

28 January 2022

The Honourable Ms Judy Hermans,  
Chairperson: Portfolio Committee on Trade and Industry  
Attention Mr A Hermans  
Parliament of the Republic of South Africa  
CAPE TOWN

By email only to: [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za)

Dear Ms Judy Hermans, Dear Portfolio Committee Members,

**Copyright Amendment Bill [B13B-2017] “CAB”– Call for Public Submissions and Comments on Certain Amendments of CAB and the Performers Protection Amendment Bill, [B24B-2016] “PAB”; Submission by the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd (DALRO)**

DALRO herewith:

- (1) submits its comments in respect of the Copyright Amendment Bill further Amendments presented synoptically in a document entitled “All Proposed Amendments” by the Secretariat of the Portfolio Committee;
- (2) requests to be heard at future public hearings and/or workshops as may be scheduled to maximise participation by stakeholders and Members of Parliament.

#### Preface

We are aware that the Portfolio Committee’s (PC) notification is construing its discretion narrowly. This is inappropriate and unreasonable for two reasons:

Firstly, the PC is obliged to provide the space to air all constitutional reservations, not only those specified by the Presidency in asking for the Bills to be re-tagged and reconsidered. There is case law to the effect that a remitted Bill must be scrutinized for all constitutional defects, not only those enumerated by the Presidency that were enough to cause a retagging and remittal.

Secondly, as a matter of substantive copyright law, it is not possible to meaningfully answer a call for submissions on the Proposed Amendments marked in Blue (the “Blue Amendments”) without referring to the CAB and PAB (“the Bills”) in general and alerting the Portfolio Committee to the consequences the Green Amendments have read with the balance of the legal text. The Blue Amendments make only sense when they are assessed against both the exclusive rights and exceptions contained in the balance of the Bills, and when further read in conjunction also with the application and enforcement of the exclusive rights through individual and collective licensing, and ultimately corrective civil, administrative or criminal enforcement. Thus, it is necessary to discuss the Bills holistically when discussing the Blue Amendments and also missing amendments, i.e. amendments that should be there in Blue.

For ease of reference, this submission is divided into three parts: A, B and C, which are preceded by a “Headlines Items” section and followed by a brief Conclusion and also contains an Annexure which is referred to in Parts A, B and C. Together, these different sections form an integral submission only divided for convenience:

Headline Items – the most salient features of DALRO’s submission.

Part A – deals with Blue Amendments.

Part B – refers either to missing Blue Amendments or deals with provisions in any event requiring Constitutional scrutiny or scrutiny for reasons of alignment with international obligations and alignment with treaties South Africa is signatory to and/or has already decided to accede to, namely the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, the Beijing Treaty on Audiovisual Performances, and the Marrakesh Treaty.

Part C – deals with a number of other highly problematic provisions in the Bills that the previous Committee could not properly assess in the absence of appropriate economic impact assessments, and the current Committee should at least be willing to receive additional submissions with respect to these provisions as part of the new Section 76 consultative process.

Conclusion – a brief summing up and an offer to work constructively, once the Bills and a reiteration of the view that the defective Bills should be looked upon with fresh eyes.

DALRO emphasises a view expressed by many: **Appointing a Drafting Committee of Experts and a roadmap to update responsibly and impeccably the 1978 Copyright Act, would be the single biggest positive contribution the PC could make**, rather than seeking to rearranging or rewording passages of Bills which are bound to remain structurally defective and some of which as we shall see give rise to fresh confusion and therefore legal reservations.

**Indeed, the Bills’ defects are so severe that they not only miss the threshold of being sufficiently beneficial to authors and performers, but the Bills also jeopardize the viability of the very value chain on which a creative economy depends.**

In our humble view, the Portfolio Committee would be well-advised to invite its members to submit Members Bills that allow for a complete redrafting of the Bills from scratch, or to appoint a committee of true copyright experts to produce an entirely fresh, draft.

### Headline items:

- Read literally, the exceptions proposed in the Bill propose to allow, free of charge, acts or reproduction to such an extent that this would erode the incentive to create educational and other literary works for which the educational institutions and private users are the main or an important existing market. The educational exceptions need to be (i) narrowed down to permitting only the reproduction of short extracts to comply with the three-step test and (ii) also must be qualified so as to expressly carve-out literary works that are offered under a collective license such as the existing DALRO's Higher Education Institutions (HEI) Licence. In particular, DALRO proposes an important re-wording of Section 12D(3):  
*"Educational institutions shall not incorporate extracts as envisaged under Section 12D(1) or whole or substantially the whole of a book or journal issue, or a recording of a work, as envisaged under 12D(4), unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions."*  
(Clarified new text in bold underlined)
- As a corollary, exceptions for personal and private permitted uses also must be carefully crafted and narrowed down and would then only pass the 3<sup>rd</sup> step of the three step test if they are combined with a private copy levy system for literary works. To this end, the said exceptions should be withdrawn for now and combined with a proposal for a private levy system. DALRO is aware that the Department of Arts, Culture and Sports has long worked on the introduction of a copyright levy and the work is quite advanced. Like DALRO's Higher Education Licence, a private copy levy would permit limited reproductions of copyright works in return for a reasonable levy. These licence fees and private copy levies are distributed to authors, illustrators and visual artists and their publishers, either directly (within South Africa) or through sister organisations with which DALRO has entered into reciprocal arrangements (abroad).
- Whilst it is to be commended that the Department has caused the Portfolio Committee to introduce the Berne Convention 3-step test, finally, into the Bill, the wording of the 3-step test has been altered and the area in the Bill where the (modified) 3-step is placed is not covering all exceptions and limitations, but only some. This is disturbing as it underscores the continued half-hearted attempt to not comply with international treaty requirements, when the stated policy goal adopted by Cabinet and proponents of the Bills is to ratify and accede to the various treaties, all of which demand complete and strict compliance of all national exceptions and limitations with the (verbatim) correct version of the 3-step test. South Africa may unnecessarily confuse and alarm international trading partners, at best, and might sleep-walk into an international dispute and constitutional court challenge for irrationality, at worst. DALRO proposes two changes that would remedy this unsatisfactory situation and, if adopted, would not only lead to greater legal certainty but also remove unnecessary diplomatic stress to be expected from South Africa's trading partners:

#### **Change 1: Amend Section 12A(1)(d):**

*12A(1)(d) The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use in relation solely to the purposes and special cases there stated and shall be determined by the factors contemplated in paragraph (b), and to the extent that they do not conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the holders of rights in the works."*

Change 2: Stick to Berne Convention Article 9(2) (Paris Text) verbatim:

<u>CAB Section 12D(1): altered three-step test:</u>	<u>Berne Convention Art. 9(2) original, binding wording:</u>
<p><i>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—</i></p> <p><i>(a) the copying does not exceed the extent justified by the purpose;</i></p> <p><i>(b) a reproduction may only be made in the cases stipulated in this section;</i></p> <p><i>(c) the reproduction does not conflict with the normal exploitation of the copyright work; and</i></p> <p><i>(d) the reproduction does not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work. [...]</i></p>	<p>12D(1). Subject to subsection (3), a person may make copies of works <del>or recordings of works, including broadcasts</del> for the purposes of educational and academic activities: Provided that – the reproduction of a work shall be confined to</p> <p>(a) certain special cases for the purposes stipulated in this section,</p> <p>(b) that such reproduction does not conflict with a normal exploitation of the work and</p> <p>(c) does not unreasonably prejudice the legitimate interests of the author.</p>

- The Exceptions and Limitations as proposed in the Bills, even with the now half-hearted attempt to rectify some of the over-broad language, some individually, and certainly when read in the aggregate, erode the purpose of the Bills. It is as if the Bill “*giveth half-heartedly*” with its memorandum to creators, authors, performers, publishers and producers, yet “*taketh doubly*” away with a barrage of contractual restrictions, threats of committing offenses when licensing and over-broad exceptions. DALRO supports effective and meaningful legislation to update the Copyright Act, 1978, but on the basis that the legislation would advance the interests of authors, artists and composers and the creative industries as a whole by protecting their interests, without destroying the value chain of copyright through free, or gratis, ‘uses’ of copyright works. Authors will have nothing to gain if there is nothing to share.
- Whereas, in principle, effective regulation of collecting societies should be for the benefit of rightsholders, we are concerned about the constitutionality of overly prescriptive provisions in the Bill. If unconstitutional, the provisions unenforceable in practice and thus will hamper rather than empower the collective management of copyright for the benefit of creators, producers and publishers. The present amendments do not at all deal with this and this unjustifiable restriction on the freedom of carrying on trade, both for creators and publishers and also their licensing agents, remains a glaring omission that puts the proposed legislation at risk of being found unconstitutional or impracticable or the law-making process and outcome is at risk of being found irrational (as a technical term of unconstitutionality).
- Neither the Explanatory Memorandum of the Bill nor the overly-brief and substantively meagre Socio-Economic Impact Assessment (SEAI) Report for the Bill make reference to the impact of the Bill on collective licensing of literary works. Contrary to the Copyright Review Commission of 2011’s recommendation— that DALRO facilitates distributions, in addition to publishers, to authors directly; not to erode the licensing market for DALRO and its stakeholding authors and publishers. DALRO has since started the process to distribute to authors directly and continues to transition not least with the help of ANFASA to achieve this recommendation.

