ means a compliance notice contemplated in section 171 of the Companies Act, 2008 (Act No. 71 of 2008), read with the necessary changes.

(2) 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 accreditation conditions of that collecting society or is managed in a manner detrimental to the interests of the performers or copyright owners concerned.

(3) 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 accreditation of the collecting society contemplated in subsection (1), pending an inquiry for such period as may be specified in the order.

(4) 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 accreditation of the collecting society in question.

(5) 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.’’.

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—

(a) by the insertion of the following subsection:

“(5A) 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 authorized 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.”;

(b) by the substitution for subsection (6) of the following subsection:

“(6) A person convicted of an offence under this section shall be liable—

- (a) in the case of a first conviction, to a fine **[not exceeding five thousand rand]** or to imprisonment for a period not exceeding three 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 five per cent of its annual turnover, for each article to which the offence relates; or
- (b) in any **[other]** case other than those contemplated in paragraph (a), to a fine **[not exceeding ten thousand rand]** 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, for each article to which the offence relates.”; and

(c) by the addition after subsection (8) of the following subsection:

“(9) For the purpose of subsection (6), 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, as the case may be, were committed and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, under all transactions to which this Act applies.”.

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.

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

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

‘‘Establishment of Tribunal

29. (1) The Copyright Tribunal is hereby established.

(2) The Chief Justice shall designate—

(a) three judges; and

(b) five judges, who have been discharged from active service in terms of section 3 of the Judges Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001),

as members of the Tribunal.

(3) The Minister must designate one of the persons contemplated in subsection (1) as chairperson and one as deputy chairperson.

(4) The members of the Tribunal contemplated in subsection (1) shall serve for a period not exceeding five years, which period is renewable for a further five years.

(5) The chairperson may, on one month written notice addressed to the Minister and the Chief Justice—

(a) resign from the Tribunal; or

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

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

(7) 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.’’.

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

31. 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 Copyright;

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

(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 Copyright;

(e) settle disputes relating to licensing schemes, 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 Copyright; and

(f) settle any dispute that relates to Copyright.

(3) The Tribunal does not have the power to review any administrative action by the Commission that does not relate to Copyright.

Removal or suspension of members of Tribunal

29B. The Minister may at any time, in consultation with the Minister responsible for Justice and the Chief Justice, remove or suspend a member of the Tribunal from office if such a member—

- (a) no longer qualifies to be a member of the Tribunal as referred to in section 29;
- (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

29C. (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 29B(d), 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

29D. The Minister must, in consultation with the Minister responsible for Justice, prescribe—

- (a) the form and procedure to make an application or referral to the Tribunal;
- (b) rules that determine the form and manner of proceedings before the Tribunal;
- (c) the fees applicable to proceedings before the Tribunal; and
- (d) any other matter necessary for the proper functioning of the Tribunal.

Hearings before Tribunal

29E. (1) The Tribunal must conduct its hearings in the prescribed manner and must specifically conduct its hearings—

- (a) in public;
- (b) in an inquisitorial manner;
- (c) as expeditiously as possible;
- (d) as informally as possible; and
- (e) 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

29F. 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

29G. 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.

Orders of Tribunal

29H. 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.”.

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

5

32. Sections 30, 31, 32 and 33 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

33. 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;’’; 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

34. 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 open licences or voluntary dedications of a work to the public domain.”.

Insertion of Schedule 2 in Act 98 of 1978

35. 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 sub-item (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 authorization 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 authorization 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 month 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 sub-item (4).

(4) The further periods contemplated in sub-item (3) shall be computed from the date on which the requirements mentioned in sub-item (1)(a) and sub-item (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 sub-item (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 authorization 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 sub-item (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 a language regularly used in the Republic;

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

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

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

(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 the use contemplated in the licence 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 organization

5. (1) A licence under this Part may also be granted to a domestic broadcasting organization 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 organizations with their headquarters in the Republic; and

(e) all uses made of the translation are without commercial purpose.

(2) A broadcast contemplated in sub-item (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 organization under all of the conditions provided in sub-item (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 authorization 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 as contemplated in the licence to be granted, 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, authorization 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 sub-item (1)(a) and sub-item (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 sub-item (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 sub-item (1)(b)(ii) have been mailed.

(5) If, during the period of six or three months referred to in sub-item (3) or (4), any distribution or sale as contemplated in sub-item (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 authorization 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 authorization 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

36. 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.

Transitional provision

37. (1) Any reference in the Copyright Amendment Act, 2019, to the phrases “indigenous cultural expressions” or “indigenous community” shall only be effective upon the date on which the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013) becomes operational.

(2) Until the date of commencement of the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013), ‘**Commission**’ means the Commission established in terms of section 185 of the Companies Act, 2008 (Act No. 71 of 2008).

Short title and commencement

38. (1) This Act is called the Copyright Amendment Act, 2019, and subject to subsection (2), comes into operation on a date fixed by the President by proclamation in the *Gazette*.

(2) The following sections come into operation on a date fixed by the President by proclamation in the *Gazette*, which date may not precede the commencement of the regulations relevant to each of the sections respectively:

- (a) Section 5, in respect of the insertion of section 6A(7);
- (b) section 7, in respect of the insertion of section 7A(7); and
- (c) section 9, in respect of the insertion of section 8A(5).

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 Organization (“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—

2.2.1. 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;

2.2.2. 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 accredited with the Companies and Intellectual Property Commission (“CIPC”).

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 the strengthening of the Copyright Tribunal.

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 also providing for ownership by local organizations that may be prescribed.

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 literary or 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 inserts a new section 6A specifically providing for royalty sharing after assignment of copyright in a literary or musical work or where the author of a literary or musical work authorized another to do any of the acts contemplated in section 6.

3.6. Clause 6 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 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.

- 3.7. Clause 7 of the Bill inserts a new section 7A specifically providing for royalty sharing after assignment of copyright in an artistic work or where the author of an artistic work authorized another to do any of the acts contemplated in section 7. It also provides in sections 7B to 7E 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 assignment by the author of such work of art.
- 3.8. Clause 8 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 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.
- 3.9. Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing after assignment of copyright in audiovisual works or where the author of an audiovisual work authorized another to do any of the acts contemplated in section 8.
- 3.10. Clause 10 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 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.
- 3.11. Clause 11 of the Bill proposes the substitution of section 9A of the Act. It requires the recording and reporting of any act contemplated in section 9(c), (d) or (e) and makes the failure to do so, an offence. It also makes certain amendments related to the parties involved in determining the royalty amount, and for referral to the Tribunal.
- 3.12. Clause 12 of the Bill proposes the repeal of section 12, in order to provide for exceptions in all works, rather than only in literary and musical works.
- 3.13. Clause 13 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection, section 12B providing for specific exceptions and section 12C providing for the permission to make

transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process. It also proposes the insertion of section 12D providing for exceptions related to educational and academic activities.

- 3.14. Clause 14 of the Bill proposes an amendment to section 15 of the Act to provide for panorama and incidental use exceptions.
- 3.15. Clause 15 of the Bill proposes an amendment to section 16 of the Act, providing for the deletion of subsection (1).
- 3.16. Clauses 16 and 17 proposes the repeal of sections 17 and 18 of the Act, respectively.
- 3.17. Clause 18 of the Bill proposes the repeal of section 19A of the Act.
- 3.18. Clause 19 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 authorization 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.
- 3.19. Clause 20 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.
- 3.20. Clause 21 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.
- 3.21. Clause 22 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. It further provides for the protection of the author by allowing an application to the Tribunal where the work is not used, or not used for the purpose of the commission.
- 3.22. Clause 23 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. It also provides a reversion right for where copyright in a literary or musical work was assigned by an author to a publisher.

- 3.23. Clause 24 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.
- 3.24. Clause 25 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation and regulation of Collecting Societies. It also provides that where a person intentionally gives him or herself out as a Collecting Society, that person commits an offence.
- 3.25. Clause 26 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.
- 3.26. Clause 27 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. It also provides for an increase in penalties for penalties where the convicted person is not a natural person.
- 3.27. Clause 28 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.
- 3.28. Clause 29 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.
- 3.29. Clauses 30 and 31 of the Bill amend section 29 and propose the insertion of sections 29A to 29H into the Act, which provide for, amongst others, the strengthening of the Copyright Tribunal; its functions; appointment of its members; term of office; removal and suspensions; and procedural matters on

the conduct of hearings of the Tribunal.

- 3.30. Clause 32 of the Bill proposes the repeal of sections 30, 31, 32, 33 and 36 of the Act.
- 3.31. Clause 33 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.
- 3.32. Clause 34 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.
- 3.33. Clause 35 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.
- 3.34. Clause 36 provides for the amendment of the expressions “cinematographic film” and “film”.
- 3.35. Clause 37 provides for transitional provisions related to terms inserted in the Act by the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013).
- 3.36. Clause 38 of the Bill provides for the short title and commencement.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 4.1. 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 organizations, 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

- 5.1. Any financial requirement will be accommodated within the existing budget.

6. PARLIAMENTARY PROCEDURE

Tagging

- 6.1. 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.

6.2. 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.

6.3. 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.’”

6.4. In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that “any Bill whose provisions in substantial measure”

¹ 2010 (8) BCLR 741 (CC)

fall within a specific Schedule must be classified in terms of that Schedule.

6.5. 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.

6.6. 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).

6.7. 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.

6.8. 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

6.9. 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.”.

6.10. 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.

APPENDIX 4

CORRESPONDENCE WITH THE PORTFOLIO COMMITTEE
8 DECEMBER 2017 TO 18 SEPTEMBER 2018

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 08 December 2017 15:27
To: Myburgh Andre
Cc: Andre Hermans; Thandiswa Macanda
Subject: Invitation letter to serve in a panel
Attachments: Adv Myburgh letter.doc; TERMS OF REFERENCE panel of technical experts.draft3.docx

Dear Adv Myburgh

Kindly receive our invitation letter and the terms of reference.

Please send us your profile as well in your acknowledgement.

Regards

Tenda Madima

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PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

COMMITTEES SECTION

Portfolio Committee on Trade and Industry

P.O. Box 15 Cape Town 8000 RSA

Tel: 27 (21) 403 3822 Fax: 0866527753

Cell: 083 709 8419

Email: tmadima@parliament.gov.za

www.parliament.gov.za

05 December 2017

Dear Adv A Myburgh

(per email)

PARTICIPATION ON THE TECHNICAL PANEL OF THE COPYRIGHT AMENDMENT BILL

The Portfolio Committee on Trade and Industry is currently considering the Copyright Amendment Bill. As part of its process, it is establishing a voluntary technical panel to ensure that the Committee's final proposed amendments to the Bill will fit into the international copyright regime, meet the policy objectives agreed to and pass constitutional muster. The panel's role will precede the Committee's final adoption of the Bill to be adopted by the National Assembly.

The purpose of the panel will be to advise the Committee on any technical or drafting issues pertaining to the Committee's amendments to the Copyright Amendment Bill.

Currently, the Committee plans to finalise its deliberations on the Bill during the second quarter of 2018. The panel will be kept abreast of the developments on the programme. Upon finalisation of the Committee's amendments, panel members will then be given about three weeks to submit their inputs for the Committee's consideration.

The Committee has recommended your appointment to the panel as per the attached terms of reference. Please confirm whether you are willing to serve on this panel by Tuesday, 12 December 2017.

For any further information, kindly contact Tenda Madima via email at tmadima@parliament.gov.za or André Hermans at ahermans@parliament.gov.za.

Yours sincerely

J L Fubbs (Ms), MP
Chairperson: PC on Trade and Industry



TERMS OF REFERENCE

Establishment of a panel of technical experts on the Copyright Amendment Bill

1. Introduction

The Copyright Amendment Bill intends to address and resolve issues arising from the findings of the Copyright Review Commission, which concluded their report in 2011. These issues include:

- The non-payment of royalties;
- The lack of formalisation of the creative industry and the related abuse;
- The incidence of piracy; and
- The moral and economic rights of performers related to audio-visual fixations.

The Bill specifically focuses on the:

- Definition of certain words and expressions.
- Allowance for the reproduction of copyright work.
- Provision for the protection of copyright in artistic work
- Provision for the accreditation and registration of Collecting Societies.
- Provision for the procedure for settlement of royalties disputes.
- Allowance for the fair use of copyright work.
- Provision for access to copyright works by persons with disabilities.
- Provision for the protection of authorship of orphan works by the State.
- Provision for the establishment of the Intellectual Property Tribunal, the appointment of its members and its powers and functions.
- Provision for prohibited conduct in respect of technological protection measures and copyright management information.
- Provide for the management of digital rights.
- Provision for certain new offences.

Given the complexities of copyright law, the number of technical amendments that were required to be made and that may need to be made once policy discussions are concluded, the Committee is considering establishing a panel of technical experts and key industry associations.

2. Purpose and scope of the panel

The purpose of the panel is to advise the Committee on any technical or drafting issues pertaining to the Committee's amendments to the Copyright Amendment Bill. This should focus on:

- the appropriateness of the terminology used in the Bill;
- whether the wording of the Bill will achieve the policy objectives as agreed to by the Committee;
- whether the amendments agreed to can withstand Constitutional muster; and
- whether the concepts outlined in the Bill will comply with international copyright law.

Panel members should note that this process is not to discuss the merits or demerits of the Bill, but an attempt to get the inputs of experts on the decisions the Committee may make on policy and other matters reflected in the Bill.

