

Written comments on the Copyright Amendment Bill 2017

The Anton Mostert Chair of Intellectual Property Law

The Anton Mostert Chair of Intellectual Property Law (the “Chair”) is an independently financed entity that forms part of the Department of Mercantile Law of the Law Faculty of Stellenbosch University. Further details of the Chair, its objectives and its activities can be obtained from its website, which can be accessed at www.sun.ac.za/iplaw. Its focus is on intellectual property law and achieving excellence in that regard. Accordingly, it can speak with authority on matters pertaining to this field of expertise, and, in particular, in regard to copyright law.

The Chair’s functions include developing intellectual property law in South Africa and playing a role as custodian of this branch of the law with a view to fostering lucid, coherent, fair, up-to-date, effective and high-quality legislation, which is in harmony with the principles of intellectual property law and is compliant with South Africa’s international obligations in that regard.

The Chair has no clients or any private interests that it serves or seeks to benefit. The views that it holds and expresses in regard to matters of intellectual property law are entirely honest and objective. It seeks only to promote and safeguard the integrity and quality of South African intellectual property law with a view to having it compare favourably with the best laws elsewhere in the world, having regard to the South African context. Its goal in pursuing this objective is the welfare of South Africa and all its people.

Background and initial remarks

An amended draft of the 2017 Copyright Amendment Bill was released by the Portfolio Committee on Trade and Industry on 20 June 2018 (the “2018 Copyright Amendment Bill”). The Portfolio Committee on Trade and Industry (the “Portfolio Committee”) has invited interested individuals and stakeholders to submit written comments – initially to be submitted on 9 July 2018, and then extended to 18 July 2018 - and these comments are submitted in response to such invitation.

Given the importance of the proposed changes, the short notice periods given for the submission of written comments have to be condemned in the strongest terms. There is no way in which interested parties could provide well-considered, complete submissions in the time allocated. Thus, the comments below only reflect the most glaring issues. It cannot, therefore, be assumed that provisions that have not been dealt with are entirely free of shortcomings.

Given the passage of this Bill, and continued poor quality of the proposals, it would not be an unfair comment to state that the Portfolio Committee seems to have followed suit where the Department of Trade and Industry (“DTI”) left off, namely, trying to rush through an ill-considered amendment, in a high-handed, and highly-questionable manner. There appears to be no valid reason why the public’s right to submit comments has been limited to specific clauses. Given the fact that most clauses have been materially changed since the 2017 draft Bill, there appears to be no justifiable grounds for such limitation. For example, the Bill now seems, for the first time, to have unambiguously adopted a fair-use approach to the exceptions to copyright protection, despite that system being heavily criticised in the US, from where it originates. There is now ample evidence to suggest

that companies, such as, Google have lobbied for such changes in South Africa and elsewhere, and have paid for “research” to further their cause. It appears that the DTI, and the Portfolio Committee, have been quite prepared to follow a biased agenda. While it is prepared to be “captured” by foreign lobbying, and to foster certain business interests, it appears to pay little heed to the possible economic consequences of its proposals on local copyright owners, publishers and innovation. In fact, while the DTI publicly proclaims to be concerned about the welfare of South African artists, its proposals will only serve to weaken their position against certain business interests, such as, Google with its YouTube service. Accordingly, comments may extend to provisions beyond those indicated for comment by the Portfolio Committee.

The fact that the DTI appears intent on doing untold damage to the integrity of our intellectual property laws with the Intellectual Property Laws Amendment Act, 2013 (“IPLAA”), not only evidences a recklessness that staggers belief, it also proves how government departments continue to work in silos. At the risk of repetition, traditional knowledge or indigenous knowledge (TK/IK) are fundamentally different to that which is sought to be protected by intellectual property law, such as, copyright law. In addition to the damage which IPLAA causes to the intellectual property law framework, it fails to provide TK/IK with specific protection it may warrant. It is high time that the DTI and the Department of Science and Technology, which is preparing draft legislation that covers most of the same field, stop pulling in different directions on this issue.

Given the limited time for comments, it is only possible to submit perfunctory comments. As a results, the comments are also not in the Chair’s more professional, considered form. However, if the above assessment is indeed correct, it is probably not worth spending time and effort in trying to provide more detailed comments anyway, as there is a particularly agenda being pursued, regardless of its merits or the harm it may cause.

The Chair’s comment have been highlighted in yellow. On occasion, the relevant portion of the text which is being commented on has been highlighted in red. In order to help identify the Chair’s comments, should the document be printed in black and white, the Chair’s comments have also been inserted in square brackets, start and end with a double asterisks in the various places, and the comments are prefaced with the term “NOTE”, e.g., [[**NOTE: comment **]].

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Anton Mostert Chair of Intellectual Property Law

REPUBLIC OF SOUTH AFRICA

COPYRIGHT AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75) and redrafted by
the Portfolio Committee on Trade and Industry; explanatory summary of Bill
published in Government Gazette No. 40121 of 5 July 2016)*

(The English text is the official text of the Bill.)

(MINISTER OF TRADE AND INDUSTRY)

[[**NOTE: INTRODUCTION

[1] It is necessary to first make some general observations. Thereafter, comments will be made concerning the specific provision of the Bill itself.

[2] The Intellectual Property Laws Amendment Act, 2013 (hereafter referred to as the “IPLAA” has, as yet, not been brought into operation. Consequently it is not formally on the statute book and has not made any amendments to the Copyright Act, 1978. It is apparently open to doubt whether it will be – and, preferably should not be - brought into operation in the foreseeable future. There are instances (to which attention will be drawn) where the Bill assumes that such amendments have taken place. This is clearly incorrect and must be rectified.

[3] Following on from the previous paragraph, there are currently no references in the Copyright Act to “indigenous communities” nor are any rights conferred on such bodies in it. To the extent that the Bill purports to regulate rights and functions of indigenous communities it is wrong and such anomalies should be eradicated.

[4] The Bill (in the proposed section 5, introducing a new proposed section 6A) creates what is in effect a compulsory licence in respect of certain categories of work pursuant to the assignment of the copyright of that work. Schematically section 6 of the Act deals with the restricted acts applicable to literary and musical works (i.e the exclusive rights which can give rise to infringement claims). Assignments and licences are dealt with specifically in section 22 of the Act. This is where provisions dealing with compulsory licences pursuant to assignments should be dealt with. It is inappropriate to deal with these compulsory licences in an area of the Act that deals with the bundle of rights which constitute copyright in a work.

[5] The “Commission” is referred to in the Act and certain functions are ascribed to it. Nowhere, however, is it mentioned who or what the Commission is. This is presumably another side-effect of IPLAA not having been brought into operation. In the circumstances the Commission should be properly introduced into the Bill, possibly by means of a definition, and it should be provided that it is the body referred to in the Companies Act and has the powers and functions ascribed to it in that Act.

[6] Section 231 of the South African Constitution binds the country to all International Treaties to which it has acceded. Our legislation must thus be consistent with what is

required by such a treaty. South Africa is a member of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) and the Agreement on Trade-related Aspects of Intellectual Property Rights (“TRIPS Agreement”). Both these treaties impose minimum conditions with which member countries and their laws must comply. If our Copyright Act does not comply with the dictates of these treaties, we are in breach of our international obligations and consequently the Act does not comply with section 231 of the Constitution.

Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement both prescribe that in regard to limitations or exceptions to the protection provided to a copyright work they must be *confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder*. (This principle is known internationally as the “**three step rule**”). The legitimate interests referred to include the ability of the copyright owner to exploit his exclusive rights of copyright to make a profit from the use of his work. It will be contended below that as they currently stand the proposed new sections 12A and 12B do not comply with this requirement. In the premises they are unconstitutional and cannot pass muster. They must accordingly be amended to overcome this shortcoming. This issue will be dealt with further below when addressing these sections.

[7] The proposed section 30 and the following sections of the Bill (excluding the new proposed schedules) are in general coherent and well drafted. Their content is in some respects open to debate, but the quality of the draftsmanship is good. However, the same cannot be said of sections 1-29 which contain many blemishes, misconceptions of principle, instances of lack of coherence and inconsistencies. Attention will be drawn to some of these below. These sections ought to be reviewed and where necessary redrafted or deleted. Special mention is made here of the proposed amendments to sections 22(3) and 23(2) of the Act. These proposed amendments are so misguided and damaging to the law that it is difficult to believe that the draftsman thought them through properly or intended them; there appears to be a *faux pas* in both instances. They must definitely not be pursued for the reasons advanced below where these sections are discussed.**]]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for the reproduction of copyright work; to provide for the protection of copyright in artistic work; to provide for the accreditation of Collecting Societies; to provide for the procedure for settlement of royalties disputes; to allow fair use of copyright work; to provide for access to copyright works by persons with disabilities; to provide for the protection of ownership in respect of orphan works; to strengthen the powers and functions of the Copyright tribunal; to provide for prohibited conduct in respect of technological protection measures; to provide for prohibited conduct in respect of copyright management information; to provide for management of digital rights; to provide for certain new offences; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 98 of 1978, as amended by section 1 of Act 56 of 1980, section 1 of Act 66 of 1983, section 1 of Act 52 of 1984, section 1 of Act 13 of 1988, section 1 of Act 125 of 1992, section 50 of Act 38 of 1997, section 1 of Act 9 of 2002, section 224 of Act 71 of 2008 and section 3 of **Act 28 of 2013**

[[NOTE:This Act, IPLAA, has not been brought into operation. See above. This reference is therefore incorrect. As already indicated, IPLAA should never be brought into effect as its provisions are simply damaging of the intellectual property law framework.**]]**

1. Section 1 of the Copyright Act, 1978 (hereinafter referred to as “the principal Act”), is hereby amended—

- (a) by the insertion before the definition of “adaptation” of the following definition:

“ ‘**accessible format copy**’ means a copy of a work in an alternative manner or form which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without disability;”;

- (b) by the insertion after the definition of “artistic work” of the following definition:

“ ‘**audiovisual work**’ means embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which either can be perceived, reproduced or communicated through a device, and includes a cinematographic film;”;

[NOTE: The effect of this definition and the use of the term in the Bill is to create a new category of work eligible for copyright. The term as defined is largely synonymous with “cinematograph film” as defined. However, the definition creates a new *genus* of work of which “cinematograph film” is a *species*. The term “cinematograph film” as currently used in the Act can now have two possible meanings. The term being the equivalent of the new *genus* must be changed to “audiovisual work” while the one denoting the *species* must remain unchanged. The Bill as presently worded will have the effect that when it is operative many of the provisions of the amended Act dealing with cinematograph film will have the limited meaning of the *species* whereas it is probably intended that they should have the wider meaning of the *genus*. This will be at variance with the apparent intention of the Bill.**

Since “cinematograph film” is presently widely defined in the Act (and covers everything that is covered by the new definition) it is probably better to stay with the existing terminology and delete this definition or possibly have it say that it means “cinematograph film” in which case no further changes are necessary.]**

- (c) by the insertion after the definition of “collecting society” of the following definition:

“ ‘**commercial**’ means the obtaining of direct economic advantage or

financial gain in connection with a business or trade;”;

[[**NOTE: Why is the meaning limited to “direct” economic advantage? Surely an activity attaining **any** economic advantage should be considered to be commercial. For instance, distributing free copies of a musical CD, which ultimately leads to a song becoming a hit and, thus, in great demand to be purchased, although not immediately achieving economic advantage, ultimately does so and therefore should be considered to be commercial.

It appears that the attempted definition of “commercial” may simply create grounds for some types of infringing activity to be excused. If this is what is being intended, it is deeply mischievous. This is particular the case in the context of the new proposed fair use provision in the proposed section 12A. For example, when an Internet user uploads infringing content onto YouTube and that user, or Google, potentially earns advertising revenue as a consequence, is that commercial use because the benefit is considered to be “indirect”?

The definition appears to be unnecessary, and the issue of what is commercial should be considered in the context of a particular provision. Accordingly, this definition should be deleted.**]]

- (d) by the insertion after the definition of “community protocol” of the following definition:

[[**NOTE: This term does not currently appear in the Act and the reference to it is a further side effect of IPLAA not being in operation.**]]

“ ‘**Companies Act**’ means the Companies Act, 2008 (Act No. 71 of 2008);”;

- (e) by the insertion after the definition of “copyright” of the following definition:

“ ‘**copyright management information**’ means information attached to or embodied in a copy of a work that—

(a) identifies the work and its author or copyright owner; or

(b) identifies or indicates some or all of the terms and conditions for using the work or indicates that the use of the work is subject to terms and conditions;”;

- (f) by the insertion after the **definition of “National Trust”** of the following definitions:

[[**NOTE: There is currently no such definition in the Act. This is another side-effect of the IPLAA not being in operation.**]]

[[**NOTE: A new definition ‘**primary product**’ should be added. It should read as follows:

“means the completed material embodiment of the work which gives rise to the copyright in it and is an article capable of being sold.”

The purpose of this definition is to distinguish between a physical article embodying a work and the copyright in that work which is an item of intangible property. The relevance of this definition will be discussed below when dealing with the proposed new section 7B, the resale royalty right**]].

“ ‘**open licence**’ means a royalty-free, non-exclusive, perpetual, irrevocable copyright licence granting the public permission to do an act for which the permission of the owner of copyright, or the author, is required;

‘**orphan work**’ means a work in which copyright subsists and the owner of a right in that work—

- (a) **cannot be identified;** or

[[**NOTE: This ought to read: “cannot *reasonably* be identified.” It creates too onerous a standard to make the requirement absolute.**]]

- (b) is identified, but cannot be located;”;

- (g) by the insertion after the definition of “performance” of the following definitions:

“ ‘**performer**’ has the meaning ascribed to it in section 1 of the Performers’ Protection Act, 1967 (Act No. 11 of 1967);

‘**person with a disability**’ means a person who has a physical, intellectual, neurological, or sensory impairment and requires an accessible format copy in order to access and use a work;”;

- (h) by the insertion after the definition of “sound recording” of the following definitions:

“ **‘technologically protected work’** means a work that is protected by a technological protection measure;

‘technological protection measure’—

(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work; **and**

(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;

[[NOTE: The fact that the definition is cumulative makes the second part particularly confusing. Is there TPM technology which both protects the work and allows for non-infringing use? What if the technology does not allow for non-infringing use? Does that mean it is not considered to be a TPM for purposes of the Act?**]]**

‘technological protection measure circumvention device’ means a device primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure;”;

- (i) by the insertion after the definition of **“traditional work”** of the following definitions:

[[NOTE: There is currently no such definition in the Act. This is another side-effect of IPLAA not being in force.**]]**

“ **‘Tribunal’** means the Copyright Tribunal established by section 29;

‘visual artistic work’—

(a) means an **original** artistic work that was created for the purpose of being appreciated by the visual sense and includes a painting, a sculpture, a drawing, engraving and a photograph; **and**

(b) excludes **commercialised** artistic work such as industrial design, works of architecture, engineering drawings, digital or graphic design, fashion design, interior design, circuit layouts, commercial logos and icons for

applications;’’.

[**NOTE: All artistic works are by their very nature **visual**. One cannot have an invisible artistic work within the meaning of this term as defined in the Act. It would appear that the purpose of this definition is to make a distinction between **aesthetic** (and actual, first artwork) and **functional** works. Such a distinction is made in the Designs Act and functions effectively.

The terms ‘original’ and ‘commercialised’ are inappropriate and ineffective to make this distinction. All works **must** be ‘original’ in order to qualify for copyright, and the use of the term in this context is both confusing and ineffective. ‘Commercialised’ is also an entirely inappropriate term to use in this context. An aesthetic drawing, painting or photograph could be commercialised by later selling reproductions or using them on book covers and the like.

This provision is confusing because it is not initially clear what the purpose of the definition is. For example, it was not clear if this was intended to deal with some of the problems associated with section 15(3A). On later reading, it is clear that this definition is solely for the purposes of the resale royalty right. That fact should be made clear.

Incidentally, it is clear that there are no amendments proposed to section 15(3A). This is probably because the DTI and the Portfolio Committee’s “experts” are foreigners, who are not familiar with the provisions and the problems in the current Act, in light of our case law.**]]

Insertion of section 2A in Act 98 of 1978

2. The following section is hereby inserted in the principal Act after section 2:

“Scope of copyright protection

2A. (1) Copyright protection subsists in expressions and not—

(a) in ideas, procedures, methods of operation or mathematical concepts; or

(b) in the case of computer programs, in interface specifications.

(2) A table or compilation which by reason of the selection or arrangement of its content, constitutes an original work, shall be protected as such by copyright.

(3) The copyright protection of a table or compilation contemplated in subsection (2) does not extend to its content.

[[**NOTE: These provisions are unnecessary as their content is already trite in copyright law, as interpreted in case law. By codifying them in the statute they become inflexible and there is an assumption that there is an intention to change the existing law, which does not appear to be the case. Unwanted confusion is thus created. This is particularly the case in relation to (3). An anthology of poems is a compilation, but that does not mean that each poem (i.e., the content) is not protected. This is the type of problem which can be encountered when trying to codify matters which are clearly understood, but cumbersome, and unnecessary, to define.**]]

(4) No protection shall—

(a) extend to an expression—

(i) inextricably merged with an idea such that the idea can be expressed intelligibly only in one or a limited number of ways; or

(ii) when the particular expression is required by law; or

[[**NOTE: The effect of this provision is that it determines that no copyright ever existed or will ever exist in the work in question. This is very far reaching. If the requirement by the law comes about some time after the work is made, it will amount to a deprivation of existing property. If the work is later no longer required by law, copyright cannot at that stage be created afresh. A better approach would be to make this an exception from copyright infringement. This presupposes that the work enjoys copyright but it is free for use for as long as it is required by law. When the work is no longer required, the exemption can be removed and the copyright status of the work is at all times unaffected.**]]

(b) subsist in—

(i) official texts of a legislative, administrative or legal nature or in official translations of those texts; or

(ii) speeches of a political nature, in speeches delivered in the course of legal proceedings or in news of the day that are mere items of press information: Provided that the **maker** of the speeches referred to in this subparagraph shall have the exclusive right of making a collection of the speeches in question.”.

[NOTE: What if the speech was written by someone else?**]**

Amendment of section 5 of Act 98 of 1978, as amended by section 5 of Act 52 of 1984 and section 5 of Act 125 of 1992

3. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or **[such]** an international **or local** **[organizations]** organisation as may be prescribed.”.

[NOTE: This is a bad provision. What is a local organisation, as distinct from the state (which is a broad term including all aspects of government)? Why should the normal rules not apply to non-state and non-international organisations? The Western Province Rugby Union would no doubt be a local organisation. Is there any good reason why the same rules should apply to it as apply to the state? Clearly not! This provision should be changed.**]**

Amendment of section 6 of Act 98 of 1978, as amended by section 3 of Act 56 of 1980 and section 6 of Act 125 of 1992

4. Section 6 of the principal Act is hereby amended—

(a) by the insertion after paragraph (e) of the following paragraphs:

“(eA) communicating the work to the public by wire or wireless means;

(eB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person;” and

(b) by the substitution for paragraph (g) of the following paragraph:

“(g) doing, in relation to an adaptation of the work, any of the acts specified **[in relation to the work]** in paragraphs (a) to [(e)] (eB) inclusive.”.

Insertion of section 6A in Act 98 of 1978

5. The following section is hereby inserted in the principal Act **after section 6:**

[**NOTE: See above regarding where this section should appear in the Act, assuming that it is wanted at all. The same principle applies to sections 7A, 7B, 7D, 7E and 8A of the Bill. Likewise the comments made below in regard to this section apply equally to the other specified sections. All of these sections could be consolidated into a single section, if dealt with, in the proper part of the Act. In this way unnecessary duplication and prolixity could be avoided. The foregoing would be a further good reason why the principle involved here should be dealt with in the part of the Act dealing with assignments and licences generally.]