- We re-state as DALRO's own observations to both your predecessor and Chair of the Portfolio Committee Ms Fubbs on 6 June 2018 at her request (previously attached to DALRO's submission of 16 July 2021), as well as the CCSA letter sent to the late Duma Nkosi, on 29 November 2021 (Attached). This latter letter is annexed and made part and parcel of DALRO's submission and it contains a schedule listing grave reservations as well as solutions how to address meaningfully each such reservation. Mending all these defects will provide a sound platform for jobs and investment into the vast creative arts talent that South Africa proudly calls home.
- DALRO supports the submissions in particular of (i) PASA, the Publishers Association of South Africa, (ii) ANFASA, the Association of Non-Fiction Authors of South Africa; (iii) CISAC, the *Confédération Internationale des Auteurs et Compositeurs* (iv) IFRRO, the International Federation of Reprographic Rights Organisations, and (v) IPA, the International Publishers' Association. DALRO is mandated by members of these four organisations to license reprographic and visual art reproductions of extracts from published works and to reproduce works of visual art, works originating in South Africa (i)-(ii) and internationally from all corners of the world (iii)-(v).

**Part A's** focus is on these specific exceptions found in sections 12A, 12D, 12C, 12B, 19B and 19C. The sections introduce copyright exceptions which present instances where exclusive acts for the copyright owner may be undertaken by third parties without permission of the copyright owner, which according to their plain English literal meaning of the proposed statute would conflict with the international treaties which South Africa subscribes to, especially the so-called "three-step test".

**DALRO's recommendations on Section 13 and 20 of the CAB, which seek to amend or introduce sections 12A to 12D, 19B and 19D:**

1. Section 12A, deals with General Exception from copyright protection – entitled Fair Use

Ostensibly inspired by so-called US-style fair use, the section grafts on wording that is **inconsistent with the US statute** as is shown below:

**Comparison between the 'fair use' provision in the new Section 12A of the Copyright Amendment Bill and Clause 13 and Section 107 of the US Copyright Act**

Clause 13 of the Bill:	Section 107 of the US Copyright Act:
<p>12A.(a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:</p> <p>(i) Research, private study or personal use, including <b>the use of a lawful copy of the work at a different time or with a different device</b>;</p> <p>(ii) criticism or review of that work or of another work;</p> <p>(iii) reporting current events;</p> <p>(iv) scholarship, <b>teaching</b> and <b>education</b>;</p> <p>(v) comment, <b>illustration</b>, <b>parody</b>, <b>satire</b>, <b>caricature</b>, <b>cartoon</b>, <b>tribute</b>, <b>homage</b> or <b>pastiche</b>;</p> <p>(vi) <b>preservation of and access to the collections of</b></p>	<p>Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section,</p> <p>for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.</p>

<p>libraries, archives and museums; and</p> <p>(vii) ensuring proper performance of public administration.</p> <p>(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—</p> <p>(i) the nature of the work in question;</p> <p>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;</p> <p>(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</p> <p>(iv) the substitution effect of the act upon the potential market for the work in question.</p> <p>(c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.</p>	<p>In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—</p> <p>(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;</p> <p>(2) the nature of the copyrighted work;</p> <p>(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and</p> <p>(4) the effect of the use upon the potential market for or value of the copyrighted work.</p> <p>The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.</p>
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The table above illustrates that the South African fair use provision, even before it is to be interpreted side by side with the other exceptions under discussion here, is much broader in its introductory chapeau, and also in the way it frames the four-factor analysis.

The South African variant shows that the proponents did not think even the so-called US-styled fair use would be “enough” to erode exclusive rights, but went out of their way to broaden the wish list for potential free uses.

It is submitted that this alone, and especially the mentioning in section 12A (iv) of “teaching” and “education” is a direct attack on the livelihood of the South African publishing industry. Unlike the US publishing industry, SA’s publishing industry is 80% dependent on revenue from educational publishing and uses these revenues as a launchpad to deepen literary, advance local and indigenous content and to eventually have a thriving South African literature so important for SA’s identity as it is for the world at large.

If a decision is made against the advice of DALRO to introduce the foreign invading plant that is US-style fair use, at least do not introduce a viral version that is even drafted broader than the variant in the country of origin: then at least stick to a verbatim copy which will make application of some 100 years of US case law easier.

Constitutionally speaking, the new section 12A introduces a 'wild version' of the US-style open-ended copyright exception doctrine of 'fair use' into South African law which amounts to deprivation of property and violates the freedom to trade, occupation and profession.

Section 12A by incorporating the words "*for purposes such as*" provides for an open, illustrative list of purposes for which a work can be used and be considered 'fair use'. **These words should be removed**, as was done in Uganda recently where a US-style fair use four-factor test was introduced verbatim, but without opening the list up by "such as".

As an alternative, the wording suggested by TUMSA during the August 2021 hearings would also work.

Finally the following amendment to the blue section of Section 12A(1)(d) as further alternative could work as well. This would balance access needs of those unable to pay with the need to protect the rights of authors, publishers and producers –for if there is nothing created and published, there is nothing to access:

"(d) The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use in relation solely to the purposes and special cases there stated and shall be determined by the factors contemplated in paragraph (b), and to the extent that they do not conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the holders of rights in the works."

(Clarified new text in bold underlined)

#### **Reason/Justification:**

From a Treaty alignment point of view, if passed into law in this form, the Bill will not, *as it must*, be limited to certain special cases of exceptions and limitations from exclusive rights and the Bill will interfere with the normal exploitation of works and will be extremely damaging to and interfering with the legitimate interests of authors, creators and their publishers, contrary to the purpose the Bill was intended for and contrary to the demands of international compliance.

We submit that, whilst even US-style fair use is capable of interpretations that put it at odds with the international treaty obligations if introduced into SA law, the broadened hybrid "wild" fair use in the current form is certainly beyond compatibility with the international obligations of South Africa, most notably, the *true and correct* Berne Convention three-step test.

#### **Recommendation**

##### ➤ **We recommend that:**

- (i) **the over-broad fair use doctrine is revised,**
- (ii) **that the words "such as" are struck,**
- (iii) **that the provision be narrowed down to the words not highlighted in yellow above, and**
- (iv) **directly subjected to a test limiting Section 12A inherently by mandating a court to apply the three-step test of the Berne Convention as an overall yardstick. Whilst others have demonstrated how this could be done and offered wording, most notably TUMSA during the August 2021 hearings, DALRO offers the wording as a further modification on Section 12D(1)(d) which is currently under comment.**

##### ➤ **We also urge that widespread public consultation process and a proper economic impact assessment be conducted to assess for the first time the impact of the amendments on the various copyright sectors.**



- **We urge the suspension of personal and private use provisions until a private copy levy draft legislation is ready for simultaneous adoption by Parliament.**

## 2. Section 12D - Reproduction for educational and academic activities

The main issue for DALRO is contained within the introduction of overbroad education exceptions in Section 12D coupled with the fair use defence in Section 12A.

Whilst the purpose of the Bills is to benefit and protect authors by ensuring royalties relating to reprography of their works are passed through to them, however, the section has the effect of legitimising expropriation and plagiarising of copyright material at education institutions, thus conflict with a normal exploitation of copyright works. The exceptions, unreasonably prejudice the legitimate interests of the authors and take away due remuneration, rendering the section contrary to the three step test.

Sub-sections 12D (1)-(3) are not only poorly drafted, hard to read and ambiguous, the subsections could be construed quite easily to allow an individual to legitimately make an exact reproduction of an entire book which he has borrowed or taken from a library so as to avoid having to purchase his or her own copy. The risk is that the author's entire market would be destroyed, if the wording is not amended. We note that ReCreate and various Professors speaking in favour of the Bills continue to say that this is not intended and not the effect of the sub-section. That is encouraging, but DALRO would then request the PC to amend the section to state in unambiguous and easy-to-read terms what the apologists of the subsections claim.

Section 12D (4) further extends the right to make copies. The section allows for copies to be made, and a substitution of textbooks in the market '*where the textbook is out of print*' in South Africa. Despite the adding of the words '*for commercial purposes*' in section 12D(5), the legitimising of making copies of whole textbooks is not based on any policy statement and deprives the copyright owner from legitimate remuneration. The section needs to confirm that "out of print" does not apply to electronic editions and to new editions: where an accounting 101 title in its 4<sup>th</sup> edition may be "out of print" is actually replaced by the 5<sup>th</sup> edition –and hence is NOT out of print at all; there is simply a newer edition. Also the section needs to be narrowed to not apply to multi-volume and multi-author works. It is entirely possible that a chapter is removed in a future edition but that does not make the whole book "out of print".

Section 12D(6) legitimises plagiarism by allowing incorporation of portions of printed works, a restricted act in terms of copyright law, and also a further prejudice to the copyright owner. The section should simply be deleted.