The intention is that the Committee would forward the technically corrected B-Bill to the panel as a reference point and then to submit the final draft, as well as the agreed policy objectives prior to adoption for their technical input.

Panel members should work separately and may assist on one or more of the above areas based on their technical strengths and expertise. Inputs should be submitted in writing to the Committee and if necessary, additional clarity on points raised in the submissions may be requested.

Membership to the panel is voluntary. Panel members will be identified by the Committee using the list of stakeholders that made submissions to the introduced Bill, as well as any other appropriately qualified individuals the Committee may identify.

Panel members will be given at least three weeks to submit their inputs for the Committee's consideration.

From: Myburgh Andre
Sent: 12 December 2017 10:41
To: 'Tenda Madima'; Andre Hermans
Cc: Thandiswa Macanda
Subject: RE: Invitation letter to serve in a panel

Dear Tenda, dear André

This is just to acknowledge receipt of your email of Friday afternoon. I am working on sending you my reply this evening.

Best regards
André

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Tenda Madima [mailto:tmadima@parliament.gov.za]
Sent: 08 December 2017 15:27
To: Myburgh Andre <andre.myburgh@lclaw.ch>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Thandiswa Macanda <tmacanda@parliament.gov.za>
Subject: Invitation letter to serve in a panel

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 12 December 2017 11:07
To: Myburgh Andre
Cc: Andre Hermans; Margot Sheldon
Subject: RE: Invitation letter to serve in a panel

Good day

We appreciate your response.

Regards

Tenda

From: Myburgh Andre [mailto:andre.myburgh@lclaw.ch]
Sent: Tuesday, 12 December 2017 11:41
To: Tenda Madima <tmadima@parliament.gov.za>; Andre Hermans <ahermans@parliament.gov.za>
Cc: Thandiswa Macanda <tmacanda@parliament.gov.za>
Subject: RE: Invitation letter to serve in a panel

Tenda Madima

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From: Myburgh Andre
Sent: 12 December 2017 18:35
To: 'Tenda Madima'; Andre Hermans
Cc: Thandiswa Macanda
Subject: RE: Invitation letter to serve in a panel
Attachments: AF_Myburgh CV Panel_Copyright_Amendment_Bill Dec2017.pdf

Dear Ms Fubbs

Thank you for your invitation to join the panel of experts to support the Portfolio Committee on the Copyright Amendment Bill in accordance with the terms of reference attached to it.

I am prepared to accept the nomination, subject to my firm's clients, whom we have advised on the Bill, agreeing to it. All of them have reacted positively so far, but in a few cases internal procedures have to be followed, and the MD of one of our clients was hospitalised for this week. You may therefore take this email as an in-principle acceptance, subject to confirmation, which we expect by not later than next week.

Please find my CV attached, which is shortened to focus only on my work in relation to copyright and qualifications that are relevant to my appointment to the Panel.

Declaration of Interests:

My firm has instructions to advise a number of organisations on the Bill, as you are aware. These organisations are the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd, DALRO, the Publishers Association of South Africa, PASA, the International Association of Scientific Technical and Medical Publishers, STM, the International Publishers Association, IPA, the Motion Pictures Association, MPA, and the International Federation of Film Producers Associations, FIAPF.

All these organisations, who have each made submissions in response to the Bill or the Draft Bill that preceded it, have consented to their being named in this declaration of interests.

In the light of the stated intention to have representatives from industry lend their expertise to the Panel, your invitation and the terms of reference do not preclude my firm or me from representing anyone in responding to the Bill, the abovenamed clients in particular, and we will continue to do so, notwithstanding my appointment to the Panel. My firm and I believe, however, that it is important that the Committee be appraised from the beginning of our firm's existing attorney and client relationships.

Timing:

The invitation indicates that the members of the Panel will be asked to supply improved drafting within three weeks of a technically corrected version of the B-Bill being circulated to them, and that this is expected to happen in the second quarter of 2018.

Please note that I am scheduled to attend various conferences and other events during every week of April 2018 and the WIPO SCCR session in the last week of May 2018. Although I will not be completely out of contact during these times, I do not foresee that I will be able to work on the document during those weeks.

I would also like to caution that, if the document covers the same extensive list of items as the current Bill, three weeks may well not be sufficient to complete the desired work, bearing in mind that the Panel members will likely have other commitments as well. I recommend that the Panel be consulted

on timing closer to the time and that sufficient notice is given of the intended circulation of the document.

Membership of the Panel – expertise from the music industry:

The terms of reference commences with a reference to the findings of the Copyright Review Commission, whose report related primarily to issues arising from the music industry.

My background being mostly with copyright in publishing, I very strongly recommend that the Committee considers Mr Nick Matzukis and Adv Joel Baloyi for appointment to the Panel. I consider both to be experts in the role of copyright to the music industry. Mr Matzukis, you will recall, is the non-executive Chair of collecting society CAPASSO and is also a lawyer by training, the author of the only textbook in South Africa that deals with the legal aspects of the music industry (including copyright and collective licensing) and a musician. I have worked with Adv Baloyi on occasions since 2010 in relation to copyright as applied to musical works and sound recordings, and I consider his drafting skills to be superb.

I have their permission to make this suggestion to you and they are available to volunteer for the Panel. They can be contacted at the following email addresses:

- * Nick Matzukis nick@ase.co.za
- * Joel Baloyi creativeindustryconsulting@gmail.com, joel.baloyi@gmail.com

I trust that this acceptance meets with the Committee's approval and, subject to my confirmation which I will send you as soon as I can, I look forward to hearing from you.

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Tenda Madima [<mailto:tmadima@parliament.gov.za>]
Sent: 08 December 2017 15:27
To: Myburgh Andre <andre.myburgh@lclaw.ch>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Thandiswa Macanda <tmacanda@parliament.gov.za>
Subject: Invitation letter to serve in a panel

From: Myburgh Andre
Sent: 15 December 2017 12:01
To: 'Tenda Madima'; 'Andre Hermans'
Cc: 'Thandiswa Macanda'
Subject: RE: Invitation letter to serve in a panel

Dear Tenda, dear André, I'm just following up on my email Tuesday to confirm that you've received it and its annexure.

Best regards
André

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Myburgh Andre
Sent: 12 December 2017 18:35
To: 'Tenda Madima' <tmadima@parliament.gov.za>; Andre Hermans <ahermans@parliament.gov.za>
Cc: Thandiswa Macanda <tmacanda@parliament.gov.za>
Subject: RE: Invitation letter to serve in a panel

From: Myburgh Andre
Sent: 21 December 2017 12:08
To: 'Tenda Madima'; 'Andre Hermans'
Cc: 'Thandiswa Macanda'
Subject: RE: Invitation letter to serve in a panel
Attachments: AF_Myburgh CV Panel_Copyright_Amendment_Bill Dec2017.pdf

Dear Ms Fubbs

Having spoken to all of my clients who have an interest in the Copyright Amendment Bill, I am pleased to confirm my acceptance of the nomination to serve on the Panel.

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Myburgh Andre
Sent: 12 December 2017 18:35
To: 'Tenda Madima' <tmadima@parliament.gov.za>; Andre Hermans <ahermans@parliament.gov.za>
Cc: Thandiswa Macanda <tmacanda@parliament.gov.za>
Subject: RE: Invitation letter to serve in a panel

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 09 February 2018 09:48
To: Myburgh Andre
Cc: Andre Hermans; Margot Sheldon
Subject: Process on the Copyright Amendment Bill

Good day

Thank you for availing yourself.

Kindly note that the Committee will be formally considering the Copyright Amendment Bill on 15 June 2018. It is expected that the Bill will be sent to you thereafter in order to solicit further input. As a panel member, you will be expected to get back to the Committee in writing within 30 calendar days (on 15 July 2018), in order for the Committee to finalize the Bill.

Please be aware that dates might change as well.

Regards

Tenda Madima

021 403 3822

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From: Myburgh Andre
Sent: 12 February 2018 10:39
To: 'Tenda Madima'; Andre Hermans; Margot Sheldon
Subject: RE: Process on the Copyright Amendment Bill

Dear Ms Madima

Thank you for letting me know, and I look forward to hearing from you in due course. I will be following the proceedings of the Committee with great interest.

I happen to be in Cape Town next Wednesday, 21 February, and am available to introduce myself in person to Committee members and the secretariat. Please let me know if you would like to arrange something.

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Tenda Madima [mailto:tmadima@parliament.gov.za]
Sent: 09 February 2018 09:48
To: Myburgh Andre <andre.myburgh@lclaw.ch>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>
Subject: Process on the Copyright Amendment Bill

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 12 February 2018 11:16
To: Myburgh Andre
Cc: Andre Hermans; Margot Sheldon
Subject: RE: Process on the Copyright Amendment Bill

Dear Adv Myburgh

I appreciate your response.

We will indeed be in touch.

Regards

Mr Tenda Madima

From: Myburgh Andre [mailto:andre.myburgh@lclaw.ch]
Sent: Monday, 12 February 2018 11:39
To: Tenda Madima <tmadima@parliament.gov.za>; Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>
Subject: RE: Process on the Copyright Amendment Bill

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Please note: This email and its content are subject to the disclaimer as displayed at the following URL: <https://www.parliament.gov.za/email-disclaimer>

From: Myburgh Andre
Sent: 17 April 2018 09:15
To: Andre Hermans
Cc: Tenda Madima; Margot Sheldon
Subject: RE: Process on the Copyright Amendment Bill

Dear André

In the light of the extended recess being proposed for Parliament, could you please let me know how the Committee and the Sub-Committee will plan to deal with the Bill so far as timing is concerned? I understand that the Sub-Committee meets for the rest of the week from tomorrow, and I would be interested to know whether there will be any decision on the planned timetable.

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Myburgh Andre
Sent: 12 February 2018 09:39
To: 'Tenda Madima' <tmadima@parliament.gov.za>; Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>
Subject: RE: Process on the Copyright Amendment Bill

From: Myburgh Andre
Sent: 06 June 2018 16:42
To: 'jfubbs@parliament.gov.za'
Cc: Andre Hermans; 'Tenda Madima'
Subject: RE: Process on the Copyright Amendment Bill - questions on statements concerning 'fair use' exceptions in Singapore and Australia

Dear Ms Fubbs

You will recall that I was appointed to the Portfolio Committee's Panel of Experts in respect of the Copyright Amendment Bill, and as such I am closely watching the development of the Bill in the Committee. As you will have seen from my CV, I am directly involved in numerous copyright reviews around the world, and I am reasonably up to date with international developments.

Certain statements in the Committee concerning the exception "fair dealing in relation to works" in Singapore (an open exception which, with some justification, is referred to as Singapore's 'fair use clause') have come to my attention, which the Committee would be well-advised to interrogate further.

The statements concern the five factors of the 'fair use' test in Singapore, specifically the so-called fifth factor in Section 35(2)(e), "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price." This factor is part of Singapore law <https://sso.agc.gov.sg/Act/CA1987#pr35> and there is no Bill or policy statement or even any public statement from Government to the effect that it will be repealed.

Yesterday, on 5 June, a statement was attributed to Ms Padayachee of the dti that Singapore's fair use test only comprised four factors. When questioned about the fifth factor outside the meeting, she is reported to have said that Singapore is doing away with it and that the dti will not be incorporating it. Nevertheless, in this morning's slide presentation, she presented the provisions of the Singapore 'fair use' test with all its five factors.

Today, 6 June, Adv van der Merwe recounted advice from Dr Tobias Schonwetter of the UCT IP Policy Unit to the effect that a fifth factor was also in Australian law, now repealed, and that Singapore is in process of repealing the fifth factor because "it does not work."

The factors used in determining 'fair use' was one of the subjects of a public consultation in Singapore between August and October 2016. I advised clients in responding to this consultation and am therefore personally familiar with it. This consultation was in the form of a questionnaire, not in respect of a draft Bill, setting out a background sketch motivating specific "proposals for possible changes" and concluding with specific questions. In respect of this topic, the questions were, "Do you agree to the removal of the fifth factor, which relates to obtaining a copy of the work within a reasonable time at an ordinary commercial price, from the exception of "fair use"?" and "Are there any other changes to the "fair use" defence that can better fulfil the purposes of a balanced copyright regime?" As can be expected, there were numerous different responses to these questions.

Since the consultation closed in 2016, there has, to my knowledge, confirmed with colleagues in Singapore this morning, been no public statement from the Singapore Government about whether this change will go ahead or not.

Australian law has the five-factor test in its 'fair dealing' exception for research or study, in Section 40(2) http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca1968133/s40.html. Although there have been numerous recent copyright review consultations, in which I have been personally involved, there is no decision to remove the 'fifth factor' in subsection (c).

Inasmuch as this advice is influencing the debate in the Committee, I can only recommend that the above information be taken into account and that the advice the Committee has been receiving be investigated and verified before any decision is taken on it.

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 12 February 2018 11:16
To: Myburgh Andre <andre.myburgh@lclaw.ch>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>
Subject: RE: Process on the Copyright Amendment Bill

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 06 June 2018 17:16
To: Myburgh Andre
Subject: RE: Process on the Copyright Amendment Bill - questions on statements concerning 'fair use' exceptions in Singapore and Australia

Dear Mr Myburg

Thank you for your response.

