

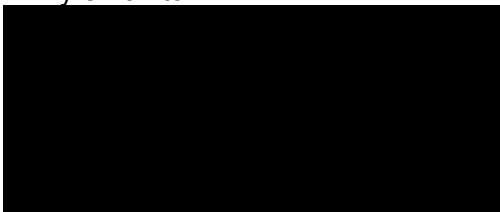


A NON-PROFIT COMPANY WITH MEMBERS  
NPC Registration Number: 2018/240939/08

16 July 2021

**The Honourable Mr Duma Nkosi**  
**Chairperson: Portfolio Committee on Trade and Industry**  
**Attention Mr. A Hermans**  
**Parliament of the Republic of South Africa**  
**CAPE TOWN**

By email to:



Dear Mr. Nkosi,

**COPYRIGHT AMENDMENT BILL, B13 OF 2017/ PERFORMERS PROTECTION  
AMENDMENT BILL, B24 OF 2016; Submission by the Independent Black Film Producers  
Collective (IBFC)**

**A. INTRODUCTION**

1. The Independent Black Film Producers Collective (IBFC) is a South African Collaborative Business to Business Network of wholly Black Owned South African Film and Television companies. We represent black Filmmakers, Content Creators, Film



and Television/Commercials Directors, Producers, Marketers, Exhibitors, Media and Entertainment Facilities as well as Service Industry and Black Industrialists and Entrepreneurs.

2. This submission is part of a collaborative effort of the South Africa AV sector, working with the IPO – Independent Producers Organisation and the ASA – Animation SA.
3. The IBFC’s Key intervention is through Enterprise Development along with several programmes including policy review and inputs into legislation, specifically Intellectual Property legislation, which directly affects the growth and sustainability of our industry. Accordingly, we recognize that our current copyright law is outdated, and a new legislative framework needs to be developed in order to be on par with modern international, technological developments. More so with the 4th industrial Revolution.
4. In addition, we recognize that South Africa is party to several treaties such as the Berne Convention and the World Trade Organisation and has obligations under same to ensure that our copyright laws are brought in line with ‘Trade-Related Aspects’ of Intellectual Property Rights Agreement.
5. Since the passing of the Copyright Amendment Bill (‘the Copyright Bill’) and the Performance Protection Amendment Bill, 2016 (‘the Performance Protection Bill’) (hereinafter collectively referred to as the ‘Bills’), the IBFC welcomes the Presidents referral of both Bills back to parliament for reconsideration having expressed several substantive reservations to the constitutionality of the Copyright Amendment Bill.

6. The IBFC also appreciates the opportunity to make submissions in response to the Portfolio Committee for Trade and Industry (the 'Committee') invitation to submit comments on the Bills.

**B. IBFC'S SUBMISSIONS**

7. The IBFC strongly believes and is of the considered view that the process of assenting the Bills into law should be a transparent one and more importantly one that abides by the Rule of law and the Constitution.
8. It is submitted from the onset that some of the President's areas of concern were recorded by the IBFC in its submission to the Select Committee on Trade and International Relation dated 22 February 2019, which for your ease of reference is herein attached as Annexure "A".
9. Given the limited scope issued for this consultation, the IBFC's will refrain from raising various other defects in the Bills and which are of concern to the organization and the sector, but we will focus on submissions which find support in the President's reservations. Specifically, the IBFC shall not deal with the retrospective effect of proposed section 7A and the impermissibly delegate legislative authority to the Minister of Trade and Industry reservations as it has since become common cause that these reservations are not constitutionally compliant.
10. In these submissions, the IBFC shall deal with the following specific issues that affect IBFC in the audio-visual sector in relation to the Presidents reservations:

- 10.1 That the Copyright Bill was not submitted by the Department of Trade and Industry ('DTI') for an interdependent regulatory impact assessment before introduction to the National Assembly. Various sections of the Bills, including the 'fair use' provision were not put out for public comments and external experts were not consulted to consider the consequence of the complex proposed amendments<sup>1</sup>;
- 10.2 That the NCOP's Select Committee on Trade and International Relations (NCOP Committee) extend the period for submission by stakeholders in order to allow for comprehensive and well considered submissions from all stakeholders;<sup>2</sup>
- 10.3 That the added exceptions in respect of technological protection measures introduced by section 28 (P) are contrary to the Marrakesh Treaty to which South Africa intends becoming signatory to<sup>3</sup>;
- 10.4 That section 39B encroaches on freedom to contract between the parties<sup>4</sup>;  
and

---

<sup>1</sup> Paragraph 2 of the IBFC's submission.

<sup>2</sup> Ibid.

<sup>3</sup> Paragraph 3.6 of the IBFC's submission.

<sup>4</sup> Paragraph 3.7 of the IBFC's submission.

10.5 That section 12A-12D and 19B-19C of the Copyright Bill is non-compliant with international treaty obligations, unconstitutional in that it amounts to deprivation of property and in turn violates section 25 of the Constitution.

11 The IBFC in making its submissions shall first deal with the President's areas of concern that pertain to the Copyright's Bill constitutionality and international treaty noncompliance and second deal with other areas of concern which the IBFC deems important and ought to be ventilated at this stage.

**12 We submit that the legislature must return to the drawing table and correct the defects in the Bill discussed hereinunder.**


*(i) The new 'copyright exceptions' introduced by section 12A, 12B, 12C, 12D, 19 B and 19 C of the Copyright Bill*

13 One of the objectives of the Copyright Bill is to enhance access to and use of copyright work, to promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creative industry.<sup>5</sup>

14 In an attempt to realise the above-mentioned objectives the Copyright Amendment Bill introduced the 'new copyright exceptions' in the form of the proposed sections 12A, 12B, 12C, 12D, 19 B and 19 C of the Copyright Bill ('the copyright exceptions').

---

<sup>5</sup> Paragraph 2.3 of the Memorandum on the objects of the Copyright Amendment Bill.



- 15 The Bill has removed all the ‘fair dealing’ provisions from what is now Section 12 and seems to have explicitly adopted a fair use approach to the exceptions to copyright protection, despite that system being heavily criticised in the US, from where it originates.
- 16 The South African variant of ‘fair use’ erodes exclusive rights, and further broadens the wish list for potential free uses. Regrettably these extensions were not put through the three-step test as required by the Berne Convention’s provisions.
- 17 The procedural complexity with the introduction of these exceptions is that they were not put out for public comments before the final version of the Copyright Bill was published.<sup>6</sup> The copyright exceptions therefore are susceptible to substantive and procedural defect.
- 18 The need for further consultation in this regard cannot be overstated.
- 19 Facilitating public participation is a material part of the law making process. The Constitutional Court in *Doctor’s for Life* held that the failure to comply with the duty renders the resulting legislation invalid.<sup>7</sup>
- 20 In *Masondo*, the court highlighted the importance of public participation and held as follows “*The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the*

---

<sup>6</sup> Paragraph 12 of the President’s correspondence dated 16 June 2020.

<sup>7</sup> *Doctor’s for life* at para 23.

*next vote-counting exercise occurs. Rather, it contemplates a plurastic democracy where continuous respect is given to the rights of all to be heard and have their views considered.”*

- 21 Parliament has a duty to involve the public when enacting the legislation.<sup>8</sup>
- 22 Should the Copyright Amendment Bill be passed without having gone through the public process, the Bills shall be constitutionally invalid.
- 23 In so far as the substantive defects are concerned, it is submitted that the copyright exceptions are broad and constitutionally invalid. The means used by the legislature (being the introduction of copyrights exceptions) to realise the objectives of the Copyright Bill (to enhance access to and use of copyright work, to promote access to information for the advancement of education and research) are not proportionate.
- 24 The courts have held that if the impact of the law is not proportionate with such objectives, that law may be deemed overbroad.<sup>9</sup>
- 25 The Portfolio Committee in 2019, asked a Panel of Experts to advise “on any technical or drafting issues pertaining to the Bills, including “whether the clauses that address international treaties, correctly reflect the content of those treaties”. The experts conveyed their opinion with regards to several defective aspects of the Bill, in addition

---

<sup>8</sup> SA Veterinary Association v Speaker of the National Assembly and Others 2019 (3) SA 62 (CC) ay para 19.

<sup>9</sup> See Royal College of Dental Surgeons of Ontario v. Rocket 5[1990] 71 D.L.R. (4th) 68. Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison 71995 (10) BCLR 1382 (CC) 1391

to identifying issues that made the provisions of the draft Bill incompatible with international treaties.

- 26 The experts' opinions herein attached as Annexure "B", offered specific suggestions on how Sections 12 B, 12 C, 12 D, 19 C and 19 D, the subject of the present consultation, can be reconsidered, deleted or amended to ensure South African copyright law be compatible with the Berne Convention's provisions.

***(ii) Copyright Bill compliance with South Africa's international treaty requirements***

- 27 The Copyright Bill seeks to strategically align itself to international treaties which South Africa is a signatory but is yet to accede to, such as the World Intellectual Property Organization Copyright Treaty ('WCT'), World Intellectual Property Organization ('WIPO') Performance and Phonograms Treaty ('WPPT'), the Marrakesh Treaty, and the Berne Convention ('hereinafter collectively referred to as the Copyright Treaties').
- 28 There are cogent and valid reasons why the Copyright Bill would seek to do the above, and the reason is that firstly, there are benefits to accession to international treaties. Acceding to international treaties allows for South African rights-holders to be part of the global network to enhance and guarantee protection for their rights in foreign jurisdiction based on the national treatment principle.



- 29 Some rights e.g., the regime for remuneration rights, even though badly drafted in the current Performers Protection Amendment Bill, are generally administered through collective management, through Collective Management Organizations (CMOs). To benefit local rights-holders in the audio-visual sector, the CMOs enter into reciprocally agreements with other international CMOs in other countries. If South Africa has not acceded to the international treaties, the international CMOs are not keen to conclude the reciprocal agreements as protection in South Africa would not guarantee protection for their right-holders. In this case, the relevant treaty is the Beijing Treaty. This stifles investment and growth of in our case, the audio-visual sector.
- 30 Secondly, South Africa cannot simply wish away its international treaty obligations, this is so notwithstanding the fact that some of the above-mentioned international treaties have not been acceded to.
- 31 The President's signature on official documents, especially international agreements is not ordinary and is never inconsequential.<sup>10</sup> The effect of the aforementioned signature is that South Africa is restrained from acting in a manner inconsistent with the spirit of the above mentioned international treaties or its own commitment as borne out by the signature, pending ratification. It binds the state but only to the extent of conscientising the state about the new direction it has committed itself to.<sup>11</sup>

---

<sup>10</sup> Law Society of South Africa and Others v President of The Republic Of South Africa and Others 2019 (3) SA 30 (CC) at para 30.

<sup>11</sup> Ibid at para 40.

32 The above therefore means that South Africa is obliged to give effect to its international agreements, provided that they are not in conflict with the Constitution.<sup>12</sup>

33 Article 9 of the Berne Convention read with Marrakesh Treaty provides for a three-step test applicable to copyright exception or limitation. It states that copyright exception or limitation shall

33.1 cover only certain special cases,

33.2 not conflict with the normal exploitation of the work; and

33.3 not unreasonably prejudice the legitimate interest of the rightsholder.

34 It is submitted that the copyright exceptions in its current form as embodied in the Copyright Bill are in conflict with the three-step test in that the fair use provisions unreasonably prejudices the legitimate interest of the copyright author by allowing use without permission from or remuneration to the copyright author in instances where fair use is found. This results in significant legal uncertainty and places a heavy onus on the copyright owner to institute court proceedings to challenge unauthorized use of their work.

---

<sup>12</sup> *Minister of Justice and Constitutional Development and Others v Prince And Others* 2018 (6) SA 393 (CC) at para 82.

- 35 What further compounds issues is that the copyright exceptions are cast in wide terms, the consequence whether intended or not is the inclusion of audiovisual work which under normal circumstances the copyright owner would be eligible to exploit and derive income from. A provision of the Copyright Bill that is illustrative of the foregoing is section 12 B(1)(c) that provides as follows “*copyright is a work shall not be infringed by the reproduction of such work by a broadcaster by means of its wone facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster.....*”
- 36 It is submitted by IBFC, and also clear from the experts’ opinions, that the adoption of the Bill in its current form will conflict with South Africa’s obligations under the Berne Convention and the WTO TRIPS Agreement, in addition to preventing South Africa from acceding to the WCT or to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. In addition, also in contravention of section 25 (1) of the Constitution.
- 37 The Copyright exceptions are also in contravention of the WCT which grants authors the right to authorize distribution, rental and communication to the public of their work.
- 38 We reiterate that if the Bills remain in their current form, the legal uncertainty generated for copyright owners will likely prevent any investments be continued into the creative sector, a situation which in the current post-covid-19 climate would destroy our sector.

39 In conclusion is it submitted that the copyright exceptions including the overbroad fair use exception under section 12 of the Bill be interrogated in order to align them to South Africa's international treaty obligation and for it to pass the constitutional muster.

40 We further submit and recommend that an impact assessment is conducted to determine if fair use is the best option to achieve the objectives set out, or whether they can be achieved in other ways which reduce the impact on copyright holders and burden on the Audio-Visual sector.

***(iii) Other issues***

41 The following are other issues in the CAB which the IBFC believes are problematic from the standpoint of the audio-visual sector and that it believes would require significant amendments or outright deletion:

41.1 Notable errors remaining in the Bill, despite the advice of the Panel of Experts;

41.2 The retention in the Bill of remuneration rights for performers in Section 8A(1) to (4) which in our view should be dealt with clearly in the Performers Protection Amendment Bill;

- 41.3 The renaming of “cinematograph films” in the Copyright Act, “audio-visual works”, which, broadens the term without explanation and also does not amend related legislation that depends on this definition, namely the Registration of Copyright in Cinematograph Films Act ;
- 41.4 Legitimation of parallel importation and introduction of international exhaustion rights (14(6); and
- 41.5 Vesting of Copyright in works made under the direction/control of the state (5 (2),22(2),23(1)) – by adding and retaining the words ‘local organisation’, the provision remains problematic in that it allows for the designation of the South African Broadcasting Corporation (SABC) as one of the prescribed ‘local organisation’ making the SABC a copyright owner on these works made under the control or direction of the SABC.

## **C. CONCLUSION**

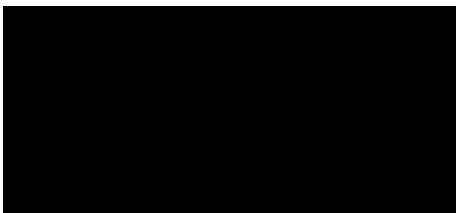
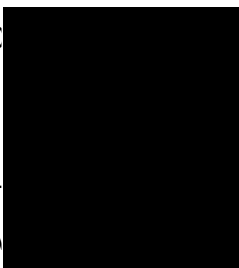
- 42 The IBFC thanks members of the Portfolio Committee for wanting to ensure proper reform of the Copyright Act and hopes that the members will take the necessary time to read through the IBFCs submission, and having done so, will agree that fixing the defective Copyright Bills that have been remitted and re-tagged is a task requiring much effort and expertise perhaps beyond the scope of the committee members.
- 43 The IBFC recommends that in order to achieve first class Copyright Act, a fresh process of public consultation be held to address the constitutional shortcomings of

the Copyright Bill and various experts be immediately consulted to embark on a proper drafting/amending process.

- 44 The IBFC requests the opportunity to engage directly with the Portfolio Committee at the scheduled hearings by stakeholders and Members of Parliament to illustrate the impact that the Bill in its current form will have on black emerging filmmakers and producers and all those involved in the audio-visual value chain.

Yours sincerely,

C  
—  
A



Maganthrie Pillay

**Annexures:**

1. Annexure "A" – Comments by The Independent Black Filmmakers Collective on the Copyright Amendment Bill, No B13 Of 2017 on 22 February 2019
2. Annexure "B" - Reports and Recommendations of (four) Experts appointed by the previous Portfolio Committee.



**Select Committee on Trade and International Relations  
National Council of Provinces  
3<sup>rd</sup> Floor  
W/S 3/083  
90 Plein Street  
Cape Town  
8001  
Email: [REDACTED]  
Att: Mr Hlupheka Mtileni**

22 February 2019

Dear Sir,

**COMMENTS BY THE INDEPENDENT BLACK FILMMAKERS COLLECTIVE ON THE  
COPYRIGHT AMENDMENT BILL, NO B13 OF 2017**

**1. General comments**

The Independent Black Film Producers Collective (IBFC) is a South African Collaborative Business to Business Network of wholly Black Owned South African Film and Television companies. We represent black Filmmakers, Content Creators, Film and Television/Commercials Directors, Producers, Marketers, Exhibitors, Media and Entertainment Facilities as well as Service Industry and Black Industrialists and Entrepreneurs.

Our organisation was formed in January 2018 as a response to fight the challenges facing our industry and to amalgamate and empower independent black businesses, filmmakers ,producers and creatives in the entire value chain in order to accelerate transformation within the sector and increase trade and job creation through domestic directive investment and foreign direct investment.

The IBFC's Key intervention is through Enterprise Development along with several programmes including policy review and inputs into legislation, specifically Intellectual Property legislation, which directly affects the growth and sustainability of our industry. Accordingly, we recognize that our current copyright law is outdated, and a new legislative framework needs to be developed in order to be on par with modern,

INDEPENDENT BLACK FILMMAKERS COLLECTIVE

[REDACTED]



international, technological developments. Moreso with the 4<sup>th</sup> industrial Revolution. In addition we recognize that South Africa is party to several treaties such as the Berne Convention and the World Trade Organisation and has obligations under same to ensure that our copyright laws are brought in line with 'Trade-Related Aspects' of Intellectual Property Rights Agreement.

The reform of the Copyright Act No 98 of 1978 ("principle Act") is therefore greatly welcomed by the IBFC for the continued development and transformation of the industry.

## **2. General issues of concern from the Film producer's perspective**

The draft copyright legislation, whilst proposing fundamental change, has been perceived by the South African creative sector to be 'unraveling the core of the philosophical premise for the protection of Intellectual Property'. Under this old age principle, creatives have through a limited duration of time, exclusive rights to their works in order to be able to exploit its use or authorise other persons the right to use such with a view to attain and enjoy economic benefits of these rights.

We are greatly concerned that the original Bill was not submitted by the DTI for an interdependent regulatory impact assessment before introduction to the National Assembly. The contract for a regulatory impact assessment was put out for tender, but the tender was never awarded. Therefore, in our view outside expertise have not been consulted to consider the legal and socio-economic consequences of some of the complex amendments to the principle Act.

Numerous stakeholders from industry, representing a number of creator's associations, copyright industry sectors, collecting societies and legal professionals, petitioned and made submissions to the Portfolio Committee of Trade and Industry ("Portfolio Committee") to highlight industry wide concerns and how the Bill is likely to impose significant negative consequences on the South African creative industry. The Bill in its current state, neglects to incorporate changes to address the key issues which have been raised over a long period by the various groups. This is unacceptable and necessitates a more thorough review of the amendment.

Whilst we are pleased with this initiative and opportunity offered by the NCOP's Select Committee on Trade and International Relations ("NCOP Committee") to invite and offer industry an opportunity to file written submissions on the Bill. We would propose that the Committee review the time-frame and extend the period in order to provide well-considered and complete submissions from all stakeholders. The time granted for these submissions is in our view too short, given the importance of the proposed changes they far reaching impact and unintended consequences that could have an adverse





socioeconomic effect if unchecked. As a newly established organization, the IBFC has not had an opportunity to comment on the amendment with its constituents.

We also look forward to an opportunity to present our viewpoint directly to the NCOP Committee during one of the oral sessions, to illustrate the impact that the Bill in its current form will have on black emerging filmmakers and producers and all those involved in the audiovisual value chain.

We now wish to highlight some aspects and specific clauses of the Bill of concern that will affect our sector and more particularly independent black film practitioners who have been “voiceless”.

### **3. Specific clauses in the Bill which need re-engagement, amendment or deletion.**

#### **3.1 Section 5(2), 22(2), 23(1) - Vesting of Copyright in works made under the direction/control of the State**

The manner in which this section is phrased creates uncertainty.

- 5(2) **automatically vests copyright in the State for works** “made under the control or direction” of the State,
- 22(2) appears to only vest the copyright in the State “initially”, **suggesting transfer or assignment remains possible**, and then
- 23(1) asserts that copyright “vested in or under the custody of the State” **may not be assigned**

It is common knowledge that the State gives direction and is the chief investor in the black local film production industry in South Africa. Government has stressed the importance of local film in building the country’s heritage and has set about providing an “enabling” regulatory framework to encourage the production of local content.

However, the proposed amendment in this section and its ambiguity seems to create a “disabling” environment in the industry by precluding film producers from the *automatic right* to copyright ownership in their works. It also prevents further syndicate investment funding from private parties thus creating difficulties in promoting these ‘*State owned films*’ and getting distribution contracts.

Clarity is also sought as to the category mentioned of these “*local or international organizations*”, as well as what “*under the control of the state*” means, in order to avoid



the likely surge of illegal copyright transactions or back door ownership of State funded work.

It is accordingly proposed by the IBFC that the amendment to section 5(2) in the draft Bill be refined, the wording amended, and any ambiguity removed.

### **3.2 Clause 7: Section 7A(5): Retrospective Application:**

- (5)(a) A person who obtained the copyright in an artistic work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement negotiate a percentage of royalty as contemplated in subsection (1) with the author of the copyrighted artistic work in question.*
- (b) Subsections (2), (3) and (4) apply to the negotiation contemplated in paragraph (a).*
- (c) Section 22A, with the necessary changes, applies where the author cannot be found.*
- (d) This subsection does not apply—*
- (i) to a copyright owner who commissioned, or who is the author of, the copyrighted artistic work in question; or*
  - (ii) where the term of copyright in the copyrighted artistic work has ended.*

The IBFC strongly objects to any royalties or remuneration being imposed retrospectively. It is fundamentally unfair to impose legal and financial obligations after the fact and it is possibly also unconstitutional in being an arbitrary deprivation of property.

### **3.3 Section 14(6) – “First Sale Doctrine”**

Section 14(6) states:

*14(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.*

The effect of inserting this section is that the act of assigning copyright is considered to constitute a first sale, thus exhausting the rights in the work concerned. As such, the provision legitimizes the parallel importation and introducing of international exhaustion ‘rights’.

INDEPENDENT BLACK FILMMAKERS COLLECTIVE

A registered Non Profit Company; NPC# 2018/240939/08

Website : [WWW.IBFC.CO.ZA](http://WWW.IBFC.CO.ZA)

Address: SKYRINK STUDIOS 7th Floor, 132 Main Street Johannesburg ,Gauteng,  
2001

Board : Azania Muendane (Chairperson), Xoliswa Sithole, Ramadan Suleman, ZikethiwiNgcobo,  
Mandla Dube, Themba Sibeko, Glenn Ujebe Masokoane, Mickey Madoda Dube, Lebone Maema.



This, in our view is another perplexing amendment in the Bill. We presume that the drafters intended to make provision for the so-called American, 'First Sale Doctrine' which again like other noted importations, has never been a part of, or tested in our law.

This sub-section is incomprehensible as currently drafted. We propose that it must be interrogated and amended to allow for only physical copies of a work, and only certain works to be subjected to the 'doctrine', as opposed to all copyright in the work, in order to combat legalizing of *piracy* of copyright works.

### **3.4 Section 21 (1)(c) - Commissioned Works**

The IBFC believes where work is commissioned by an entity or broadcaster, should not entitle same to authorship and ownership of the work.

In accordance with copyright philosophy, copyright vests in the author whose skills have made an idea to be reduced to material form. Broadcasters, therefore, should be entitled to licence the work for only a period and for the primary requirements, i.e. to attract an audience.

Creators have a strong interest and will continue to advocate for the principle to own their intellectual property. This right to ownership is inherent and such rights should be assigned to others only through contract.

The IBFC wishes to point out that the great majority of television and film content in South Africa is produced under commission and most are owned by the state-owned South African Broadcasting Corporation (SABC), Multichoice and ETV. By virtue of this section, the producers rarely own the copyright in these works. As such, many films face and will continue to encounter a copyright barrier to their further dissemination and marketing without permission from the commissioning party.

The IBFC supports the proposed section 21(1)(c) to the extent that it restores the default that creators own the works they create in the absence of a contract. However, we do not support section 21(3) of the Bill which removes such ownership, giving commissioners the right to "own" copyright in our works.

We oppose these provisions and submit they contain limited redress in our development agenda. The provision proposes a litigious process to enable authors to obtain a right in respect of commissioned works where they are not used. Creators should not have to approach the Tribunal to use rights in their works where the commissioning party does not use the commissioned work.





The IBFC believes that ownership of copyright by the producers will promote increased investment in ideation & innovation, increased investment in R&D and audience development and quality, uniquely SA globally competitive content, as opposed to low cost content.

The IBFC would therefore urge that the current position be revised to offer the creatives ownership of rights, of their audio-visual content in commissioned works. The broadcaster, as funder, should be issued a licence for their contribution to the total cost similar to publishing and music sector.

### **3.5 Section 23(c)(8) - Licensees permitted to conclude sub-license agreements without licensor's consent**

We are unclear with the rationale in the Bill to depart from ordinary rules of contract in this section, for which there has been no prior assessment to justify the insertion of section 23(c)(8) into the Bill.

This provision, which permits licensees to conclude sub-license agreements without licensor's consent will negatively impact the types of contracts entered into, thereby limiting the ability of copyright owners to deal with the copyright in works they acquire, by way of onward assignment or by licence.

This amounts to a limitation to trade, blocks investment and will in fact lead to unfair exploitation on the original licensor (authors and performers), a situation which the amendments to the principle Act, aim to circumvent.

The IBFC requests a redrafting of this provision with less restrictive measures in order to maintain international business practices and encourage much needed investment in our sector.

### **3.6 Section 28 (P) - Exceptions in respect of technological protection measures**

The primary aim of technological protection measures (TPMs) is to reduce infringement of copyright works. These protective measures are critical now more than ever as the audio-visual world migrates to online platforms and more films are offered online and become susceptible to illegal downloads and streaming.



The IBFC notes with concern the added exceptions in respect of technological protection measures which are likely to pose a disadvantage on already vulnerable South African rights-holders.

As previously mentioned, the Constitution in Section 231 binds South Africa to all International Treaties to which it has acceded. The aim to align with international treaties and “international imperatives” and in this context, the Marrakesh Treaty, the Bill is somewhat inconsistent and in conflict and unreasonably prejudices the legitimate interests of the rights holder.

In light of the above, IBFC wishes to submit to the NCOP Committee, that we reject this provision that seeks to create limitations and exceptions only in respect of the works of South African rights-holders. This will grossly disadvantage South African rights-holders whilst benefiting both South African and foreign users.

In fact, this gives the perception that the Bill was enacted to favour users and to penalize rights-holders.

Given the ambiguous language in this section, a revision is imperative to ensure that there is certainty regarding the rights of authors, and any limitations and exceptions included to be subjected to a three-step test as prescribed by *article 11* of the Marrakesh Treaty.

### **3.7 Section 39B - Contractual override**

Section 39B states:

*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.*

This contractual override clause to prescribe compulsory and standard contractual terms to be included in agreement to be entered into in terms of Bill goes far beyond the “bare minimum condition[s] for contracts.

The IBFC is of the view that this section encroaches on the principle of freedom to contract between parties and is going to be very difficult to implement in practice and likely to be ignored. It creates and prevents producers from contracting with actors, writers etc to find a deal that works for all the parties.

We are not in support of this provision and request that the over prescriptive provision be reviewed.



### **3.8 Section (12A, 12D(1), 12D(2), 19(c)(1), 19(c)(2), 19(c)(3), 19(c)(4) – Expansion clauses including Fair use**

In light of the intensive debate over 'fair use' in the public consultations, the Bill has removed all the 'fair dealing' provisions from what is now Section 12 and seems to have explicitly adopted a fair use approach to the exceptions to copyright protection, despite that system being heavily criticised in the US, from where it originates.

Several arguments were presented to the Portfolio Committee by concerned creatives on a principle which would be best suitable for South African environment to find a balance between copyright owners and consumers of their copyright works. To date, no assessment of the economic impact of 'fair use' or these copyright exceptions has been carried out by Government or by Parliament.

'Fair use' has the danger of allowing infringement of copyright, in the sense that no permission from or remuneration to the copyright owner is required in cases where 'fair use' is found. It will result in significant legal uncertainty and places the onus on the copyright owner to institute court proceedings to challenge unauthorised use of their work.

Section 25 (1) of the Constitution protects Intellectual property, as a right of property. The IBFC sees the insertion of these clauses is likely to receive objection under the Constitution as it amounts to deprivation of property.

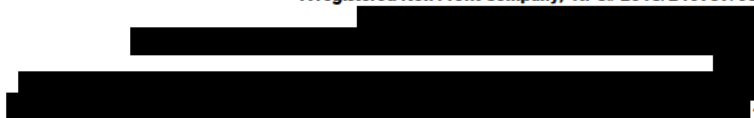
The IBFC submits that section 12 of the Bill be thoroughly interrogated to determine whether the new copyright exceptions meet Constitutional muster.

In addition, proceeding with the untested expansion clauses is likely to see South Africa in breach of its treaty obligations under the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights Agreement, to which South Africa is a party.

## **4 Concluding remarks - Digital Colonialism**

We the IBFC submit that the industry is under attack by what we consider as "Digital Colonialism".

The digital colonialist in the form of the Silicon Valley Giants and new global imperial powers intend to control Intellectual Property rights around the world without the express consent of the right-holders. Elaborate copyrighted search algorithms are owned by the likes of Google, Facebook & YouTube and are used daily to access otherwise protected content.





Content is king! It is therefore the intention of digital emperors to access vast amounts of free, deregulated content that has no copyright and no regulation that will encumber its usage, in order for their business models to work. As such, lobby groups around the world including South Africa have been funded, capturing operations, create and use quasi-pressure groups to push nation states to act on their behalf to be able to harvest vast quantities of free content and in our South African context, largely stripping small independent producers of possible incomes. The unfavourable outcome of the legislative amendment to the industry, suggest that companies, such as Google have lobbied for changes in South Africa and have paid for research to ensure their desired regulation.

On the contrary, the EU has recognized this and has proposed legislation two years ago to force tech giants to pay billions to publishers. The proposed legislation's main aim is to update copyright for the digital age, through a 'link tax' which will force news aggregation and search sites such as Google and Facebook to obtain consent from publishers for linking stories on their sites. Furthermore, platforms such as YouTube would be forced to seek licences for content in order to allow artists to seek royalties.

South Africa must diversify its economy. The creative industries are large employers contributing to the country's wealth creation and in our context, transformation agenda. Authors must be offered adequate protection for a period where they too can create value from the content, they generate.

We the IBFC believe the changes we propose will unencumber the creative industries to supply content to the black diaspora; America, the Caribbean, Britain, France, Africa, Brazil and off course trade with our BRICS partners. If we devalue our content by enacting, badly drafted, ill-considered legislation, we will be undermining our economic growth, devaluing our authors and enabling the new digital imperial powers to control us in every way possible.

In conclusion, the IBFC is of the view that the proposed legislative amendments will not achieve the intended outcomes and offer authors and creators of copyright works the benefits due to them.

Our comments above only reflect the most glaring concerns in the Bill. Given the urgency and importance of the proposed changes, we recommend that NCOP Committee immediately obtain expert legal opinion and assistance to firstly determine what is required from the Bill to bring the Act in compliance with International Treaties, and secondly conduct a proper impact assessment on the complex provisions in the Copyright Amendment Bill to deal with the shortcomings of some of these provisions in the Bill.

14 March 2019

The Minister of Trade & Industry  
The Hon. Dr Rob Davies

by email to 

cc: The Director-General, dti

by email to 

and to

The Hon. Mr Edwin Makue  
the Select Committee on Trade and International Relations  
National Council of Provinces  
Parliament of the Republic of South Africa

by email to the Committee Secretariat:  


cc: Michele Woods  
Joel Baloyi  
Wiseman Ngubo

Dear Minister Davies, dear Mr Makue

**COPYRIGHT AMENDMENT BILL, NO B13 OF 2017 and  
PERFORMERS PROTECTION AMENDMENT BILL, NO. B24 OF 2016:  
Request to deal with incorrect statements made in the dti  
presentation on 6 March 2019 regarding provisions of the Bill  
having been “cleared” or “verified” by the Panel of Experts**

On 6 March, I attended the meeting of the Select Committee where the dti presented its responses to the public comments that arose from the Select Committee’s call for comments on the Copyright Amendment Bill. As a member of the Panel of Experts appointed by the Portfolio Committee that had submitted a written advice on the Bill in October 2018, I was profoundly disturbed and disappointed by statements made in the dti presentation that the Panel had “cleared” the Bill or certain

**Basel**

Advokatur · Notariat:  
Dr. Felix Iselin, Notar  
Dr. Gert Thoenen, LL.M.  
Dr. Benedikt A. Suter, Notar  
Dr. Caroline Cron  
Dr. Martin Lenz, Notar  
Fachanwalt SAV Erbrecht  
Dr. Beat Eisner  
Carlo Scollo Lavizzari, LL.M.  
Dr. Lucius Huber  
Prof. Dr. Andrea Eisner-Kiefer  
Dr. Cristina von Holzen  
Dr. Damian Schai  
Dr. Philipp Ziegler  
dipl. Steuerexperte  
Marine Müllershausen, LL.M.  
Avocate au Barreau de Paris - EU-Anwältin  
van Quy Peter Tran  
Michel Jutzeler  
Basil Kupferschmid  
eingetragen im Anwaltsregister  
des Kantons Basel-Stadt  
André Myburgh  
Rechtskonsulent

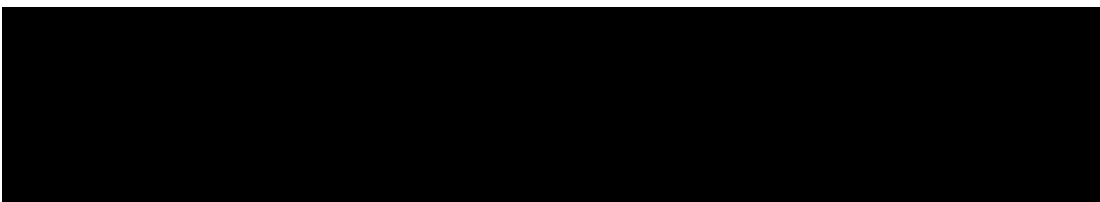
**Karlsruhe**

Rechtsanwälte:  
Dr. Eberhardt Meiringer  
Dr. Michael Pap  
Dr. Oliver Melber  
Alexander Doll  
Hartmut Wichmann  
Christian Walz  
Hartmut Stegmaier  
Bernd Schmitz  
Stefan Flaig  
Karen Fiege  
Dr. Michael Artner  
Bernhard Fritz  
Ullrich Eidenmüller  
Christian Schlemmer  
Severine Deutsch  
Martin Eigenberger  
Jörg Schröder  
Dr. Rico Faller  
Sebastian Jung  
Cornelius Weiß  
Dr. Jürgen Höffler  
Vanessa Meiringer  
Julia Stein  
Swantje Schreier  
Michaela von Poeppinghausen  
Marko Wedemeyer  
Katuscia Indirli

Wirtschaftsprüfer · Steuerberater:  
Dr. Michael Ohmer

**Erfurt**

Rechtsanwälte:  
Bernd Gindorf  
Jan Helge Kestel  
Dr. Ingo Vollgraf





provisions of it, confirmed by the PowerPoint presentation (slide 24) that the Panel had “verified” certain sections of the Bill in respect of which there had been demands for their withdrawal.

The purpose of this letter is to respectfully ask the Minister to ensure that these misstatements made on behalf of the dti are corrected on public record at the next meeting of the Select Committee on the Bill, currently scheduled for 20 March 2019, and to respectfully ask the Select Committee to consider the actual responses of the Panel members in its deliberation of the Bill.

In order to enable the Select Committee to carry out its own research into the veracity of the statements by the dti, you are referred to the advices of the Panel members:

- Ms Michelle Woods of WIPO, Geneva, Switzerland, cover letter and mark-up attached (referred to in this letter as “Woods 1” and “Woods 2” respectively).
- Mr Joel Baloyi of UNISA, Pretoria, at <http://legalbrief.co.za/media/filestore/2018/10/Baloyi.pdf> (“Baloyi”).
- Mr Wiseman Ngubo of CAPASSO, Johannesburg, at <http://legalbrief.co.za/media/filestore/2018/10/Ngubo.pdf> (“Ngubo”).
- Myself, André Myburgh, of Lenz Caemmerer, Basel, Switzerland, at [http://legalbrief.co.za/media/filestore/2018/10/andre\\_myburgh.pdf](http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf) (“Myburgh”).

At the same time, I refer to the submission by Adv Nick Matzukis, the only author of a work on copyright law in the music industry in South Africa, where his ‘support’ of the reporting obligation was taken out of context (slides 12 and 24 of the dti presentation). Adv Matzukis’ submission to the Select Committee was, in fact: “With great respect and deference, the Bill should, quite simply, not be approved by the NCOP in its current form.”

### ***Mandate to the Panel of Experts***

The Portfolio Committee asked the Panel of Experts to advise it “on any technical or drafting issues pertaining to the Committee’s amendments to the Copyright Amendment Bill”, to focus on amongst others “the appropriateness of the terminology used in the Bill, when considering the Copyright law terminology currently used in South Africa”, “whether the wording of the Bill reflects the policy objectives as agreed to by the Committee” and “whether the clauses that address international treaties, correctly reflect the content of those treaties ...” Their inputs were required by way of track changes to a Microsoft Word document containing the then-current version of the Bill. (*Myburgh* p.132).

Neither the scope of the mandate, nor the time allowed (just three weeks, with no prior notice) enabled the Panel members to “clear” or “verify” anything, in the way communicated by the dti to the Select Committee on 6 March.

### ***Advice of the Panel of Experts***

A principal focus point for the Panel of Experts was the copyright exceptions and exceptions to enforcement of technological protection measures in the Bill. These exceptions appear in

the new Sections 12A, 12B, 12C(b), 12D, 19B, 19C, 19D and 28P, as read with the contract override provision in new Section 39B, and the new Schedule 2. The exceptions are also incorporated by reference into the Performers Protection Amendment Bill. It is in respect of these provisions that South Africa's treaty obligations are highly relevant, whether they are under the Berne Convention or TRIPs, to which the country is already a party, under WCT, WPPT and the Beijing Treaty, for which Cabinet has already recommended South Africa must become a party, or the Marrakesh Treaty, in respect of which there is the express intention for South Africa to become a party at some point in the future.

We ask that you take the following statements of the Panel of Experts into account:

- Michelle Woods:  
“While I have tried to cover as many points related to the multilateral copyright treaties as possible in the time available for this review, there are likely additional points within this category that could be addressed.”  
“Given the instructions and the relatively limited time period for undertaking the requested review, I have not commented on a number of areas ...”  
(*Woods 1 p.1.*)
- Joel Baloyi:  
“I do not comment on every part of the Bill. My expertise is mainly in the area of the creative industries (the music, film and to a lesser extent, literary publishing industries). In the call I received in which I was advised of my appointment as a member of the panel of experts I was asked to focus on issues relating to the music and film industries. I have tried to do this in my opinion...” (*Baloyi p.1.*)  
“The most pertinent question to ask here is whether the proposed limitations and exceptions under these clauses were subjected to a three-step test, as required under the Berne Convention, the TRIPs Agreement and other international treaties... In this regard it needs to be reiterated that where the minimum rights guaranteed under international treaties are eroded by national law, such erosion shall only affect the rights of the nationals of the country concerned, and not those of other countries who are members of the same treaty. In this regard the question to ask is why the Legislature would be hell-bent on clipping the wings of South African rights-holders, while foreign rights-holders can fly like eagles.” (*Baloyi p.24.*)
- Wiseman Ngubo:  
“It is however pertinent to note that technical wording and policy are difficult to divorce from merits of any clauses. This difficulty has resulted in a very limited assessment of the Bill as it needed to fit the scope of the instructions. The process might have been better served by affording the panel an unlimited scope to review the Bill holistically as some clauses within the Bill have no policy informing them nor have they been debated in parliament, thus the review was without much needed context.” (*Ngubo p.1*)  
“The introduction of general exceptions within the Bill requires a more extensive impact assessment. The SEIAS report does not cover any objections raised by the stakeholders, in fact it states that the stakeholders had accepted the policy issues despite how contentious these provisions proved to be. This showcases a fatal flaw in the report. In

addition, the introduction of the general exceptions as currently articulated seems contrary to the policy objective which is to ensure the protection of authors and copyright owners in the digital environment... Further, the Berne Convention (to which South Africa is a signatory) established the 3 step test in relation to the implementation of exceptions and limitation of copyright. This test is also articulated in the TRIPS Agreement (to which South Africa is a signatory) as well as the WIPO Internet Treaties which South Africa intends to ratify... [T]he introduction of these clauses must be evaluated in light of this test. Without any provisions to make the clauses less burdensome on copyright owners, the provisions would not be seen to be unreasonably prejudicial to their interests.” (*Ngubo* p.19)

- André Myburgh:

“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.” (*Myburgh* p.14)

“... 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.” (*Myburgh* p.60.)

By the Panel following the instructions of the Portfolio Committee not to evaluate policy decisions, the points expressed in the advices are not “views” advancing or countering policy positions, but advice from experienced copyright practitioners selected by the Portfolio Committee.

By and large, *none* of the changes suggested in relation to the copyright exceptions and exceptions to enforcement of technological protection measures in the Bill were taken up by the Portfolio Committee. This is particularly disappointing, in that not only was advice on treaty obligations largely not followed, but nor were the recommendations from members of the Panel as to how certain desired policy outcomes could be made to work, namely the exception for the disabled, Section 19D, and the statutory licences for reproduction and translation of works not available in South Africa, Schedule 2.

The members of the Panel of Experts commented specifically on the following provisions relating to the exceptions, in respect of which the dti’s statements or inferences that they have been “cleared” or “verified” by the Panel are patently incorrect:

- Section 12A: *Baloyi* p.24, *Ngubo* p.19, *Myburgh* pp.38-41 and 59
- Section 12A(a)(iv): *Ngubo* p.20, *Myburgh* pp.60-61
- Section 12A(a)(v): *Ngubo* p.20, *Myburgh* pp.61-62
- Section 12A(a)(vi): *Myburgh* p.62
- Section 12A(a)(vii): *Myburgh* pp.62-63

- Section 12B(1)(a): *Woods 2 p.23, Ngubo p.21, Myburgh pp.40 and 63*
- Section 12B(1)(b): *Woods 2 p.23, Ngubo p.21, Myburgh p.40*
- Section 12B(1)(c): *Myburgh p.63*
- Section 12B(1)(d): *Woods 2 p.24*
- Section 12B(1)(e): *Myburgh pp.40 and 63*
- Section 12B(1)(f): *Woods 2 pp.25, Myburgh p.63*
- Section 12B(1)(i) and (2): *Ngubo pp.22-23*
- Section 12B(6): *Baloyi p.24, Ngubo p.23*
- Section 12C: *Baloyi pp.26-27, Ngubo pp.23-24, Myburgh p.97*
- Section 12D: *Ngubo p.24, Myburgh pp.40 and 94-95*
- Section 12D(3): *Woods 2 p.27-28, Myburgh p.63*
- Section 12D(7): *Myburgh p.63*
- Section 19C: *Ngubo p.27, Myburgh pp.40, 63 and 95-96*
- Section 19C(4): *Woods 2, p.31-32.*
- Section 19C(6): *Woods 2, p.32*
- Section 19C(7): *Woods 2 p.33*
- Section 19C(9), *Woods 2 p.33*
- Section 19C(11): *Woods 2 p.34 (some points changed, but a key word not)*
- Section 19D: *Woods 2 p.36 (only one change made), Baloyi pp.3-10, Ngubo pp.30-31, Myburgh pp.75-76*
- Section 28P and related amendments to Section 23 and definitions: *Woods 2 pp.6, 48 and 54.*
- Section 39B 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”: *Myburgh pp.40, 59-60, 96*
- Schedule 2: *Woods 2 pp.25 and 62, Baloyi pp.34-35, Myburgh pp.72-74*

### **Rights of ‘communication to the public’ and ‘making available’ in respect of computer programmes**

The only point on which the dti conceded in its presentation that a provision had been overlooked was in relation to the granting of the exclusive rights of ‘communication to the public’ and ‘making available’ for computer programmes (*Ngubo p.26, Myburgh p.64*). There is no provision to amend Section 11B of the Copyright Act to introduce these rights. Failure to do so would render the Bill non-compliant with the WIPO Copyright Treaty.

### **Interests of performers contrasted with the advice of experts**

Another disappointment arising from the 6 March meeting was how the Chair of the Select Committee chose to deal with the advice of the Panel, and presumably other experts, by stating in a press release at <https://www.parliament.gov.za/press-releases/ncop-committee-applauds-broad-participation-stakeholders-copyright-bill> that “The interesting phenomenon is that the performers and artists who the bill seeks to cover are happy, but that experts have somehow expressed dissatisfaction on some aspects of the bills.”

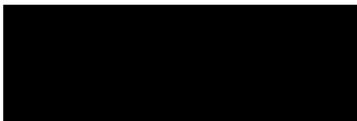
Performers and artists, including those who were present at the 6 March meeting, supported the new rights in the Performers Protection Amendment Bill. The role of the Panel of Experts was confined to the Copyright Amendment Bill. Specifically, the copyright exceptions referenced above in respect of which the members of the Panel have expressed various concerns, but which the dti presentation claims to have cleared, are *for cases of reproductions, broadcasts, etc, of works by others where performers and artists will not be remunerated and where the producers of their work will be unable to enforce their rights.*

The positions of the members of the Panel of Experts are therefore either loose-standing from, and in respect of the exceptions, even consistent with, the position of those performers and artists.

### Conclusion

Being the only member of the Panel of Experts who was present at the 6 March meeting, I am taking the initiative to ask that the statements made about the advice given by the Panel's members are corrected and that the Select Committee gives due consideration to those recommendations made by the members of the Panel and not taken up in the National Assembly in the version of the Bill adopted by it on 5 December 2018. I am copying the other members of the Panel with this letter.

Yours faithfully



**ANDRÉ MYBURGH**

**B.Comm. LL.B. (Stell)**

**Attorney and Notary Public of the High Court of South Africa (non-practising roll)**

**Solicitor of England and Wales (non-practising roll)**

**Fellow of the South African Institute of Intellectual Property Lawyers**



October 1, 2018

Mr. Andre Hermans  
Mr. Tenda Madima  
Committees Section  
Portfolio Committee on Trade and Industry  
Parliament of the Republic of South Africa  
P.O. Box 15  
Cape Town 8000  
Republic of South Africa

Re: Comments on Copyright Amendment Bill

Dear Messrs. Hermans and Madima,

My comments in response to the request to the Technical Panel of Experts on the Copyright Amendment Bill to comment on the draft bill are attached to this letter.

As requested, I have tried to keep my comments and proposed technical and drafting amendments within the limits described in the instructions. In particular, I have focused on whether the sections of the bill related to implementing multilateral copyright treaties correctly reflect the content of the WIPO copyright treaties, as well as related questions of terminology and wording.

The comments reflect my views but they are not offered and should not be viewed as official interpretations of international treaty provisions by the World Intellectual Property Organization (WIPO). While I have tried to cover as many points related to the multilateral copyright treaties as possible in the time available for this review, there are likely additional points within this category that could be addressed.

With respect to the instructions, I note the statement that the clauses of the Bill may have a broader scope than a treaty, but not a narrower one. This would indeed be the case with respect to many treaty provisions setting minimum standards. The Republic of South Africa could choose to adopt broader provisions at the national level while implementing multilateral copyright treaties. However where treaties contain conditions or detailed requirements, these features may need to be implemented in addition to the minimum requirements in order to have legislation that is consistent with treaty provisions. A number of my comments reflect considerations related to such conditions and requirements.

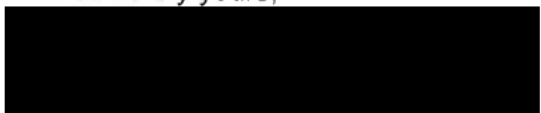
Given the instructions and the relatively limited time period for undertaking the requested review, I have not commented on a number of areas, such as the detailed provisions regarding collective management organizations, although there is a relationship between these topics and the international treaty framework. However on the subject of collective

...

management and several others identified in the comments, including the incorporation of the provisions of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired and Otherwise Print Disabled* and the *Appendix to the Berne Convention (Paris Act 1971)*, the International Bureau of WIPO would be available to provide further advice and assistance if requested to do so.

Thank you for the opportunity to provide technical comments on the Copyright Amendment Bill. I would be pleased to respond to any questions or to provide clarifications with respect to the attached comments.

Sincerely yours,



Michele J. Woods  
Director  
Copyright Law Division  
Copyright and Creative Industries Sector  
World Intellectual Property Organization

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)



Draft 3.Edited.2018.09.31

No. of copies printed . 800

**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;”;

[It is suggested to add here a definition of the term “authorized entity” \(or the equivalent term\) and to include in the definition the elements found in Article 2\(c\) of the Marrakesh Treaty. Other definitions would likely also be needed to implement the Marrakesh Treaty. See comments on Article 19D below.](#)

- (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;”;

[This definition appears to exclude many activities that could be considered commercial, including obtaining indirect economic advantage or financial gain \(drawing the line between direct and indirect may be difficult\) or economic activity by an individual that leads to financial gain but is not done in relation to a formal business or trade. The term “commercial” is also found numerous times throughout the bill in a variety of contexts, in some of which a more restrictive meaning of commercial might be advisable, for instance when applied to certain limitations and exceptions where a literal application of this definition might lead to questions as to whether the limitation or exception meets the three-step test. The definition could either be rewritten \(for example by changing the word “direct” to “any”\), deleted, or just applied \(even if modified\) to certain sections of the legislation.](#)

- (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, or which appears in connection with the communication of a work to the public, that—

When a work is communicated, the relevant information may not be attached to the work as such, but rather appear in a separate database, to which the work is linked. The proposed wording in the definition of ‘copyright management information’ corresponds to WCT Art. 12 and WPPT Art. 19.

(

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;~~

Item (b) of the definition of ‘technological protection measure’ may be difficult to reconcile with WCT Art. 15, WPPT Art. 18 and Beijing Treaty Art. 15, which all require “adequate legal protection”, because the proposed text indicates that all processes, etc. capable of controlling non-infringing uses are exempt from the concept. This seems to cover most, if not all such processes, etc., as they might be used for various non-infringing uses, such as reproduction for private study or research, time-shifting, criticism or review or any other uses covered by limitations and exceptions, or all uses of works that have fallen into the public domain. Thus, in practice there is a risk that only very few, or none, of the circumvention devices defined below in reality would be covered by the protection under Sec. 27 of the Bill. It is therefore recommended that item (b) of the definition be deleted and more detailed rules be inserted in Sec. 27 of the Bill to balance the protection against limitations and exceptions.

**‘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

The definition of ‘technological protection measure circumvention device’ may be too narrow to ensure the “adequate legal protection” required by WCT Art. 15, WPPT Art. 18 and the Beijing Treaty Art. 15. To focus on whether a device is ‘primarily’ designed, produced or adapted for circumvention purposes seems inadequate if it is still deliberately designed with such a purpose as a feature. It is therefore recommended that two additional elements be added as alternatives, namely that the devices are either

- promoted, advertised or marketed for the purpose of circumventing effective technological protection measures; or
- have only a limited commercially significant purpose or use other than to circumvent effective technological measures.

- (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 other than those mentioned in paragraphs (d) and (e), above;

The proposed addition to paragraph (eA) avoids an overlap between paragraphs (d) and (e) and (eA). That way it is clarified that the Law will continue to apply the flexibilities under Art. 11 bis(2) of the Berne Convention, notably in relation to simultaneous and unchanged cable retransmission of broadcasts.

(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.”.

The Act, as proposed to be amended, does not appear to grant any rights of distribution and rental, as required by Art. 6 and 7 of the WCT. In order to accomplish that, the insertion of the following items in Secs. 6, 7 and 8 of the principal Act is suggested:

( ) distributing the original or a copy of the work to the public:

The right of distribution under item (...) does not apply to the original or a copy of the work that has already been subject to a sale or other transfer or ownership in [any country] [the national territory] authorized by the owner of the copyright.

The square brackets indicate the policy choice between national (the national territory) and international (any country) exhaustion. In the former case, copyright can be used to prevent the domestic distribution of copies, lawfully made abroad. This alternative has been preferred by countries that wish to strengthen national infrastructure and distribution systems, organized by the local rightsholders, by preventing ‘gray market’ imports. In the latter case, copyright will not prevent the importation of copies made with the authorization of local rightsholders abroad, and this solution has been preferred by countries that put a particular emphasis on international trade and the possibility to acquire any lawfully reproduced work in the most advantageous conditions available.

Furthermore, provisions regarding rental of computer programs, audiovisual works and works embodied in phonograms are established by Art. 7 of the WCT, as regards phonograms by Art. 13 of the WPPT, and as regards performances by Art. 9 of the Beijing Treaty. While the obligations for most of these categories are dependent on different conditions, spelled out in the said articles, a right of rental for computer programs is mandatory. Items inserting such rights in Secs. 6 and 8 of the principal Act could be worded as follows:

(...) renting the original or a copy of [an audiovisual work] [a work embodied in a phonogram or] a computer program to members of the public;

The right of rental under item (...) does not apply to rental of computer programs where the program itself is not the essential object of the rental.

### **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 other than those mentioned in item (c), as regards the inclusion in television broadcast, and item (d), above;

The proposed addition to paragraph (dA) avoids an overlap between paragraphs (c) and (d) and paragraph (eA). That way it is clarified that the Law will continue to apply the flexibilities under Art. 11bis(2) of the Berne Convention as regards simultaneous and unchanged cable retransmission of broadcasts.

(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.

In implementing this permissive provision of the Berne Convention, it would be advisable to avoid creating uncertainty in the art markets, in order to maintain and expand existing domestic art sales. In this respect, some thought could be given as to whether 7B(2)(c) could create such uncertainty by making it possible for the rate to be changed at any time with only a 30-day comment period. Consideration could be given to modifying the provision to avoid this possible effect or clarifying the language if this is not the intention. In 7B(3), having the seller and the art market professional may be redundant in situations where the art market professional is the seller. One way to address this would be to simply use the term “seller”, which has been done in a number of jurisdictions. In this case the joint and several liability provision could be deleted. In 7B(4) below, the addition of “designated institutions” could be considered as this is the practice in a number of jurisdictions. It may also be simpler to remove some of these implementation details from the legislation and to state that some of those details, such as setting the rates and collection procedures, will be established by regulation.

(4) The author of a visual artistic work or his or her heirs [or any designated institution], 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, or domiciled in, a designated country specified by the Minister in accordance with section 37; and

Art. 14ter(2) of the Berne Convention refers to the legislation of the country “to which the author belongs”. When that text was adopted in Brussels in 1948, the point of attachment for authors under Art. 4 of the Brussels Act was only nationality, but in Article 3(2) of the Stockholm and Paris Acts of 1967 and 1971, respectively, it was broadened to cover the author’s habitual residence as well. The assimilation of habitual residence with nationality applies “for the purposes of this Convention” and it must therefore be understood as covering also the reference in Art. 14ter(2). It is therefore suggested that the criterion be broadened as indicated in the proposed addition to the text of paragraph (4)(a)(i) and (4)(b) below.

- (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, or domiciled in, 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 [other than those mentioned in paragraphs \(c\) and \(d\), above](#);

The addition to paragraph (1)(dA) avoids an overlap between paragraphs (c) and (d) and (dA). That way it is clarified that the Law will continue to apply the flexibilities under Art. 11bis(2) of the Berne Convention, notably in relation to simultaneous and unchanged cable retransmission of broadcasts.

- (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[.] other than those mentioned in paragraphs (c) and (d), above;”;

The addition to paragraph (e) avoids an overlap between paragraphs (c) and (d) and paragraph (e). That way it is clarified that the Act applies the flexibilities under the WPPT, which does not require protection of phonogram producers in relation to simultaneous and unchanged cable retransmission of broadcasts carrying their phonograms.

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).

The rights covered by items (i) through (iii) are covered by Art. 12 of the Rome Convention and Art. 15 of the WPPT and may thus be made the subject of non-voluntary licenses. This does not, however, apply to the right of interactive communication to the public under Art. 10 and 14 of the WPPT, which must be granted as an exclusive right.

(aA) Any person who executes an act contemplated in section 9(c), (d), or (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 [that is compatible with fair practice](#): Provided that—

[The proposed wording in Section 12B\(1\)\(a\) includes the additional condition required by Art. 10\(1\) of the Berne Convention.](#)

(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 [be compatible with fair practice and that it 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;

[The proposed wording in paragraph \(b\) includes the additional condition required by Art. 10\(2\) of the Berne Convention.](#)

(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~~source and the name of the author should be indicated in so far as it is practicable;

The provision in paragraph (d) seems to aim at implementing Art. 2bis(1) of the Berne Convention. That provision is not an exception to the protection but rather an exclusion of certain speeches from protection. In the Bill, the protection as such is not affected, but an exception is proposed, which clearly defines its field of application, and it does not relate to the publication of collections. Therefore, the proviso appears to be superfluous. On the other hand, in line with Art. 6bis(1) of the Berne Convention, as well as other limitations in the Bill, it is suggested to consider including a proviso giving the rights owners appropriate rights in relation to having the source and their names mentioned. Alternatively, it may be considered whether it would be useful to avoid the overlaps between this item and item (e)(iii), immediately below, by merging the two provisions.

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, broadcasting and publication of such work by a person giving or receiving instruction for purposes of teaching, scholarship and research, to the extent and under the conditions set out in Schedule 2 to this Act; : 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;

The proposed exception in paragraph (f) appears to aim at the implementation of the Appendix to the Berne Convention (Paris Act 1971), but it does not include the numerous conditions and details which are included in that Appendix. At the same time, the scope of application of paragraph (f) appears to be much more limited than what is set out in Schedule 2 and the proposed wording aims at redressing that. If this is the intention, the provisions in paragraph (f) and Schedule 2 would need to be reviewed for compatibility with the provisions of the Appendix to the Berne Convention. In addition, certain notifications would be required in this connection by Art. I of the Appendix to the Berne Convention. If the aim is not to implement the Appendix, then questions may arise regarding the compatibility of this provision with the three-step test. Further modifications here and in Schedule 2 have not been attempted pending clarity regarding the intention of the drafters.

(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.~~

---

Exceptions and limitations to the right of reproduction must be compatible with the three-step-test, as laid out in Art. 9(2) of the Berne Convention and Art. 10 of the WCT. Whether this is the case for the proposal is a matter of interpretation. Subsection (3) appears to be doubtful in this respect, because it means that unless the rights owners themselves offer a license for reproduction of their entire books, etc., this is covered by a limitation allowing for free use. This may well be argued to conflict with the normal exploitation of works, notably works created and marketed for educational purposes. Even if this is not considered the case, it may be argued that systematic use of whole books, etc. without payment of equitable remuneration would unreasonably prejudice the legitimate interests of the authors as well as the publishers as successors in title. It is therefore recommended that the provision be deleted from the Bill.

In addition, subsections (1) and (2) allow for important limitations of the exclusive right of reproduction. It is suggested for consideration that a general safeguard clause be linked to those subsections, as has been done in comparable situations in other countries. Such a clause might have the following wording:

Subsections (1) and (2) of this Section only apply to the extent that a license to do the described acts is not available from the copyright owner, a 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: Provided that this subsection only applies if the works or recordings are not commercially available to the users on reasonable terms.

It is a matter of interpretation whether the provision in subsection (4) is compatible with the three-step-test in Art. 10 of the WCT, Art. 16 of the WPPT and Art. 13 of the Beijing Treaty. It may be argued that the permitted use is broad, compared to the quite limited provision of Art. 10(2) of the Berne Convention, which otherwise applies as regards literary and artistic works. On the other hand, there is a valid argument that use of materials in libraries and other institutions outside the premises of such institutions is necessary for the purposes of distance education, etc. In order to safeguard the normal exploitation reserved for rights owners, not least as regards audiovisual works specifically created for educational purposes, the addition of a proviso limiting the application of the subsection to cases where the works are not commercially available on reasonable terms is recommended.

(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: Provided that such missing parts are not commercially available on reasonable terms.

Provisions to this effect are commonplace in national copyright legislation. Most commonly, however, they apply only in cases where the missing parts are not commercially available at reasonable terms. The inclusion in subsection (6) of a proviso to that effect is suggested in order to safeguard the normal exploitation of the works and ensure that there is no unreasonable prejudice to the legitimate interests of the rights owners.

(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-: [Provided that such missing parts are not commercially available on reasonable terms.](#)

[Provisions to this effect are for important reasons increasingly commonplace in national legislation. The production or sale of older works and recordings in new formats is, however, also becoming a normal part of their commercial exploitation. Therefore the inclusion in subsection \(7\) of a proviso to that effect is suggested in order to safeguard the normal exploitation of the works and ensure that there is no unreasonable prejudice to the legitimate interests of the rights owners.](#)

(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.

[The compatibility of the provision in subsection \(9\) with the three-step test of the international conventions and treaties is difficult to assess. On the one side, the provision does not allow for any use of the copies made, as is the case in subsection \(7\), above, but on the other hand, the provision does not in any way describe or limit the purposes that may be pursued by the making of the copies. Possibly, the provision could be clarified as follows: “A library, archive, museum or gallery may make a copy for its own collections, or for the collections of another such institution, of a copyright work which for important cultural or scientific reasons should be included therein, when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot, after reasonable endeavor, be obtained and where the work is not available by general trade or from the publisher. Only one such copy of each work may be made for the collection of each institution.”](#)

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 for preservation purposes, 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, scholarship, research or any other legal use and for use by the judiciary.

It seems difficult to reconcile the permissibility under subsection (11) to use copies of retracted works for 'any other legal purposes' with the three-step test of the international conventions and treaties, because such use apparently would include lending to the general public. If that were the case, it might in practice nullify the effect of the withdrawal of the work and thus unreasonably prejudice legitimate interests of the authors. It is therefore recommended that the scope of the provision be clarified as indicated.

(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.”

Proposed Section 19D appears to be intended to implement the Marrakesh Treaty and to extend its provisions to a broader group of beneficiaries, encompassing all persons with disabilities. The Republic of South Africa has the ability to adopt a national exception or limitation that applies to all persons with disabilities. However as drafted section 19D does not contain a number of provisions that would be needed to benefit from the provisions of the Marrakesh Treaty, and in particular the cross-border provisions. In addition to calling into question compliance with Treaty provisions, the lack of these provisions could create practical difficulties in exchanging works with authorized entities in other countries, as some implementing legislation in other jurisdictions requires strict compliance with Marrakesh Treaty provisions, and most implementing legislation incorporates the concept of authorized entities as the main actors in cross-border exchanges. As the goal of the Marrakesh Treaty is to harmonize limitations and exceptions to benefit persons who are blind, visually impaired, or otherwise print disabled, it is suggested to redraft this section to include a general national exception for persons with disabilities, together with a separate section covering the activities encompassed by the Marrakesh Treaty. In the latter case a number of additional definitions would be needed, including those to describe the works covered, the beneficiaries, and the activities of authorized entities or “organizations serving persons with disabilities.” It would also be important to clarify the copyright rights that are subject to the flexibilities based on the Marrakesh Treaty (e.g. distribution and making available in addition to distribution). Language would also be needed to ensure that the requirements of Article 5(4)(b) of the Marrakesh Treaty are met. Further information and specific suggestions on this subject could be obtained from the International Bureau of WIPO.

**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 or other derogatory action in relation to, 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.

The inserted text in subsection (1) aims at obtaining compatibility with Art. 6bis of the Berne Convention. It clarifies that the protection covers not only situations where the work is changed in one way or another, but also where the work is used ‘as is’ but in a prejudicial context.

(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.”;

In relation to audiovisual works, the provision in paragraph (c) does not seem compatible with Art. 14bis(2) of the Berne Convention. In countries following the common law tradition, normally the producer of an audiovisual work is considered the author of that work, without prejudice to the rights regarding other exploitation of pre-existing works that are included in the audiovisual work. In countries following the civil law tradition, the individual contributing authors are considered co-authors of the audiovisual work, but their rights are made subject to a presumption of legitimation for the producer to exploit them as part of the audiovisual work, as established in Art. 14bis(2). It is therefore suggested that the following general provision clarifying the ownership of rights in audiovisual works be inserted in order to replace the references to audiovisual works in paragraph (c):

In respect of an audiovisual work, the original owner of the economic rights shall be the producer, unless provided otherwise in a contract. The co-authors of the audiovisual work and the authors of the pre-existing works included in or adapted for the making of the audiovisual work shall, however, maintain their economic rights in their contributions or pre-existing works, respectively, to the extent that those contributions or pre-existing works can be subject of acts covered by their economic rights separately from the audiovisual work.

If the intention behind paragraph (c) is to follow the system normally used in countries following the civil law system, the following wording is suggested instead:

In respect of an audiovisual work, the original owners of copyright are its co-authors, such as the principal director, the authors of the screenplay, the authors of the dialogue and the composer of music specifically composed for use in the audiovisual work. Authors of pre-existing works adapted for or used in audiovisual works are assimilated to the co-authors. In the absence of agreement to the contrary, an agreement between the producer of an audiovisual work and a co-author of that work, other than the author of a musical work included in the audiovisual work, concerning the contribution of those authors to the making of the audiovisual work, shall be deemed to mandate the producer to exploit the rights in the author’s contributions together with the audiovisual work, and to subtitling or dubbing the texts, but without prejudice to any right of the author to obtain remuneration for such use of his or her work to the extent that is stipulated in the said agreement.

(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- licenser, as the case may be]** sub-licensor, as stipulated in Schedule 2: Provided that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.

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

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

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

### **Insertion of section 22A in Act 98 of 1978**

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

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

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

It is suggested to delete the reference to the resale royalty in this section in order to avoid confusion, as licenses would not generally be required as part of the operation of the resale royalty right system. In the case of the resale royalty right, the seller of the work would be entitled to make the sale, while with an orphan work the applicant for the license would be asking to exploit the copyright rights of another party. If there is a concern about payment of the resale royalty in cases where one or more parties entitled to receive the royalty payment is unknown or unlocatable, that situation could be addressed in the resale royalty right implementing regulations.

(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; and

(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.~~

Proposed Section 22C(3)(c) raises concerns about possible interference with the payment of royalties pursuant to the national treatment principle of the Berne Convention. Deletion of the provision is therefore suggested.

### **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 [copyright management](#) information kept by any other person in order to administer copyright in terms of this Act or distributes, imports for distribution, broadcasts or communicates to the public, without authority, works or copies of works knowing that [electronic copyright management information has been removed or altered without authority](#); or

[The text added to paragraph \(b\) aims at securing a full implementation of the provision of WCT Art. 12. Reference is made to the remarks regarding proposed Sec. 28R of the principal Act.](#)

(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 [access a work or 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 [access a work or 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.”;

It may be argued that the proposed subsection (5A) does not completely fulfill the requirements of Art. 11 of the WCT, which requires “adequate legal protection and effective legal remedies” against the circumvention of technological protection measures. The proposed text appears to allow, for example, sale and dissemination of circumvention devices, as long as the person doing that has only reason to believe that the circumvention is not for purposes of copyright infringement. The private access to a work, however, does not necessarily infringe copyright, and the provisions may therefore lead to widespread dissemination of such devices, which would then for all practical purposes undermine the legal protection. The fact that the act of accessing data without authorization is an offence under Sec. 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), to which the proposed Sec. 28O(6) of the principal Act refers, apparently would not prevent a widespread dissemination of circumvention devices. The suggested amendments of the proposed text aim at avoiding such dissemination. Furthermore, the addition of provisions clarifying the safeguarding of limitations and exceptions under the Law is proposed. Such safeguarding should be limited to certain of those limitations and exceptions, because otherwise it would in a similar way enable widespread circulation of circumvention devices and information which in practice would mean that the protection against circumvention would not be adequate, as required by the WCT. A similar aim appears to be pursued by the proposed Section 39(cH) of the principal Act. The following text is proposed as an option:

Upon the request by the beneficiary of an exception or limitation in accordance with Sections 12B(1)(b) to (e), 12D(2), 19B, 19C(5) to (7), (9) and (11), and 19D, the [appropriate public authority, to be specified] may order that the necessary means be made available, to the extent strictly required, to benefit from it and in accordance with the guidelines issued under Section 39(cH).

(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

The proposed amendment to subsection (2) that is proposed for deletion effectively would mean that copies made in countries without copyright protection could be freely imported into the Republic. Therefore, it would not be compatible with Art. 16(2) of the Berne Convention. The provision would also be incompatible with the principle expressed in Art. 5(2), last sentence, of that Convention, according to which the applicable law in international relations is that of the country where protection is claimed, that is, where the use takes place. This means that when foreign works are used in the Republic, that use is governed by the laws of the Republic and not the laws of the foreign countries of origin of the works. By referring to the legality of the copies under the law of the country in which the work was made, the proposed provision would extend extraterritorial effect in the Republic to such foreign laws, contrary to the principle of territoriality expressed in Art. 5(2) of the Convention.

(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~~ Republic.”

[Regarding the amendment suggested for subsection \(5\), reference is made to the comments to the similar amendment suggested for subsection \(2\).](#)

### **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.

As regards the proposed Sec. 28O and 28P, reference is made to the suggestions and remarks made with respect to the definitions of ‘technological protection measure’ and ‘technological protection measure circumvention device’ as well as to proposed Sec. 27(5A) of the principal Act.

### **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 or communicate to the public a work or a copy of a work, if any copyright management information has been removed or modified without the authority of the copyright owner.

The amendments suggested to proposed paragraph (b) aim at ensuring the implementation of Art. 12 of the WCT, Art. 19 of the WPPT and Art. 16 of the Beijing Treaty. It is clarified that communication of a work to the public explicitly is made unlawful when the rights management information is not intact, and the limitation to business activities has been removed, partly because it is not permitted under the said treaty provisions, and partly because communication over the Internet may take on very serious proportions, even if it is not done in the course of business.

**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))**

[With respect to proposed Schedule 2, please see the comments regarding proposed Section 12B\(1\)\(f\).](#)

**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**<sup>1</sup>. 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.”

---

<sup>1</sup> 2010 (8) BCLR 741 (CC)

- 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” 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.