### **Recommendation**

- **The relationship between Section 12A and section 12D must be clarified as follows: Copying not permitted under Section 12D should be deemed also unfair under Section 12A; copying permitted subject to the unavailability of a license under Section 12D should also constrain copying under Section 12A.**

**The wording offered by DALRO amending new paragraph in Section 12D(1)(d) would achieve this:**

*12A(1)(d) "The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use in relation solely to the purposes and special cases there stated and shall be determined by the factors contemplated in paragraph (b), and to the extent that they do not conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the holders of rights in the works."*



- **We submit that section 12D be amended and reworded to provide legal certainty and introduction of exceptions when reproduction is justifiable and in compliance with South Africa's treaty obligations. See DALRO proposal:**

*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 reproduction of a work shall be confined to*

- (a) certain special cases for the purposes stipulated in this section,*
- (b) that such reproduction does not conflict with a normal exploitation of the work and*
- (c) does not unreasonably prejudice the legitimate interests of the author."*

- **The textual deletions and clarifications as per above need to be inserted into Section 12D.**
- **The entire Section 12D should apply only to the extent that there is no licensing scheme in place. Where copying of extracts of books is permitted under license by collective management organisations, section 12D should be inapplicable. See DALRO proposal on Section 12D(3) which achieves this:**

DALRO proposal:

*Section 12D(3) "Educational institutions shall not incorporate extracts as envisaged under Section 12D(1) or whole or substantially the whole of a book or journal issue, or a recording of a work, as envisaged under 12D(4), unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions."*

***(Clarified new text in bold underlined)***

### 3. Section 12C

DALRO objects for the reason already above stated in relation to Section 12A(1)(d) to the tinkering with the exact wording of the 3-step test stemming from venerated and tried and trusted international treaties, some already binding on South Africa like the TRIPS Agreement Art. 13.

Thus, Section 12C(2)(c), which invents and grafts on new uncertain wording should be changed to a verbatim wording of the international treaty norms. Whilst it is correct that South Africa can legislate in the way it chooses, the Government policy is to adhere to international law and to accede to four more treaties using the exact wording. So why tinker with it, if not only to irritate the international trading partners and cause South African judges to wonder what the difference in wording might suggest. Common law-making sense and rationality command that the South African Parliament and this Portfolio Committee stick to the letter of the treaties and especially the pivotal 3-step test.

### 4. Section 12B deals with "Specific exceptions from copyright protection applicable to all works"

Whilst appreciated that this section is not proposed for amendment, DALRO re-iterates the need to look at this section and the way it alters the character also of sections that are proposed to be amended.

Section 12B should be narrowed down to only permit the exceptions that are traditionally applicable and set out in Sub-section 12B(1)(a) to (e), (g), (h) and (i). These sub-sections form part of a traditional catalogue of exceptions. They could also have been introduced into the 1978 Copyright Act by regulations under Section 13 of the present Copyright Act. Whilst some of the wording is misleading and over-broad, these exceptions have a good sense and legitimate intention.

Constitutionally speaking, the remainder of section 12B amounts to an arbitrary and at times discriminatory deprivation of property:

Section 12B(1)(i) is an improvement as it clarifies that a person may only benefit from exceptions if the copy of the work has been “lawfully acquired” as defined and the definition section contains an appropriate definition of this expression. **The definition of “lawfully acquired” could clarify that notwithstanding a person being the recipient of a gift, perhaps even a well-intentioned “gift”, the section would not apply where the gift recipient is aware or ought reasonably to be aware, or for the moment the recipient has notice that the gift in reality is stolen property or an illegally made copy that he or she is purported to being given as a gift.**

That said, **DALRO is of the view that the section should only apply to natural persons and not companies and that the entire section 12B of the Bill should be suspended until appropriate legislation is ready to be simultaneously adopted on a private copy levy system.**

**Recommendation:**

- **Suspend work on Section 12B and delay adoption of a text until a suitable private copy levy Bill has been introduced as a private member bill or by the DACS or DTI.**
- **Clarify that “gifts” as per the definition of “lawfully acquired” copies do not include stolen goods or illegally made copies gifted by another.**

DALRO now deals with the remainder of Section 12B as it does have an impact on how Section 12(1)(i) will be interpreted.

Section 12B (1)(f) is a violation of the Berne Convention as it allows translation of works. This right will disproportionately discourage publishing in the national and indigenous languages of South and Southern Africa, quite apart from violating international agreements such as the Berne Convention and TRIPS Agreement. DALRO posits that the discrimination against indigenous languages that will result, even if not intended, is not consistent with the South African Constitution and may also violate cultural freedoms of its peoples and is simply unbecoming of a free and open democratic society. The pressure to give away translation rights as otherwise competitors will translate an indigenous work under an exception is unbearable.

Subsections 12B(2)-(6) are all massively overbroad and some are clearly introduced in the guise of exceptions benefitting individuals, but massively benefitting cloud services and US tech giant companies. The section is so broadly drafted as to virtually exempt cloud services from the copyright legislation altogether. There is no justification to allow the electronic storage of works in a massive way merely because the works may be accessed by individuals. This is a business model that YouTube and others are perfecting, as it is also a business model of professional pirates. The Sub-sections that stand out in this regard are Subsection 12B(1)(j) read with 12B(2)(b) and 12B(2)(c) The sections are unacceptable and might lead to unnecessary diplomatic stress on the South African government through its trading partners.

## 5. Clause 20 – new section 19C

DALRO recognises that publicly accessible libraries have special and legitimate needs in relation to uses of works that are in their collections. Exceptions relating to libraries’ reproduction of copyright works must be carefully crafted. We submit that Section 19C is poorly drafted, providing for exceptions for actions that are not restricted by copyright and also extremely broad exceptions that go way beyond the objects set out in the policy statements supporting “access” to works in the collection of libraries. The qualification “lawful access” is not sufficient to ameliorate the harm that these exceptions will cause. The inclusion of “galleries” as such is over-broad. Galleries are commercial entities that deal in visual and artistic works, typically, although some antique and literary works also occasionally are offered for sale in Galleries, such as original manuscripts of famous writers or personalities. There is no reason to grant exceptions to Galleries and this category of beneficiary should be simply deleted.

We submit that the exceptions for libraries and archives should be considered in consultation with authors, publishers and libraries and archives, and that any special exception for libraries and archives must be subject to the work not being commercially available, as is already captured in new Sections 19C(1) and 19C(5). Moreover, the exceptions should only apply to the extent that there are not individual subscription agreements that already permit the uses in question, albeit permitting safeguards against cyber-attacks and overload of publishing platforms.

Section 19C(2) must be subject to a collective management lending scheme and this lending scheme must narrow down the number of times a copy of a work may be lent. The lending must be confined to physical copies and it should be made clear that lending of ebooks is subject to access and licensing terms and conditions.

Section 19C(3) to (11): These are traditional library exceptions that per se DALRO has no objection to, provided the wording can be made unambiguous. Rather than offering wording at this stage, DALRO is of the view that a consensual approach should be pursued with the library and stakeholder community to find wording that best meets the need of the libraries, museums and archives.

Section 19C (12) and (13) should also be made subject to there not being a licensing scheme offered for this type of copying and supply activity. Limiting the rights of copyright holders could substitute for the purchase of copies of literary works. Admitting that the functions of libraries is to form collections and also to engage in inter-library loan activities, the activities should be permissible subject to a collective licensing fee being paid where a Collective Management Organisation or Independent Management Entity offers such bundled one-stop shop licenses.

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

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

19C(15) should be deleted: the section currently seems to suggest that it does not constitute a “lex specialis” to Section 12A. Section 12A should be confined to users as private natural persons whereas libraries, museums, archives and the like are systematic structural mass users of copyright material. Section 19C should be read as a lex specialis and a library should not be able to rely on Section 12A. Section 12(15) should be deleted with this understanding in mind or should be amended to make this clear.

#### **Recommendation**

- **DALRO submits that Section 19C shall be amended in light of above comments**
- **A round table of DALRO, authors, librarians and publishers must be convened to see if the stakeholders cannot agree on guidelines that could later be substituted for overbroad provisions. Guidelines could also be more frequently and easily amended than casting any over-broad exceptions into the statutory text. The National Library of South Africa already holds roundtable exchanges with publishers and these should be made more inclusive for wider stakeholders such as Authors, Creators, Museums, Archives.**
- **All of the exceptions that are red-raftered should be explicitly prefaced to apply only subject to the Three-Step Test.**

➤ **Wording proposal on amended (blue) section 19C(4):**

“(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 and in respect of all paragraphs of Section 19C reproductions and performances, the making works or performances available or communicating works or performances to members of the public shall be confined to special cases that do not conflict with the normal exploitation of the works or performances and do not unreasonably prejudice the legitimate interests of the rightsholders in such works or performances, as the case may be.

**(Clarified text in bold underlined)**

Compare the wording of the Berne Convention three-step test [Article 9\(2\) Berne Convention \(Paris text\) 1971](#): *Article 9(2) “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”*

## **Part B – Constitutional and Treaty Alignment Concerns raised by the Bills**

### **1. Introduction**

Part B of DALRO’s submission focuses on the international law aspects of the Bills, to the extent that these have not been raised as corollary issues in Part A in relation to exceptions and limitations specifically mentioned in the Portfolio Committee’s Call for Submissions.

Part B namely discusses the Bills’ compliance with South Africa’s treaty obligations under the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) and the Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPs”), as well as the Bills’ readiness for compliance with the WIPO Copyright Treaty (“WCT”), the WIPO Performances and Phonograms Treaty (“WPPT”) and the Beijing Treaty on Audiovisual Performances (the “Beijing Treaty”). It also points to significant conceptualisation and drafting errors that remain in the Bills, despite the advice from Parliaments Panel of Experts.

The expert advice to the Portfolio Committee in October 2018 **by four experts the then Portfolio Committee appointed**, singled out provisions in the Bill that have no foundation in policy, whether in the Explanatory Memorandum to the Bill or in the SEIAS report or the Draft Intellectual Policy document that preceded it.

DALRO’s submission does not repeat the observations of the four experts, but notes that all the expert views form part of the work of the current Portfolio Committee based on the decision made by the National Assembly when rescinding the defective Bills.

Accordingly the Portfolio Committee is invited to consider the above point in the advice at [http://legalbrief.co.za/media/filestore/2018/10/andre\\_myburgh.pdf](http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf) in para 1 pp. 15-33.

### **2. International law and treaty obligations**

With this background, DALRO makes the following comments relating to the Bills and South Africa’s current and anticipated obligations under international treaties:

## 2.1. South Africa's intended accession to WCT, WPPT and the Beijing Treaty

The Cabinet resolved on 5 December 2018 that South Africa should accede to WCT, WPPT and the Beijing Treaty. This motion has been introduced to Parliament and is on the agenda of the Portfolio Committee for Trade & Industry in the National Assembly on 26 February 2019.

The members of Parliament's Panel of Experts all advised that there were deficiencies in the Bills' compliance with these treaties. **Specifically, the Reports and Recommendations of the Panel of (four) Experts that the previous Committee requested, but which were not taken into account are annexed to this submission.** Some of the deficiencies were corrected by the withdrawal of certain proposed sections and of certain proposed deletions, but many others, notably in relation to the copyright exceptions and the protection of technological protection measures and copyright management information, were not adopted, leaving the Bills non-compliant with WCT and WPPT and the Beijing Treaty on Audiovisual Performances. Regarding the latter, it is imperative that South Africa fully adheres to the Agreed Statements of each of those treaties and on TPMs the Beijing Treaty, as the latest Treaty has two very important agreed statements that must be reflected in the South African Bills, it is submitted in relation not only to audiovisual works and performances but all categories of works and performances:

*Concerning Article 15 as it relates to Article 13: It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party's national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.*

**Comment:** The said Agreed Statement effectively means that there is a clear process that must be followed and that there is no "licence to hack" or leave TPMs unprotected on the sole decision of a beneficiary of an exception or based on there being a use claimed to be falling under exceptions or limitations. Given the currently over-broad nature of exceptions and limitations of the South African defective Bills, this provision assumes a relevance it would otherwise need not have. But due to the exceptions and the contract over-ride provisions, TPMs will be the true owner and rightsholder's only safeguard and the only semblance of treaty adherence is if South Africa adopts an approach consistent with the international treaties on TPMs. The Agreed Statement means that a user wishing to circumvent a TPM must first check if the rightsholder has not made arrangements for legitimate uses falling under exceptions to provide a mode of access. This is key as otherwise any user under pretext of over-broad exceptions interpreted on top over-broadly will just circumvent and later claim that the Bills allowed this.

*Concerning Article 15: The expression "technological measures used by performers" should, as this is the case regarding the WPPT, be construed broadly, referring also to those acting on behalf of performers, including their representatives, licensees or assignees, including producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization.*

**Comment:** This Agreed Statement makes plain that not only authors but also their producers and publishers are entitled to apply TPMs. This is self-evident but the South African defective Bills remain unclear on this point.

See for all Agreed Statements to the Beijing Treaty: [WIPO Lex](#)

## 2.2. Copyright exceptions in the Bills and the Three-Step Test for exceptions under the Treaties.

The Panel of Experts advice to the Portfolio Committee dealt at length with the flexibilities allowed under international law for member states of the Treaties to devise their own copyright exceptions and the basic principle that govern them, namely the so-called Three Step Test. We do not intend repeating the full exposition here, but refer you to the advice at [http://legalbrief.co.za/media/filestore/2018/10/andre\\_myburgh.pdf](http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf), at para 4.

The members of the Panel of Experts all raised concerns of compliance of the construct of copyright exceptions appearing in the Bill and their compliance with the Three-Step Test. These new exceptions in the Bill are incorporated by reference in the Performers Protection Amendment Bill.

The Three-Step Test is set out in Article 9(2) of the Berne Convention as conditions for the application of exceptions to and limitations of the right of reproduction as follows:

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

Article 13 of TRIPs has extended the test to all exceptions to and limitation of the exclusive rights under copyright. The Three-Step Test was also extended by the WCT to all exceptions and limitations; both (i) to those which are specifically provided in the Berne Convention in certain specific cases; and (ii) to any possible exceptions to or limitations of those rights which have been newly recognized under WCT.

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

The Bill, in Clause 13, introduces certain purposes in the ‘fair use’ clause, Section 12A, which do not appear in the US ‘fair use’ provision in section 107 of its Copyright Act, nor in the current ‘fair dealing’ provisions of the Act, namely:

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

There is no indication that either the DTIC or the Portfolio Committee took the Three-Step Test into account in developing and adapting the ‘fair use’ provision in the new Section 12A and the new copyright exceptions in Sections 12B, 12C(b), 12D, 19B and 19C, together with their expanded application as a result of the contract override clause in new Section 39B. This failure causes South Africa coming into conflict with its obligations under the Berne Convention and TRIPs, and also that South Africa will not be ready to accede to WCT and WPPT.

**The Experts’ advice to the Portfolio Committee also demonstrated that “education” and “teaching”, in their generic sense, is not the proper subject matter for a “special case” under the Three-Step Test.** Indeed, the Berne Convention makes special provision elsewhere for exceptions for specific educational purposes, namely

in [Berne Convention Article 10](#) for “**illustration [...] for teaching**” and in the Appendix, where there is a special dispensation for developing countries relating to making of reproductions and translations.

Turning to specific exceptions in the Bill, DALRO is of the view that at least the following provisions will not meet the requirements of the Three-Step Test:

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

### 2.3. The compulsory licences in Schedule 2 of the Bill and the Berne Appendix

Schedule 2 of the Bill contains the compulsory licences for translation and reprographic reproductions that find their origin in the Appendix to the Berne Convention. These are special rules that are only available to developing countries.

The deviations of Schedule 2 from the explicit text of the Appendix and its incorporation by the amended Section 23(3) of the Act (which is meant to deal with the formalities of assignments and exclusive licences) are material errors in the conceptualisation and drafting of these provisions, leaving the Bill non-compliant with the Berne Convention in this respect.

**In her advice to the Portfolio Committee, Ms Michelle Woods of WIPO showed how Schedule 2 could be anchored in the new Section 12B. This advice was not adopted.**

It also has to be determined whether South Africa can avail itself of the benefits of the Appendix, specifically whether the country qualifies to make a notification in terms of Article 28(1)(b) of the Berne Convention.

#### **Recommendation**

- **South Africa’s Department of Foreign Affairs should seek advice from the TRIPS COUNCIL on whether or not South Africa may avail itself of the notification referred to above.**

### 2.4. Extending the ‘digital rights’ to computer programmes and compliance with WCT

Computer programmes are deemed to be literary works under Berne and WCT, and WCT therefore requires the ‘digital rights’, namely the exclusive rights of ‘communication to the public’ and ‘making available’ to be extended at least to computer programmes. This does not appear in the Bill.



**DALRO notes with satisfaction that these proposals have been accepted and welcomes the changes to provisions of software and published editions.**

#### 2.5. Enforcement of the 'digital rights' by criminal sanction

There remains no consequential amendment to the criminal sanction provision in Section 27 following the introduction of the exclusive rights of 'communication to the public' and 'making available', which applies to all other unauthorised exercise of the other exclusive rights with guilty knowledge. This omission has been drawn to the Portfolio Committee's attention, but not dealt with, with no explanation.

#### 2.6. The obligations of National Treatment for foreign authors, artists and performers in respect of uses of works in South Africa

**The consequences of the obligations under National Treatment, to which South Africa is bound under the Berne Convention and TRIPs, and which also appear in WCT, WPPT and the Beijing Treaty, do not seem to have been considered** in devising Sections 6A, 7A and 8A or their predecessors in the Original Bill (which were provisos to the exclusive rights in Sections 6, 7 and 8).

Under National Treatment, the rights of copyright legislated in South Africa must apply equally to the nationals of other treaty countries as it does to nationals of South Africa. The obligations of National Treatment are:

- Article 5(3) of the Berne Convention: "[W]hen the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors." The obligation of National Treatment applies to WCT in the same terms under Article 3 of WCT.
- Article 3(1) of TRIPs: "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement."

With Sections 6A and 7A applying to rights created where an author owns the copyright and assigns it, then, under National Treatment, those rights must apply equally to South African authors and to authors of all treaty countries, currently those who are members of Berne and TRIPs.

The consequence of the application of National Treatment to Sections 6A and 7A as read with Section 39B is that foreign authors who have authorised rights of use or assigned copyright to South African persons under South African law, will have an unwaivable claim against the South African rightsholders and against South African collecting societies (in terms of the new Section 22D(1)(b) and (c) and 22D(2)(b) specifically naming authors as beneficiaries of collecting society distributions in addition to copyright owners).