Regards

Tenda

From: Myburgh Andre [mailto:andre.myburgh@lclaw.ch]
Sent: Wednesday, 06 June 2018 16:42
To: Joanmariae Louise Fubbs <jfubbs@parliament.gov.za>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Tenda Madima <tmadima@parliament.gov.za>
Subject: RE: Process on the Copyright Amendment Bill - questions on statements concerning 'fair use' exceptions in Singapore and Australia

EXTRACT FROM MEETING
PORTFOLIO COMMITTEE FOR TRADE & INDUSTRY

DATES:

7 JUNE 2018

PARTIES:

ADV CHARMAINE VAN DER MERWE

VERITAS a division of
EOH LEGAL SERVICES (PTY) LTD

EXTRACT FROM MEETING
PORTFOLIO COMMITTEE FOR TRADE & INDUSTRY

DATE:

7 JUNE 2018

5

EXTRACT OF AUDIO 180607 pctrade 1 – FROM 17:10 UP TO 22:04

MS VAN DER MERWE: Clause 14; here we're dealing with the issue of fair use, Section 12A.

What we have, what came out of the discussion is that the Bill is correctly worded, but the DTI might come and confirm if there are small changes required. Something that I just want to point out to members at this stage on Section 12A, and if members would like to follow in the Bill it is on page 16. We have in Section 12A sub-section 1 paragraph (b). We say:

15 "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..."

And then we list four factors.

Now yesterday I presented to the Committee an opinion that we received – well, an opinion that is now from a legal point of view, it's not a written opinion it was an email with some advice from Prof Schonwetter and he indicated that there is a fifth element that Singapore had. That fifth element, the fifth factor rather is the possibility of obtaining the work or the other (indistinct) within a reasonable time at an ordinary commercial price.

So in other words when you want to see if something – so I've now used the work and I'm saying, "But it's fair use what I've done, it's fair use."

Now they look at all these four factors. What Singapore also has is an additional factor to say, "Can you obtain this work in the market at a reasonable commercial price?" Prof Schonwetter indicated that Australia also had this specific factor and that they
 5 repealed that from their legislation and he indicated that although it is currently part of the Singapore legislation, they are planning on repealing it.

Then we received some advice from Mr André Myburgh, who is on the Technical Panel, who is one of the Technical Panel
 10 members, and he said but that is a little bit misleading because there isn't a formal decision to repeal. In fact there was, according to him it seems that that comes from a survey within Singapore, and some people said, "Yes, remove," and some people said, "No, don't."

15 So in other words the Committee should not accept that that fifth factor should not be included in the Bill because other countries don't want it.

So it is something the Committee can consider, whether we should add that fifth factor, in other words can you obtain it
 20 commercially. Maybe Trade and Industry can just address more on why they did not include it in the Bill itself as the Bill has introduced. I'm sure that there was a rationale why they said, "No, this factor is not something that we need to keep in mind," but I also just want to point out to members that the four factors that we
 25 list in our Bill aren't an – what do you call it? – it's not a closed list of factors. We say that:

"In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be

taken into account, including...”

And then we list our four factors. In other words the fact that it is commercially available could be considered in relevant circumstances.

5 So it is not that we exclude it, it is just that it is not specifically mentioned, but I think also for members I think it was import just to point that out because we don't want to make a decision on information that is not 100% correct.

 So for members to just understand that. But then also I think
10 members' view point was, “Look, we don't have to copy the Singapore Act word for word and we can add to the Singapore,” you know what Singapore (indistinct) because we are making it for ourselves.

 So perhaps when we look at that it is something that we can
15 consider and then decide yes or no.

 If we then go on to clause 14; what members indicated here is – this is, the issue that was outstanding was the fact that you could make a copy of your own – you can make a copy of the copy of the work that you own, and it was indicated that you must be
20 able to make personal copies.

END OF EXTRACT

EXTRACT FROM MEETING
PORTFOLIO COMMITTEE FOR TRADE & INDUSTRY

DATES:

7 JUNE 2018

PARTIES:

ADV CHARMAINE VAN DER MERWE

MS JOANMARIAE FUBBS

VERITAS a division of
EOH LEGAL SERVICES (PTY) LTD

EXTRACT OF AUDIO 180607 pctrade 1 - FROM 35:52 TO 38:50:

MS FUBBS: Some of the issues that are just coming up here from staff who, you know, sort of advised me as well, is that over a period of time we have referred to Myburgh sort of thing, as being
5 one of the technical experts, but in fact there are a number of technical experts; we know that there's a Panel, if I can put it that way, and are they, some communication being made to the Secretariat, is that, "Well, we hear you mentioning Myburgh, Myburgh, Myburgh, but I'd also like to comment. I'm also part of the
10 Technical Panel," and we need to – I believe and I was just confirming, but according to my notes that I've made, we were only going to approach the Technical Panel as a team when we had finished.

However the reality is in the sub-committee certain
15 engagements were had with folks; I can't give you a list off-hand, and I would imagine the same applies to DTI as well as to yourself, Adv Van der Merwe.

So what I have just pointed out to the Secretariat is that anyone can write into the Committee at any stage; there's no
20 blockage; you can't write if; it has that prerogative, and then we can alert the Committee to something that has come to our attention.

So I think we need to look at it in that manner and not allow some technical experts, whose noses may be out of joint, to be
25 dictating to us because we give our people a lot of opportunities, alright?

So anyone who writes in, yes, we're looking at it, but the decision is let us complete this process; that's what we are going

to do. Thank you, Advocate.

MS VAN DER MERWE: Thank you, Chairperson. Chairperson,
maybe if I could just add on the Technical Panel issue, just to
remind members that the Technical Panel was not intended to give
5 policy advice. They're simply from a technical nature. Thank you,
Chair.

Then if I may proceed. The last couple of pages deals with
issues that – I did not put it on the previous matrix because we
were focussing on the DTI's comments and aspects that came up
10 exactly on the Bill itself, but I think we are reaching a point where
if we're going to advertise and members wanted things to be
included, we need to consider these things now and okay them or
not.

END OF EXTRACT

15

EXTRACT FROM MEETING
PORTFOLIO COMMITTEE FOR TRADE & INDUSTRY

DATES:

14 JUNE 2018

PARTIES:

MS MESHENDRI PADAYACHY

VERITAS a division of
EOH LEGAL SERVICES (PTY) LTD

EXTRACT FROM MEETING
PORTFOLIO COMMITTEE FOR TRADE & INDUSTRY

DATE:

14 JUNE 2018

5

AUDIO 180614 pctrade – FROM 2:29:17 TO 2:30:05:

MS PADAYACHY: We'd just like to, as the Department, respond to the letters before everyone on the introduction of a fifth criteria to the hybrid model.

10 As you would note in the Bill there was only a fourth criteria because we believe that those four criteria were suited to the South African circumstance. It is our view that the fifth criteria is obsolete in our investigations because it mirrors the fourth one, and therefore we do also support the letter that has
15 been given in because it mirrors our policy position when we draft it, because if you add the fifth criteria it could close the system again and then you'll be operating as a fair dealing almost, and Singapore and Australia are making moves to remove the fifth criteria completely and just have a four factor
20 test like in the US fair use provision.

END OF EXTRACT

From: Myburgh Andre
Sent: 11 June 2018 08:47
To: 'Andre Hermans'; 'Tenda Madima'
Subject: RE: Process on the Copyright Amendment Bill

Dear Mr Madima, dear Mr Hermans

In the light of recent statement in the Committee that a reworked version of the Bill will be advertised soon for public comment in respect of certain aspects, could you please let me know at what point the Panel of Experts, which includes me, will be expected to start with their work?

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Myburgh Andre
Sent: 12 February 2018 09:39
To: 'Tenda Madima' <tmadima@parliament.gov.za>; Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>
Subject: RE: Process on the Copyright Amendment Bill

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 11 September 2018 14:14
To: Myburgh Andre
Cc: Andre Hermans; Margot Sheldon; Yvonne Manakaza
Subject: FW: 2018.09.10.Instructions to the Technical Panel
Attachments: 2018.09.10.Instructions to the Technical Panel.docx; Copyright Amendment Bill.B Bill.Draft 3.Edited.2018.09.10.docx

Good day

Kindly receive the attached.

Regards

Tenda Madima

From: Tenda Madima
Sent: Monday, 10 September 2018 17:37
To: 'Natasha Pather' <natashapather84@gmail.com>; 'myburgh@lclaw.ch' <myburgh@lclaw.ch>; 'joel.baloyi@gmail.com' <joel.baloyi@gmail.com>; 'Ntsietsom@sampra.org.za' <Ntsietsom@sampra.org.za>; 'Thabang Mathibe' <mathibets@mtaattorneys.co.za>; 'wiseman@capasso.co.za' <wiseman@capasso.co.za>; 'Woods, Michele' <michele.woods@wipo.int>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>; Yvonne Manakaza <ymanakaza@parliament.gov.za>
Subject: FW: 2018.09.10.Instructions to the Technical Panel

Dear Experts

Kindly receive the attached in relation to instructions on Copyright.

You are expected to get back to us at least by 26 September 2018.

Regards

Tenda Madima

0214033822
0837098419

From: Andre Hermans
Sent: Monday, 10 September 2018 14:52
To: Tenda Madima <tmadima@parliament.gov.za>
Subject: FW: 2018.09.10.Instructions to the Technical Panel

Please forward the attached document to the panel.

Regards,

André

From: Margot Sheldon
Sent: Monday, September 10, 2018 2:23 PM
To: Andre Hermans <ahermans@parliament.gov.za>
Subject: 2018.09.10.Instructions to the Technical Panel

Please
note: This email and its content are subject to the disclaimer as displayed at the following URL:
<https://www.parliament.gov.za/email-disclaimer>

From: Myburgh Andre
Sent: 12 September 2018 08:18
To: 'Tenda Madima'
Cc: Andre Hermans; Margot Sheldon; Yvonne Manakaza
Subject: RE: 2018.09.10.Instructions to the Technical Panel

Dear Mr Madima

Thank you for your email and picking up my correct email address.

Your covering email requires a response by 26 September and the instructions by 28 September. In our original correspondence in December 2017, the Terms of Reference indicated that the Panel would be given at least three weeks to respond. With the deadlines currently set amounting to just over two weeks, and in the light of the magnitude of the subject matter and the fact that all of the experts also have other commitments during this period, I can only ask that the due date be extended to the original timeframe.

Could you also please send the experts the Genesis Analytics regulatory impact assessment on the 2013 Draft National IP Policy (which, as commented upon, is one of the sources of policy underlying the Bill), which was carried out in 2014. You may have to get it from the dti.

At the Committee meeting on 14 June, it was reported that an opinion would be obtained from Adv Trengrove on the Constitutionality of some of the retrospective provisions. Was such an opinion obtained? If so, could it be circulated to the experts? We would not want to revisit work that may already have been done by one of SA's most respected constitutional lawyers!

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 11 September 2018 14:14
To: Myburgh Andre <afm@lclaw.ch>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>; Yvonne Manakaza <ymanakaza@parliament.gov.za>
Subject: FW: 2018.09.10.Instructions to the Technical Panel

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 12 September 2018 08:34
To: Myburgh Andre
Cc: Andre Hermans; Margot Sheldon; Yvonne Manakaza
Subject: RE: 2018.09.10.Instructions to the Technical Panel

Good morning

Thank you for a prompt response.

We will get back to you.

Regards

Tenda

From: Myburgh Andre [mailto:andre.myburgh@lclaw.ch]
Sent: Wednesday, 12 September 2018 08:18
To: Tenda Madima <tmadima@parliament.gov.za>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>;
Yvonne Manakaza <ymanakaza@parliament.gov.za>
Subject: RE: 2018.09.10.Instructions to the Technical Panel

From: Myburgh Andre
Sent: 18 September 2018 09:59
To: 'Tenda Madima'
Cc: Andre Hermans; Margot Sheldon; Yvonne Manakaza
Subject: RE: 2018.09.10.Instructions to the Technical Panel

Dear Mr Madima

Following our correspondence last Wednesday, I look forward to hearing from you at your earliest convenience about the due date for the delivery of the advice, and also about the availability of the Genesis Analytics report and whether there is an opinion from Adv Trengrove SC.

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 18 September 2018 11:20
To: Myburgh Andre
Cc: Andre Hermans; Margot Sheldon; Yvonne Manakaza
Subject: RE: 2018.09.10.Instructions to the Technical Panel

Dear Mr Myburgh

The Committee has re-looked at its schedule, and is able to extend the due date to Monday, 1 October 2018, to allow for the three weeks initially agreed to.

In terms of the constitutional opinion from Adv Trengove SC, this opinion was for the National Credit Amendment Bill. Therefore, not applicable to the current process.

In terms of the Genesis Analytics report, we have consulted with the DTI and we are of the opinion that the RIA is beyond the scope of the current exercise.

Hoping this addresses your concerns.

With kind regards

Tenda

From: Myburgh Andre [mailto:andre.myburgh@lclaw.ch]
Sent: Tuesday, 18 September 2018 09:59
To: Tenda Madima <tmadima@parliament.gov.za>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>; Yvonne Manakaza <ymanakaza@parliament.gov.za>
Subject: RE: 2018.09.10.Instructions to the Technical Panel

From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 18 September 2018 11:24
To: Natasha Pather; joel.baloyi@gmail.com; Ntsietsom@sampira.org.za;
Thabang Mathibe; Woods, Michele; Myburgh Andre;
wisemann@capasso.co.za
Cc: Andre Hermans; Margot Sheldon; Yvonne Manakaza
Subject: RE: 2018.09.10.Instructions to the Technical Panel

Dear Experts

Please note, that the Committee has extended the deadline to Monday, 1 October 2018.