The proposed section was not in the 2017 draft Bill, but it was not listed as one of the sections on which written comments could be made. This illustrates the arbitrary nature in which the decision to limit comments to specific provisions has been made.**]]

“Royalties regarding literary or musical works

6A. (1) Notwithstanding the **assignment** of the copyright in a literary or

[[**NOTE: This section in effect constitutes a compulsory licence in favour of an assignor. What about the case where the copyright owner grants an exclusive licence, which in practical (commercial) effect is virtually the same as an assignment?

On a point of principle, why should a copyright owner (author) not be able to assign his copyright in return for a lump sum payment? What if the new owner does not intend to charge for access to the copyright work, and simply seeks to make the work available by way of an open licence (given the affection shown by the drafters of the Bill for open licences), or wishes to donate the work to the public domain? On what basis will a royalty be calculated?

The section encroaches on the principle of freedom of contract between parties and is going to be very difficult to implement in practice. Assignments are often in respect of the world-wide copyright and it is most unlikely that parties will be willing to go into this degree of detail for one country (very few, if any other countries have similar provisions in their laws). In practice, the provision is likely to be ignored. It should be scrapped.**]]

musical work the **author** shall have the right to a percentage of any royalty received by

[[**NOTE: What about the situation where the author is not the initial owner of the copyright, such as where the work is made in the course of employment and the copyright vests initially in the employer. In this case there would be no assignment by the author or any of his successors in title. See sub-section (2)(b). The section thus incorporates inherent anomalies.**]]

the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 6.

(2) (a) The royalty percentage contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the author and the person to whom the author is assigning copyright, or between their representative collecting societies.

(b) Any subsequent assignment of the copyright in that work is subject to the agreement between the author and the assignee, contemplated in paragraph (a), or the order contemplated in subsection (3), as the case may be.

(3) Where the author and assignee contemplated in subsection (2)(a) cannot agree on the royalty percentage, the author or assignee may refer the matter to the Tribunal for an order determining the percentage.

(4) The agreement contemplated in subsection (2)(a) must include the following:

(a) The rights and obligations of the author and the assignee;

(b) the royalty percentage agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid by the assignee to the author;

(d) a cooling off period; and

(e) a dispute resolution mechanism.

(5) (a) A person who obtained the copyright in a literary or musical work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement negotiate a percentage

of royalty as contemplated in subsection (1) with the author of the copyrighted literary or musical work in question.

[[**NOTE: This is a preposterous provision. It, in effect, seeks to give this provision retrospective effect, and requires parties to renegotiate agreements that were possibly concluded years ago.**]]

(b) Subsections (2), (3) and (4) apply to the negotiation contemplated in paragraph (a).

(c) Section 22A, with the necessary changes, applies where the author cannot be found.

(d) This subsection does not apply—

(i) to a copyright owner who commissioned, or who is the author of, the copyrighted literary or musical work in question; or

[[**NOTE: The meaning and effect of this paragraph is unclear. The possibilities include a party having to pay himself royalties! It seems as though an assignment by both the commissioner of a commissioned work and the author of that work are not subject to the requirement that any assignment must be subject to the compulsory licence. The author is not the initial copyright owner and cannot therefore assign the work. The commissioner cannot contract on behalf of the author. It is not clear why this position should be different to an employee-made work as discussed above. The paragraph requires to be re-thought and revised.**]]

(ii) where the term of copyright in the copyrighted literary or musical work has ended.”.

[[**NOTE: When the copyright has expired there is no right to licence and this paragraph is thus tautologous. **]]

Amendment of section 7 of Act 98 of 1978, as amended by section 4 of Act 56 of 1980 and section 7 of Act 125 of 1992

6.

(a) by the insertion after paragraph (d) of the following paragraphs:

“(dA)communicating the work to the public by wire or wireless means;

(dB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person;”; and

(b) by the substitution for paragraph (f) of the following paragraph:

“(f) doing, in relation to an adaptation of the work, any of the acts specified [in relation to the work] in paragraphs (a) to [(d)] (dB) inclusive.”.

Insertion of section 7A, 7B, 7C, 7D and 7E in Act 98 of 1978

7. The following sections are hereby inserted in the principal Act after section 7:

[NOTE: See comments made in respect of proposed section 6A.**]**

“Royalties regarding artistic works

7A. (1) Notwithstanding the assignment of the copyright in an artistic work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 7.

(2) (a) The royalty percentage contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the author and the person to whom the author is assigning copyright, or between their representative collecting societies.

(b) Any subsequent assignment of the copyright in that work is subject to the agreement between the author and the assignee, contemplated in paragraph (a), or the order contemplated in subsection (3), as the case may be.

(3) Where the author and assignee contemplated in subsection (2)(a) cannot agree on the royalty percentage, the author or assignee may refer the matter to the Tribunal for an order determining the percentage.

(4) The agreement contemplated in subsection (2)(a) must include the following:

(a) The rights and obligations of the author and the assignee;

- (b) the royalty percentage agreed on, or ordered by the Tribunal, as the case may be;
- (c) the method and period within which the amount must be paid by the assignee to the author;
- (d) a cooling off period; and
- (e) a dispute resolution mechanism.
- (5) (a) A person who obtained the copyright in an artistic work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement negotiate a percentage of royalty as contemplated in subsection (1) with the author of the copyrighted artistic work in question.
- (b) Subsections (2), (3) and (4) apply to the negotiation contemplated in paragraph (a).
- (c) Section 22A, with the necessary changes, applies where the author cannot be found.
- (d) This subsection does not apply—
 - (i) to a copyright owner who commissioned, or who is the author of, the copyrighted artistic work in question; or
 - (ii) where the term of copyright in the copyrighted artistic work has ended.

Resale royalty right regarding visual artistic works

7B. (1) The author of a visual artistic work in which copyright subsists must be paid royalties on the commercial resale of his or her work

[NOTE:** This paragraph evidences a fundamental misconception. In the Act the term **work** denotes the intellectual (intangible) item of intellectual property which is the subject of the copyright. That work must be embodied in a material form, e.g. a book, a piece of canvas or paper or the like. The material embodiment (e.g. the canvas carrying a painting) constitutes two separate and distinct items of property, namely, the intellectual property (copyright), and the tangible piece of physical property (the canvass to which paint has been applied, possibly in a frame). When the painting is sold, the transaction entails the transfer of ownership of the physical property. A sale of the item of physical property does not encompass the transfer of the copyright subsisting in the painting; that can only be accomplished by the

assignment of the copyright in a written agreement.

This section contemplates and regulates the sale of the item of physical property. What it is intended to say is that each and every time the item of physical property (that is, the piece of canvas carrying the painting as a work) is sold, a proportion of the proceeds of such sale should be paid to the author of the copyright work. This principle is commonly referred to internationally as the author's *droit de suite*.

In dealing with the definitions section of the Bill, it was said that a new definition of the term 'primary product' should be introduced and wording for such definition has been proposed. The primary product refers to the completed material embodiment of the copyright work, i.e. the canvass carrying the painting. This section is concerned with the sale of the **primary product**. It is incorrect to refer in the section to the re-sale of the **work** because the section does not deal with the transfer of the copyright in the item of intellectual property.

The royalty in question should be paid to the author by the seller of the primary product, upon the sale being concluded, and this should be specifically stated in the section.

To the extent that actual legal principles matter, the artists' resale royalty right, strictly speaking, is not a copyright matter, and should not be in the Copyright Act, but a separate piece of legislation. There is no "joint" ownership of copyright or licensing of copyright when someone simply purchases a piece of art from an artist.**]]

(2)(a) Royalties in respect of [visual] **the sale of the primary product of an aesthetic artistic work[s]** shall be payable at the rate prescribed by the Minister after consultation with the Minister responsible for arts and culture.

[[**NOTE: The terminology used here should be used throughout the section and the necessary changes should be made wherever pertinent. In regard to the substitution of *aesthetic* for *visual*, see my comments above in connection with the proposed definition of *visual artistic work*.**]]

(b) The Minister must, before prescribing the rate referred to in paragraph (a), publish the rate proposed in the *Gazette* and call for written comments by any interested party to be provided within 30 days after

publication.

- (c) The Minister may from time to time in the manner contemplated in paragraph (b), **increase** the prescribed rate contemplated in paragraph (a).

[[NOTE: Why not “adjust”? Why is it restricted to increases? The Minister may wish to “zero-rate” it in the future.**]]**

- (3) The **author** of a visual artistic work shall be entitled to receive a resale royalty if—

[[NOTE: The words ‘or his or her heirs’ should be inserted here for obvious reasons.**]]**

- (a) at the time when the resale is concluded—

(i) the author is a South African citizen or is legally domiciled or resident in the Republic or is a citizen of a designated country; and

(ii) the term of validity of the resale royalty right has not expired;

- (b) in the case of a deceased author, the deceased was at the time of death a South African citizen or was **resident in the Republic**;

[[NOTE: Or designated country?]**]**

- (c) the resale or any part of the transaction takes place in the Republic or in any country contemplated in Article 1 of the Berne Convention for the Protection of Literary and Artistic Works; and

- (d) the resale of the work is recognisable after the commencement of section 9 of the Copyright Amendment Act, 2019.**

[[NOTE: The meaning and intention of this provision is incomprehensible. The suggestion is that this provision should have retrospective effect. It should be revised.**]]**

- (4) A resale royalty right applies whether or not the author was the first owner of any copyright in the work.**

[[NOTE: This provision suggests that the royalty right also applies to works which were created, for example, during an employment relationship, or to commissioned works. If the intention is that we should be providing reciprocal**

protection in respect of this right, it is not clear that this right is so broadly construed in other jurisdictions.**]]

(5)(a) The Minister may designate any country for the purposes of subsection (3)(a)(i) by notice in the *Gazette*.

