

19 July 2021

The Honourable Mr Duma Nkosi
Chair: Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
Cape Town

Attention: Mr A Hermans

By email only to the Portfolio Committee Secretariat: ahermans@parliament.gov.za;
tmadima@parliament.gov.za; msheldon@parliament.gov.za; ymanakaza@parliament.gov.za

Dear Mr Nkosi

SUBMISSIONS ON THE COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 AND THE PERFORMERS' PROTECTION AMENDMENT BILL NO. B24 OF 2016 BY THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW (SAIPL) – CORRECTED VERSION

In reviewing the submission that we had sent to Mr Hermans before the deadline on Friday 16 July, we noticed a couple of errors in references as well as several stylistic and typographical errors.

We trust you will indulge us in sending you a correction of the submission since it would assist your researchers in finding all the referenced provisions and hopefully also facilitate easier reading. There is no additional substantive material in this correction.

Yours faithfully

SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAWYERS


SHANAAZ MAHOMED
President


DEBBIE MARRIOTT
Convenor: Copyright Committee

Please reply by email to mlgrobler@saiipl.co.za

16 July 2021

The Honourable Mr Duma Nkosi
Chair: Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
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Attention: Mr A Hermans

By email only to the Portfolio Committee Secretariat: ahermans@parliament.gov.za;
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The attached submission was prepared by the Copyright Committee of the South African Institute of Intellectual Property Law (SAIPL).

SAIPL was established in 1954 and has as its members approximately 200 lawyers and practitioners of copyright, patent, and trade mark law who are experienced in the protection of intellectual property rights.

SAIPL participated in the August 2017 Parliamentary hearings that were held in respect of the Copyright Amendment Bill, and it filed written submissions in respect of the Bill.

We thank you for the Portfolio Committee's call for public comments and submissions of 4 June 2021 in respect of certain aspects of the Copyright Amendment Bill and the Performers' Protection Amendment Bill. We are interested to participate in the upcoming engagements, including the in-person hearings scheduled for August, and we are prepared to assist the Portfolio Committee's understanding of legal questions on key issues.

Yours faithfully

SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAWYERS


SHANAAZ MAHOMED
President

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DEBBIE MARRIOTT
Convenor: Copyright Committee

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY
ON
THE COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 AND THE PERFORMERS'
PROTECTION AMENDMENT BILL NO. B24 OF 2016
BY
THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW (SAIIPL)**

16 JULY 2021

We focus our comments on the key issues afflicting the Copyright Amendment Bill (CAB), as most of the serious constitutional reservations raised by the President have direct bearing to provisions in this Bill. We therefore reserve our comments with respect to the Performers' Protection Amendment Bill (PPAB), although we avail ourselves, should the Portfolio Committee wish to receive our detailed analysis of the PPAB, to prepare a supplementary submission.

It bears mentioning that the legal research and advice needed to properly assess the Bills for constitutionality and treaty-compliance should, with respect, have been undertaken by the Department of Trade and Industry (DTI) as part of its Socio-Economic Impact Assessment System (SEIAS) process when it developed the Bills. However, the DTI's SEIAS report on the CAB - that, contrary to the guidelines for the SEIAS process, was never published - illustrates that this research was never undertaken. It is therefore now incumbent on the National Assembly to undertake the research and legal work.

Noting that this is a highly specialized and complex area of the law, it is our recommendation that the National Assembly should engage an independent Senior Counsel experienced in constitutional law and intellectual property to prepare the comprehensive legal opinion that this consultation deserves. Submissions from the public, industry stakeholders and other interested parties will not provide a sufficient basis from which the Portfolio Committee could make an accurate legal determination with respect to the legal questions raised in the call for public comments.

For provisions in the Bills that are identified for amendment or further development in order to pass constitutional muster and/or alignment with international treaties, we further recommend that the Portfolio Committee considers engaging independent experts who are knowledgeable about intellectual property law and skilled at drafting legal texts, to assist with the drafting of any corrections or amendments that may be required. In this regard, we note that the Standing Advisory Committee on Intellectual Property, required by Section 40 of the Copyright Act, 1979 (that is not to be amended by CAB), is on the verge of being reconstituted.

SAIPL's submission covers several legal topics directed at the constitutionality and treaty compliance of the CAB:

- The need to have an independent legal assessment of the proposed copyright exceptions in new Sections 12A, 12B, 12C, 12D, 19B, 19C and 19D.
- Excising wording in new Section 39B that applies to the proposed copyright exceptions in new Sections 12A, 12B, 12C, 12D, 19B and 19C.
- Withdrawing Section 12A, *or*, alternatively and subject to a proper and independent impact assessment, undertaking a substantial amendment of Sections 12A and 39B with the deletion of Sections 28O(6) and 28P.
- Withdrawal of the replacement of the 'fair practice' qualification with "appropriate" or "justifiable" in the 'fair dealing' copyright exceptions in new Section 12B and reconsidering the copyright exceptions in new Sections 12D and 19C.
- Withdrawing the translation exception in new Section 12B(1)(f).
- Effecting two amendments to the general exceptions for persons with disabilities in new Section 19D, subject to South Africa acceding to the Marrakesh Treaty.
- Withdrawing the exclusion of copyright protection for computer software interface specifications in new Section 2A(1)(b).
- Recasting or withdrawing the qualification of new rights in technological protection measures and their impact on the Electronic Communications and Transactions Act in new Sections 28O(6) and 28P.
- Redrafting the definitions relating to technological protection measures.
- Recasting the amendment to Section 23(3) of the Act and new Schedule 2 if South Africa will qualify for the benefits of the Appendix to the Berne Convention, or withdrawing those provisions if South Africa does not qualify.
- Withdrawing the new statutory power of the State to designate local organizations that could divest authors from rights of copyright in certain works in the amendment of Section 5 of the Act.
- Introducing the new exclusive rights of 'communication to the public', 'making available' and 'distribution' for published works in Section 11A and computer programmes in Section 11B of the Act insofar as they are relevant.
- Consider repealing Section 45 of the Act and Sections 45 and 45A introduced by the Copyright Amendment Act, 1983, as not being compatible with the exclusive rights of 'distribution' and 'making available'.
- Remediating the absence of consultation in respect of new sections 6A, 7A and 8A.
- Remediating the disproportionate penalty clauses of Sections 8A and 9A.
- Recasting the artists' resale right (resale royalty right) in new Sections 7B-7F and its definitions in a new, discrete, chapter of the Act.
- Assessing the implementation costs of the Tribunal established in terms of new Sections 29 to 29H.

These topics should not be considered as the sum-total of all the issues regarding constitutionality or divergence from international treaties to which South Africa is or intends to become a party.

In addition to these topics, we question whether the scope of the present consultation, which limits the questions of the constitutionality and treaty-compliance of the Bills only to those points raised by the President of the Republic of South Africa in his referral of the Bills back to the National Assembly in June 2020, and the time allowed to respond to this consultation, namely five weeks, subsequently extended to six weeks, in themselves constitute sufficient opportunity to gain public input on issues as complex as those raised by the Bills.

We conclude that the present public consultation on legal issues is not sufficient to deal with these issues, and that it would be incumbent on the National Assembly to undertake substantial additional work to properly assess the Bills for constitutionality and international treaty compliance, and we anticipate that the receipt of detailed and independent legal advice will necessitate substantial amendment to the Bills to render them fully compliant.

1. The time allocated for responses to the present consultation

The Call for Public Submissions and Comments in effect requires a substantial amount of work, including legal analysis and commentary on the constitutionality and treaty compliance of numerous individual provisions, many of the questions being extremely complex, all the more so since neither the Government nor the previous Parliament undertook this kind of work. Five weeks and even six weeks is insufficient time to prepare the comprehensive advice that is needed for this consultation.

Similar consultations in respect of proposed reforms of copyright and neighbouring rights in recent years in several countries, notably Australia, New Zealand, Singapore, the European Union, the United Kingdom and Canada, have allowed far longer periods, at least two months, if not four.

We also note that the history of the consultations on the Bills is characterised by short notice periods, that often had to be extended.

The time allocated for this consultation is insufficient, and the one-week extension that was granted in response to a request for an extension of five weeks, did not assist, not to mention that this week suffered from major disruption due to the state of national unrest.

In the light of the short consultation period, this submission only focuses on what SAIPL perceives to be those provisions in the Bills that require further in-depth investigation into constitutionality and treaty compliance, and deals with them at a very high level. It is, however, clear even from a high-level analysis that both Bills suffer from material flaws and drafting errors to which 'quick fixes' cannot be applied by the mere correction of the wording of the clauses of the Bills.

2. The scope of the present consultation

We submit that it is incumbent on the National Assembly to consider all provisions in the referred Bills which may have constitutional implications, not only those stated in the President's decision to refer the Bills back to the National Assembly in terms of Section 79 of the Constitution.

The Bills were referred to the National Assembly by the President in their entirety due to the incorrect Parliamentary procedure followed by the previous Parliament, namely that they should have been tagged as bills under Section 76 of the Constitution, as opposed to Section 75. The National Assembly and the Joint Tagging Mechanism have already agreed with the President's reservation on this point, and the Bills are now tagged as Section 76 Bills. We therefore submit that all aspects of the Bills that have constitutional implications may, and should, be reconsidered by the National Assembly and the National Council of Province.

Also, in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*¹, the Constitutional Court held that, when a Bill is referred to the National Assembly by the President in terms of Section 79 of the Constitution, the attitude of the National Assembly to the constitutionality of the Bill is a factor that the Constitutional Court will take into account in a subsequent constitutional challenge.² The judgment considers Parliament, therefore the National Assembly, to be an active participant in referrals under Section 79, and we therefore submit that this means that the National Assembly may, and should, consider *any* provisions which may have constitutional implications.