Looking forward to hearing from you.

Regards

Tenda

From: Tenda Madima
Sent: Monday, 10 September 2018 17:37
To: 'Natasha Pather' <natashapather84@gmail.com>; 'myburgh@lclaw.ch' <myburgh@lclaw.ch>;
'joel.baloyi@gmail.com' <joel.baloyi@gmail.com>; 'Ntsietsom@sampira.org.za'
<Ntsietsom@sampira.org.za>; 'Thabang Mathibe' <mathibets@mtaattorneys.co.za>;
'wiseman@capasso.co.za' <wiseman@capasso.co.za>; 'Woods, Michele' <michele.woods@wipo.int>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>;
Yvonne Manakaza <ymanakaza@parliament.gov.za>
Subject: FW: 2018.09.10.Instructions to the Technical Panel

From: Myburgh Andre
Sent: 18 September 2018 12:20
To: 'Tenda Madima'
Cc: Andre Hermans; Margot Sheldon; Yvonne Manakaza
Subject: RE: 2018.09.10.Instructions to the Technical Panel

Dear Mr Madima

Thank you for considering the extension of time to enable the Experts to complete their work.

My understanding is that the Genesis Analytics impact assessment is relevant for Schedule 2 of the Bill.
I trust that it has at least been made available to the Portfolio Committee and its Secretariat.

With kind regards
André Myburgh

André Myburgh
Foreign Counsel (South Africa and England, non-practising)
LENZ CAEMMERER
Elisabethenstr. 15 - Postfach 430
CH-4010 Basel, Switzerland

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From: Tenda Madima <tmadima@parliament.gov.za>
Sent: 18 September 2018 11:20
To: Myburgh Andre <andre.myburgh@lclaw.ch>
Cc: Andre Hermans <ahermans@parliament.gov.za>; Margot Sheldon <msheldon@parliament.gov.za>; Yvonne Manakaza <ymanakaza@parliament.gov.za>
Subject: RE: 2018.09.10.Instructions to the Technical Panel

APPENDIX 5

TIMELINE IN THE DEVELOPMENT OF THE COPYRIGHT AMENDMENT BILL, NO 13 OF 2017

Date	Item
27 July 2015	Draft Copyright Amendment Bill released for public comment. Stipulated deadline for comment is 30 calendar days after notice, i.e. 25 August 2015.
end July to 25 August 2015	dti holds stakeholder meetings with various interested stakeholder groups, including authors and writers, publishers, visual artists, attorneys, academics, collecting societies and Government departments and agencies. Invitations issued around 29-31 July, with RSVPs requested by 3 August. The meetings were originally scheduled to be held 5-19 August. (5 August meeting with authors and writers postponed on the day to 25 August.)
11 August 2015	Invitation to dti conference in Gauteng (no venue given) to be held on 27 August. On 20 August, the Birchwood Hotel, Boksburg, was stated as the venue, and invitees were presented with a list of speakers.
18 August 2015	dti extends submission for comments on the draft Copyright Amendment Bill to 16 September 2015.
27 August 2015	dti conference on the draft Copyright Amendment Bill at the Birchwood Hotel. Independent economic impact study promised.
28 August 2015	Invitation to tender for the independent economic impact study (dti tender 06/15-16). Tender closed 18 September 2015. The tender was not awarded.
16 September 2015	End of consultation period on the draft Copyright Amendment Bill. 120 submissions received.
22 February 2016	Nedlac writes to the Minister for Trade and Industry requesting the Copyright Amendment Bill to be tabled at Nedlac. Nedlac receives an answer that the dti commits to tabling the Bill once the incorporation of public comments has been concluded. Nedlac sends a reminder in May 2016.
20 April 2016	The Minister of Trade and Industry announces the intended introduction of the Copyright Amendment Bill in his department's budget speech: "The Copyright Amendment Bill will be tabled in Cabinet for approval on 18 May 2016; and in Parliament on July 2016. When the legislative process is completed, the creative industries, in particular the music sector, will greatly benefit."
8 June 2016	Cabinet meeting approves the Copyright Amendment Bill. "Bills 3.1. The Copyright Amendment Bill and the Performers' Protection Amendment Bill will be introduced into Parliament. The Copyright Act, 1978 (Act 98 of 1978) and the Performers Protection Act, 1967 (Act 11 of 1967) are outdated and do not consider developments at multilateral level nor deal with digital issues. This is aligned to the NDP's objectives of promoting innovation, improved productivity, more intensive pursuit of a knowledge economy and better exploitation of comparative and competitive advantage. The current policy revision is based on the need to align the Intellectual Property legislation with the digital era and developments at a multilateral level. This also

	secures a one-policy approach at national and international level from government. This revision also includes the incorporation of key flexibilities in the area of copyright and performers' protection."
5 July 2016	Notice of introduction of a bill into Parliament in respect of the Copyright Amendment Bill is published in government Gazette number 4012. The notice does not contain the text of the bill, only the headings, and no bill number is allocated. Announcement of a Performers Protection Amendment Bill is made at the same time and in the same manner.
12 July 2016	Announcement on the dti website of the Cabinet approval. The announcement contains a forecast of growth in the economy of 5% if the bill is properly implemented. The forecast is not supported by an impact study.
late July 2016	Statement on the dti website that the text of the Copyright Amendment Bill and of the Performers Protection Amendment Bill will be placed on the website before the end of July. By 19 August 2016, this had not happened, but then drafts were made available to Nedlac on that date (see below).
12 August 2016	dti advises Nedlac that the bill "is in Parliament", but agrees to meet a Nedlac delegation at the dti Campus on 22 August to "engage" on its "concerns" provided documentation is available in time. [Parliament was in recess from end May to mid-August 2016.]
19-22 August 2016	dti makes then-current drafts of the Bills available to Nedlac, too late for the scheduled meeting date of 22 August, which is then called off on the day and ultimately postponed to mid-September. The draft Bills circulated are voluminous (45 and 17 pages) and still contain numerous spelling, typographical, drafting and conceptual errors, some remaining despite advice resulting from the 2015 consultation, in addition to controversial substantive policy concepts.
30 August 2016	Presentation by dti's Meshendri Padayachy at PASA Annual Meeting, Cape Town. Explanation about the policy considerations behind the Bills, and also a statement understood as saying that dti will recommend that SA signs up to the WCT, WPPT, Marrakesh Treaty and Beijing Treaty. States that promised regulatory impact assessment has been replaced with the SEIAS Report.
4 October 2016	Meeting between BUSA (Business representative on Nedlac) and dti on the Bills. Interested Business stakeholders had been asked by BUSA to send comments on the Bills by 15 September.
11 November 2016	Informal presentation by the dti to the Portfolio Committee for Trade & Industry. Observations: <ul style="list-style-type: none"> • Ostensibly only about the Performers' Protection Amendment Bill, but the proposed Copyright Amendment Bill was interwoven into the presentation. • Bill and SEIAS report made available. • No unequivocal statement in the presentation about SA's accession to copyright treaties. • Committee members asked to see the submissions or at least summaries of them and for an explanation why the Bill had not gone to Nedlac.
2 December 2016	Performers Protection Amendment Bill, No. 24 of 2016, introduced to Parliament.

5 December 2016	<p>Workshop on the Copyright Amendment Bill at Parliament, presented by Program on Information Justice and Intellectual Property of the American University, Washington College of Law, and partner organizations of the Global Expert Network on Copyright User Rights</p> <p><u>Topics</u> The Need for Limitations and Exceptions for Libraries, Archives, Research and Education - Mrs. Denise Nicholson, Scholarly Communications Librarian, University of the Witwatersrand, Johannesburg. Fair Use in Action, Lessons from the United States on How Fair Use Promotes the Public Interest - Prof. Peter Jaszi, Professor of Law and Faculty Director of the Glushko-Samuelson Intellectual Property Clinic, American University Washington College of Law Access for Persons with Disabilities and the Importance of Ratifying the Marrakesh Treaty - Mr. Jace Nair, President of the African Union of the Blind and CEO, BlindSA Empirical Research on the Impact of Fair Use - Prof Sean Flynn, Associate Director, Program on Information Justice and Intellectual Property, American University Washington College of Law</p>
6-7 January 2017	Notice of Parliamentary Portfolio Committee on Trade & Industry consultation and public hearings on the Performers Protection Amendment Bill
17 January 2017	<p>Secretary of Portfolio Committee on Trade & Industry notifies stakeholders on record of consultation and public hearings by email.</p> <p>Written submissions requested by 6 February; hearings on 21 and 24 February.</p> <p>Extension for written submissions subsequently given to some stakeholders to 10 February.</p>
7 February 2017	<p>Workshop on intellectual property for the Portfolio Committee on Trade & Industry.</p> <p>Observations:</p> <ul style="list-style-type: none"> • The introduction of the Performers Bill is a prelude to the Copyright Bill, but there is no indication precisely when that will be. Sometimes it is not clear from the discussion whether by "Bill" they mean the Performers Bill or both Bills. • It is not apparent to the MPs that the Performers Bill is dependent on the not-yet introduced Copyright Bill. • The statement attributed to Meshendri Padayachy that the Copyright Amendment Bill had been published for consultation in July 2016 is incorrect. She admits that the drafting leaves much to be desired. • dti officials in favour of SA's acceding to international treaties, but they say it is Parliament that must decide. • No answer to the questions raised at the November 2016 workshop about (i) why the dti says the legislation should not go through Nedlac and (ii) for feedback on the submissions in the 2015 consultation.
14 February 2017	Secretary of Portfolio Committee on Trade & Industry notifies stakeholders that draft programme is aimed to be sent to stakeholders by 15:00 on Wednesday, 15 February 2017.
15 February 2017	Notice of postponement of oral hearings in respect of the Performers' Protection Amendment Bill to 24 and 28 February 2017.
20 February 2017	Notice of postponement of oral hearings in respect of the Performers' Protection Amendment Bill to a date to be announced pending determination of the status of the Copyright Amendment Bill.
21 February 2017	<p>dti briefing to Parliamentary Portfolio Committee on Performers' Protection Amendment Bill.</p> <p>Decisions:</p> <ul style="list-style-type: none"> • The Committee will deal with the Bill. • The Committee will delay dealing with the Bill until the Copyright Bill reaches it.

16 May 2017	dti briefing to Arts & Culture Portfolio Committee on the proposed Copyright Amendment Bill.
16 May 2017	Copyright Amendment Bill, no 13 of 2017, introduced to Parliament. Statement that “Explanatory Summary” was published on 5 July 2016 is misleading. Only the heading of the Bill was published then (see above).
22 May 2017	Secretary of the Trade & Industry Portfolio Committee emails stakeholders on Parliament’s circulation list to inform them of the introduction of the Copyright Amendment Bill and that no dates have been set yet for the processing of both Bills, further information to be communicated in due course.
25 May 2017	Secretary of the Trade & Industry Portfolio Committee emails stakeholders to announce that the Committee will receive a briefing on the Copyright Amendment Bill, 2017, on 30 May 2017.
26 May 2017	Secretary of the Trade & Industry Portfolio emails stakeholders announcing request for submissions by 19 June 2017 and public hearings on 27, 28 and 29 June 2017. These arrangements were later amended, on 2 June and 28 June 2017.
30 May 2017	dti presentation to joint sitting of the Trade & Industry and Arts & Culture Portfolio Committees. SEAIS Report released to the Committees.
2 June 2017	Secretary of the Portfolio Committee emails stakeholders with amended details of public participation process in respect of the Copyright Amendment Bill. Oral hearings will take place during dates in August 2017 to be announced and with a call for written submissions by 30 June 2017. These arrangements were amended on 28 June 2017.
27-28 June 2017	Workshop for Portfolio Committee members, arranged by Dr Tobias Schonwetter, UCT IP Policy Institute <ul style="list-style-type: none"> • Different types of IP and how they are protected in South Africa – Dr Tobias Schonwetter, UCT. • Basic Principles of Copyright Law and the Protection of Performers - Prof Tana Pistorius, UNISA. • International dimension of IP protection, including key international instruments – Dr Tobias Schonwetter, UCT. • Orphan Works – Prof Caroline Ncube, UCT. • Grassroots effect of copyright [on the visually impaired] – Christo de Klerk of Blind SA. • Link between IP protection, innovation and economic development – Dr Tobias Schonwetter, UCT. • Creators vis-à-vis User Rights - Dr Tobias Schonwetter. [In this presentation, copyright exceptions are termed “users’ rights”.]
28 June 2017	Secretary of the Portfolio Committee emails stakeholders with amended details of public participation process in respect of the Copyright Amendment Bill, with notice that oral hearings will take place on 1, 3 and 4 August 2017 and an extension of time for written submissions until 7 July 2017.
7 July 2017	Deadline for written submissions on the Copyright Amendment Bill
21 July 2017	<i>The Value of Fair Use for South Africa, The role of copyright and user rights in promoting social and economic progress in South Africa</i> , Wits University, Johannesburg, a public event hosted by the Mandela Institute in collaboration with Google, Freedom of Expression Institute (FXI), and the American University Washington College of Law on the Copyright Act Amendment Bill.