(b) The Minister may by notice withdraw any designation contemplated in paragraph (a).

(6) Sections 7B, 7C, 7D and 7E apply to a visual artistic work that was made before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic work falls within the application of this Act.

Proof of author

7C. (1) Where a mark or name purporting to identify a person as the author of a visual artistic work appears on such work, that person is, in the absence of evidence to the contrary, presumed to be the author of such work.

(2) If a visual artistic work—

(a) is a work of more than one author, the presumption in subsection (1) applies to each co-author of such visual artistic work; or

(b) includes indigenous cultural expressions or knowledge the relevant indigenous community is entitled to an equitable share in the resale royalty payable.

[[**NOTE: Who is to determine whether a work contains an indigenous cultural expression and which community is to benefit? The costs of this exercise will erode any benefit which an artist may benefit from. This provision amply demonstrates the minefield which needs to be navigated when blurring the lines between copyright protection and TK/IP. It also seeks to give any TK/IP provisions retrospective effect, which is highly problematic. It is reiterated that the Act currently makes no provision for TK or for “indigenous communities and this paragraph is accordingly in any event meaningless.**]]

Duration of resale royalty right

[[**NOTE: In terms of the proposed section 7B(1) copyright must subsist in the work in order that the resale royalty right might be applicable. The corollary of this

is that if the copyright expires there is no resale royalty right. In the premises the logical and practical approach would be to have the duration of the resale royalty right be coterminous with the duration of the copyright. In any event the duration prescribed in this section approximates largely with the term of the copyright and it would be a lot simpler to merely state that the right expires when the copyright in the work expires. If the resale royalty right were to outlast the copyright term this would be in conflict with section 7B(1); there is no good reason why the duration of the resale right should be shorter than the duration of the copyright.**]]

7D. (1) The resale royalty right of an author of a visual artistic work expires at the end of the period of 50 years calculated from the end of the calendar year—

- (a) in which the author concerned died; or
- (b) in the case of more than one author, in which the last of the known authors died.

(2) In the case of a visual artistic work created by an unknown author—

- (a) the resale royalty right in that work expires at the end of the period of 50 years calculated from the end of the calendar year in which the work was first made available to the public; or
- (b) where the identity of the author becomes known at a later stage, the resale royalty right of that author expires in accordance with the period contemplated in subsection (1).

Transmission of resale royalty right

7E. (1) A resale royalty right may not be alienated, save for transmission on the death of the holder of the right by testamentary disposition; or by operation of law.

(2) In the case of a bequest of a visual artistic work by an author who did not assign copyright in that work in his or her lifetime, the bequest must be read as including the resale royalty right.

[**NOTE: Why is this still limited to a bequest? It should apply to any form of succession for the relevant right.**]]

(3) If resale royalties are recovered by a collecting society or an indigenous community after the death of a holder of a resale royalty right, those resale royalties

must be treated as part of the estate of the deceased holder.

[[**NOTE: The existing Act makes no reference, and grants no rights, to an indigenous community. This is another side-effect of the IPLAA not being in operation. These words should accordingly be deleted. Moreover, it suggests that an artist's estate may have to be left open until this right terminates, which is preposterous. Thus, this provision needs to be revised.**]]

(4) A resale royalty right may not be assigned or waived and any assignment or waiver of a resale royalty right is unenforceable.’’.

Substitution of section 8 of Act 98 of 1978, as amended by section 5 of Act 56 of 1980, section 6 of Act 52 of 1984, section 1 of Act 61 of 1989 and section 8 of Act 125 of 1992

8. The following section is hereby substituted for section 8 of the principal Act:

“Nature of copyright in [cinematograph films] audiovisual works

[[**NOTE: See the comments above in regard to the definition of ‘audiovisual works’

Since it is apparent that the existing category **cinematograph film** is to be replaced by a new category **audiovisual work**, all references to ‘cinematograph film’ in the Act, where the term is used as a *genus*, must be replaced by ‘audiovisual work’. This has not been done. In particular, it is essential in section 2(1)(d) of the Act. Where an existing use of ‘cinematograph film’ is use in the context of a species of audiovisual work (e.g. sections 26(9) and 43(b) of the Act), the term must be retained.**]]

8. (1) Copyright in **[a cinematograph film]** an audiovisual work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the **[film]** work in any manner or form, including making a still photograph therefrom;
- (b) causing the **[film]** work, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
- (c) broadcasting the **[film]** work;
- (d) causing the **[film]** work to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including

the **[film] work**, and is operated by the original broadcaster;

(dA) communicating the work to the public by wire or wireless means;

(dB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person;

(e) making an adaptation of the **[film] work**;

(f) doing, in relation to an adaptation of the **[film] work**, any of the acts specified in relation to the **[film] work** in paragraphs (a) to [(d)] **(dA)** inclusive;

[[NOTE: Should this not be (dB)?**]]**

(g) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the **[film] work**.”.

[[NOTE: This should be inserted immediately after (dB) and then the provisions concerning adaptations should be inserted, with reference to the full range of rights.**]]**

Insertion of section 8A in Act 98 of 1978

9. The following section is hereby inserted in the principal Act after section 8:

“Royalties regarding audiovisual works

[[NOTE: See the comments above in regard to royalties in respect of literary and musical works, i.e., the proposed section 6A.**]]**

8A. (1) Notwithstanding the assignment of the copyright in an audiovisual work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 8.

(2) (a) The royalty percentage contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the author and the person to whom the author is assigning copyright, or between their representative collecting societies.

(b) Any subsequent assignment of the copyright in that work is subject to the agreement between the author and the assignee, contemplated in paragraph (a), or the order contemplated in subsection (3), as the case may be.

(3) Where the author and assignee contemplated in subsection (2)(a) cannot agree on the royalty percentage, the author or assignee may refer the matter to the Tribunal for an order determining the percentage.

(4) The agreement contemplated in subsection (2)(a) must include the following:

(a) The rights and obligations of the author and the assignee;

(b) the royalty percentage agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid by the assignee to the author;

(d) a cooling off period; and

(e) a dispute resolution mechanism.

(5) (a) A person who obtained the copyright in an audiovisual work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement negotiate a percentage of royalty as contemplated in subsection (1) with the author of the audiovisual work in question.

(b) Subsections (2), (3) and (4) apply to the negotiation contemplated in paragraph (a).

(c) Section 22A, with the necessary changes, applies where the author cannot be found.

(d) This subsection does not apply—

(i) to a copyright owner who commissioned, or who is the author of, the copyrighted audiovisual work in question; or

(ii) where the term of copyright in the copyrighted audiovisual work has ended.”.

Amendment of section 9 of Act 98 of 1978, as substituted by section 2 of Act 9 of 2002

10. Section 9 of the principal Act is hereby amended—

(a) by the substitution for paragraph of the following paragraph:

“(e) communicating the sound recording to the public by wire or wireless means[.];”; and

(b) by the addition after paragraph (e) of the following paragraph:

“(f) making the sound recording available to the public by wire or wireless

means, so that any member of the public may access the sound recording from a place and at a time chosen by that person.’’.

Substitution of section 9A of Act 98 of 1978, as inserted by section 3 of Act 9 of 2002

11. The following section is hereby substituted for section 9A of the principal Act:

‘Royalties regarding sound recordings

[NOTE: See the comments above in regard to royalties in respect of literary and musical works, i.e., the proposed section 6A.**]**

9A. (1) (a) In the absence of an agreement to the contrary or unless otherwise authorised by law, no person may, without payment of a royalty to the owner of the relevant copyright—

- (i) broadcast[,] a sound recording as contemplated in section 9(c);
- (ii) cause the transmission of a sound recording as contemplated in section 9(d); or **[play]**
- (iii) communicate a sound recording to the public as contemplated in [section 9(c), (d) or (e) without payment of a royalty to the owner of the relevant copyright] section 9(e).

(aA) Any person who **performs** an act contemplated in section 9(c), (d) or (e) must—

[NOTE: The term ‘performer’ is defined in to mean a performer as defined in the Performers Protection Act. It is used in this context in the Act and in the Bill. See for instance paragraph (b) of this section below.**

In the context highlighted above, ‘perform’ has a different meaning, namely ‘undertakes’ or ‘does’. What is contemplated is the person who broadcasts, diffuses or communicates a sound recording. This is not a ‘performer’ under the Performers Protection Act. It is bad drafting to use a defined term in a different context with a different meaning. It is likely to cause confusion and uncertainty. Accordingly the word ‘performed’ should here be replaced by ‘undertakes’.]**

- (i) register that act in the prescribed manner and form; and
- (ii) submit a report to the performer, copyright owner or collecting society, as the case may be, in the prescribed period and manner, for the purpose of calculating the royalties due and payable by that person.

[[**NOTE: In order to clarify the situation and to avoid confusion, the words 'whose performance is featured on the sound recording' should be added after 'performer'.**]]

- (b) The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, the indigenous community, or between their **[representative]** collecting societies.

[[**NOTE: The Act does not recognise indigenous communities nor does it grant any rights to them. These words should therefore be deleted. This is another side-effect of the IPLAA not being in operation. The same applies to the use of this term in sub-section (2)(a) below.**]]

- (c) In the absence of an agreement contemplated in paragraph (b), the user, performer or owner may in the prescribed manner refer the matter to the **[Copyright]** Tribunal **[referred to in section 29(1)]** or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

[[**NOTE: Given the fact that the dispute may involve a foreigner, does that then involve a cross-border situation, requiring resolution under the new legislation dealing with international commercial arbitration?**]]

- (2)(a) The owner of the copyright, collecting society or indigenous community who receives payment of a royalty in terms of this section shall ensure that [share] such royalty is equally shared between the copyright owner and [with] any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).

[(b) The performer's share of the royalty shall represent fair and equitable remuneration determined by an agreement between the performer and the owner of copyright, or between their representative collecting societies.