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

There is no policy statement foreseeing this outcome. The policy statements in the SEAIS Report and the Memorandum of Objects are clearly aimed at protecting the interests of South African authors and performers in their transactions in relation to their work.

#### 2.7. Provisions relating to technological protection measures in both Bills

The definitions of ‘technological protection measure’ and ‘technological protection measure circumvention device’ are insufficient to meet the requirements of Article 15 of WCT, Article 18 of WPPT and Article 15 of the Beijing Treaty, which all require “adequate legal protection.”

The proposed text in para (b) of the definition of ‘technological protection measure’ indicates that all processes, etc. capable of controlling non-infringing uses are exempt from the concept, but 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 of Section 27, as it is to be amended by the Bill.

The definition of ‘technological protection measure circumvention device’ focusses on whether a device is ‘primarily’ designed, produced or adapted for the purpose of circumvention. This will create loopholes for infringers, in that the definition is inadequate if the device is still deliberately designed with such a purpose as a feature.

The new subsection (5A) for the infringement provision, Section 27, does not completely fulfil the requirements of Article 11 of 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.

In this regard, Section 28O(6) and 28P(1) would seem to be an attempt to reduce the scope of the Electronic Communications and Transactions Act, without formally amending it, an action which, we submit, not only requires the inter-governmental cooperation of the responsible Government Department, but may well have constitutional implications.

The provisions in the exception clause, Section 28P(2), are problematic, in that it legitimises uses of measures circumvention devices simply by notice to the copyright owner. This mechanism is sometimes referred to as giving the user a “licence to hack”. The notion that private users can hack through circumvention devices will create a secondary market for devices and services that precisely enable users to do so. The Bills even envisage contact with third parties for such purposes. This entire scheme is incompatible with the WCT, WPPT and Beijing Treaty (See Agreed Statement to Beijing Treaty on Articles 13 and 15). This is compounded by the broad scope of the new copyright exceptions, especially the ‘fair use’ defence to copyright infringement. The United States undertakes a three-yearly rule-making process for exemptions and this may be a solution for the Bill. However, as it stands, Section 28P(2) undermines the protection afforded by technological protection measures and that may well, too, not be sufficient for the amended copyright legislation to comply with Article 11 of WCT.

Similarly, the threshold for an infringement for circumvention of the *dealing with devices* is still too high, in that it requires that the one offering the devices or service to have known or ought to have known that the they were used to infringe rights. Whereas already the offering of devices or services should constitute a criminal offence. The knowledge of actual use to infringe rights is in practice almost always absent and even

the imputed knowledge standard “should have known” is too high. The mere offering of devices or services should be enough.

These deficiencies apply equally to the new Sections 8E and 8F to be introduced by the Performers Protection Amendment Bill. The definitions of ‘technological protection measure’ and ‘technological protection measure circumvention device’ are incorporated by reference from the Copyright Act, and I suggest a loose-standing set of definitions.

New Section 39(cH) contemplates “prescribing permitted acts for circumvention of technological protection measures”. However, there are a number of errors, since this section cross-refers to Section 28B, where it should be 28P, and Section 28P has no reference to permitted acts “as prescribed.”

## 2.8. Exceptions for the disabled, including the visually impaired, and the Marrakesh VIP Treaty

DALRO refrains at this stage from making comments on Section 19D as the provision is sub iudice before the Constitutional Court the highest Court in such matters in the land.

### **Recommendation**

- **Parliament and the Portfolio Committee should hold off deliberating or adopting wording on Section 19D until such time as the Constitutional Court has made a final ruling. DALRO understands that a hearing has provisionally been set down for as early as 12 May 2022. It would be irrational under the circumstances to proceed with adopting wording that may yet not comply with the demands of the Constitution and international treaty obligations.**

## 2.9. The Africa Growth and Opportunities Act (USA)

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

“(1) (A country that) has established, or is making continual progress toward establishing-- (C) the elimination of barriers to United States trade and investment, including by--  
(i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;  
(ii) the protection of intellectual property”

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

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

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

To the extent that the Bills could be considered by the United States as an undoing of existing intellectual property protection, South Africa will place its beneficiary status under AGOA in jeopardy under Section 104 of AGOA.

## 3. Errors in conceptualisation and drafting of the Bills

3.1. The most notable errors remaining in the Bill, despite the advice of the Panel of Experts, are:

- 3.1.1. The new express rights of remuneration for authors, composers and artists coupled with government regulation, which may well prove unworkable since their conceptualisation and drafting do not take into account the situations applying to multi-author works, nor can they effectively govern works that are compilations of a variety of copyright-protected material from different kinds of copyright works and from different authors.
- 3.1.2. The retention in the Bill of remuneration rights for performers in Section 8A(1) to (4). The topic of remuneration of performers in audiovisual works should be dealt with in the Performers Protection Amendment Bill (in respect of which see para 3.2 below)
- 3.1.3. The 25-year limit on assignments of copyright in literary works is not a true reversionary right, as stated in the Memorandum of Objects, but is attached to the Copyright Act's provisions relating to the *formalities* for deeds of assignment and exclusive licences. This results in not only the relative provision - which is simply a new proviso to section 22(3) - expanding across a wide variety of copyright works for which it was never intended (judging from the recommendations of the Copyright Review Commission), but there are also no substantive provisions that govern the intended reversion of rights, namely the disposition of rights of the copyright owner and the re-acquisition of rights by the original author or authors.
- 3.1.4. The compulsory licences for reproductions and translations in Schedule 2 are linked to the provisions of the Copyright Act dealing with the formalities for licences, instead of being an expansion of the exceptions. Michelle Woods of WIPO offered the solution to correct this mistake, namely by making an appropriate adjustment to one of the proposed exceptions in the new section 12B (which was otherwise not compliant with treaty obligations), yet it was never taken up.
- 3.1.5. The resale royalty right is provided for under the Berne Convention. Its introduction is welcomed, yet some of the provisions must be adapted to make it also apply to traditional and indigenous expressions of culture. For instance, having the orphan works and "out of commerce" exceptions apply to the resale right might cause confusions, especially as also many traditional or indigenous works are bound to be "orphan", in the sense that their actual author(s) may remain unknown. The wording needs to be adapted to avoid confusion when seeking to apply the provision for the benefit of holders of copyright and holders of traditional knowledge and traditional and indigenous expressions of culture.
- 3.1.6. The renaming of "cinematograph films" in the Copyright Act, "audio-visual works", which, with the relative new definition, 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.
- 3.1.7. The transitional provisions. The fact that the Intellectual Property Laws Amendment Act, Act 28 of 2013, has not been brought into operation after 5 years, with no final decision on its fate, compels the need for transitional provisions which are necessarily imperfect.

We draw to the Portfolio Committee's attention that many of the goals of the Intellectual Property Laws Amendment Act relating to traditional works have some overlap with the Indigenous Knowledge Systems Act. How this Act relates to a revised set of CAB and PPAB and how it inter-leaves with remnants of IPLAA in the existing Copyright and Performers Protection Act remains unsolved.

- 3.2. In relation to performers rights, both Bills have been developed in the Portfolio Committee in a way that grant performers co-extensive rights to prohibit certain uses of their performances, exclusive rights to certain uses of their performances, as well as certain remuneration rights.
- The “right to prohibit” in Section 5 (to be amended) is the original performers right introduced by the Performers Protection Act in 1967 and follows the format of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.
  - The exclusive right to be introduced in new Section 3 is a right offered to performers in audio-visual works by the Beijing Treaty.
  - The addition of a remuneration right for performers by Section 8A(1)-(4) in the Copyright Act will have to be measured against Article 11 of the Beijing Treaty, that provides for performers having an exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations **or**, after notification deposited with the Director General of WIPO, a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public.
- 3.3. Considering the extent of the comments on the Bill by the Panel of Experts, the changes made by the Portfolio Committee have by and large not been material, especially inasmuch as they have led to hardly any changes to the copyright exceptions and exceptions allowing uses of technological protection measure circumvention devices.

### **Part C – Additional Shortcomings with a severe risk of making the defective Bills unenforceable because of additional constitutional defects**

#### **1. Selected shortcomings of the Bill**

Part C lists additional provisions that in DALRO’s view present serious challenges that hamper the functioning and correct application of the Bills. **The Bills will fail to provide “adequate and effective” enforcement of copyright legislation. Not providing such enforcement is itself a violation of the TRIPS agreement.**

#### **2. Offences and procedural provisions of the Copyright Commission/ Tribunal**

Many of the provisions that are perhaps meant to be “adequate and effective” enforcement mechanisms, and also meant to make the judicial system and access to justice easier for authors, creators, publishers and producers, are due to poor drafting, vulnerable to be found unconstitutional. This defect would in other words then backfire on the protection of the copyright interests, but not addressing the defect would equally be a violation of constitutional law and tenets of fundamental justice.

### **It is not least also for these severe defects that DALRO has urged the Portfolio Committee to send the Bills back to the drawing table.**

What follow is a list of provisions the Portfolio Committee will need to consider in advancing on a constitutional manner to legislate in the field of copyright law:

**8A. (7) (a)** Any person who intentionally fails to register an act as contemplated in subsection (6)(a), or who intentionally fails to submit a report as contemplated in subsection (6)(b), 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.

**22B** (8) (a) Subject to subsection (7), any person who intentionally gives him or herself out as a 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.

**22C.** (4) (a) Any person who intentionally fails to submit a report to a collecting society as contemplated in subsection (2)(b), 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.

**27.** “(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—

(b) publishes information enabling or assisting any other person to circumvent a technological protection measure with the intention of inciting that other person to unlawfully circumvent a technological protection measure in the Republic; or

(c) circumvents such technological protection measure when he or she is not authorized to do so, shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

(b) by the substitution for subsection (6) of the following subsection:

“(6) A person convicted of an offence under this section shall be liable—

(a) in the case of a first conviction, to a fine **[not exceeding five thousand rand]** or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates or

(b) in any **[other]** case other than that contemplated in paragraph (a), to a fine **[not exceeding ten thousand rand]** or to imprisonment for 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) (a) 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, in respect of all uses to which this Act applies.

(b) If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsection (6), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”

Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing between performers and the copyright owner of audiovisual works for any of the acts contemplated in section 8. It requires the recording and reporting of any act contemplated in section 8 and makes the failure to do so, an offence.

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), (e) or (f) 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.

Clause 25 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation, administration 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.

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 or abuses copyright and technological protection measures.

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 or copyright owner. It also provides for penalties where the convicted person is not a natural person.

Clause 29 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, and 28S in the Act providing for prohibited conduct in respect of technological protection measures and of copyright management information; exceptions in respect of technological protection measures and copyright management information; and enforcement by the commission.

3. Select additional offences and penalties – and their curtailment - that raise treaty compliance and constitutional questions for the Portfolio Committee to resolve:

DALRO agrees that failure to provide returns of usage should be a criminal offence and is an important provision empowering the role of collective management organisations for the benefit of their members. However, the fine proposed for users who do not supply returns in Section 22C(4)(b) (10% of turnover) comes across as very arbitrary, especially considering the administrative nature of the offence. Whilst not expressing a view either way, we ask that expert opinion, perhaps from the Department of Justice, be obtained in respect of all the penalties proposed in the Bill.

We are extremely concerned that rightsholders and collective management organisations will be left without any remedy if these penalty provisions are held to be unconstitutional.

Finally, DALRO also believes that at least outside the field of needletime for sound-recordings, the definition of “royalty” in various sections of the Bills should stick to the ordinary meaning of the term in the industry as a proportion of turnover.



Rightsholders' ability to act against infringers (often done at the behest of authors and performers in the literary publishing and music industries) will be eroded due to:

- the lack of new enforcement provisions equipped to deal with the Internet Age and
- the removal of the right to prevent trade in infringing copies.

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### Conclusion

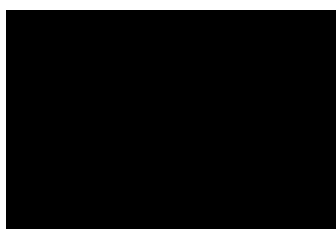
**DALRO has made specific proposals that would remove the worst excesses from the defective Bills. Yet, DALRO believes that South Africa and its peoples deserve much better than being rid of "worst excesses" in a legislation that will define the cultural sector and the South African cultural identity and mark on the world stage. South Africa can and must do, and frankly deserves much better.**

DALRO applauds the South African Parliament and the Portfolio Committee for doubling down on working towards a first rate Copyright Act that is up to date and passes national and international muster.

DALRO hopes that if Members of the PC take the time to read through the present submission, they will concur that the defective Copyright Bills that have been remitted and re-tagged is a task of Augean proportion. It is beyond the scope of what the PC can do by committee drafting. **Either through members Bills or even better through the provision of a roadmap the PC could oversee the drafting of a fresh piece of legislation that would meet with the aspirations and potential of South Africa's creative people.**

DALRO suggests that, in order to achieve this objective in good time, the PC would be well-advised to define a roadmap with stakeholder consultations to feed into a group of copyright experts to completely redraft the Copyright Bills.

DALRO is ready to engage in the goal of improving South Africa's legislation in the fields of copyright and performers' rights, and looks forward to being able to participate in any public hearings and future consultations, at national and provincial level.



### Background on DALRO

DALRO, is a multi-purpose copyright collective management agency and rights broker established in 1967, which administers various aspects of copyright on behalf of authors, artists and publishers.

DALRO's main areas of administration are reprographic reproduction rights (from published editions), public performance rights (including stage rights for book musicals and dramas), management of film rights granted by authors, and reproduction rights (for both publishing and copying) in works of visual art.

DALRO is a full member of the International Federation of Reproduction Rights Organizations (IFRRO), as are copyright collective management associations from many other countries in the world.

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**Annexures:**

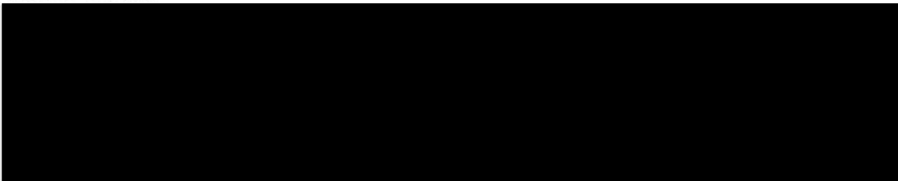
- CCSA LETTER OF 29 NOVEMBER 2021 TO THE LATE RIGHT HONOURABLE DUMA NKOSI, CHAIRMAN (AS HE THEN WAS) OF THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY



**COPYRIGHT COALITION OF SOUTH AFRICA NPC**

29 November 2021

Portfolio Committee on Trade Industry and Competition  
c/o The Honourable Mr. Duma Nkosi, Chair  
Parliament of the Republic of South Africa  
CAPE TOWN



za:

Dear Honourable Nkosi

**Response from the Copyright Coalition of South Africa (CCSA) to proposals by the Parliamentary Legal Adviser for changes to the Copyright Amendment Bill, No B13 of 2017**

The CCSA and its membership continue to follow closely the process for the development of the Copyright Amendment Bill, as well as the Performers Protection Amendment Bill.

It is notable from the proceedings that your Committee is committed to ensure that legislation is passed that will stand up both to public concerns in the Section 76 process and to constitutional challenge, and that such an outcome is reached before these Bills are tabled with the National Council of Provinces. Your Committee's members have pointed out the complexities in the Bills and the Parliamentary Legal Adviser concurred with these views, stating there are several 'grey areas'.

We have noted your Committee's consideration of a list of changes to the Bills that was tabled by the Parliamentary Legal Adviser at the meeting on 24 November 2021. We are taking the liberty of writing to your Committee in advance of its scheduled meeting on 30 November 2021 to again offer our support, to respond to the tabled changes inasmuch as they relate to the Copyright Amendment Bill.

The observations and comments that follow in the section "Comments by the Copyright Coalition of South Africa on the text proposals for changes to the Copyright Amendment Bill tabled by the Parliamentary Legal Adviser on 24 November 2021" from p.3 onwards, are by no means exhaustive but point out the complexity of this legislation and the difficulty faced by the Committee in ensuring the resulting Bills are well drafted.



We again offer to present to you the state of copyright law and the immediate needs for amendment in a workshop format, as the CCSA and its predecessor, the Copyright Alliance, have offered since the Bills were first introduced in 2017.

We also trust that the exposition set out below will inform your Committee on the changes proposed by the Parliamentary Legal Adviser, and how the need for a proper review of the Copyright Amendment Bill has now become all the more important.

Yours faithfully



Chola Makgamathe

**COPYRIGHT COALITION OF SOUTH AFRICA**

The Copyright Coalition of South Africa has as its members Academic and Non-Fiction Authors of South Africa (ANFASA), Animation SA, Audio Militia, the Academy of Sound Engineering, Composers Authors and Publishers Association (CAPASSO) Dramatic Artistic Literary Rights Organisation (DALRO), The Independent Black Filmmakers Collective (IBFC), Independent Producers Organisation (IPO), The Music Publishers Association of South Africa (MPASA), The Publishers Association of South Africa (PASA), PEN Afrikaans, Printing SA (PIFSA), Recording Industry of South Africa (RiSA), RiSA Audio Visual (RAV), Southern African Music Rights Organisation (SAMRO), Trade Union for Musicians of South Africa (TUMSA), the Visual Arts Network of South Africa (VANSA), and Writers Guild SA.

**Comments by the Copyright Coalition of South Africa on the text proposals for changes to the Copyright Amendment Bill tabled by the Parliamentary Legal Adviser on 24 November 2021**

*Relevant background set out in our Open Letter of 15 November 2021*

The CCSA and its members, that are widely representative of creators of copyright works and businesses that support and invest in them, are concerned that the proposed changes tabled by the Parliamentary Legal Adviser and other changes raised by the Minister for Trade Industry and Competition and the DTIC, will not go to the heart of the problems with the Bill.

In our Open Letter of 15 November 2021 and also in our earlier letters of 24 August 2020 and 9 May 2021, we expressed concerns about misleading and false information put before your Committee after the Bill was referred back to the National Assembly by the President, and about the partiality and privileged access of the academics that have been advising your Committee, the previous Committee, and the Minister, with the resultant bias in the development of the Bill.