	<p>Opening address by Mr MacDonald Netshitenzhe, Acting Deputy Director General, DTI.</p> <p>Presentation of recent empirical research by Sean Flynn, American University Washington College of Law.</p> <p>Comment provided by Dr Malebakeng Forere, Wits School of Law, Professor Coenraad Visser, UNISA and Dr Tobias Schonwetter, UCT IP Unit.</p>
24 July 2017	<p>Copyright Act Amendment Bill Roundtable, hosted by the Freedom of Expression Institute in collaboration with the dti and Google South Africa, Pretoria.</p> <ul style="list-style-type: none"> • Keynote Address: Hon. Buti Manamela, Deputy Minister: Planning, Monitoring and Evaluation (Presidency) • Amendment Bill Overview Highlights and Roadmap: Meshendri Padayachy, the dti Quick Fire Stakeholder Inputs on the Bill • Malebakeng Forere, Mandela Institute, School of Law Wits University • Denise Nicholson, Scholarly Communications & Copyright, Services Office University of the Witwatersrand • Sean Flynn, American University Washington College of Law • Nothando Migogo, Southern African Music Rights Organisation (SAMRO) • Charmaine Mrwebi, Dramatic Artistic and Literary Rights Organisation (DALRO) • Jacques Allers, Southern African Federation Against Copyright Theft (SAFACT) • Joel Baloyi, Recording Industry of South Africa (RISA) • Rehad Desai, South African Screen Federation (SASFED) • Izak Minaar, South African National Editors Forum (SANEF) • William Bird, Media Monitoring Africa (MMA) • Pria Chetty, EndCode • Ben Cashdan, Freedom of Expression Institute (FXI) • Erin Simon, Google • Douglas Scott, Wikipedia <p>Way Forward and Thank You</p> <ul style="list-style-type: none"> • Google, FXI, the dti
1 August 2017	<p>Portfolio Committee: Public hearings on the Copyright Amendment Bill Day 1</p> <p>Motion on the Desirability of the Bill was supported by the Portfolio Committee.</p> <p>The Chairperson added that when criticisms for poor drafts were given during public hearings, the way forward would be to give proposals on how the proposed Bill should be drafted.</p> <ul style="list-style-type: none"> • Prof Sadulla Kajiker, Anton Mostert Chair of Intellectual Property (IP) Law, Stellenbosch University • Dr Tobias Schonwetter, Director; Intellectual Property Unit, University of Cape Town • Southern African Music Rights Organisation (SAMRO) • Dramatic Artistic and Literary Rights Organisation (DALRO) • Prof Sean Flynn, Global Network on Copyright Users Rights(GNCUR) • Publishers Association of South Africa (PASA) • South African Institute for Intellectual Property Law (SAIIPL) • The Copyright Alliance
3 August 2017	<p>Portfolio Committee: Public hearings on the Copyright Amendment Bill Day 2</p> <ul style="list-style-type: none"> • Uhuru Productions and Documentary Filmmakers Association (DFA) • Google • Wikimedia • Freedom of Expression Institute (FXI) • Kagiso Media • Composers, Authors and Publishers Association (CAPASSO) • South African Guild of Editors (SAGE) • MultiChoice and M-Net • Recording Industry of South Africa (RISA) • Xrystal Productions

	<ul style="list-style-type: none"> • Media Monitoring Africa (MMA), endorsed by South African National Editors' Forum (SANEF) • Independent Music Performance Rights Association (IMPRA), incl Association of Independent Record Companies (IRCO), Music Performers Association of South Africa • Cultural and Creative Industry Federation of South Africa (CCIFSA)
4 August 2017	<p>Portfolio Committee: Public hearings on the Copyright Amendment Bill Day 3</p> <ul style="list-style-type: none"> • Academic Non-Fiction Authors' Association of South Africa (ANFASA) • South African Book Development Council (SABDC) • South Africa National Council for the Blind SANCB) • International federation of Film Producers Association (FIAPF) • South African Guild of Actors (SAGA) • South African Screen Federation (SASFED) • National Association of Broadcasters (NAB) • Library and Information Association of South Africa (LIASA) • Spoor and Fisher IP law firm • American Chamber of Commerce in South Africa (AmCham) • Innovus (Business Development Arm), Stellenbosch University
15 August 2017	<p>Portfolio Committee: Copyright Amendment Bill: engagement with key stakeholders</p> <ul style="list-style-type: none"> • Aspire Art Auctions – on artist's resale rights in South Africa • Department of Science and Technology, which contended that the Copyright Amendment Bill contradicted the Indigenous Knowledge (IK) Bill. DST appealed for an amendment that would extend performer protection to include traditional/indigenous performers' control over copyright. • Composers and music performers <p>Committee Chairperson: The Amendment Bill was no longer a draft Bill as it had been tabled. The Portfolio Committee could reject the Bill; it could amend 20%, 60% or 70% of the Bill, and ask for it to be rewritten.</p> <p>A Subcommittee on copyright was to be formed, chaired by Ms Theko. It would meet one hour before the Portfolio Committee and would streamline matters to reduce the time spent on the Bill.</p>
18 August 2017	<p>Meeting of the Portfolio Committee: Copyright Bill: dti and Parliamentary Legal Advisor response:</p> <p>The Committee approved a team of drafters: Adv C van der Merwe, Parliamentary Legal Advisor, Adv J Strydom, DTI Legal Advisor, Mr G Hoon, State Law Advisor, Ms M Padayachy, Deputy Director, Intellectual Property Law and Policy, DTI.</p> <p>The Intellectual Property Laws Amendment Act and the Copyright Bill had to be aligned. The Committee should determine whether any transitional provisions were necessary.</p> <p>The Chairperson established a Subcommittee: Chairperson: Ms C Theko (ANC), Ms J Fubbs (ANC), Ms S van Schalkwyk (ANC), Mr D Macpherson (DA), Ms N Louw (EFF), Mr J Esterhuizen (IFP).</p> <p>The Committee agreed to adopt a B Bill in relation to the Copyright Bill.</p>
18 August 2017	<p>Media release by the Chairperson: Trade and Industry Portfolio Committee</p> <p>The Committee resolved to prepare a B Bill to address initial drafting concerns and reassured the public that it is within its powers to do what is best for all South Africans, even if this includes rewriting many clauses in the Bill. The Chairperson proposed the establishment of a multiparty Subcommittee, and the establishment of a panel of technical experts to assist with complex issues in the Bill.</p> <p>The Director-General of the dti said the Minister had recommended that a step by step approach to manage the Bill. The work had been divided into two phases, and the dti would be focusing only on the major issues that had come out of the CRC Report. He proposed to leave aside all the other issues so that they could confine themselves to prioritised ones only and deal with the rest in the second phase for more consultation and engagements. The Portfolio Committee was not in support of the dti's approach of prioritising only certain issues. The Members wanted the Bill to be pursued in its entirety.</p>

22 August 2017	<p>Meeting of the Portfolio Committee: identification of policy issues</p> <p>A list of policy issues related to the Copyright Amendment Bill was submitted by the Committee Researcher. It included: 1. Fair dealing versus fair use, and exceptions related to educational institutions and libraries; 2. accessibility for the disabled, parallel education, freedom of panorama and private copying levy; 3. Public funding and state ownership of copyright, commissioned works and copyright ownership, royalties and economic rights, the assignment of rights; 4. Compulsory licensing and the regulation of collecting societies; 5. Artists resale rights, how to incorporate technological aspects, moral rights attached to translation and reduction licences, orphan works.</p>
24 August 2017	<p>Meeting of the Portfolio Committee: Appointment of Technical Experts.</p> <p>Proposed as technical support team: Prof Caroline Ncube, Tobias Schonwetter, Prof Sadulla Karjiker. Prof Ncube and Tobias Schonwetter selected.</p> <p>A panel of experts would be nominated when the work had been completed.</p>
25 August 2017	<p>Draft of the <i>Intellectual Property Policy of the Republic of South Africa Phase 1</i> published for public comment.</p>
10 October 2017	<p>Meeting of the Portfolio Committee</p> <p>The drafting team had been enlarged with a trade law drafting expert, plus two people to advise on policy issues and two Committee experts. Many amendments had been technical amendments relating to terminology. The amended version would be available by 17 October 2017.</p>
18 October 2017	<p>Meeting of the Portfolio Committee</p> <p>The 'technically revised' version of the Bill was presented to the Committee as a revision of the Original Bill cleaned of technical errors with technical inputs from the public by the parliamentary legal advisor and the advisory team from the dti, Prof Schonwetter and Prof Ncube as experts and the State Law Advisor. The words "such as" appear in the 'fair use' clause. 'User' had been replaced by 'copyright holder' throughout the Bill, except where user referred to one paying royalties. The Committee determined that it would work through policy issues first and thereafter go through the Bill clause-by-clause.</p>
24 October 2017	<p>Meeting of the Portfolio Committee on Trade and Industry: Debt Relief Committee Bill: response to stakeholders; Localisation inquiry terms of reference; SAFDA; Copyright Amendment Bill technical panel</p> <p>The Chairperson noted that the Bill could be adopted as it was, but a technical panel would ensure that all the relevant sections had been covered. The terms of reference for a technical panel, i.e. performers, publishers and people with a university background, were adopted.</p>
22 November 2017	<p>Meeting of the Portfolio Committee on Trade and Industry: Sugar Industry: resolution; Debt Relief Bill process; Copyright Amendment Bill</p> <p>Status report by the Parliamentary Legal Advisor. Policy issues to be considered: exceptions, including fair use versus fair dealing; general and specific exceptions; the private copying levy and freedom of panorama; orphan works; collecting society regulation and commissioned works; royalties assignment; Tribunal. Also, technology, the Copyright Act and the circumvention device, moral rights. Translation, reproduction licences and Indigenous Knowledge.</p> <p>Technical panel requirements: three to five members. Terms of reference were adopted with minor amendments.</p>
7 March 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill: Briefing by Subcommittee</p> <p>The Subcommittee nominated persons for the technical panel in order of preference, in case of a reduction in numbers by the Committee: Mr Andre Myburgh (already appointed), Adv Natasha Pather (already appointed), Adv Joel Baloyi, Ms Michele Woods, Adv Ntsietso Makhafola-Mokitimi, Mr Wiseman Ngubo, Mr Thabang Mathibe.</p>

	<p>If a person were on the technical panel and the Committee needed assistance, that person/those persons could be invited to assist.</p> <p>The technical panel would not advise on policy.</p>
13 March 2018	<p>Meeting of the Portfolio Committee</p> <p>Seven members of the technical panel were approved by the Committee.</p> <p>The Subcommittee was to work on the following policy areas: fair use versus fair dealings; exceptions and imitations; accessibility for people with disabilities; parallel importation; freedom of panorama; regulation of collecting societies; ownership.</p>
14 March 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill: Farlam Copyright Review Commission: briefing by dti.</p> <p>The creative industry met with the then President in 2009 and in 2010, the Minister of Trade and Industry had appointed the Copyright Review Commission. Its recommendations were presented in 2012.</p> <p>The Committee agreed to focus on the Farlam Commission recommendations that were linked to the Bill.</p>
28 March 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill: regulation of Collecting Societies</p>
18 April 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill</p> <p>The Director-General of the Department of Trade and Industry suggested a two phase approach to the Bill: the first phase would deal with issues related to musicians and artists and the second phase would address the bigger issues of Intellectual Property. dti agreed with the Minister and the Chairperson of the Committee on the phased approach. dti was allowed to add three issues to the Farlam recommendations: assistance to visually impaired people, libraries and museums, and a third non-contentious issue still to be determined.</p> <p>The Subcommittee agreed that the Portfolio Committee had to approve the phased approach. The Department of Arts and Culture was requested to attend all meetings on the Copyright Amendment Bill.</p>
24 April 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill: Department report-back on priorities and way forward</p> <p>dti's DDG CCRD informed the Subcommittee that dti was working on the relevant treaties to ensure that they would be ratified.</p> <p>The Subcommittee agreed to recommend the suggestion by Adv van der Merwe that the Committee work through the Bill clause by clause.</p> <p>The Subcommittee flagged its concern that the Bill would not meet the deadline of 31 May 2018.</p>
25 April 2018	<p>Meeting of the Portfolio Committee on Trade and Industry: Copyright Amendment Bill: new working draft</p> <p>The Committee began working through the latest version of the Copyright Amendment Bill which incorporated amendments suggested by public comment, clause by clause. The Committee worked through clauses 2, 3, 4, 6, 8, and 9, all of which were flagged for further discussion by the Subcommittee.</p>
2 May 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill: Subcommittee engagement with dti on flagged clauses</p>
8 May 2018	<p>Meeting of the Portfolio Committee on Trade and Industry: Copyright Amendment Bill: two-phase proposal</p> <p>dti stated that certain clauses required further research that would take up to a year.</p> <p>Proposal for a two-phase approach to amending the Copyright Act. Phase 1 would focus on the Copyright Review Commission recommendations. Phase 2 would address all policy issues that had not been fully addressed, including fair use and the private copy levy.</p> <p>Members were asked to take the dti presentation to their caucuses for consideration.</p>