(c) In the absence of an agreement contemplated in paragraph (b), the performer or owner may refer the matter to the Copyright Tribunal referred to in section 29(1), or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).]

(d) Any payment made by the user of the sound recording in terms of this subsection shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).

(3) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.

(4) (a) Any person who intentionally fails to register an act as contemplated in subsection (1)(aA)(i), or who intentionally fails to submit a report as contemplated in subsection 9A(1)(aA)(ii), shall be guilty of an offence.

[[NOTE: Bearing in mind the severe penalties that can be imposed for non-compliance with this requirement, this provision is unduly draconian as it currently reads. A disc-jockey who plays recorded music at a party or at a church fete, possibly for no charge, would fall within the ambit of this provision. With respect, it is excessive to make such a person potentially liable to five years imprisonment if he fails to register or report the music played at such an event. One can understand the justification for such a provision in the case of a radio station and the like, but to inflict such consequences on a private person is unreasonable. It is suggested that some appropriate exceptions should be made to this rule.**]]**

(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 year immediately preceding the calculation, under all transactions to which this Act applies.”.

[[**NOTE: It is not clear what would be covered by the highlighted portion.**]]

Substitution of section 11 of Act 98 of 1978

12. The following section is hereby substituted for section 11 of the principal Act:

“Nature of copyright in programme-carrying signals

11. (1) Copyright in programme carrying signals vest the exclusive right to undertake, or to authorize, the—

(a) direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic;

(b) communication of the work to the public by wire or wireless means;

(c) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person.”.

Repeal of section 12 of Act 98 of 1978

13. Section 12 of the principal Act is hereby repealed

[[**NOTE: Section 12 is repealed but not replaced. The next following section will be section 12A. Why does this not become section 12? It deals with substantially the same subject matter as the present section 12.**]]

Insertion of sections 12A, 12B, 12C and 12 D in Act 98 of 1978

14. The following sections are hereby inserted in the principal Act after section 12:

“General exceptions from copyright protection

12A. (1) (a) In addition to uses specifically authorised, fair use in respect of

a work or the performance of that work, for purposes such as the following.

NOTE: The Copyright Act does not protect **performances**. That is the province of the Performers Protection Act. Fair use in respect of a work covers all the restricted acts for literary works included in section 6 and the corresponding sections for other categories of work. So, for instance it will cover reproducing, publishing, performing, broadcasting etc. the work. It is therefore unnecessary and wrong to make specific reference to performance as that creates the anomaly that an exemption is given in the Copyright Act to performances protected under the Performers Protection Act.

The examples given of fair use preceded by the words ‘such as’ causes the section to give the court an extremely wide discretion to exempt any uses of whatsoever nature of a copyright work. This is very far reaching and will probably make our range of exemptions from copyright infringement one of the widest in the world. The situation is aggravated by the proposed new section 12B which provides for yet further mandatory exemptions that are over and above the discretionary exemptions in section 12A. The net result is that tremendous uncertainty is created as to precisely what a copyright owner can actually prevent. This uncertainty is no-one’s benefit (except those who have been lobbying for it, such as, Google) and is likely to give rise to considerable litigation. The lobbying for the adoption of fair use is motivated by spurious research.

Internationally countries generally give exemptions, subject to limitations, in respect of fair use of works according to the discretion of the court, or, alternatively to a circumscribed list of activities in respect of which fair dealing is permitted. The Bill goes very far in adopting both of these principles side-by-side. This approach is not supported, and the Bill should make a choice between the two competing systems, not implement both of them.

Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement state that members may allow exceptions to the copyright owner’s rights **in certain special cases**, provided such exceptions do not *conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author*. South Africa is bound by this provision, the so-called ‘three step rule’, and is **obliged** to apply this principle in our copyright law. The unfettered discretion provided in this section must perforce be limited by this principle and it should be

specifically stated in the section as a qualification or limitation of the fair use doctrine. Neither the DTI, nor the Portfolio Committee has provided any basis to suggest that the adoption of fair use is in compliance with South Africa's treaty obligations. On the contrary, it has been rejected in the UK, Australia, New Zealand and the EU. Currently, it has only been adopted by five countries, despite the lobbyists' claims of "international" acceptance. The DTI and the Portfolio Committee are being misled, or are now willingly accepting these spurious claims. Simply questions need to be asked. Who is seeking this change, and why? Therein lies the answer to the lobbying.

The fact that the public is not allowed to comment on this entirely new approach speaks volumes for the credibility of this process.**]]

does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
 - (ii) criticism or review of that work or of another work;
 - (iii) reporting current events;
 - (iv) scholarship, teaching and education;
 - (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
 - (vi) preservation of and access to the collections of libraries, archives and museums; and
 - (vii) ensuring proper performance of public administration.
- (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
- (i) the nature of the work in question;
 - (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
 - (iii) the purpose and character of the use, including whether—

(aa) such use serves a purpose different from that of the work affected; and

(bb) it is of a **commercial** nature or for non-profit research, library or educational purposes; and

[[**NOTE: This is an instance in which the definition of “commercial” becomes potentially problematic.**]]

(iv) the substitution effect of the act upon the potential market for the work in question.

(c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.

Specific exceptions from copyright protection applicable to all works

[[**NOTE: Attention is drawn to my reference to the three-step rule in the comments above on section 12A. Those comments apply equally to the instant section.

This section corresponds to some extent with the present section 12 of the Act, but with one important difference. Before the existing section 12 exempted these sorts of activities it was necessary for the potentially infringing acts to be used in a manner that was a ‘fair dealing’ (in essence this is the embodiment of the three step rule). This introduced a measure of discretion on the part of the court as to whether an exemption should be granted. **Fairness** or reasonableness was the criterion. The proposed section has removed the element of fairness from the equation and the exemptions provided for will be absolute. This is an extremely retrogressive step and it is to be condemned. It renders the section contrary to the three-step rule. For instance (and this is but one of many examples) paragraph (1)(i) allows the making of a personal copy of a work for non-commercial purposes without qualification and irrespective of whether the individual acts reasonably, fairly or otherwise. In other words, the individual can 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 own copy. If every potential reader of a book was to adopt this approach (which is contemplated by the section), the author’s entire market would be destroyed. This renders the whole purpose of copyright nugatory. Such conduct is clearly

unreasonably prejudicial to the legitimate interests of the copyright owner. This shortcoming must be rectified. These exemptions have to be qualified by reasonableness or fairness!**)]]

12B. (1) Copyright in a work shall not be infringed by any of the following acts:

(a) Any quotation: Provided that—

(i) the extent thereof shall not exceed the extent reasonably justified by the purpose; and

(ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;

(b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;

(c) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;

(d) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;

- (e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—
- (i) the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;
 - (ii) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; and
 - (iii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;
- (f) the translation of such work by a person giving or receiving instruction: Provided that—
- (i) such translation is not done for **commercial** purposes;
- [[**NOTE: Again, it may now be acceptable to make an unauthorised free translation and to benefit therefrom indirectly.**]]**
- (ii) such translation is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes only; or
 - (iii) such work is translated and communicated to the public for non-commercial purposes;
- (g) the use of such work in a *bona fide* demonstration of electronic equipment to a client by a dealer in such equipment;
- (h) the use of such work is for the purposes of judicial proceedings or preparing a report of judicial proceedings; and
- (i) the making of a personal copy of such work by an individual for the

individual's personal use and made for ends which are not **commercial**.

[[NOTE: See earlier comments concerning this problematic definition.**]]**

(2) For the purposes of subsection **(1)(j)**, permitted personal uses **include—**

[[NOTE: There is no subsection (1)(j) in the proposed Bill. Presumably paragraph (i) is what is intended. The use of the word 'include' means that the list of examples is not exhaustive and is in fact unlimited. See the comments above on paragraph (i).**]]**

(a) the making of a back-up copy;

(b) time or format-shifting; or

(c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.

(3) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.

[[NOTE: What is the purpose of this provision?**]]**

(4) An authorisation to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.

(5) The provisions of subsection (1)(d) and (e) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

(6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other assignment of ownership of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy.

[[NOTE: This sub-section is incomprehensible in its present form and should be**

re-drafted.

Presumably what is intended is to make provision for the so-called First Sale Doctrine. On this assumption, what the sub-section should say is something along the following lines:

The first sale of an article in any country by, or with the authority of, the copyright owner in respect of a work embodied in it shall enable that article to be imported into the Republic and to be resold or otherwise disposed of, without infringing that copyright and irrespective of any right of copyright held by any person in that work.

Of course, there is an even simpler solution to deal with the problem of parallel importation, and that is to amend section 23(2) of the Act. However, it does require the drafter to know what the law in South Africa currently is!**)]]

Temporary reproduction and adaptation

12C. (1) Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—

- (a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or
- (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.

Reproduction for educational and academic activities

12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose.

[[**NOTE: This sub-section is very badly worded and contains mixed and incorrect use of terminology, which make its interpretation uncertain and difficult. It ought to read along the following lines:

a person may make a reproduction of a work, or may broadcast it, for the purposes of educational and academic activities; provided that the extent of the reproduction

*or of the portion broadcast does not exceed the bounds of what can reasonably be justified**]]*

(2) Educational institutions may incorporate the [copies] reproductions made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.

(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal [issue] comprising copyright material, [for a recording of a work], unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.

[[**NOTE: The Act makes no reference to indigenous communities and confers no rights on them. This is a further side-effect of the IPLAA not being in operation. This reference should be deleted.**]]

(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—

(a) where the textbook is out of print;

(b) where the owner of the right cannot be found; or

(c) where authorised copies of the same edition of the text book are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.

(5) The right to make copies in terms of this section shall not extend to reproductions for commercial purposes.

(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.

[[**NOTE: The ‘instruction’ should be taking place at a recognised educational institution.

‘Incorporate’ is not a restricted act under copyright. ‘Reproduce’ which is, should be substituted for it. The effect of an exemption is to authorise the performance of a restricted act under copyright.