In respect of treaty compliance, we read the Call for Public Submissions and Comments as inviting submissions with respect to *all and any* provisions in the Bills which may result in breaches of relevant international treaties if enacted as presently tabled. Provisions should be measured for compliance in respect of treaties to which SA is presently a member, such as the Berne Convention for the Protection of Literary and Artistic Works ('Berne Convention') and the Agreement on Trade Related Aspects of Intellectual Property Rights ('TRIPS'), as well as treaties which SA has resolved to accede to following the enactment of the Bills, including the WIPO Copyright Treaty ('WCT'), the WIPO Performances and Phonograms Treaty ('WPPT') and the Beijing Treaty on Audiovisual Performances (the 'Beijing Treaty'). In the light of the support expressed by stakeholders across the board, the Call for Public Submissions and Comments rightly states that the National Assembly should also consider compliance with the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind or Visually-Impaired (the 'Marrakesh Treaty'), even if Government has not yet initiated the steps for South Africa to accede to it.

The assessment of treaty compliance necessarily means that new sections introduced by CAB not expressly mentioned in the Call for Public Submissions and Comments (including new Sections 2A(1)(b), 19D and 27(5A)) should be considered, as should the amendments still needed and not contained in the CAB in order to make the Act itself treaty compliant (such as to Section 11B of the Act, and to Section 45 of the Act as well as Sections 45 and 45A of the Act introduced in 1983 that were never put in operation).

Finally, as our submission shows, there are provisions in the CAB that fall outside the specific provisions listed in the Call for Public Submissions and Comments (namely new Sections 12A, 12B, 12C, 12D, 19B, 19C) that add to them – notably new Section 39B – or that purport to

¹ (CCT12/1999), [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999)

² at para. 18.

extend their implementation – notably new Sections 28O(6) and 28P – in ways that raise questions of constitutionality.

3. Copyright exceptions in new Sections 12A, 12B, 12C, 12D, 19B, 19C and 19D – general observations

The Berne Convention and TRIPS have flexible rules for member countries to introduce copyright exceptions into their respective national laws.

Copyright exceptions allow unpermitted and unremunerated uses of copyright protected materials where it is deemed to serve specific public interest objectives, and where the exceptions and limitations are compliant with the so-called Three-Step Test. The Three-Step Test was introduced in Article 9(2) of the 1971 Stockholm text of the Berne Convention in relation to reproduction rights, and Article 13 of the TRIPS Agreement subsequently extended this test to all exceptions and limitations of exclusive rights under copyright. The Three-Step Test offers some flexibility, while at the same time setting out the limits beyond which national laws of member states are not allowed to go when establishing exceptions and limitations to exclusive rights of copyright.

The Three-Step Test requires that:

- (1) exceptions may only be granted in *certain special cases*; and
- (2) exceptions must *not conflict with the normal exploitation of the work* concerned; and
- (3) exceptions must *not unreasonably prejudice the legitimate interests of the rightsholder* concerned.

These steps are cumulative, in the sense that any proposed exception must meet all three steps.

The enactment of a legislative proposal that would introduce an exception or limitation to copyright protection that would not be compliant with all three of the steps mentioned above, would not be compliant with the Berne Convention or TRIPS and would therefore not be recognised by a foreign rightsholder exercising its rights to a copyright work in South Africa.

Therefore, when new copyright exceptions are intended to be legislated, it is good practice to assess each proposed exception against the Three-Step Test. Failure to do so could expose South Africa to a complaint before the TRIPS Council and could also result in foreign rightsholders demanding that copyright exceptions be interpreted or “read down” in compliance with the Three-Step Test when enforcing their rights of copyright in South Africa – all of which being to the disadvantage of South African rightsholders who would not be able to rely on the Three-Step Test in local infringement actions.

SAAIPL agrees that the current copyright exceptions in the Copyright Act have to be updated to meet the circumstances of the new digital age. The current Copyright Act already allows such updating by way of regulatory intervention by the Minister by way of regulation made under Section 13 of the Act, but these changes can also be made by legislative amendment, so long as new exceptions meet the criteria of the Three-Step Test to ensure compliance with international law.

A copyright exception for the benefit of the visually-impaired, on the other hand, does not have to comply with the Three-Step Test if it complies with the Marrakesh Treaty.

Noting (a) that the CAB is characterised by an extensive set of new copyright exceptions that are imported by reference into the PPAB, (b) that neither Government nor the previous Parliament assessed these exceptions for constitutionality or for treaty compliance or carried out an economic impact assessment on them, and (c) that the exceptions are by and large the same as those that appeared in the CAB when it was originally introduced in May 2017 notwithstanding the many reservations raised against them in the public consultation process in the previous Parliament, **SAIPL submits** that the National Assembly must undertake a socio-economic impact assessment of the copyright exceptions in in new Sections 12A, 12B, 12C, 12D, 19B, 19C and 19D, as well as the other new provisions in the CAB that supplement and implement them, and engage an independent Senior Counsel experienced in constitutional law and intellectual property to fully assess the constitutionality and treaty compliance of these provisions before the Bills can again be passed by the National Assembly.