	<p>The Chairperson informed the Committee of the legal position of the Bill: the Minister had tabled the Bill in Parliament and it was for Parliament to decide what to do with it. Parliament could send it back or the Minister could withdraw the Bill.</p>
8 May 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill: Subcommittee Report</p> <p>The Subcommittee reached agreement on the flagged issues in clauses 2, 3, 5, 7, and 11. To be put to the Committee for decisions.</p>
17 May 2018	<p>Chair of the Portfolio Committee, Ms J Fubbs, sends a communication by email to all stakeholders on the Copyright Amendment Bill:</p> <p>“The Portfolio Committee on Trade and Industry has received correspondence from a number of stakeholders raising their concerns about the proposal made by the Department of Trade and Industry (DTI) on a two-phased approach for the Copyright Amendment Bill. The DTI has proposed that the Committee adopts an approach where the Copyright Review Commission’s (CRC) recommendations are fast-tracked and the other aspects proposed in the current Amendment Bill be dealt with after further consultation by the DTI in a second Amendment Bill, to be introduced at a later date.</p> <p>Given that the CRC issues are long outstanding and that the plight of musicians has been ongoing for a number of years with no relief, as well as the interlinkage between the Copyright and Performers’ Protection Amendment Bills, the Committee is under pressure to fast-track the Copyright Amendment Bill, so that the Performers’ Protection Amendment Bill can also receive attention during this 5th Parliament. The Committee is cognisant of the wide ranging concerns from various creative sectors that is purported to be ignored if the two-phased approach is adopted.</p> <p>It should be noted that although this proposal has been received from the DTI, the Committee has not formally adopted it and is considering the merit of all clauses in the Amendment Bill against the DTI’s proposal. The Committee would like to assure all stakeholders that all submissions received are being taken into account, as well as any additional proposals made.</p> <p>A further concern was raised around the technical panel. The Committee would like to allay the fears of stakeholders by stating the following:</p> <ul style="list-style-type: none"> • It remains the prerogative of the Committee to appoint panel members which happens through a rigorous process involving all political parties represented on the Committee. • Any panel member appointed receives its instructions from the Committee and would be required to advise on the following: <ul style="list-style-type: none"> ○ The appropriateness of the terminology used in the Bill, to avoid the criticism raised by the public against the terminology used in the Bill as introduced; ○ Whether the policy positions identified by the Committee, not the technical panel, is correctly reflected in the final draft; and ○ Whether the proposed policy areas will comply with international copyright law. <p>Your understanding is appreciated.”</p>
18 May 2018	<p>Meeting of the Subcommittee on the Copyright Amendment Bill: Department of Arts and Culture submission</p> <p>The Subcommittee Chairperson addressed concerns by the public that the Committee had taken a position on the Copyright Amendment Bill. The Committee was considering input by the Departments of Trade and Industry and Arts and Culture and only after it had applied itself would it take a stance on policy proposals.</p> <p>The Department of Arts and Culture presented its position on various clauses in the Bill: clauses 3, 5, 7, 8, 13, 20, 22, 25.</p>
30 May 2018	<p>dti announces Cabinet approval of the <i>Intellectual Property Policy of the Republic of South Africa Phase 1</i>, subsequently published in the Government Gazette on 31 August 2018.</p>
31 May 2018	<p>Meeting of the Portfolio Committee: Copyright Amendment Bill: dti briefing on Bill and DAC and dti positions</p>

	<p>Party positions on the Bill: the ANC believed that in certain instances fair use was appropriate and in others fair dealing was more suitable so the ANC suggested that a hybrid model was necessary.</p> <p>Clauses 2, 3, 4, 6, 8, 9, 10, 11, 12, 14, 19, 20, 21, and 24 were accepted without significant material changes.</p> <p>Clauses 7, 13, 22, and 23 were flagged for further research and clarification.</p> <p>Clauses 5, 12 and 25 were discussed in depth.</p>
5 June 2018	<p>Meeting of the Portfolio Committee: Copyright Amendment Bill: Consideration</p> <p>The Parliamentary Legal Advisor presented the clauses in the Bill. Clauses accepted with no further amendment or discussion: 2, 4, 8, 10, 12, 13, 14, 15, 16, 17, 18, 20, 26, 28, 34.</p> <p>Extensive deliberations took place, but no decisions were reached on clauses 3, 5 (section 6A to be advertised), 7 (sections 7A, 7C, 7E), 11 (section 9A), 14 (section 12A and 12B), 19 (section 19C), 22, 23, 25 (sections 22A – F), 27, 28, 29, 30, 31, 32A, 35, 36(Schedule 2).</p> <p>A decision was taken to take the contingency approach whenever 'indigenous communities' were referred to in case Indigenous Knowledge legislation was not passed timeously.</p>
6 June 2018	<p>Meeting of the Portfolio Committee: Copyright Amendment Bill: DTI & CIPC Response on flagged clauses</p> <p>Prof Schonwetter provided feedback on fair use and fair dealing.</p> <p>Flagged clauses were discussed.</p>
7 June 2018	<p>Meeting of the Portfolio Committee: Copyright Amendment Bill: flagged clauses</p> <p>Report by Parliamentary Legal Advisor on finalisation of clauses following deliberations the previous day.</p> <p>The Chairperson informed the Committee that the Copyright Amendment Bill would be set aside until the Performers' Protection Bill was at the same stage as the Copyright Amendment Bill and then the two would be reviewed. The intention was to present both Bills to Parliament on the same day.</p>
14 June 2018	<p>Meeting of the Portfolio Committee: Copyright Amendment Bill</p> <p>The Committee did not accept the DTI proposal that it would be unwise to make the payment of royalties retrospective. Redress for those not paid in the past was an essential part of the Bill.</p> <p>Penalties for non-compliance and infringements would be a fine and/or five years' imprisonment for a natural person and a minimum fine of 10% of the company's annual turnover for a non-natural person.</p> <p>The Committee decided that the following clauses would be advertised for public comment: Clauses 1, 5, 7, 9, 11, 15, 22, 25, 27, 30, 37.</p>
19 June 2018	<p>The Portfolio Committee published specific clauses of the working draft of the Copyright Amendment Bill and the Memorandum on the Objects of the Bill, for public comment by 9 July 2018</p>
9 July 2018	<p>Deadline for comments on specific clauses in the Bill extended to 18 July 2018</p>
18 July 2018	<p>Deadline for written submissions on specific clauses in the Copyright Amendment Bill</p>

14 August 2018	<p>Meeting of the Portfolio Committee</p> <p>50 public submissions had been received following the publication of clauses for comment. Commentary was extensive but all submissions had been read and included in 104 page matrix distributed to Members. A summarised matrix was presented by dti. Public comments suggested that retrospectivity was unworkable but the Committee decided to reject that view.</p> <p>Despite a call by some Members for oral submissions, the Committee decided that oral submissions were not necessary.</p>
15 August 2018	<p>Meeting of the Portfolio Committee</p> <p>The presentation of public submissions by the dti was completed and the Parliamentary Legal Advisor provided a response to the public submissions from a legal perspective. dti proposed a number of amendments to clauses in response to the public submissions.</p>
21 August 2018	<p>Meeting of the Portfolio Committee</p> <p>The Parliamentary Legal Advisor indicated that she had met with various legal persons to address drafting, technical and legal issues raised in the public submissions. Certain clauses would have to be advertised: clauses 5, 7, 9.</p> <p>Retrospectivity was discussed in detail.</p> <p>Unsolicited comment in public submissions would not be considered unless it made a pertinent and important point that improved the Bill.</p>
22 August 2018	Meeting of the Portfolio Committee: deliberations on revised clauses
30 August 2018	<p>Meeting of the Portfolio Committee</p> <p>The Committee agreed that the three clauses on retrospectivity be prescribed by the Minister in regulations. Those clauses would only commence on a date fixed by the President, and only after the Minister had issued regulations on retrospectivity. To issue regulations, the Minister would have to address the concerns about who would benefit , the process required and other details. Because there would be a process for managing retrospectivity, the clauses would then be constitutional.</p> <p>Enforcement of the requirement that all collecting societies be accredited was addressed in clause 22 8(a) and (b). That clause would be advertised for two weeks from 31 August 2018.</p>
3 September 2018	The Portfolio Committee published one clause of the working draft of the Copyright Amendment Bill, for public comment by 21 September 2018
5 September 2018	<p>Meeting of the Portfolio Committee: Copyright Amendment Bill; Performers' Protection Amendment Bill</p> <p>The Committee agreed to formally request permission from the National Assembly to amend additional sections of the Copyright Act, that were outside the scope of the Bill but which had already been addressed/amended by the Committee based on public submissions or consequential amendments.</p> <p>The Committee also determined to send the Bill to the technical panel of experts in its current form.</p>
11 September 2018	<p>Parliament: Announcements, Tablings And Committee Reports</p> <p>National Assembly approves request by Portfolio Committee on Trade and Industry to include additional sections in the Copyright Amendment Bill</p>

APPENDIX 6

SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)
FINAL IMPACT ASSESSMENT TEMPLATE (PHASE 2)
COPYRIGHT AMENDMENT BILL

Presented to the Portfolio Committee on 30 May 2017
Source: Parliamentary Monitoring Group



THE PRESIDENCY

REPUBLIC OF SOUTH AFRICA

DEPARTMENT OF PLANNING, MONITORING AND EVALUATION

SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)

FINAL IMPACT ASSESSMENT TEMPLATE (PHASE 2)

COPYRIGHT AMENDMENT BILL

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1 BACKGROUND

1.1 Introduction

The Socio-Economic Impact Assessment System (SEIAS) was adopted by Cabinet in February 2015 and introduced for implementation by government departments in July 2015. The SEIAS aims to improve policy and legislative processes so as to reduce the cost and optimise the benefits of regulation. The SEIAS also ensures that policy and legislation are aligned to government's national priorities such as inclusive economic growth, employment creation, social cohesion, etc. The risks associated with the implementation of the policy or legislative proposals are also a key feature in the SEIAS process.

The SEIAS is undertaken in two phases, wherein phase 1 is referred to as the initial impact assessment and is about problem identification, analysis of the possible options for addressing the problem and adoption of the most preferred option or intervention. Phase 2 is considered to be the final impact assessment and it provides details of the proposed intervention in terms of impact and risks likely to result from implementation, dispute resolution mechanisms, consultation and monitoring and evaluation.

This report is the final impact assessment in terms of the SEIAS process, undertaken on the Copyright legislative review process.

1.2 Policy review

The current policy revision is based on the need to bring the Copyright legislation in line with the digital era and developments at a multilateral level. The policy revision is based on the Draft National Policy on Intellectual Property (IP Policy) as commented on, the recommendations of the Copyright Review Commission (CRC) as chaired by retired judge Ian Farlam and it 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 Intellectual Property (IP) matters.

The challenges identified are a result of the current Act being out-dated. The Act does not have any provisions which deal with digital issues. Furthermore, the practical problems experienced by educators, researchers, and libraries under the current law calls for a

revision which enhances access to and use of copyright works and to enhance access to information for the advancement of education and research.

2 PROBLEM STATEMENT / THEORY OF CHANGE

the dti as a custodian of IP has the responsibility to ensure that IP legislation remains updated in view of the ever evolving digital space and that the current legislation does not limit access to education. Information and resources needs to be made available for persons with disabilities, and that authors and artists do not die as paupers due to ineffective protection.

The universal purpose of Copyright is to reward and incentivise creators of knowledge and art. The existing legislation is out-dated and has not been effective in a number of areas that impact upon educators, researchers, people with disabilities in terms of access to copyright works.

Favourable provisions of international treaties in the area of copyright have not been incorporated into the copyright legislation in order to enhance access to education and knowledge. There is a need to provide exceptions and flexibilities to allow third parties to gain access to copyright works for education and personal use.

The current Copyright Tribunal is not effective in that there are delays in settling disputes as the whole process is entirely dealt with by Judges of the High Court. This dispute resolution mechanism is thus reviewed.

Education and awareness programs are to be addressed in order to develop and support the growth of the creative industry and to encourage South Africans to be creators of copyright works.

Problems	Root Causes
Challenges on non-payment of royalties.	<ul style="list-style-type: none">• Lack of contractual agreements between producers and authors/ owners.• Lack of proper regulation on the collection and distribution of royalties.• Fragmented and unstructured management of copyright works.• No clear provision for the payment of royalties where the work of the authors is reused.

Problems	Root Causes
Limited access to copyrights works for fair dealings and use.	<ul style="list-style-type: none"> No provision for works to be made available for fair dealings and use.
Inadequate protection of copyright authors/ owners.	<ul style="list-style-type: none"> Inadequate provision of what constitutes an infringement of copyright in areas such as technological protection measures and copyright management information.
Lack of access to orphan works that limits the use of such copyright works	No provision for the exploitation of orphan works.
Lengthy and costly dispute resolution processes	The current legislation provides for a High Court judge to be the Copyright Tribunal, and disputes can only be resolved through the court process.

3 INTENDED OUTCOMES OF THE PROPOSED AMENDMENTS

The current copyright legislative review aims to achieve the following outcomes:

- Improved access and use of copyright works.
- Improved welfare and economic opportunities for copyright owners.
- Improved access to dispute resolution mechanisms.

4 DESIGNATED GROUPS AND THE BENEFITS

Groups that will benefit	How will they benefit?
The State	Revenue generation through the collection of royalties
The public	<ul style="list-style-type: none"> • Improved access to copyright works for the following – fair dealings and use, use of orphan works. • Efficient dispute resolution by the Tribunal.
Authors/ creators of copyright works.	<ul style="list-style-type: none"> • Payment of royalties for copyright works. • Royalties from the reuse of the created works. • Improved management and distribution of royalties. • Improved protection of copyright works. • Improved protection through the prescription of minimum contractual terms.
Collecting Societies	<ul style="list-style-type: none"> • Administration of authors/ owners' rights and royalties.