Of specific relevance to our comments in this letter are the repeated statements the Minister's response to the consultation of July and August 2021 that it is based on advice he received. The Minister's response discloses that that advice came from Dr Schonwetter of the UCT IP Policy Unit, amongst others. The CCSA has strongly objected to Dr Schonwetter's continued presence as an adviser in its Open Letter for the reasons stated there.

***Introduction***

The purpose of copyright is to provide creators of written and other works with the power to exercise control over the commercial exploitation of their works. The rationale is to place them in a position to derive material benefits from the fruits of their labour in creating original works, thus providing them with a means of deriving income and incentivizing them to create more and better works for the benefit of all.

The copyright system in South Africa has been accused of not working for creators, especially with the dawn of democracy and advancement in technology. The Copyright Review Commission's report of 2011 cites the poverty of musicians evidenced by the recurring phenomenon of seemingly successful musicians dying poor (Simon 'Mahlatini' Nkabinde being named as someone who had passed away in such circumstances).

All serious stakeholders in the process for the development of the Copyright Amendment Bill and the Performers Protection Amendment Bill, the CCSA and its members included, are unanimous that the Copyright Act must be updated and improved to better the position of our creators and performers.

South Africa is a mine of creativity. The local and international communities are keen to engage our creators but can only do so through an enabling policy environment. The digital era, with its fast pace, requires that our domestic policies are fit-for-purpose, informed by competent economic impact assessments and aligned with international best practices, to bolster the protection of our creators from new forms of exploitation that would result from the unfair and unremunerated uses of their works, and thereby ensure that our policies do not pose unintended obstacles for investment.

The problem with the Bill is that it is entangled in *other* factors that are not to the benefit of creators, namely the proposals for expansive exceptions to copyright, notably the ‘fair use’ clause. There was no proper socio-economic impact assessment, no legal evaluation, and no policy foundation of these other factors before the Bill was introduced. That directly led to the constitutionality of these copyright exceptions being questioned, which is still weighing heavily on the deliberations of your Committee today.

Copyright exceptions do not help creators. Copyright exceptions are what the dictionary meaning of the word “exception” implies, namely an exception to a rule. In the case of copyright, the rule is that permission is required for “uses” and “re-uses” of a work to allow the creator or the copyright owner to ask for remuneration. The so-called “uses” and “re-uses” of their works in circumstances where these exceptions apply, are instances where third parties may make copies, publish, perform, broadcast, etc, their works without permission and therefore without compensation. Once the new “digital rights” are introduced by amending legislation, these instances will extend to the distribution and online communication of their works by third parties, again without permission or remuneration.

There are many cases where copyright exceptions are justified, as already appear in the current Act, and there is justification for other exceptions, both to cater for the new “digital rights” and for specific public-good purposes. However, the copyright exceptions in the Bill, including in the ‘fair use’ clause and its late introduction of the words “such as”, have no prior socio-economic impact assessment that back them and they go way beyond what can be justified. The changes proposed by the Parliamentary Legal Adviser belatedly recognise that many of the new exceptions have to be scaled back.

***The persistence with the Bill’s expansive copyright exceptions that weaken copyright contradicts the publicly-stated object of benefitting creators***

We wish to again bring it to the Committee’s attention that there has been confusion, some of it deliberate, between the benefit of copyright for creators on the one hand and the true purpose of copyright exceptions contained in the Bill on the other.

In April 2016, the former Minister for Trade & Industry, Dr Rob Davies, announced in Parliament that “The Copyright Amendment Bill will be tabled in Cabinet for approval on 18 May 2016; and in Parliament on July 2016. When the legislative process is completed, the creative industries, in particular the music sector, will greatly benefit.”

However, through the rest of 2016 and up to the introduction of the Bill to Parliament in May 2017, DTI presentations stated that “users” would benefit. The concept of “users” was first understood as being a reference to creators as users of the rights of *copyright*, but when the Bill was introduced to Parliament in May 2017, it became clear that this meant third-party users of copyright *works*. This is illustrated by Dr Schonwetter’s presentation to the former Committee in June 2017 when he presented copyright exceptions as “users’ rights” – a concept that is alien to South African law. Nevertheless, many in the public were initially confused by the term ‘fair use’, being under the misimpression that this was about ‘being fair to authors’, whereas in fact it is the name of an exception to copyright. During 2018, proponents of the Bill re-cast the exceptions as provisions that would benefit creators and “recreators”, coinciding with the establishment of the pro-Bill lobby group RecreateZA. This presentation of copyright is an extreme view that has no support amongst creators of copyright works or amongst the

industries that invest in them, yet this view has become embedded in the advice that your Committee and the Minister is receiving, to the exclusion of more prevalent and mainstream points of view.

We believe that this effort to convince legislators and the public that copyright exceptions are somehow beneficial to creators, has led to the confusion surrounding the contested provisions in the Bills to this day. We are concerned that implementing this advice by the National Assembly adopting this Bill, even with the changes proposed by the Minister and the Parliamentary Legal Adviser to date, will result in continued challenges to the Bill in the legislative process in the NCOP and the Provinces, and even new challenges as to its constitutionality thereafter.

Since 2017, the Copyright Coalition and its predecessor, the Copyright Alliance, have consistently referred to the disconnect between the laudable object of the Bill to improve the conditions of creators, and the reality that creators will be more vulnerable than before due to these copyright exceptions.

***Response to specific text proposals for changes to the Copyright Amendment Bill tabled by the Parliamentary Legal Adviser***

With this background, we turn to the text proposals for changes tabled by the Parliamentary Legal Adviser on 24 November 2021.

On the face of it, the changes proposed by the Parliamentary Legal Adviser are material and positive, covering a number of points made by various stakeholders.

However, many of these points had already been raised by the Panel of Experts of the former Committee in October 2018. The previous Committee's advisers could have recommended these changes then, but they did not do so. Some of these points were errors and oversights in the Bill that the DTIC and the Parliamentary Legal Adviser knew about and must have known about before the Bill was first passed by the National Assembly. They have only belatedly recognised these errors and oversights. One can therefore only speculate about the extent of the detrimental impact that the Bill would have had on the legal framework for South African copyright if the President had signed it and not referred it back to the National Assembly for concerns about constitutionality and treaty compliance.

***Retention of 'fair use'***

The Minister's answer in response to consistent criticism of the 'fair use' provisions – based on advice he received from Dr Schonwetter, amongst others - was that 'fair use' is not unconstitutional and that it is treaty compliant. With respect, this does not answer the criticism of the most controversial clause in the entire Bill.

The Minister's answer can only apply in respect of the classic formulation of 'fair use' as appears in Section 107 of the US Copyright Act. However, the submissions conclusively show that Section 12A departs materially from the classic formulation. To call the difference between Section 12A and the existing fair dealing exceptions "relatively mundane" is, with respect, misleading, and echoes a similar statement made by Dr Schonwetter in his document entitled "Opinion" handed in to the previous Committee in October 2018 (that was also referred to in the Minister's answer).



It should also be noted that, despite the extensive references to the 2014 report of the Australian Law Reform Commission, Australia has neither adopted ‘fair use’ nor introduced legislation to do so.

In any event, the question of this consultation was not whether ‘fair use’ – which can only refer to its classic formulation – is constitutional and treaty compliant or not. The ‘fair use’ clause was the subject of a special consultation to enquire whether the insertion of the words “such as” is desirable or good law. Considering the extent of the concerns raised by the CCSA, its members, and others, such as Prof Karjiker and the SA Institute of Intellectual Property Lawyers, and by members of the previous Committee’s Panel of Experts in 2018, the Minister’s answer is, with respect, unpersuasive.

Despite the large number of changes that the Parliamentary Legal Adviser proposes to make, including to Section 12A, these changes avoid touching the ‘fair use’ concept. The proposed changes include a cutting-back of specific ‘purposes’ in the ‘fair use’ clause on the basis that the Bill has other exceptions covering those purposes, but then the four ‘fair use factors’ are proposed to be introduced there.

The introduction of the ‘fair use factors’ are proposed not to be advertised on the assertion that “the Bill was drafted as a fair use hybrid – fair use should permeate the exceptions.” This statement is incorrect. The first time the copyright exceptions were described as a “hybrid model based on fair use” in the previous Committee was on 31 May 2018, one year after the Bill had been introduced. Far from being a policy statement or a basis on which the exceptions were drafted, the “hybrid model” is actually an after-the-fact rationalisation of these expansive copyright exceptions in the absence of socio-economic impact assessment, legal evaluation and a cogent policy statement.

We comment on the specific text proposals in the table on the next pages under the following headings:

- Changes proposed in respect of the copyright exceptions
- Other proposals for changes tabled by the Parliamentary Legal Adviser
- Proposals for changes raised by the Minister
- Errors in the Bill falling outside the scope of the consultation.