‘Assignment’ has a recognised specific meaning in copyright law, namely to transfer the ownership of copyright. It should not be used in this context as it is misleading and can cause confusion.**]]

(7)(a) The author of a scientific or other [contribution] work, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, [has the right] may, despite granting [the publisher or editor an] the exclusive right of publication to another, [use, to] make the [final] unpublished manuscript version of it available to the public under an open licence or by means of an open access institutional repository.

[[**NOTE: The wording of this sub-section is not acceptable and evidences confusion of terminology; it should be changed as indicated. **]]

(b) In the case of a [contribution] work published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author’s right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.

[[**NOTE: The latter part of the paragraph should by reason of its inadequacy be amended to read:

the exercise of the author’s right referred to in paragraph (a) may by agreement with the holder of the publication right be delayed for up to 12 months from the date of first publication.

The impact on the viability of South African academic publishing needs to be properly investigated. Of course, the great beneficiary of this type of provision is Google Scholar, who has not invested in the academic output which it seeks to benefit from.**]]

(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.

[[**NOTE: This paragraph should by reason of its inadequacy be amended to read:

*When the unpublished manuscript version of the work is made available to the public in terms of paragraph (a), due acknowledgement of the published edition of it must be made by the author.**]]*

(d) **Third parties**, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.

[[**NOTE: When “third parties” is, in effect, Google Scholar?**]]

(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.

(8) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (5).’’.

Amendment of section 15 of Act 98 of 1978, as amended by section 2 of Act 13 of 1988 and section 13 of Act 125 of 1992

15. Section 15 of the principle Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) The copyright in an artistic work shall not be infringed by its [inclusion] use in [a cinematograph film or a television broadcast or transmission in a diffusion service] another work, if—

(i) such [inclusion] use is merely by way of background, or incidental, to the principal matters represented in [the film, broadcast or transmission] that other work; or

(ii) the artistic work so used, is situated in a public place.

(b) The copyright in an artistic work shall not be infringed by the issue to the public of copies, or the communication to the public of anything, whose making was by virtue of this subsection not an infringement of the copyright.’’.

Amendment of section 16 of Act 98 of 1978, as substituted by section 14 of Act 125 of 1992

16. Section 16 of the principal Act is hereby amended by the deletion of subsection (1).

[[**NOTE: This section should be amended to refer to ‘audiovisual works’ in lieu of ‘cinematograph films’.**]]

Repeal of section 17 of Act 98 of 1978

17. Section 17 of the principal Act is hereby repealed.

Repeal of section 18 of Act 98 of 1978

18. Section 18 of the principal Act is hereby repealed.

Repeal of section 19A of Act 98 of 1978

19. Section 19A of the principal Act is hereby repealed.

Insertion of sections 19C and 19D in Act 98 of 1978

20. The following sections are hereby inserted in the principal Act after section 19B:

“General exceptions regarding protection of copyright work for libraries, archives, museums and galleries

19C. (1) A library, archive, museum or gallery may, without the authorisation of the copyright owner, use a copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work is not used for commercial purposes.

(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.

[[**NOTE: This activity is not restricted by copyright in any event and consequently no exception is required. The sub-section should be deleted**]]

(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.

(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means

of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work for commercial purposes.

[[**NOTE: This activity is not restricted by copyright in any event and consequently no exception is required. The provision should be deleted.**]]

(5) A library, archive, museum or gallery may make a copy of —

(a) any work in its collection for the purposes of back-up and preservation;
and

(b) a publicly accessible website for the purposes of preservation.

(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery.

(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from ageing or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.

[[**NOTE: The passage is redundant and should be deleted as it may cause confusion. First, the point has already been made in sub-section (1) and does not need to be repeated. Second, it is not made in the other relevant sub-sections and this makes the current sub-section different for no good reason. This will give rise to serious issues of interpretation of the section.**]]

(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act, 1997 (Act No. 54 of 1997).

(9) A library, archive, museum or gallery may make a copy of a copyright work when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.

[[**NOTE: The Act makes no reference to indigenous communities nor does it confer any right on such a body. This is a side-effect of the 2013 Amendment not being in force. The words should be deleted.**]]

(10) Notwithstanding any other section, a library, archive, museum or gallery

may buy, import or otherwise acquire any copyright work that is legally available in any country.

[[**NOTE: This is most inelegant and unusual drafting. The conventional, and better, expression would be to substitute it with ‘the provisions of this Act’.**]]

(11) A library, archive, museum or gallery may reproduce in any format any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for preservation, research or any other legal use.

(12)(a) A library, archive, museum or gallery may make a copy of any copyright work and make it available to another library, archive, museum or gallery or for public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.

(b) A library, archive, museum or gallery contemplated in paragraph (a) may also, for the purposes of that paragraph—

(i) take and show a photograph of such work or show video footage of such work;

(ii) create other images such as paintings of buildings; or

(iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place.

(13)(a) Subject to paragraph (b), a library may supply to any other library a copy of a copyright work in its collection, whether by post, fax or secure digital transmission.

(b) The receiving library, archive, museum or gallery must delete any digital file received from the other library, archive, museum or gallery immediately after supplying the person who has requested it with a digital or paper copy of the work.

[[**NOTE: The highlighted passage creates a necessary exception in favour of the despatching library; it is authorised to make a reproduction of a

work. However, the receiving library also makes a reproduction of the work and requires a similar exception in its favour. This should be provided. The way the sub-section currently reads, it would seem that an obligation is placed on the sending library to ensure that the receiving library carries out the requirements of paragraph (b) and the sending library's exemption is conditional upon this being done. If this is the intention it should be stated more clearly.**]]

(14) An officer or employee of a library, archive, museum or gallery acting within the scope of his or her duties, shall be protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—

[[**NOTE: The highlighted text is contorted and should be replaced by:

absolved from infringing copyright provided the task

If the the activity does not constitute copyright infringement there can be no question of damages or criminal liability being incurred and reference to them is redundant and confusing.**]]

- (a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or
- (b) the copyright work, or material protected by related rights, is in the public domain or licensed to the public under an open licence.

[[**NOTE: If the work is in the public domain there is no copyright and it is incorrect to make reference to 'the copyright work'. The Act only protects copyright and not 'related rights' (whatever this may mean) and the reference to them is inappropriate and should be deleted. The highlighted text should simply be replaced by 'work'.**]]

(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in sections 12 and 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.

[[**NOTE: Section has been deleted by the Bill!**]]

General exceptions regarding protection of copyright work for persons with disability

19D. (1) Any person or an organisation that serves persons with disabilities may, without the authorisation of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

- (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;
- (b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and
- (c) the activity under this subsection must be undertaken on a non-profit basis.

(2)(a) A person with a disability, or an organisation that serves persons with disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the owner of the copyright work, reproduce the work for personal use.

(b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.

(3) A person with a disability or an organisation that serves persons with disabilities may, without the authorisation of the copyright owner export to or import from another country any copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person or organisation.

(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.”.

Amendment of section 20 of Act 98 of 1978, as substituted by section 19 of Act 125 of 1992

21. Section 20 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) Notwithstanding the **[transfer] assignment** of the copyright in a **[literary,**
[[NOTE: This provision comes from Art. 6(bis) of the Berne Convention and it**
uses the term ‘transfer’. It is the better term as ‘assignment’ has a narrower meaning
and does not cover other forms of transfer of ownership such as by operation of law
or by testamentary disposition, which should be covered. The amendment should be
cancelled.]]**

musical or artistic work, in a cinematograph film or in a computer program]
work, the author shall have the right to claim authorship of the work, subject to the
 provisions of this Act, and to object to any distortion, mutilation or other
 modification of the work where such action is or would be prejudicial to the honour
 or reputation of the author: Provided that an author who authorizes the use of his or
her work in a sound recording or **[cinematograph film or a television broadcast]**
audiovisual work or an author of a computer program or a work

[[NOTE: Why delete ‘television broadcast’? It is appropriate that this type of**
work should be covered. It makes sense that ‘cinematograph film’ should be
replaced by ‘audiovisual work’ but the latter term does not include a ‘television
broadcast’; it should therefore be specifically stated.]]**

associated with a computer program may not prevent or object to modifications
 that are absolutely necessary on technical grounds or for the purpose of commercial
 exploitation of the work.

(2) Any infringement of the provisions of this section shall be treated as an
 infringement of copyright under Chapter 2, **[and] except that**, for the purposes of
 the provisions of the said Chapter, the author shall be deemed **[to be] to have the**
right to complain of infringement of the provisions of this section, rather than the
 owner of the copyright in question.”.

Amendment of section 21 of Act 98 of 1978, as substituted by section 9 of Act 56 of 1980

22. Section 21 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of **[a cinematograph film]** an audiovisual work or the making of a sound recording and pays or agrees to pay for it in money or money’s worth, and the work is made in pursuance of that commission, **[such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4]** the ownership of any copyright subsisting in the work shall, subject to subsection (3), be governed by agreement between the parties.”;

[NOTE: What is the purpose of this provision, given the fact that subsection (e) already permits parties to amend the preceding default positions in section 21? What is the position is there is no agreement between the parties?**]]**

- (b) by the substitution for subsection (2) of the following subsection:

“(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international **or local** **[organization]** organisation concerned, and not in the author.”; and

[NOTE: These words are non-sensical and should be deleted. See the comments above relating to section 5 of the Act.**]]**

- (c) by the addition after subsection (2) of the following subsection:

“(3) (a) The agreement contemplated in subsection (1)(c) may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission.

(b) Where the agreement contemplated in subsection (1)(c) does not specify who the copyright owner is, limited ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to such rights as

may be necessary for the purpose of the commission.

(c) The author of a work contemplated in subsection (1)(c) may approach the Tribunal for an order—

(i) where the work is not used by the copyright owner for the purpose commissioned, licencing the author to use that work for such purpose, subject to a tariff determined by the Tribunal payable to the copyright owner; or

(ii) where the work is used for a purpose other than that for which it was commissioned, ordering **the copyright owner** to make payment of royalties to the author for such other use.