Groups that will bear the cost	How will they bear the cost?
The State	<ul style="list-style-type: none"> • The costs of registering the copyright. • Establishment of the Tribunal. • Law enforcement institutions for monitoring compliance and dealing with infringements.
Companies and Intellectual Property Commission (CIPC)	<ul style="list-style-type: none"> • Management of Collecting Societies. • Administration of licensing of orphan works.
Copyright authors/ owners	<ul style="list-style-type: none"> • Contractual arrangements.
Publishers Producers	<ul style="list-style-type: none"> • Making accessible copyright works for fair use purposes. • Contractual agreements for the sharing of royalties. • Payment of royalties for the reuse of copyright works.
The public/ users of copyright works	<ul style="list-style-type: none"> • Application for use of copyright works. • Undertake the required search before any copyright work could be regarded as orphan work. • Payment of royalties for reuse of copyright works.

5 BEHAVIOUR AND MECHANISMS FOR CHANGE

Groups inside government whose behaviour will have to change	Behaviour that must be changed	Main mechanisms to achieve the necessary change
The State	Non registration of copyright works funded by the State.	<ul style="list-style-type: none"> • Registration of copyright works
Law enforcement institutions (SAPS, Courts)	Enforcement of legislation	<ul style="list-style-type: none"> • Systems for collection, storage and presentation of evidence.
the dti	<ul style="list-style-type: none"> • Limited provision for fair dealings and uses. • Lack of provision to deal to orphan works. • Inadequate protection to authors and creators of works. 	<ul style="list-style-type: none"> • Provision for licenses to be obtained for fair dealings and uses. • Provision for licenses to be obtained for the use of orphan works. • Provision to offer more protection to authors and creators of works, e.g. incorporation of digital treaties, payment of royalties for the resale of original works of art, and payment of royalties for the commercial re-use of works.

Groups inside government whose behaviour will have to change	Behaviour that must be changed	Main mechanisms to achieve the necessary change
	<ul style="list-style-type: none"> • Lack of provision for the collective management of copyright works. 	<ul style="list-style-type: none"> • Provision for collective management of copyright works. • Training of law enforcement institutions on infringements on copyright works.
Groups outside government whose behaviour will have to change	Behaviour that must be changed	Main mechanisms to achieve the necessary change
Collecting societies	<ul style="list-style-type: none"> • Collection of royalties for many sets of rights. • Non distribution of royalties. 	<ul style="list-style-type: none"> • Provision for one collecting society per one set of rights. • Provision for the management of collecting societies.
Authors	<ul style="list-style-type: none"> • Limited access for copyright works for fair dealings and uses. 	<ul style="list-style-type: none"> • Comply with the provisions on fair dealings and uses.
Publishers, and Producers	<ul style="list-style-type: none"> • Limited access for copyright works for fair dealings and uses. • Non-payment of royalties. 	<ul style="list-style-type: none"> • Comply with the provisions on fair dealings and uses. • Provision for royalties to be paid through contractual arrangements.
Copyright owners	Exclusive rights that impede learning and development.	Incorporation of provisions to provide for access to protected works for educational and research purposes.
Users of copyright works	<ul style="list-style-type: none"> • Non-payment of royalties. • Infringement of copyrights. 	<ul style="list-style-type: none"> • Application for licenses. • Payment of royalties. • Compliance with the provisions on infringements in the legislation.

6 CONSULTATIONS

Affected stakeholders	What do they see as main benefits, costs and risks	Do they support or oppose the proposal	What amendments do they propose	Have these amendments been incorporated in your proposal
Department of Arts and Culture	Creators of works of art will be rewarded for the continuous use of their works through the provision for royalties to be paid for the resale of art works.	They support the proposal	None	Not applicable
Ministry of Women	The incorporation of the provisions of the Marrakesh treaty would afford persons with disabilities access to educational materials.	They support the proposal	None	Not applicable
Academics and Libraries	The provision for 'fair use' of copyright works will offer access to educational materials and enhance learning and research.	They support the proposal	None	Not applicable
Authors and Publishers	The 'fair use' provision should be implemented with proper control measures to avoid abuse of the provision.	They support the 'fair use' provision	None	Provision for what constitutes 'fair use' is already included.
Photographers and creators of works of art	Section 21 (1) (b) – (d) of the copyright legislation under the heading of ownership of copyright unfairly and prejudicially discriminates against photographers' work with little or no financial reward to photographers.	They oppose the fact that section 21 has not been amended to offer rights to creators of works where such work has been commissioned.	The copyright legislation should protect creators of literary and artistic works working in employment.	The proposal is still under consideration.
Copyright owners	The collective management of copyright will facilitate royalty	They support the proposal	None	Not applicable

Affected stakeholders	What do they see as main benefits, costs and risks	Do they support or oppose the proposal	What amendments do they propose	Have these amendments been incorporated in your proposal
	payments to copyright owners.			
Collecting societies	The regulation of the collective management of copyright will ensure standardization of practices among collecting societies.	They support the proposal	None	Not applicable

7 IMPACT ASSESSMENT

7.1 Implementation costs and benefits

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p>Proposal 1: (a) 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 an international or local organisations.</p> <p>(b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organisation in question.</p>				
<p>The State</p> <p>The public</p> <p>the dti</p> <p>CIPC</p> <p>International or local organisations</p>	None	<p>Education and awareness of the public and organisations by the dti and CIPC so that they are aware of the new provisions on the work funded by the State or the organisations in question.</p> <p>The State and organisations will incur costs for registration of copyright with the CIPC.</p>	<p>The State and organisations would generate revenue through royalties paid on the use of their work.</p>	<p>the dti through regulations should make provision for the state institutions that would need to register copyright on the work they have authored. The State will need to determine what work can be registered for copyright.</p> <p>Copyright owned by the State needs to be on works commissioned by the State and undertaken for the State.</p> <p>Where the State funds business enterprises or individuals that undertake the work for personal or business purposes, such</p>

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
				work need not be owned by the State as the State would be seen to be competing with those who need the State's financial support to develop their talent, innovation and businesses.
Proposal 2: Notwithstanding the transfer of the copyright work in a literary or musical work; artistic work and cinematograph film or an audiovisual fixation by the user, performer, owner, producer, or author, the user, performer, owner, producer or author, the author of such work shall have the right to claim an equal portion of the royalty payable for the use of such copyright work.				
Copyright authors/ owners the dti CIPC	None	Education and awareness by the dti and CIPC to artists, performers and producers so that they are aware that besides the transfer of copyright, the author of such work still has the right to claim a royalty fee as and when the work is used. CIPC to monitor compliance. Costs will be incurred for contractual arrangements in relation to the payment	Authors/ owners of copyright work will enjoy continuous benefits form royalty payments even after transfer of their rights.	There would need to be contractual agreements between authors of works and those upon whom the rights are transferred so that the terms and conditions for the transfer are agreed upon. The legislation needs to clarify what amount of the royalty fee can be claimed by the author after the transfer.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		of royalties after transfer.		
<p>Proposal 3: A person who intends to broadcast, cause transmission of or communicate the sound recording to the public by wire or wireless means must, at any time before performing that act, submit a prescribed notice in the prescribed manner to the copyright user, performer, owner, producer, author, collecting society or indigenous community, community trust or National Trust, as the case may be, of his or her intention to perform that act, and must, in that notice-</p> <ul style="list-style-type: none"> (i) indicate, where practicable, the date of the proposed performance and the proposed terms and conditions for the payment of a royalty; and (ii) request the copyright user, performer, owner, producer, author, collecting society or indigenous community, community trust or National Trust to sign the proposal attached to the notice in question. 				
Copyright author Producers The public Broadcasters Sellers of copyright works Collecting Societies IP Tribunal CIPC the dti	None	Broadcasters, producers, the public, and sellers of copyright works would incur costs of submitting notices to the copyright owners and Collecting Societies about their intention to use the copyright work and subsequently paying royalties for the use of the performances. Education and awareness by the CIPC and the dti for copyright users,	Improved collection of royalties by Collecting Societies and copyright authors. Improved livelihoods and welfare of copyright authors from payment of royalties. Improved resolution of disputes over royalty payments.	None

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
Indigenous communities Community trusts National Trusts		performers, owners, producers, authors, collecting societies or indigenous communities, community trusts or National Trusts, broadcasters, the public, about the process to be followed when one intends to make use of copyright works. CIPC to monitor compliance. Copyright users, performers, owners, producers, authors, collecting societies or indigenous community, community trusts or National Trusts will incur administrative costs related to dealing with notices from people interested in broadcasting, transmitting or communicating a sound recording by wire or		

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		<p>wireless means.</p> <p>The applicants / copyright author / Collecting Society will incur the cost of referring the disputes to the Tribunal.</p>		
<p>Proposal 4: The user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust of the copyright who receives payment of a royalty in terms of this section shall share such royalty 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).</p>				
<p>Author of copyright</p> <p>Copyright owners</p> <p>Performers</p> <p>Producers</p> <p>Collecting Societies</p> <p>Indigenous communities</p> <p>Community trusts</p> <p>National Trusts</p> <p>the dti</p>	None	<p>Costs for contractual arrangements between authors and owners of copyright works and performers for the equal sharing of royalties where performers' performances feature in sound recordings.</p> <p>Education and awareness by the CIPC and the dti for all identified groups about the equal sharing of royalties where performers' performances feature in</p>	Performers would benefit in sharing royalties where their performances are featured in other copyright authors' work.	<p>The enforcement of this provision would require that the equal sharing of royalties be documented in the form of a contract.</p> <p>The equal sharing of royalties, may not always be a justifiable arrangement based on each party's contribution to the production.</p>

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
CIPC		<p>sound recordings.</p> <p>CIPC to monitor compliance.</p>		
Proposal 5: 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.				
Copyright authors / owners The public the dti CIPC	None	<p>The CIPC will incur costs in the administration of applications for parallel importation.</p> <p>The intended users will incur costs associated with the application for parallel importation.</p> <p>Education and awareness by the CIPC and the dti for copyright authors / owners and the public so that they are aware of the parallel importation provision that states that the rights of distribution and importation by the copyright owner to make available their work locally would be deemed to</p>	<p>The public and users of copyright works will benefit from parallel importation in that copyright works would be accessible at competitive prices.</p> <p>Improved access to copyright works that were not previously accessible.</p>	The Regulations need to indicate the circumstances under which parallel importation can take place.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		have been exhausted once they make their work available in other foreign jurisdictions.		
Proposal 6: Notwithstanding the transfer of the copyright in a 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 audiovisual fixation 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.				
Copyright authors The public CIPC the dti	None	<p>The costs of enforcing the moral rights will be embedded in the costs for the application for use of the copyright works.</p> <p>There could be costs incurred by copyright authors of incorporating the moral rights in the copyright management information.</p> <p>Education and awareness by CIPC and the dti to copyright authors and the public on the moral rights of copyright authors.</p>	Improved protection of the moral rights of copyright authors as regards the use of their works.	The moral rights need to be included in the copyright management information, so that every user is aware of such rights.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
Proposal 7: 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 or audiovisual fixation 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, the ownership of any copyright subsisting in the work shall be governed by contract: Provided that in the absence of 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, apart from the licence, be exercisable exclusively by such author.				
Photographers Broadcasters Publishers CIPC the dti	None	Photographers and those commissioning the work of photography (e.g. broadcasters and publishers) would incur costs of entering into contractual agreements. Education and awareness by CIPC and the dti to copyright authors, producers and the public on the moral rights of copyright authors. CIPC to monitor compliance.	Photographers may be able to enter into contractual agreements with those commissioning their work where they are in a position to determine the terms and conditions about works that have been authored by them.	The rights of the photographers are not adequately protected because the person commissioning the work may choose not to enter into a contract over the commissioned work, thereby by default still remaining the owners of the work.
Proposal 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.				
Copyright authors	None	The sub-licensee will bear the costs of obtaining the licence depending on the	The sub-licensee will benefit from the possibly shortened licensing process	The regulations would need to clearly indicate under what circumstances

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
Copyright users the dti CIPC The public		requirements for sub-licensing. Education and awareness by CIPC and the dti to the public on the provisions for sub-licensing.	and reduced licensing costs.	sub-licensing may or may not take place and what the requirements will be.
<p>Proposal 9: Copyright shall be infringed by any person—</p> <p>(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;</p> <p>(b) who tampers with any information kept by any other person in order to administer copyright in terms of this Act;</p> <p>(c) who omits to pay the performer, owner, producer or author of copyright work a royalty fee as and when the copyright work is used;</p> <p>(d) who omits to pay the author of artistic work a royalty fee as prescribed by this Act as and when the artistic work is sold;</p> <p>(e) who misuses 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.</p>				
The public Copyrights users SAPS (South African Police Services)	None	The SAPS and the courts would need to put in place mechanisms to collect evidence and prove any contravention of the law. Education and awareness	The determination of the stated offences would come with improved protection of the rights of copyright authors / owners, resulting in improved compliance with the law and increased	None

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
The Courts the dti CIPC		by CIPC and the dti to law enforcement institutions so that they are aware of the new offences and how to enforce the law where such offences have been reported. CIPC to monitor compliance.	payment of royalties.	
<p>Proposal 10: (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.</p> <p>(2) No person may provide a service to any other person if—</p> <p>(a) such other person intends to use the service to circumvent an effective technological protection measure; or</p> <p>(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.</p> <p>(3) No person may publish information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting another person to unlawfully circumvent a technological protection measure in the Republic.</p> <p>(4) No person may, during the subsistence of copyright in a work and without a licence of the author of the copyright in such work, circumvent an effective technological protection measure applied by the author of the copyright to such work.</p>				