SAIPL's comments on individual provisions in these submissions do not detract from this point.

Given sufficient time, SAIPL could contribute toward the necessary full and detailed legal analysis of each exception proposed in the CAB.

4. New Section 39B – contract override clause applying to all copyright exceptions in new Sections 12A, 12B, 12C, 12D, 19B, 19C and 19D

The contract override provision in the proposed new Section 39B supplements *every* copyright exception (namely those contained in new Sections 12A, 12B, 12C, 12D, 19B, 19C and 19D) with a substantive provision that reads:

“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.”

Therefore, taking into account that South African law considers a copyright exception to be a taking away of a property right,³ new Section 39B has to be factored into the assessment of constitutionality and treaty compliance of *every* copyright exception in the new Sections 12A, 12B, 12C, 12D, 19B, 19C and 19D.

³ *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 4 SA 591 (GJ)

We are not aware of a substantive contract override provision that applies indiscriminately to all copyright exceptions in any country in the world. Contract override provisions have been applied to specific aspects of very specific copyright exceptions where the exception concerned relates to a special case (the first step of the Three-Step Test under the Berne Convention and TRIPS⁴) where there is usually a contractual relationship with the copyright owner or its representative. Section 39B will result in uncertain outcomes, especially for rightsholders entering into contracts to license their rights, and by its applying to all copyright exceptions across the board, Section 39B is arbitrary, entrenching the deprivation of the property rights of copyright owners that already exist in the exceptions, and will impact on the freedom of contract and thereby on the constitutionally-protected freedom of trade.

SAIPL therefore submits that the words “to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport” must be deleted from the new Section 39B.

5. New Section 12A – “fair use”

The CAB introduces, in a new Section 12A, a statutory defence against infringement called “fair use”, which is inspired by Section 107 of the US Copyright Act, but is different in material respects. The new Section 12A, as read with the new Sections 39B and 28P, will materially alter the manner in which rights of copyright would be enforceable in South Africa if passed into law.

Professor Sadulla Karjiker of Stellenbosch University has argued in a peer-reviewed journal article that ‘fair use’, even as codified in Section 107 of the US Copyright Act, is in conflict with the Three-Step Test.⁵ Prof Karjiker’s argument comes across as persuasive, in our view.

However, even if it were to be concluded that ‘fair use’ as applied in the USA (and now also in a handful of other countries, such as Israel), is treaty compliant, it is clear that Section 12A of CAB is something far more extensive and therefore invasive against the rights of copyright owners.

To illustrate the differences between the fair use proposal in Section 12A and the US fair use doctrine as codified in Section 107 of the US Copyright Act, we refer to Annexure “A” of this submission. Not only is the SA proposal different in text and broader in scope to that of the US fair use doctrine, but none of the counterbalances that exist in the US to guard against an over-reliance or mis-reliance on this broad ranging statutory defence against copyright infringement were introduced in the CAB. In the US, parties who infringe copyright and who fail to successfully rely on ‘fair use’ to justify their actions, face the risk of stiff penalties in the form of statutory damages to a successful plaintiff without the need for the plaintiff to prove *guilty knowledge* on the part of the infringer or to quantify actual economic harm suffered.

⁴ The legal interpretation of the kind of situation that qualifies as a “special case” is set out in S Karjiker *Should South Africa adopt fair use? Cutting through the rhetoric* Journal of South African Law 2021-2 p240 at p.252.

⁵ S Karjiker *Should South Africa adopt fair use? Cutting through the rhetoric* Journal of South African Law 2021-2 p240

In South Africa, it is not possible for a plaintiff to claim damages from a copyright infringer, unless *guilty knowledge* can be proven on the part of the infringer. The legal problem that would result in SA is that infringers would be able to rely on the “fair use” defence to claim that they cannot be considered to have guilty knowledge that their actions amounted to copyright infringement *until such time as a Court made such a determination*. Coupled with the contract override provision in new Section 39B - that would make an informal settlement of such a dispute unenforceable - this means that it would be left up to authors, composers, artists, and other rightsholders, to resolve to litigation in each instance where an infringer were to claim that their unauthorized use of a protected work is permissible as ‘fair use’, and they would only be able to substantiate a claim for damages in most cases for continued infringement that were to occur after a Court has successfully ruled in their favour.

We consider that the large majority, if not all, of SA’s creatives do not have the financial means to litigate on each matter where their works are used or adapted or repurposed without permission by third parties. The lack of prospects of securing a financial reward to compensate them for financial expenses relating to the litigation and for the unlawful infringement of their rights by a third party, would likely lead to most vulnerable creatives simply acquiescing to infringement in most cases.

It is not sufficient to argue in favour of new Section 12A, as some academics who advocate globally for the expansion of the US-fair use system to other territories already have, that the ‘fair use’ doctrine is implemented by the United States and a handful of other countries that are members of the Berne Convention. This argument overlooks a number of important considerations in the South African context, including that the fair use proposal in the CAB is not the same as the fair use doctrine codified in US law, and caters for much broader application and potential deprivations of rights. Also, the US only became a member of the Berne Convention in 1999, by which time it already amassed a comprehensive and substantial body of case law stretching back well over a century of jurisprudence which established some clarity for US Courts as to the scope of application of the fair use doctrine in terms of US law. SA does not share any common law or legal heritage with the US, and our Courts would not be able to develop our law by having regard to decisions of US Courts and US legal precedents. Further, it ignores the reasons why other jurisdictions, with which SA does share common law and legal heritage, rejected the wholesale incorporation of fair use into their laws, and the findings after extensive consultations in those territories. The core concern is the uncertainty in law that may result from incorporating this open-ended statutory legal defence to copyright infringement that could potentially find application across the entire spectrum of uses that can be made of copyright protected works, and which would not be limited to any particular and predeterminable ‘special cases’,⁶ as required by the Three-Step Test.

It must also be noted that the factor of “market impact” that appears in Section 107 of the US Copyright Act, has been replaced in new Section 12A with the factor of “substitution effect.” We submit that a negative substitution effect (as per the CAB’s Section 12A(b)(iv)) could nevertheless be a detrimental impact on the market for the rightsholder (as per Section 107 of the US Act), and that would clearly conflict with the normal exploitation of the copyright work concerned and thus in conflict with the second step, and probably also the

⁶ S Karjiker *Should South Africa adopt fair use? Cutting through the rhetoric* Journal of South African Law 2021-2 p240 at p.252.

third step, of the Three-Step Test, and therefore not in compliance with the Berne Convention or TRIPS.

SAIPL therefore submits that **Section 12A should be fully withdrawn**

or, at the very least, that, subject to a proper and independent impact assessment confirming constitutionality and treaty compliance:

Sections 12A(a) and (b) could be amended to follow the terminology of Section 107 of the US Copyright Act (with Section 12A(c) being retained to preserve South Africa's recognition of moral rights that is not recognised in the same way in the USA) **and** that the words "purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright" be deleted from new Section 39B **and** that Sections 28O(6) and 28P be deleted.

6. The replacement of the 'fair practice' qualification with "appropriate" or "justifiable" in the 'fair dealing' copyright exceptions in new Section 12B and in the copyright exceptions in new Sections 12D and 19C

The Bill will remove all the 'fair dealing' provisions from Sections 12, 15, 16, 17, 18 and 19A of the Act (all of which are to be repealed and replaced) and insert them in new Section 12B. However, the 'fair dealing' exceptions in Section 12B are not the same as those in the current Act. The terms 'fair dealing' and 'fair practice' have been replaced by qualifications like "appropriate" and "justifiable", thereby replacing an objective test with another test that could be interpreted as subjective at the instance of the person who reproduces copyright works under these exceptions. The new exceptions in new Sections 12D and 19C also have these qualifications.

SAIPL submits that the use of the terms "appropriate" and "justifiable" to qualify the copyright exceptions in new Sections 12B(1)(a), 12B(1)(b), 12B(e)(ii) and (iii), 12D(1) and 19C(1) mean that those exceptions will unreasonably prejudice the legitimate interests of the rightsholders concerned, thereby not meeting the third step of the Three-Step Test. Although new Sections 12B(1)(a), 12B(1)(b) and 12B(e)(ii) and (iii) could be simply recast to follow the wording in Section 12 of the current Act with its 'fair practice' qualification, Sections 12D and 19C have to be reconsidered in their entirety.

7. Translation exception in new Section 12B(1)(f)

Article 8 of the Berne Convention expressly provides that the rights of copyright include the exclusive right of making and of authorizing translation.

SAIPL submits that the copyright exception for translations in new Section 12B(1)(f) is not only in breach of Article 8 of the Berne Convention and the Three-Step Test, but that it amounts to an arbitrary expropriation of property rights and is therefore unconstitutional. New Section 12B(1)(f) should therefore be fully withdrawn.

8. General exceptions for persons with disabilities – new Section 19D

Section 19D is important for SA's intended accession to the Marrakesh Treaty, but as the section is presently worded, being an exception for the benefit of all disabled, it does not contain several of the required provisions to ensure full compliance with the Marrakesh Treaty, nor do we consider that it is compatible with the Three-Step Test.

Noting the universal support in the earlier public consultations for an exception to benefit the visually impaired and South Africa's accession to the Marrakesh Treaty, **SAIPL submits** that Section 19D is converted to an empowering provision that authorises the Minister to introduce Marrakesh Treaty-compliant rules by regulation. The limitation on authors' moral rights must be withdrawn, since it is inconceivable that a user of an accessible format copy made under this exception should not know the name of the author.

Section 19D(3) will only be treaty-compliant once South Africa has acceded to both WCT and the Marrakesh Treaty.

A proposal for the text, which requires only two changes to the text in the CAB, is set out below:

19D. (1) Any person as may be prescribed and 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, on such terms as may be prescribed and 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 a person 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 a person that serves persons with disabilities may, without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.

(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.

9. Exclusion of copyright protection for computer software interface specifications in new Section 2A(1)(b)

New Section 2A(1)(b) may amount to an arbitrary exclusion of copyright protection for computer software interface specifications, which is computer software that is otherwise entitled to copyright protection. There is no clear policy objective that this exclusion serves and no definition or clarification provided as to which computer software interface specifications are considered not to be qualified for copyright protection. The exclusion of this kind of software from copyright protection actually contradicts with the exception in new Section 19B(2), that contemplates that it is subject to copyright. If left unaddressed, this provision may amount to an unjustifiable deprivation of authors' right to property, which would constitute a direct breach of Section 25(1) of the Constitution.

SAIPL submits that new Section 2A(1)(b) amounts to an unconstitutional arbitrary deprivation of property that is not necessary in the context of the CAB and that it should be withdrawn.

10. Qualification of new rights in technological protection measures and impact on the Electronic Communications and Transactions Act in new Sections 28O(6) and 28P

New Sections 28O(6) and 28P reference the notice and take-down provisions in Sections 86, 87 and 88 of the Electronic Communications and Transactions Act of 2002 (ECTA) in a manner that is unclear. The terminology used is "shall be read with" and "for the purposes of". This introduces legal uncertainty, especially considering that ECTA is not being amended to cross-reference the Copyright Act in that respect, and a person who seeks to interpret the scope of legal application of the relevant provisions in ECTA may be completely unaware of the impact of this intended extension of the applicability of copyright exceptions and limitations through the amendment of the Copyright Act. On the face of it, it comes across as a situation that may need an amendment of ECTA, yet these provisions do not formally amend ECTA. This is important, since copyright legislation is the responsibility of the Minister of Trade & Industry, and ECTA is the responsibility of the Minister of Communications and Digital Technology. We therefore question whether this kind of provision is constitutional and specifically whether the necessary inter-Governmental consultation concerning these clauses ever took place.

New Section 28P seems to be an attempt to extend the full application of all the copyright exceptions in new Sections 12A, 12B, 12C, 12D, 19B, 19C and 19D into the notice and take-down provisions in ECTA. The CAB is already noted for not introducing the legal tools that rightsholders need to enforce the new digital rights (the new exclusive rights of 'communication to the public' and 'making available'), not even by extending the existing

criminal sanctions in Section 27(1) of the Act for deliberate infringement for commercial purposes to these new rights. It is therefore remarkable that the CAB sets out to weaken the enforcement of digital rights in legislation that is the responsibility of another Government department.

SAIPL is concerned that the constitutionality of the process leading up to the introduction of Section 28O(6) and 28P is open to question, and submits that Section 28P amounts to a further erosion of the property rights of copyright owners. Unless a process is set in place to formally amend ECTA, SAIPL submits that Sections 28O(6) and 28P should be deleted.

11. The definitions relating to technological protection measures and the adequacy of the criminal sanctions relating thereto in new Section 27(5A)

The provisions in the CAB which relate to technological protection measures ('TPMs') require further consideration to measure its full compliance with international treaties. The definition of 'technological protection measure' may not be compliant with Article 15 of WCT, Article 18 of WPPT and Article 15 of the Beijing Treaty, which all require *adequate legal protection*. The new definition proposes that any process, treatment, mechanism, technology, device, system or component that, in its 'normal course of operation' controls access to a work for non-infringing purposes, is excluded from the scope of the new legal protection of TPMs. This construct is problematic, because all devices, processes, etc. that could be deployed to overcome TPMs on copyright protected works can also be used for non-infringing purposes as well, such as private study or research, time-shifting, reproduction for private use and study, uses which are permitted by the new and existing copyright exceptions.

This exclusion directly impacts on the effectiveness of the provisions in the CAB which seek to criminalize unlawful actions relating to copyright protected works that are protected by TPMs in the new Section 27(5A).

The definition of 'technological protection measure circumvention device' is equally problematic, as it may be too narrow a construct to provide adequate legal protection as required by the treaties mentioned above. Devices that are not necessarily primarily designed to facilitate infringements by overcoming TPMs could still be designed to achieve this purpose as one of its features, and therefore a rewording of this definition is also recommended, perhaps by considering utilizing the same definitions that are already contained in the relevant treaties.

The new Section 27(5A), which proposes to criminalize certain unlawful actions in respect of TPMs and copyright works protected by TPMs may also fall short of the requirement of Article 11 of WCT which requires *adequate legal protection and effective legal remedies* against the circumvention of TPMs. The proposal in the CAB would allow the sale and distribution of TPM circumvention devices as long as the person who performs these acts does not have any knowledge or reason to suspect that the devices would be used for the purpose of facilitating copyright infringement. This may lead to the widespread distribution of such devices without

risk criminal sanction as the burden of proof to establish criminal liability may be set too low, considering that most such devices could be used for non-infringing purposes as well.

SAIPL submits that the definitions ‘technological protection measure’ and ‘technological protection measure circumvention device’ must be further considered and redrafted so that they align with WCT, WPPT and the Beijing Treaty.

12. Compulsory statutory licences under the Berne Appendix – amendment to Section 23(3) of the Act and new Schedule 2

Schedule 2 of the Bill, the compulsory licences for translation and reprints, has its origin in the Appendix to the Berne Convention. The Appendix contains special rules available only to developing countries. However, Schedule 2 departs in material respects from the text of the Appendix and is therefore not compliant with the Berne Convention. Also, Schedule 2 is not introduced into the law under provisions relating to statutory licences, but by amended Section 23(3) of the Act (which deals with the formalities of assignments and exclusive licences).

If South Africa is a developing country as meant in the Berne Convention and it has met the requirements of the Convention to avail itself of the facility made available in the Appendix, then having the compulsory licences compliant with the terms of the Appendix would be unobjectionable. In order to make use of the flexibilities offered by the Appendix, the developing country must make a corresponding declaration to the Director General of WIPO under Article 28(1)(b) of the Convention. 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 Appendix or with the standards set by the Berne Convention under the Three-Step Test.

SAIPL submits that independent legal opinion should be obtained to determine whether South Africa qualifies to benefit from the provisions of the Appendix to the Berne Convention.

- If South Africa does qualify and it will make the necessary declaration in terms of Article 28(1)(b) of the Berne Convention, Schedule 2 must be amended to be in line with the Appendix and the introduction of the statutory licences have to be placed in another section of the Act, for which a discrete provision in or after Section 45 of the Act is suggested.
- If South Africa does not qualify, Schedule 2 and the relative amendment to Section 23(3) must be withdrawn.

13. New statutory power of the State to designate local organizations that could divest authors from rights of copyright in certain works – Amendment of Section 5 of the Act

Section 5 of the current Act sets out how copyright is conferred on works made under the direction or control of the State. Section 5 also provides for the same rules to apply to certain

international organisations, contemplating multilateral organisations like the United Nations. However, the amendment of Section 5 of the Act empowers the Minister to designate *local organisations* which would be vested with all rights of copyright in works made under the direction or control of such local organisations. Such designated local organisations would therefore obtain copyrights in works of South African authors without the need to employ them or to commission them in return for payment in money or money's worth or to take assignment by mutual agreement. This departure from the usual rules in relation to designated local organisations should be considered whether they are unconstitutional as an arbitrary deprivation of property or an unwarranted restriction on the freedom to trade.

SAIPL submits that there is no justification for discriminating in favour of local organisations by Ministerial regulation, where local organisations already benefit from the provisions of Sections 21 and 22 to acquire copyright, and that a Ministerial designation of a local organisation will lead to unconstitutional treatment of authors who work under its direction or control. If that is so, the amendment to Section 5 should be withdrawn.

14. New exclusive rights of 'communication to the public', 'making available' and 'distribution' not granted for published works in Section 11A and computer programmes in Section 11B of the Act

The CAB introduces the new exclusive rights of 'communication to the public', 'making available' and 'distribution' to literary, musical and artistic works and cinematograph films and sound recordings in Sections 6, 7, 8 and 9, but with no explanation there has not been corresponding amendments extending any of these rights to published editions in Section 11A or to computer programmes in Section 11B. The failure to extend these rights to computer programmes means that the relative requirements of WCT are not met.

SAIPL recommends considering amendments to Sections 11A and 11B of the Act to extend the relevant new exclusive rights of 'communication to the public', 'making available' and 'distribution' to published editions and computer programmes. These rights have to be extended to computer programmes to make the Act compliant with WCT.

15. Section 45 of the Act and Sections 45 and 45A introduced by the Copyright Amendment Act, 1983, not compatible with the exclusive right of 'distribution' and 'making available'

SAIPL submits that Section 45 of the Act and Sections 45 and 45A introduced by the Copyright Amendment Act, 1983, none of which were brought into operation, are not compatible with the exclusive rights of 'distribution' and 'making available'. This opportunity to amend the Act must be used to consider their compliance with the treaties and, if not found to be compliant, to repeal them.

16. The new unwaivable statutory royalty regimes in new Sections 6A, 7A and 8A were never open to public consultation

New Sections 6A, 7A and 8A have their origin in a rewriting of the CAB by the Portfolio Committee of the former Parliament, and not in the version of the CAB introduced in May 2017. They replaced a proposed proviso to all of the exclusive rights provisions reading “notwithstanding the transfer of copyright in a ... work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have the right to claim an equal portion of the royalty payable for the use of such copyright work.” The previous Portfolio Committee recognised that these provisos were unworkable, and set about recasting the intention behind them, that became new Sections 6A, 7A and 8A. However, these new provisions were not previously opened fully for public comment and stakeholder consultation, which may introduce a procedural vulnerability that has constitutional implications if the lack of proper public consultation is left unaddressed.

We consider that these provisions remain problematic, since they impose a single model of remuneration for all copyright works, are unwaivable in favour of the author or performer by virtue of the contract override clause in Section 39B (with a counter-exception in respect of literary works), and they have no counterpart in any country in the world.

Only sub-sections 6A(4) and (5), 7A(4) and (5) and 8A(4) and (5) of the version of the CAB that was current at the end of May 2018, were put up for public consultation. Sub-sections 6A(7), 7A(7) and 8A(5) of the current version of the CAB have since been found to bring about arbitrary deprivations of property rights and the Portfolio Committee has already resolved to remove them. However, the substantive provisions of new Sections 6A, 7A and 8A were never open to public consultation.

SAIPL submits that new Sections 6A, 7A and 8A, together with provisions in the CAB that supplement them (notably new Sections 39cl and 39B), be put up for public consultation, failing which the process for adopting them will be unconstitutional.

17. Disproportionality of the penalty clauses of Sections 8A and 9A

The penalty clauses introduced by the proposed Sections 8A(7) and 9A(4) may also have constitutional implications due to the completely disproportionate nature of the penalties prescribed for the failure of rights holders and licensed users of audiovisual works and sound recordings to report timeously to all performers featured in such works in respect of each commercial activity relating to the use of the works. Criminal liability and fines of up to 10% of a company’s annual turn-over are prescribed for a failure to comply with the new reporting obligations introduced in sections 8A and 9A. This places rightsholders who make legitimate uses of their works, in a position that is worse off than that of infringers, especially in the digital space, when considering that the CAB does not criminalize the infringement of the new digital rights of ‘making available’ and ‘communication to the public’ through amendment of Section 27(1) of the Copyright Act.

SAIPL submits that the penalty provisions in Sections 8A(6) and 9A(4) may well be unconstitutional for their disproportionate measures, and that the option of a fine as a percentage of turnover must be withdrawn.

18. Artists' resale right (resale royalty right) in new Sections 7B-7F

Article 14^{ter} of the Berne Convention allows a member state to introduce legislation granting the inalienable right to an artist to an interest in any sale of a hard copy of his or her work. Sections 7B to 7F of the CAB purport to introduce a resale royalty right for artists, but it couches this right as a right of copyright, which it is not.

SAIPL submits that, in order to comply with Article 14^{ter} of the Berne Convention, Sections 7B to 7F should be recast so as not to confuse the resale royalty right (or, as it is more commonly known, the “artists’ resale right”) with a right of copyright, and that the recast provisions be inserted in a discrete chapter of the Copyright Act. SAIPL suggests that these recast provisions and their dedicated definitions, ‘art market professional’ and ‘visual artistic work’, appear in a new chapter of the Act, ideally after Section 28 of the Act.

19. No evaluation of the implementation costs of the Tribunal established in terms of new Sections 29 to 29H

It is clear from the text of the CAB and its Memorandum that the Tribunal to be reconstituted under an amended Section 29 of the Act will play a significant role in resolving disputes arising from the Act as amended by CAB – not only in respect of the new copyright exceptions, but also in respect of the new unwaivable royalty rights of authors and performers. However, we are concerned that no provision has been made for the funding of the Tribunal. The unpublished SEIAS report simply states that “National Treasury would be required to fund the establishment of a Tribunal in terms of human, infrastructural and operational resources”, and there is no budgeted costing.

Since the Copyright Act, when amended by the CAB, will only be able to function once the Tribunal is in place, SAIPL submits that the CAB cannot proceed until such time that a cost assessment for the Tribunal has been undertaken and approved by Government.

Annexure “A”

To illustrate how the CAB’s ‘fair use’ proposal is substantially different in scope and application to the US ‘fair use’ doctrine as stated in para 5 above, a comparison of the relevant texts is set out in the table below, with key differences in the text of the CAB highlighted of ease of reference.

In addition, US law does not have a contract override provision that support ‘fair use’, as appears in the CAB’s new Section 39B, nor a blanket limitation that applies the implementation of ‘fair use’ to technological protection measures, as the CAB’s new Section 28P.

New Section 12A in the CAB	Section 107 of the US Copyright Act
<p>(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:</p> <ul style="list-style-type: none"> (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. <p>(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—</p> <ul style="list-style-type: none"> (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. 	<p>Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.</p> <p>In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—</p> <ul style="list-style-type: none"> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.