Changes proposed in respect of the copyright exceptions	CCSA Comments/recommendations
<p>1. <u>No real change to the ‘fair use’ provision, new Section 12A, the effect of which is now proposed to be extended to new Sections 12B, 12C, 12D, 19B and 19C</u></p> <p>There is no change to the ‘fair use’ principle, which is the most controversial provision in the entire Bill. The proposed changes that delete some of its ‘fair use purposes’ apply only where the Bill already has an expansive exception for those purposes, which will now also be subject to the ‘fair use factors’.</p> <p>There are material differences between the Bill’s ‘fair use’ clause and the ‘fair use’ affirmative defence to copyright infringement that applies in the United States:</p> <ol style="list-style-type: none"> <li>The expanded list of purposes – many of which are not recognised as cases warranting the fair use defence in the United States – and their extension by the later introduction of the words “such as” in the introductory sentence. This applies even after adoption of the proposed changes to Section 12A, in that “proper performance of public administration” is not a ‘fair use purpose’ in the United States.</li> <li>The factor of “<i>substitution</i> effect of the act on the potential market for the work” (our emphasis) instead of the classic formulation “the effect of the use on the impact on the potential market” in the four-factor test. There is simply no precedent for this anywhere in the world.</li> </ol> <p>These material differences disadvantage South African creators and copyright owners even more than the classic fair use formulation.</p>	<p>Even if the ‘fair use’ concept is to be retained:</p> <ul style="list-style-type: none"> <li>The case for retaining the words “such as” in Section 12A does not stand up to scrutiny and these words must be deleted.</li> </ul> <p>The legislation in Uganda, a country that has a ‘fair use’ provision, may be instructive here. It has an expanded list of ‘fair use purposes’, but it is a closed list and the words “such as” do not appear. (Section 15 of its Copyright and Neighbouring Rights Act, 2006.)</p> <ul style="list-style-type: none"> <li>If a case for an exception or other relief for “proper performance of public administration” can be made out, this should be covered in a separate exception that has still to be drafted.</li> <li>The factor “substitution effect of the act on the potential market for the work” must be replaced with “the effect of the use on the impact on the potential market”.</li> </ul>

<p>2. <u>Making the fair use factors applicable to other exceptions (new proposed Section 12A(d) changing new Sections 12B, 12C, 12D, 19B and 19C)</u></p>	<ul style="list-style-type: none"> <li>The proposed new Section 12A(d) must not be proceeded with.</li> </ul> <p>See item 1 above, particularly the reservations about the untested factor of “substitution effect”, that may well prove to be extremely damaging for creators in the online environment.</p>
<p>3. <u>Transient copies (new Section 12C)</u></p> <p>The adaptation of works for use on different technological devices (para (b) of new Section 12C) does not belong in this provision.</p>	<ul style="list-style-type: none"> <li>If sub-para (b) is removed, there is no need for the proposed new Section 12C(2).</li> </ul> <p>See for instance section 43A of the New Zealand Copyright Act 1994.</p>
<p>4. <u>The addition of the Three-Step Test wording to the education exception and the insertion of a new exception permitting reproduction of other copyright material in “a publication, broadcast, sound or visual record for the purpose of teaching” (Section 12D)</u></p> <p>The naming of all the cases for exceptions in Section 12D as special cases in a new Section 12D(1)(b) does not make any of them a special case as meant by the Three-Step Test of the Berne Convention or TRIPS.</p>	<ul style="list-style-type: none"> <li>The exceptions in Section 12D – as all the other new exceptions - have to be subject to a proper impact assessment and legal evaluation.</li> <li>The exception in the proposed new Section 12D(9) should not apply if a licence is available from a collecting society, so that authors or their successors-in-title as copyright owners can be remunerated for the use proposed here.</li> </ul>

Other proposals for changes tabled by the Parliamentary Legal Adviser	CCSA Comments/recommendations
<p>5. <u>Exception for persons with disabilities (new Section 19D)</u></p> <p>The CCSA supports an exception for persons with a print disability and for persons who have other disabilities, and supports South Africa's acceding to the Marrakesh Treaty.</p> <p>The proposed changes bring Section 19D and its related definitions closer to the requirement of the Marrakesh Treaty. However, the Marrakesh Treaty only benefits persons who are blind or who have a visual impairment (under the "beneficiary" definition of that treaty), and the works that may be reproduced, imported and exported are published literary works.</p> <p>Inasmuch as the disability exception proposes to benefit other persons with disabilities, it must meet the requirements of the Three-Step Test of the Berne Convention and TRIPS. With its mingling of Marrakesh Treaty terms of "accessible format copy" and "authorized entity" in an exception benefitting all disabled persons, it is not clear that it does so.</p> <p>Ms Michele Woods of the World Intellectual Property Organization, who was a member of the Panel of Experts for the previous Committee, in essence recommended in her advice of October 2018 that this exception be entirely redrafted for reasons she set out in detail.</p> <p>We agree with Ms Woods' advice, and we consider that simply adapting Section 19D as it now stands will not achieve the object of a provision that will fully leverage all the benefits of the Marrakesh Treaty for persons with print disabilities, nor provide an effective exception for persons with other disabilities.</p>	<ul style="list-style-type: none"> <li>• More attention must be given to drafting a cogent exception for persons with a disability. This will require going to the drawing board and rewriting the exception in a way that contains both for Marrakesh Treaty provisions to benefit persons who have print disabilities and an exception for persons with other disabilities.</li> </ul> <p>Our recommendation assumes that the Government will expeditiously commit to acceding to the Marrakesh Treaty.</p> <p>The legislation of Singapore (Sections 206 -220 as read with Sections 85 – 90 of its Copyright Act 2021) and New Zealand (Sections 69 – 69D and Sections 89 and 190 of its Copyright Act 1994) may contain useful precedents in this regard.</p>

Proposals for changes raised by the Minister	CCSA Comments/recommendations
<p>6. <u>New Schedule 2</u></p> <p>The Minister noted that “Schedule 2 of the Bill, the compulsory licences for translation and reprints, has its origin in the Appendix to the Berne Convention. The Appendix contains special rules available only to developing countries. However, Schedule 2 departs in material respects from the text of the Appendix and is therefore not compliant with the Berne Convention. Also, Schedule 2 is not introduced into the law under provisions relating to statutory licences, but by amended Section 23(3) of the Act (which deals with the formalities of assignments and exclusive licences). It needs a total redraft.”</p>	<ul style="list-style-type: none"> <li>• The CCSA agrees with this approach. The Bill’s amendment to Section 23(3) is clearly an error.</li> </ul> <p>As an alternative, the relevant amendment of Section 23(3) of the Act and new Schedule 2 should be deleted from the Bill entirely.</p>
<p>7. <u>Resale royalty right (commonly known as the “artists’ resale right”) in new Sections 7B to 7F</u></p> <p>CCSA supports the Minister’s proposal for introduction of the resale royalty right, and notes that it is allowed by the Berne Convention.</p> <p>The Minister stated, “a) In order to comply with Article 14ter of the Berne Convention, Sections 7B to 7F should be recast so as not to confuse the resale royalty right (or, as it is more commonly known, the “artists’ resale right”) with a right of copyright, and that the recast provisions be inserted in a discrete chapter of the Copyright Act. One submission suggests that these recast provisions and their dedicated definitions, ‘art market professional’ and ‘visual artistic work’, appear in a new chapter of the Act, ideally after Section 28 of the Act. b) Article 14ter of the WIPO Treaty states that the author, or after his or her death the persons or institutions authorised by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. It is submitted that this differs from the royalties received by the author for the use of copyright work. Consideration should be given to inserting a similar provision in the Bill to enhance the protection of the author’s interest.”</p>	<ul style="list-style-type: none"> <li>• The CCSA agrees that the “resale royalty right” be retained. It could be renamed the “artists resale right”, to conform with international practice. The changes referenced by the Minister should be made.</li> </ul>

Errors in the Bill falling outside the scope of the consultation	CCSA Comments/recommendations
<p>The Minister, the DTIC and the Parliamentary Legal Adviser, having recognised that the Bill was passed by Parliament in 2019 containing many errors and oversights, have regrettably limited the changes to items that were raised by the President in his reservations as to the Bill's constitutionality and treaty compliance. There are other errors too, however. These errors will no doubt be brought up and emphasised in the processing of the Bill through the NCOP and the Provinces if they were to remain in the Bill.</p> <p>8. <u>Amendment to Section 22(3) of the Act</u></p> <p>The most notable error in this category is the 25-year limit on all assignments of copyright, which was meant to be, and is even described in the Bill's memorandum of objects as, a right of reversion. A right of reversion after a set term is completely different from a term limit on an assignment of copyright. Even a general right of reversion is an unwarranted extrapolation of the recommendation of the Copyright Review Commission that it should only apply to musical works.</p> <p>9. <u>Other errors</u></p> <p>Individual members of the Panel of Experts of the previous Committee raised a number of items that are clearly errors or oversights in the Bill in October 2018. Other errors are referenced in the submission of the SA Institute of Intellectual Property Lawyers of July 2021. Notwithstanding the limitation imposed on the scope of the past consultation, the CCSA encourages the Committee to consider these items now, before it moves to pass the Bill in the National Assembly.</p>	<ul style="list-style-type: none"> <li>• The National Assembly has the power to make changes to correct errors and oversights in the Bill, even if they fall outside the scope of the consultation, and should take this opportunity to do so.</li> </ul> <p>The legal basis for doing so is set out in the CCSA's written submission of July 2021.</p> <p>The CCSA submits that it would not be in the interests of sound copyright law to limit the revisions to the items raised in the President's reservations.</p>