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
The public Tribunal SAPS The Courts CIPC the dti Copyright authors	None	<p>The Tribunal, SAPS and the courts would need to put in place mechanisms to establish whether the circumvention of the technological protection measure by the accused or alleged trespasser was deliberate or not.</p> <p>The public or would-be users of copyright works would incur costs of applying to the copyright author for assistance to enable circumvention as provided for in the Copyright Act 98 of 1978.</p> <p>The applicant will incur costs of engaging the services of another person for assistance, where the applicant did not receive a response or the request was refused as provided for in the Copyright Act 98 of 1978.</p>	<p>Improved protection of copyright authors whose work is subject to technological protection measures.</p> <p>Improved payment of royalties and benefits for copyright authors.</p> <p>Reduced cases of circumvention of technological protection measures.</p> <p>Increased use of technological protection measures to make copyright works available in digital or electronic form for the benefit of the public.</p>	Enforcement of this provision may be difficult since it depends on whether the person knew or had reason to believe that the technological protection measure circumvention device made, imported, sold, distributed, let for hire would or was likely to be used to infringe copyright in technological protection measure work.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		Education and awareness by the CIPC and the dti for copyright authors, law enforcement institutions, the public, so that they are aware of the provision to prohibit conduct that seeks to circumvent technological protection measures and the consequences for the contravention of the provision.		
<p>Proposal 11: No person may—</p> <p>(a) in respect of any copy of a work, remove or modify any copyright management information; and</p> <p>(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 author.</p> <p>The prohibition in section 28R does not apply if a person—</p> <p>(a) is authorised by the user, performer, owner, producer or author to remove or modify the copyright management information;</p> <p>(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</p> <p>(c) does not know or has no reason to believe that the copyright management information has been removed or modified without the authority of</p>				

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
the copyright user, performer, owner, producer or author.				
Copyright authors The public Sellers/dealers in copyright works Tribunal SAPS (South African Police Services) The Courts CIPC the dti	None	<p>The Tribunal, SAPS and the courts would need to put in place mechanisms to establish whether the removal or modification of the copyright management information was done deliberately to infringe on the performer's rights or not.</p> <p>The public or users of copyright works would incur costs of requesting authorisation of the copyright author to remove or modify the copyright management information as provided for in the Copyright Act 98 of 1978.</p> <p>Education and awareness by the CIPC and the dti for copyright authors, law enforcement institutions, the public and</p>	Increased protection of copyright authors' rights, and economic benefits because this provision seeks to ensure that the copyright management information is kept intact and not tampered with for all users of the works to be aware of and treat the works according to the indicated terms and conditions.	This provision may be difficult to enforce since its enforcement depends on whether one knew or had reason to believe that the removal or modification will induce, enable, facilitate or conceal an infringement of the copyright in the work.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		sellers/dealers in copyright works so that they are aware of prohibited conduct in terms of copyright management information and the consequences for contravention of the provision.		
Proposal 12. The Commission shall only register one collecting society for each right or related right granted under copyright. Where there is no collecting society for a right or related right granted under copyright, the user, performer, owner, producer or author may enter into such contractual arrangements as may be prescribed.				
Copyright authors / owners Collecting Societies the dti CIPC	Newly established Collecting Societies will incur costs in employing staff and office space, including setting up systems for registration and collection of royalties.	Collecting Societies would need to pay fees required for their registration with the CIPC. Collecting Societies would incur costs of accounting to copyright authors in terms of their activities in relation to the administration of the rights in accordance with the provisions of the Copyright Act. Collecting Societies would	Improved management and distribution of royalties leading to improved economic benefits to copyright authors/ owners. Collecting Societies would benefit through remuneration in their administration of rights.	The CIPC would need to be adequately resourced for the registration and management of Collecting Societies to enable effective and efficient collection of royalties.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		also incur costs of submitting reports and returns to the CIPC to demonstrate that their affairs are line with the registration conditions and those royalties are distributed and utilised in accordance with the provisions of the Copyright Act.		
Proposal 13. The Minister may make regulations prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act.				
the dti Copyright authors/ owners Publishers Producers CIPC	None	Education and awareness by the dti and CIPC on the regulations regarding the inclusion of minimum contractual terms in contracts between authors and publishers. Compliance monitoring by the CIPC on the adherence to the minimum contractual requirements. Costs of contractual arrangements between the	Improved protection of authors to ensure that they are rewarded fairly for their works.	The compulsory and standard contractual terms should be such that they are not deemed unfavourable by either party, therefore resulting in unintended consequences such as failure to enter into a contract.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		author/ owner, and publishers/ producers.		
Proposal 14. The author of an artistic work shall enjoy an inalienable right to receive royalties on the commercial resale of his or her work subsequent to the first transfer by the user of that work.				
<p>Creators of artistic works</p> <p>Sellers/ buyers of artistic works</p> <p>Collecting Societies</p> <p>CIPC</p> <p>the dti</p> <p>The public</p>	None	<p>Collecting Societies or author would need to put in place measures to track sales of art works for the collection of royalties thereof.</p> <p>Education and awareness by the dti and CIPC to creators of artistic works and those involved in the sale of artistic works so that they are aware of this provision.</p> <p>CIPC to monitor compliance.</p>	Improved economic benefits for creators of artistic works as a result of the re-sale of their works.	Enforcement of this provision may be a challenge since it requires that the copyright author / owner or Collecting Society should always be aware of any re-sale of artistic work taking place. This would require establishment of a system for tracking and recording sales of artistic works.
Proposal 15. There is hereby established a juristic person to be known as the Intellectual Property Tribunal.				
<p>Copyright authors / owners</p> <p>CIPC</p>	National Treasury would be required to fund the establishment of a Tribunal in terms of	Education and awareness by the dti and CIPC to copyright authors / owners, Collecting Societies and	Dispute resolution would occur in a less costly and effective manner.	None

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
The public Collecting Societies the dti National Treasury	human, infrastructural and operational resources. the dti to monitor the performance of the Tribunal.	the public for them to be aware of the establishment of the Tribunal for the resolution of disputes that may arise in the implementation of the copyright legislation.		
Proposal 16. (1) A person who wishes to obtain a licence to do an act which is subject to copyright in respect of an orphan work must make an application to the Commission in the prescribed manner.				
Copyright authors / owners Users of copyright works the dti CIPC The public	The CIPC might incur costs of employing more staff to deal with orphan works.	Users of orphan works would need to pay fees for the licensing of orphan works. Costs will be incurred by the intended user for gazetting and advertising in the national newspapers as part of searching for the author/ owner of the copyright work.	The provision to regulate orphan works and allow for its use by the public would enhance access to copyright works.	The CIPC would need to be adequately resourced for effective and efficient administration of orphan works.
Proposal 17. In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work: (i) Research, private study or personal use, including the use of a lawfully possessed work at a different time or with a different device;				

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p>(ii) criticism or review of that work or of another work;</p> <p>(iii) reporting current events;</p> <p>(iv) scholarship, teaching and education;</p> <p>(v) comment, illustration, parody, satire, caricature or pastiche;</p> <p>(vi) preservation of and access to the collections of libraries, archives and museums;</p> <p>(vii) expanding access for underserved populations; and</p> <p>(viii) ensuring proper performance of public administration.</p> <p>General exceptions:</p> <p>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 if the work is not used for commercial purposes.</p> <p>Any person may, without the authorisation of the author, 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 electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives.</p>				
Libraries Archivists Museums Galleries Persons with disabilities The public Copyright authors / owners Educational institutions	The CIPC might incur costs in employing staff members that will deal with applications for fair dealings and uses.	Intended users would incur costs for licensing to use copyright works for fair use purposes. Education and awareness by the dti and CIPC to	The 'fair use' provision would lead to legal certainty to those using copyright works for 'fair use' purposes. Improved access to copyright works for fair	None

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
Publishers CIPC the dti		<p>libraries, archivists, museums, galleries, educational institutions, persons with disabilities, the public, copyright authors / owners and publishers on the 'fair use' provisions</p> <p>The CIPC would need to put in place systems and processes for the administration of copyright works for fair use.</p>	dealings and uses.	

8 BUDGETS AND STAFFING REQUIREMENTS

The CIPCs responsibility in the collective management of rights would require more resources towards the administration of this provision. In addition, the CIPC would be required to administer the licensing of orphan works, fair dealings and uses, and parallel importation. The establishment of the IP Tribunal will have financial implications for National Treasury.

9 HOW THE PROPOSALS MINIMISES IMPLEMENTATION AND COMPLIANCE COSTS

The proposed amendments seek to protect the rights of authors and creators of works whilst balancing this with the promotion of access to such works for fair dealings and uses. Most of the proposals would come with increased implementation costs for the CIPC in terms of the administration of fair dealings and uses, orphan works and management of Collecting Societies. The proposals carry compliance costs in that they seek to ensure that users of copyright works compensate the creators of such works through payment of royalties. The Bill will also address lengthy and costly dispute resolution processes

10. DISPUTE RESOLUTION

The Copyright Amendment recommends the establishment of an Intellectual Property (IP) Tribunal that will preside over disputes lodged on IP matters. The established Tribunal will deal with potential disputes from copyright authors/ owners, Collecting Societies, producers, broadcasters and the public that may arise from the implementation of the proposed amendments. For example, there could be disputes arising from the proposal on the fair dealings and use between copyright authors/ owners and educational institutions, archivists, libraries, archivists, museums, and galleries, because they will have to forfeit any royalties.

11. RISK MANAGEMENT

Identified risk	Mitigation measures
Infringement of the freedom to contract.	Minimum requirements will seek to offer fair compensation for both parties and not take away the freedom to contract.
Lack of capacity by Companies and Intellectual Property Commission (CIPC) to regulate Collecting Societies, administer orphan works, and fair dealings and uses.	Capacity issues will be addressed prior to the implementation of the new proposals to avoid unintended consequences.
Abuse of the 'fair use' provisions	The 'fair dealings and uses' provisions provide clear criteria to ensure that copyright users do not prejudice copyright owners.
Infringements of copyright	Education and awareness and information dissemination campaigns to the public, users of copyright works so that they are aware of the new provisions.
Litigation cases on wrongful classification of orphan works.	Stipulation of the search requirements to be adhered to before work could be declared as "an orphan".

12. MONITORING AND EVALUATION

Implementation monitoring of the proposed amendments to the Copyright legislation will be a continuous process that will inform decision making on the manner in which resources are employed and activities undertaken during implementation. The information acquired through the monitoring process will also inform the short, medium and long term evaluation of the Copyright legislation. CIPC will monitor compliance of the implementation of this Bill

There exists a Monitoring and Evaluation Unit within the Consumer and Corporate Regulation Division of the Department of Trade and Industry (**the dti**), which is responsible for the monitoring and evaluation of policies and legislation under the custodianship of the Division. The Unit will develop an M&E plan to guide the monitoring and evaluation of the implementation of the copyright legislation. Monitoring will be done on a continuous basis while evaluations will be undertaken within a period of 3 to 5 years. Monitoring and evaluation results will be assessed against the legislative objectives or outcomes and appropriate measures will be undertaken to ensure that the intended outcomes are realised.

13. IMPACT ON NATIONAL PRIORITIES

Priority	Impact
Social cohesion	<p>The collective management of copyright will ensure that authors and creators of works are duly rewarded for their efforts and this would eliminate any disharmony between creators, producers, publishers and users of copyright works, thereby contributing to social cohesion.</p> <p>Facilitating access to educational materials to the public, including persons with disabilities will provide communities with the knowledge and skills required for their social development.</p>
Security	The provisions will offer legal certainty to those who use copyright works and curb the infringement of copyright and breach of security over protected works.
Economic growth and investment	Rewarding creators of works offers economic benefits in the form of royalties and encourages innovation and investment in the creative industry.
Economic inclusion (employment creation and equity)	The collective management of copyright will offer a platform for both big and small scale creators to get recognition for their work by registering with Collecting Societies to receive rewards for their works. Collecting Societies would serve as an incentive for creators of works (especially emerging authors) to enter the mainstream economy and reap economic benefits for their efforts.
Environmental sustainability	None

14. SOCIAL AND ECONOMIC GROUPS TO BENEFIT AND BEAR THE COST THE MOST

Main beneficiaries	Main cost bearers
Copyright authors/ owners	CIPC
The State	Collecting Societies
The public	Producers and publishers
Collecting Societies	Copyright authors/ owners
	Users of copyright works
	The State
	The public

15. CONCLUSION

In conclusion, the proposed legislative amendments will achieve the intended outcomes and offer authors and creators of copyright works the benefits due to them if education and awareness and the regulatory capacity of the CIPC are increased. The proposal for the management of copyright, management of orphan works and management of 'fair use' of copyright works will require increased regulatory capacity for the CIPC. The provisions that offer increased protection in the area of commercial re-use of works, re-sale of works of art and digital works will necessitate education and awareness by **the dti** and CIPC.

16. AREAS FOR ADDITIONAL RESEARCH

No areas of further research.

17. COMPILATION OF SEIAS

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OFFICIAL SIGN OFF FOR THE COPYRIGHT SEIAS REPORT:

Z. NKONYANE

CD: M&E AND SEIAS

DATE:

Approved/ not approved

M. NETSHITENZHE

ACTING DDG: CCRD

DATE: