

## COMMENTS: COPYRIGHT AMENDMENT BILL

The Copyright Amendment Bill [B 13B – 2017] (the Bill) was published by the Portfolio Committee on Trade and Industry for comment with a closing date of 9 July 2021.

<b>Clause</b> <i>(Indicate clause number)</i>	<b>Comment</b> <i>(State why the clause or proposed amendment is not supported or what the problem is with the provision)</i>
Clauses 5, 7 and 9	<p>Clause 5 provides for the insertion of proposed section 6A – Share in royalties regarding literary or musical works. Clause 7 provides for the insertion of proposed section 7A – Share in royalties regarding visual artistic works. Clause 9 provides for the insertion of proposed section 8A – Share in royalties regarding audiovisual works. Proposed sections 6A, 7A and 8A entitle authors to receive a fair share of the royalty received for the execution of their work. These rights endure notwithstanding the assignment of the copyright or authorisation by the author. [Proposed sections 6A(2) and 7a(2)] Proposed sections 6A(7)(a), 7A(7)(a) and 8A(5)(a) provide for retrospectivity in that the provisions of the respective proposed sections apply “where copyright was assigned before the commencement date of the Copyright Amendment Act”. In other words, an author has a right to a share in the royalties received in respect of his or her work, notwithstanding an assignment of copyright, even when the assignment took place before the commencement of the Copyright Amendment Act.</p> <p>These provisions providing for retrospectivity are constitutionally problematic. It is a principle of the rule of law that the law must be certain, clear and stable. [<i>Affordable Medicines Trust v Minister of Health</i> 2006 (3) SA 247 (CC)] The proposed sections undo the legal effects of agreements entered into in the past and affect the vested rights of those who entered into the agreements.</p> <p>It is also submitted that the proposed sections constitute an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution of the Republic of South Africa, 1996, (the Constitution). Intellectual property is recognised as property for the purposes of section 25 and can therefore be protected. Furthermore, it is submitted that the deprivation is substantial in that copyright owners will now have to share the profits from an exploitation of a work with the author. Finally, it is submitted that the deprivation is arbitrary. In this regard there seems to be no relationship between the means employed (the deprivation) and the purpose of the law. It would appear that the purpose of the law is to assist those authors who</p>

	<p>assigned their copyright to another but did not receive fair payment. The proposed provisions are applicable even when the author did receive fair payment for the copyright. In such cases there would be no reason for the proposed provisions. Furthermore, the current copyright owner might not be the person who entered into the agreement with the author. He or she may have acquired the copyright at a later stage from another party who was not the author. In such cases, the person who acquired the copyright in good faith will be deprived of his or her property. Finally, there is no time limit set for the retrospective provisions. In terms of the proposed provisions, even assignments made many years previously will be subject to royalties being paid to the author. It is submitted that the purpose of the proposed provision could be accomplished by less restrictive means e.g. the legislation could provide for an investigation to be conducted into the claims of an aggrieved author and provide for remedies in those instances where the author did not receive proper compensation for his or her work. It is submitted that this approach is preferable to a retrospective "catch-all" provision for all royalty payments.</p>
<p>Clauses 5, 7 and 9</p>	<p>Proposed sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) state that the Minister must develop draft regulations setting out the process to give effect to an application of "this section" to a work contemplated in paragraph (a), meaning the retrospective provisions.</p> <p>The Constitutional Court in <i>Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others</i> 1995 (4) SA 877 (CC) held that it is permissible for Parliament to delegate subordinate regulatory authority to other bodies for the purposes of implementing laws. However, the court also held that there is a distinction between delegating authority to make subordinate legislation within the framework of the Act, which is permissible, and assigning plenary power to another body, which is impermissible. Proposed sections 6A(7)(a), 7A(7)(a) and 8A(5)(a) state that the section (i.e. 6A, 7A and 8A) applies where copyright was assigned before the commencement of the Copyright Amendment Bill. Proposed sections 6A, 7A and 8A include, <i>inter alia</i>, a written agreement that must be entered into between the author and owner of the copyright regarding the author's share of the royalty. It is submitted that proposed sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) empower the Minister to make regulations about the deprivation of copyright from those to who it has been assigned. This would include determining the rights and obligations of the persons concluding the</p>

	<p>written agreement referred to in proposed sections 6A(3)(a), 7A(3)(a) and 8A(2)(a). It is submitted that these are plenary legislative powers that go beyond the mere making of regulations to implement the Act. The draft regulations must be approved by the National Assembly, but this does not detract from the fact that it is the Minister making the decisions. Furthermore, there is no requirement in the proposed provisions for the draft regulations to be subject to a public participation process. It is therefore submitted that proposed sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) are unconstitutional and need to be reassessed.</p>
<p>Clause 13</p>	<p>Clause 13 provides for the insertion of new sections in the Copyright Act, 1978 (Act 98 of 1978) (the Act). Proposed section 12A provides for general exceptions from copyright protection.</p> <p>Proposed section 12A reduces the protection that a copyright owner has over his copyright. In this regard, four new purposes for which works may be used without constituting copyright infringement have been introduced, namely proposed section 12A(a)(iv) to (vii). Those purposes contemplated in paragraphs (i) to (iii) are found in the existing section 12(1)(a) to (c) of the Act, which stands to be repealed. Copyright owners will no longer be remunerated for their work when it is used for purposes such as those contemplated in proposed paragraph (a)(i) to (vii). Furthermore, the wording has been amended broadening the scope of the purposes for which a work may be legitimately used. Section 12(1) of the Act provides for a closed list of purposes. Proposed section 12A(1) refers to "purposes such as the following". This is an open list so copyright owners may not receive remuneration if their work is used for purposes similar to those listed. It is submitted that this substantially limits the owner's right to enjoyment of his or her property. It is also submitted that the deprivation is arbitrary as contemplated in section 25(1) of the Constitution. The purpose of the legislation is presumably to provide access to copyright material without having to obtain the copyright owner's permission. However, the open list is far too wide and the circumstances in which copyright works can be used in terms of this provision are imprecise and unknown. The purpose of enhancing access to copyright material is not justified by the extent of the deprivation and weakens copyright protection.</p> <p>It is also submitted that proposed section 12A contravenes section 22 of the Constitution which states that every citizen has a right to choose their trade, occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law. In <i>South African Diamond Producers</i></p>

	<p><i>Organisation v Minister of Minerals and Energy and Others</i> 2017 (6) SA 331 (CC) the court held that if a legislative provision has a negative impact on the choice of trade, occupation or profession then the provision must be reasonable and justifiable in terms of the criterion in section 36(1) of the Constitution. If a legislative provision makes the practice of a trade or profession so undesirable, difficult or unprofitable that the choice to enter that trade or profession is limited, then section 22 of the Constitution is contravened as it negatively affects the "choice" element of that section. It is submitted that proposed section 12A contravenes section 22 in that its provisions are so onerous as to render the occupations of anyone who produces a work contemplated in that proposed section and who deals in copyright (e.g. an author or composer) to be undesirable, difficult or unprofitable. The provisions negatively affect a copyright owner's ability to make a living and thereby negatively affect the choice to pursue that occupation. Furthermore, proposed section 12A violates section 22 of the Constitution because there is no justification or rational reason for the provisions. As far as can be ascertained, no research has been done to determine the impact of proposed section 12A. It is therefore submitted that proposed section 12A is unconstitutional and needs to be reassessed.</p>
<p>Clause 13</p>	<p>Proposed section 12A(a)(i) provides for "fair use" of copyright work for research, private study or private use. Proposed paragraph (b)(iii)(bb) states that in determining "fair use" all relevant factors must be considered, including the purpose and character of the use including whether it is of a commercial nature or for non-profit research, library or educational purposes.</p> <p>It is submitted that where the use is for commercial purposes then it cannot be considered to be "fair" for the purposes of determining an exception in terms of this provision. It is submitted that private study and private use can be undertaken for a commercial purpose. If an exception from copyright protection were to be granted for research, private study and private use for commercial purposes the effect would be to deprive the copyright owner of the fruits of his intellectual property for the purposes of enriching another.</p>
<p>Clause 13</p>	<p>Proposed section 12A(a)(iv) provides for an exception to be made in those instances where a copyright work is used for the purposes of scholarship, teaching and education. The Bill does not define what is meant by "teaching" and "education". In this regard, see also proposed sections 12B(1)(b), 12B(1)(f)(ii) and 12D(1).</p>

	<p>It is submitted that this can be interpreted to mean informal teaching between two individuals. In such instances, an exception from copyright protection should not be granted. It is submitted that the Bill should clarify what is meant by "teaching" and "education", perhaps by way of definitions.</p>
Clause 13	<p>Proposed section 12A(a)(vii) states that an exception is made from copyright protection for ensuring proper performance of public administration.</p> <p>It is submitted that this provision is very wide. The wording should be amended so that the proper performance must be reasonable. It is submitted that both "proper performance" and "public administration" need to be clarified so that the copyright owner is not unnecessarily deprived of his property.</p>
Clause 13	<p>Proposed section 12B provides for specific exceptions from copyright protection applicable to all works.</p> <p>Proposed section 12B(1)(a) states that copyright shall not be infringed by "any quotation". The existing quotation exception found in section 12(3) of the Act limits the exception to literary or musical works. Proposed section 12B(1)(a) does not have this limitation and has expanded the exception considerably to include e.g. visual artistic works, which by their nature cannot be quoted but must be reproduced as a whole. Proposed section 12B(1)(c) refers to reproduction of a work by a broadcaster. Section 12(5) of the Act limits the broadcasting to literary or musical works. Proposed section 12B(1)(c) does not have this limitation and the exception has now been extended to the broadcasting of any work. It is submitted that this constitutes arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. The deprivation is substantial and overly broad. Copyright owners will no longer be entitled to profit from an exploitation of a work as contemplated in this proposed section. It is therefore submitted that proposed section 12B is unconstitutional and needs to be reassessed.</p>
Clause 13	<p>Proposed section 12C provides for exceptions from copyright protection applicable to temporary reproduction and adaptation where the copies and adaptations are an integral and essential part of a technical process. Proposed paragraphs (a) and (b) provide for the purpose for which these copies or adaptations may be made. A caveat is provided that "there is no independent, economic significance to these acts".</p> <p>It is submitted that the caveat applies to both paragraph (a) and (b) and not just paragraph (b). Furthermore, it is not clear what is meant by "economic significance". The term is imprecise and vague. Elsewhere the term "commercial" is</p>

	used. In the interests of consistency, it is submitted that the wording should be amended to "there is no commercial significance to these acts".
Clause 13	<p>Proposed section 12D provides exceptions from copyright protection applicable to reproduction for educational and academic activities.</p> <p>The exception from copyright protect in educational and academic activities also results in copyright owners being afforded far less protection and their right to benefit from their work is consequently limited. This amounts to a deprivation of property, which is arbitrary, as contemplated in section 25(1) of the Constitution. The purpose of this provision is to promote access to copyright material for educational purposes. However, it is submitted that the provision is, once again, too broad. For example, the provision permits the copying of entire books or journals if the licence to do so is not available from the copyright owner on reasonable terms and conditions [proposed section 12D(3)] or where the book cannot be obtained at a price reasonably related to that normally charged for comparable works [proposed section 12D(4)(c)]. It is not clear what constitutes a reasonable price or reasonable terms and conditions. These provisions can be interpreted very broadly and abused. It is submitted that the extent of the deprivation is not justified by the purpose of granting access to works for educational purposes and it is therefore arbitrary. Furthermore, many educational institutions are commercial undertakings and exist to make a profit. Should these institutions copy works in terms of proposed section 12D they will be enhancing their profits (by not having to pay royalties) at the expense of the copyright holders. It is not clear how this achieves the purpose of promoting access to copyrighted material for educational purposes.</p> <p>As with proposed section 12A, it is also submitted that proposed section 12D contravenes section 22 of the Constitution. Authors of academic works derive income through copyright by licensing the use of their works for academic purposes. Proposed section 12D deprives academic authors from profiting from their copyright work. These authors are negatively affected by this proposed section to such an extent so as to make entry into the occupation unprofitable and thereby limiting the choice to enter the occupation. It is also submitted that proposed section 24D is not reasonable as required by section 36 of the Constitution. It is therefore submitted that proposed section 12D is unconstitutional and needs to be reassessed.</p>
Clause 20	Clause 20 provides for the insertion of proposed section 19C providing for general exceptions from copyright protection applicable to the protection of copyright