[[**NOTE: The scheme that is provided for in connection with commissioned works is that, save as otherwise provided in an agreement, the commissioner will only be the owner of the copyright in respect of those activities which are necessary for enabling the purpose of the commission to be fulfilled. The author will be the copyright owner in respect of all other activities. This is the default position in other words.

Paragraph (ii) contemplates that in the default position the commissioner uses the work in manners falling outside the scope of the purpose of the commission (i.e. in relation to activities for which the author is the copyright owner). It provides that in this situation the commissioner must pay royalties to the author, which is logical because he is in effect operating in terms of a licence for those activities. The paragraph is in the circumstances erroneous in saying that it is the **copyright owner** who should pay the royalties (the author is in these circumstances the copyright owner). The reference to ‘copyright owner’ should be replaced by ‘commissioner’.

This provision could be simplified by incorporating the provisions of (b) into 21(c) and leaving the rest for parties to determine by contract.**]]

(d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the

following:

- (i) The nature of the work;
 - (ii) the reason why, and period for which, the copyright right owner did not use the work; and
 - (iii) public interest.
- (e) Where the work contemplated in subsection (1)(c) is of a personal nature to the copyright owner, the Tribunal may not licence the author to use that work.’’.

Amendment of section 22 of Act 98 of 1978

23. Section 22 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

“(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law: Provided that copyright owned by **vested in or under the custody of** the state may not be assigned.’’;

[NOTE: In terms of section 5 of the Act, the state can own copyright. There are, however, no circumstances provided for in the Act where, other than owning copyright, the state can be **vested** with copyright or have **custody** over copyright. I surmise that this might be some misconceived allusion to a provision of the IPLAA which is not in operation with the result that the provision is not on the statute book. The highlighted words should be deleted.**

Also, it is not clear why there is a blanket prohibition on assignment of copyright by the state. Would it not be beneficial to give the state unfettered copyright?]**

- (b) by the substitution for subsections (3) and (4) of the following subsections, respectively:

“(3) No assignment of copyright **in a literary or musical work by an author to a publisher**, and no exclusive licence to do an act which is subject to copyright **in such work** shall have effect unless it is in writing and signed by or on behalf of the assignor, the **[licenser]** licensor or, in the case of an exclusive **[principal act]** sub-licence, the exclusive **[sub- licensor, as the case may be]** sub-licensor, **as stipulated in Schedule 2**:

[NOTE: The highlighted passages should be deleted as they are preposterous.**

The effect of the passages is to allow verbal or unwritten assignments and exclusive licences and sub-licences to take place, save in the case of the granting of rights in literary and musical works to a publisher. This is patently absurd. This would make us the only country in the world that allows unwritten assignments of copyright! Assignments and exclusive licences define, often in minute detail, which parties hold which rights; these rights are enforceable against third parties. It is inconceivable that issues of such importance both to the parties themselves and to third parties can be dealt with verbally. Someone being sued for copyright infringement is entitled to know on what basis the plaintiff claims its rights. This requires the existence of a written document creating and evidencing the rights. It is self-evident that assignments and exclusive licences must be in writing.

There is no conceivable reason why assignments and licences between **authors** and **publishers** of literary and musical works should be treated any differently to other such transactions. What about other copyright owners in such works, besides authors, and transactions in favour of other parties besides publishers? What about a film maker or a record company which wants to acquire rights in a literary or musical work in order to incorporate in a film or a recording, as the case may be? What about copyright owners and assignees and exclusive licensees of all other copyright works? Why are they different? With all due respect this proposed amendment is an aberration and should be abandoned thus allowing a return to sanity. This is probably one of the most misguided and nonsensical proposed amendment in the entire Bill!**]]

Provided that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.

[[**NOTE: Leaving aside the rationality of this provision for the moment, it is difficult to see why it is limited to literary and musical works. There does not appear to be any sound reason why these categories of works should be singled out from all the other categories.

It would seem that the draftsman has been influenced by the renowned *Lion Sleeps Tonight* case (*Disney Enterprises Inc v Griesel NO and Others 895 JOC (T)*) which dealt with a musical work and confirmed that under the 1965 Copyright Act (and its predecessor the 1916 Act) assigned copyright reverted to the author's heirs twenty-five years after his death (the so-called 'reversionary interest'). This is a far cry from limiting an assignment to twenty-five years. The draftsman appears to have misunderstood the circumstances of this case and to have wrongly elevated them to an erroneous principle.

Under the existing law parties can, if they choose, limit an assignment to twenty-five years, or any other period. There does not appear to be any good reason why their freedom of contract should be curtailed in the case of literary and musical works. The provision is not sensible and should be deleted from the Bill**]].

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

[[**NOTE: These words are redundant. There is legislation dealing with electronic equivalents of writing, which deem them to be writing, and there is no need to deal with this issue in the Act.**]]

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

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

Insertion of section 22A in Act 98 of 1978

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

“Licences in respect of orphan works

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

[[**NOTE: This section deals with orphan works and all its provisions are pertinent to obtaining a licence in respect of such a work. The resale royalty right is an entirely different matter which has little or no connection with orphan works. Licences are not sought in connection with the resale royalty right. These words do not belong here and should be deleted.**]]

(2) Before making an application in terms of subsection (1), the applicant must publish his or her intention to make such application by notice in the *Gazette* in English and one other official language, as well as in two daily newspapers having general circulation throughout the Republic in any official language.

(3) An application in terms of subsection (1) must be made in such form as may be prescribed and must be accompanied by copies of the published advertisement contemplated in subsection (2) and such fee as may be prescribed.

(4) When the Commission receives an application in terms of subsection (1), the Commission may, after holding such inquiry as may be prescribed, grant to the applicant a licence to perform any act which is subject to copyright, subject to subsections (5) and (6) and the payment of a royalty.

(5) A licence issued in terms of subsection (4) is non-exclusive and is subject to such terms and conditions as the Commission may determine.

(6) The Commission may not issue the licence in terms of subsection (4) unless the Commission is satisfied that the applicant has undertaken the following steps in locating the copyright owner:

[[**NOTE: Paragraph (a), which makes reference to the register of copyright maintained by the Commission, must be deleted. There is no such register currently in existence (There is a Register of Copyright in

Cinematograph Films but this is not the register in contemplation). This clause is a side-effect of the IPLAA not having been brought into operation. If a register in respect of orphan works is envisaged, this should be provide for.**]]

- (b) conducted a search of reasonably available sources of copyright ownership and ownership information and where appropriate, licensor information;
- (c) conducted a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert assistance;
- (d) conducted a search using any other database available to the public, including any database that is available to the public through the internet; and
- (e) undertaken actions that are reasonable and appropriate in terms of the facts relevant to the search, including—
 - (i) actions based on facts known at the start of the search and facts uncovered during the search;
 - (ii) actions directed by the Commission; and
 - (iii) the review of any records not available to the public through the internet that are known to be useful in identifying and locating the copyright owner.

(7) Where a licence is granted in terms of subsection (4), the Commission may direct the applicant to deposit the amount of the royalty determined in a particular account so as to enable the owner of the copyright in the work or, as the case may be, his or her heirs, executors or legal representatives to claim such royalty at any time.

(8) The copyright owner may at any time collect the royalties fixed in the licence or in default of payment, by initiating legal action to recover such royalties.

(9) Any person who can adduce evidence for the purposes of proving that he or she is the owner of copyright in an orphan work, must submit his or her details for registration on the database of the register of copyright referred to in subsection

(6)(a) and may for the period during which the owner of copyright was unknown, recover royalties as contemplated in subsection (8).’’.

[[**NOTE: See the comments above on sub-section (6)(a) above. There is no such register in existence.**]]

Insertion of Chapter 1A in Act 98 of 1978

25. The following Chapter is hereby inserted in the principal Act after Chapter 1:

“CHAPTER 1A COLLECTING SOCIETIES

Accreditation

22B. (1) Any person who intends to act as a representative collecting society in terms of this Chapter must apply to the Commission in the prescribed manner and form for accreditation.

[[**NOTE: See the earlier comments that no real provision has been made for Companies Commission in the Act or in this Bill. It should be properly introduced and the term should be defined.**]]

(2) A collecting society that has been accredited by the Commission to administer rights on behalf of—

(a) copyright owners or authors, or on behalf of an organisation representing copyright owners or authors, has the right to receive payment of a royalty in terms of this Act; or

(b) performers or owners, or on behalf of an organisation representing performers or owners, has the right to receive payment of a royalty in terms of section 5(1)(b) of the Performers’ Protection Act, 1967 (Act No. 11 of 1967).

(3) The Commission may, for purposes of issuing an accreditation certificate, consult with any person and may grant such accreditation and issue an accreditation certificate on such terms and conditions as may be determined by the Commission.

(4) The Commission shall not accredit or issue an accreditation certificate to any applicant unless the Commission is satisfied that the applicant—

(a) is able to ensure adequate, efficient and effective administration relating to collection of royalties;

(b) is able to comply with any condition for accreditation and the relevant provisions of the Companies Act, the Broad-Based Black Economic Empowerment Act, 2013 (Act No. 46 of 2013), and any other applicable legislation; and

(c) has adopted a constitution meeting the prescribed requirements.

(5) An accreditation certificate issued in terms of this section is valid for a period not exceeding five years and, unless it is suspended or cancelled, may be renewed in the prescribed manner on such terms and conditions as may be determined by the Commission.

(6) If there is no collecting society for a right the Commission may provide such assistance as may be necessary to assist in the formation of a collecting society.

(7) (a) Any person who at the commencement of the Copyright Amendment Act, 2019, is acting as a representative collecting society in terms of this Chapter must, within 18 months of the commencement of the Copyright Amendment Act, 2019, apply to the Commission in the prescribed manner and form for accreditation.