	<p>work for libraries, archives, museums and galleries.</p> <p>It is submitted that the exceptions regarding protection of copyright work for libraries, archives, museums and galleries also constitute an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. Proposed section 19C(3) provides for a library, archive, museum and gallery to provide “temporary access” to a copyright work to a user or another library. It is not clear from this what is meant by “access”. Proposed section 19C(4) provides that a library, archive museum or gallery may, for educational purposes, permit a user to view a whole audiovisual work or listen to a full digital video disc, compact disc or other sound recording. Proposed section 19C(5)(b) permits a library, archive, museum and gallery to make a copy of a publicly accessible website for the purposes of preservation. Proposed section 19C(9) permits a library, archive, museum and gallery to make a copy of a copyright work for its own collection when the permission of the copyright owner, after a reasonable endeavor, cannot be obtained or when the work is not available by general trade or from the publisher. It is not clear from the wording what “reasonable endeavor” to obtain the permission means. Does this mean that a reasonable endeavor was made to obtain permission when the copyright owner expressly forbade the copying of the work, or does it mean that a reasonable endeavor was made to locate the copyright owner? It is submitted that these provisions constitute a substantial loss of profit for copyright owners. Furthermore, they are too broad or vague to support the purposes contemplated in the provisions and the deprivation of the copyright owner’s property is therefore arbitrary. It is therefore submitted that proposed section 19C is unconstitutional and needs to be reassessed.</p>
<p>Clause 20 Marrakesh Treaty</p>	<p>Proposed section 19D provides for general exceptions from copyright protection applicable to the protection of copyright work for persons with a disability.</p> <p>This proposed section is aligned in some respects with the <i>Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled</i> (the Treaty). Proposed section 9D(1) states that a person who serves persons with disabilities may, without the authorisation of the copyright owner, make and supply an “accessible format copy” to a person with a disability, provided certain conditions are met, namely, (a) that the person making the copy must have lawful access to the copyright work, (b) the copyright work must be converted into an acceptable format copy, and (c) the activity must be undertaken on a non-profit basis. These conditions are the same as the conditions</p>

listed in article 4(2)(a) of the Treaty, with the exception that the Treaty also includes a condition that the accessible format copies are supplied exclusively to be used by the beneficiary persons. It is submitted that this additional condition should be inserted in proposed section 19D(1) of the Bill.

Furthermore, both proposed section 19D(2)(a) of the Bill and article 4(2)(b) of the Treaty state that both the disabled person and somebody acting on his or her behalf may make an accessible format copy of a work for the personal use of the beneficiary.

It is submitted that terminology needs to be aligned, The Bill refers to "person with a disability" and the Treaty refers to a "beneficiary person" (as defined). The definition goes beyond people who are blind or visually impaired and includes physically disabled people who cannot hold a book. It is submitted that the Bill should adopt this terminology as "person with a disability" can refer to any disability.

The Treaty establishes an "authorised entity" to (a) establish that persons it serves are beneficiary persons, (b) limit to beneficiary persons its distribution and making available of accessible format copies, (c) discourage reproduction, distribution and making available of unauthorised copies, and (d) keeping records of the copies of works it handles while respecting the privacy of beneficiary persons. No similar entity is created in terms of the Bill and it is submitted that consideration should be given thereto.

In terms of the Treaty, each contracting party (i.e. signatory to the Treaty) must include in their national copyright legislation limitations and exceptions to the right to reproduce, distribute and make available to the public, and to facilitate the availability of works in accessible format to beneficiary persons. For example, a contracting party may confine limitations or exceptions to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons. The exceptions found in proposed section 19D are far wider and apply to any accessible format copy.

Proposed section 19D(3) provides that a person with a disability or a person who serves such persons may, without the authorisation of the copyright owner, export or import any legal copy of an accessible format copy as long as such activity is undertaken on a non-profit basis. Article 6 of the Treaty provides for the importation of an accessible format information. The national law of a contracting party shall permit the importation of an accessible format copy for the benefit of beneficiary persons.



	<p>Article 5 of the Treaty provides for cross-border exchange of accessible format copies. Contracting parties shall provide that an accessible format copy may, without the authorisation of the copyright holder, be made available to a beneficiary person or an authorised entity in another contracting party. Article 9 of the Treaty states that contracting parties shall endeavor to foster the cross-border exchange of accessible format copies by encouraging the voluntary sharing of information, such as their policies and practices related to cross border exchanges , with interested parties. The Bill is silent on cross border exchanges of accessible format copies and consideration should be given to including this in the Bill.</p> <p>The Treaty also provides for general obligations on limitations and exceptions, specifically that (a) the contracting party may permit the reproduction of works provided that this does not conflict with a normal exploitation of the work and (b) that the contracting party may provide for limitations of or exceptions to the rights granted to authors that do not unreasonably prejudice the legitimate interests of the author. It is submitted that such obligations should be considered for insertion in the Bill to align it with the Treaty.</p>
WIPO Treaty	<p>The <i>World Intellectual Property Organisation Copyright Treaty</i> (WIPO Treaty) is a special agreement under the Berne Convention which deals with the protection of works and the rights of their authors. In addition to the rights recognised by the Berne Convention authors are granted certain economic rights. In terms of article 6 of the WIPO Treaty authors of literary and artistic works shall enjoy exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership. Article 7 states that authors of computer programmes, cinematographic works and works embodied on phonograms shall enjoy the exclusive right of authorising commercial rental to the public of originals or copies of their works. Article 8 states that authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means. South African is a signatory to the WIPO Treaty and it is submitted that similar provisions be incorporated in the Bill.</p> <p>Furthermore, article 10 states that contracting parties may, in national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under the 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. As has been pointed out above, it is submitted that the exceptions contained in proposed sections 12A, 12B, 12D and 19C of the Bill</p>

constitute arbitrary deprivations of the copyright owner's property.

Several provisions of the Berne convention, such as articles 2(3), 8, 11 and 11(2)<sup>ter</sup> state that the author shall enjoy, during the full term of his or her rights in the original work, the same rights with respect to translations thereof. Proposed section 12B(1)(f) of the Bill states that copyright shall not be infringed by the translation of a copyright work by a person giving or receiving instruction. The provision is made subject to certain conditions, but the copyright owner is nevertheless deprived of the fruits of his or her property. It is submitted that this proposed provision is in conflict with the relevant articles in the WIPO Treaty.

Article 14<sup>ter</sup> of the WIPO Treaty states that the author, or after his or her death the persons or institutions authorised by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. It is submitted that this differs from the royalties received by the author for the use of copyright work. Consideration should be given to inserting a similar provision in the Bill to enhance the protection of the author's interest.

The WIPO Treaty also makes special provisions for when the author of a work uses a pseudonym. (article 7) In the case of anonymous and pseudonymous works the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he or she shall be entitled to protect and enforce the author's rights. This shall cease to apply when the author reveals his or her identity and establishes his or her claim to authorship of the work. [article 15(3)] It is submitted that consideration should be given to inserting a similar provision in the Bill.

Yours sincerely

**MR DAVID MAYNIER**  
**MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES**  
**DATE: 07 JULY 2021**