(b) The person contemplated in paragraph (a) may continue to act as a representative society pending such accreditation subject to any—

(i) conditions that the Commission may instruct it in writing to comply with; and

(ii) finding of the Commission related to such application for accreditation.

Administration of rights by collecting society

22C. (1) Subject to such terms and conditions as may be prescribed—

(a) a collecting society or indigenous community may accept from a performer copyright owner or indigenous community or another collecting society of rights, exclusive authorisation to administer any right in any work by the issuing of licences or the collecting of licence fees and royalties, or both; and

[[NOTE: See the earlier comments, in particular paragraph [2] of the introduction, on the absence of any references to, or right and functions of, indigenous communities in the Act. Accordingly, these words should be deleted wherever they appear in this section 22C, or indeed anywhere in the Bill.**]]**

- (b) a performer copyright owner or indigenous community or other collecting society of rights may withdraw such authorisation without prejudice to the right of the collecting society or indigenous community concerned.
- (2) Subject to such conditions as may be prescribed, a collecting society may—
 - (a) issue a licence in respect of any rights under this Act;
 - (b) collect fees and royalties in pursuance of such a licence;
 - (c) distribute such collected royalties among, performers or copyright owners, collecting societies of rights or indigenous communities after deducting a prescribed amount from the collected royalties for its own expenses;
 - (d) negotiate royalty rates; and
 - (e) perform any other prescribed function.
- (3) A collecting society may—
 - (a) enter into an agreement with any foreign society or foreign organisation administering rights corresponding to rights that it administers under this Act;
 - (b) entrust rights administered by it in the Republic to such foreign society or foreign organisation to administer in that country: Provided that no such collecting society, foreign society or foreign organisation shall permit any discrimination in respect of the terms of a licence or the distribution of royalties collected; and
 - (c) only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic.

Control of collecting society by performers or copyright owners

22D. (1) A collecting society is subject to the control of the performers or copyright owners whose rights that collecting society administers, and the collecting society shall, in such manner as may be prescribed—

- (a) collect and distribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) and subsection (2);
- (b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the purpose of distribution of the royalties to the performers or copyright owners; and
- (c) provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner.

(2) Royalties distributed among the performers or copyright owners shall—

- (a) as far as may be possible, be distributed in proportion to the actual use of their works; and
- (b) be distributed to the performer or copyright owner as soon as possible after receipt thereof, but no later than three years from the date on which the royalties were collected.

(3) Where the collecting society, for whatever reason, is unable to distribute the royalties within three years from the date on which the royalties were collected, that collecting society shall—

- (a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and
- (b) upon demand by the performer or copyright owner, or their authorised representatives, pay over the royalties together with the interest earned on the investment contemplated in paragraph (a).

Submission of returns and reports

22E. (1) A collecting society shall submit to the Commission such returns and reports as may be prescribed.

(2) The Commission may call for a report and specific records from a collecting society for the purposes of satisfying the Commission that—

(a) the affairs of the collecting society are conducted in a manner consistent with the accreditation conditions of that collecting society; or

(b) the royalties collected by the collecting society in respect of rights administered by that collecting society are being utilised or distributed in accordance with the provisions of this Act.

Suspension and cancellation of accreditation of collecting society

22F. (1) The Commission may issue a compliance notice or apply to the Tribunal for an order to institute an inquiry into the affairs of a collecting society, if the Commission is satisfied that the collecting society is being managed in a manner that contravenes the accreditation conditions of that collecting society or is managed in a manner detrimental to the interests of the performers or copyright owners concerned.

(2) The Commission may, if it is of the opinion that it will be in the interest of the performers or copyright owners concerned, apply to the Tribunal for an order suspending the accreditation of the collecting society contemplated in subsection (1), pending an inquiry for such period as may be specified in the order.

(3) The Commission may, after the inquiry contemplated in subsection (2) has been finalised and if it is of the opinion that it will be in the interest of the performers or copyright owners concerned, apply to the Tribunal for an order of cancellation of the accreditation of the collecting society in question.

(4) The Commission shall be responsible for the administration and discharge of the functions of the collecting society contemplated in subsection (3) during the period of suspension or cancellation of the accreditation of that collecting society following the order of the Tribunal: Provided that the Tribunal may, on application by the Commission, appoint any suitable person to assist the Commission in the administration and discharging of the functions of that collecting society.’’.

Amendment of section 23 of Act 98 of 1978, as amended by section 20 of Act 125 of 1992

26. Section 23 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) Copyright shall be infringed by any person[,]—

(a) not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise;

(b) who tampers with any information kept by any other person in order to administer copyright in terms of this Act; or

[[**NOTE: This paragraph is unintelligible and it should either be reworded to as to make sense, or be deleted.**]]

(c) who abuses copyright and technological protection measures in order to constitute a defence to any claim of copyright liability or any independent cause of action that may be pursued either as a counterclaim in an action for infringement or instituted independently.’’; and

[[**NOTE: The meaning and purport of this paragraph is unclear. If it is to be retained, it should be reworded to make it comprehensible**]]

(c) by the deletion in subsection (2) of paragraph (b).

[[**NOTE: This deletion is very far reaching and drastic. To a large extent it will annul the purpose and objective of copyright. Copyright law makes provision for two types of infringement, namely, primary (or direct) infringement, and secondary (or indirect) infringement. This applies worldwide. Primary infringement occurs when someone performs one of the acts restricted by copyright (e.g reproduction of a work) without the permission of the copyright owner. Secondary infringement entails the dissemination or distribution (e.g. selling or hiring out) of infringing copies of a work (i.e. copies which were made by way of primary copyright infringement). For instance, person A makes a copy of a record of a song without the required permission, and, thereby, infringes copyright (primary infringement); person B takes the unlawful item and sells it or hires it out, and, thereby, currently infringes copyright (secondary infringement) as well. This enables the copyright owner not only to prevent the manufacture of infringing copies but also to prevent them being traded in. If we do away with secondary infringement, it will mean that, although a copyright owner can stop infringing products

being made (once he has become aware that this is happening), it is powerless to prevent infringing articles from being circulated in the market place. Thousands of infringing items could enter the market before the copyright owner is in a position to stop the ongoing manufacture of such good. Without the ability to restrain dealing in infringing copies of his work, a copyright owner is emasculated.

If the Act is amended as proposed here, the market can be flooded with infringing goods with impunity. The Counterfeit Goods Act (which presupposes that trading in infringing copies is unlawful) will be rendered nugatory. It defies belief that the draftsman could intend to bring this situation about. This proposed amendment has to be an oversight! It must be redressed.

It is particularly anomalous and non-sensical that the criminal law counterpart of secondary infringement, which is dealt with in section 27(1)(b)-(e) of the Act, has been retained. It makes absolutely no sense to do away with civil law secondary infringement but to retain its counterpart in criminal law.

In the light of the fact that the Bill introduces the First Sale Doctrine (see my comments above) it will be necessary for the words ‘...or would have constituted such an infringement if the article had been made in the Republic’ to be deleted from the final portion of section 23(2) as they bring about the antithesis of the First Sale Doctrine. The court has in the past restrained trading in parallel imports on the strength of this provision. Further in regard to this section see my comments below in regard to Section 28 below.**]]

Amendment of section 27 of Act 98 of 1978, as amended by section 11 of Act 52 of 1984, section 3 of Act 61 of 1989 and section 24 of Act 125 of 1992

27. Section 27 of the principal Act is hereby amended—

(a) by the insertion of the following subsection:

“(5A) Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

[[**NOTE: These words are anomalous and should be deleted. The wrong in contemplation is trading in a device that can circumvent technological protection measures introduced by copyright owners to prevent infringements of copyright taking place. The emphasis is on the capabilities and purpose of the device. The focus is diffused by requiring copyright to subsist in a work. In

which work must copyright be shown to exist? If, for instance the complainant cannot show that he has a copyright work that the device is capable of altering, should it be permissible for the device to be sold even though it might be used in respect of works in which a third party can prove copyright. The issue of copyright in a work in this context is a total red herring and should be dispensed with.**]]

(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertise for sale or hire, a technological protection measure circumvention device if—

(i) such person knows, or has reason to believe, that that device will or is likely to be used to infringe copyright in a work protected by a technological protection measure;

(ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or

(iii) such person knows or has reason to believe that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by a technological protection measure;

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

(c) circumvents such technological protection measure when he or she is not authorised 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.’’; and

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

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

[NOTE: The fines imposed on juristic persons in this and other paragraphs are draconian and are minimum penalties. While strong copyright protection is to be welcomed, a balance needs to be maintained. This also demonstrates that there is no consistency in how our draft legislation is being developed. While on the one hand, the draft Bill threatens to seriously dilute copyright protection, on the other hand, it introduces draconian protections against copyright infringement.]**

It is understood that the legislature is not disposed to stipulating minimum fines in statutes. There does not seem to be any justification for not imposing minimum fines in the case of natural persons, but doing so in the case of juristic persons. The same principle should preferably apply to both.]**

- (a) in the case of a first conviction, to a fine **[not exceeding five thousand rand]** or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates; or
- (b) in any **[other]** case other than those contemplated in paragraph (a), to a fine **[not exceeding ten thousand rand]** or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.”.

Amendment of section 28 of Act 98 of 1978, as substituted by section 12 of Act 52 of 1984 and amended by section 25 of Act 125 of 1992

28. Section 28 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection:

“(2) This section shall apply to any copy of the work in question made outside the Republic **[which if it had been made in the Republic would be**

an infringing copy of the work], if the making of such copy constituted an infringement of copyright in the country in which the work was made.”; and

[[**NOTE: This section is the counterpart of section 23(2) of the Act, dealing with secondary civil copyright infringement. As has been pointed out, section 23(2) has been used to prevent trading in parallel imports. Section 28(2) is to the same effect in criminal law. The highlighted portion to be deleted has the same effect of the last portion of section 23(2) which it has been suggested should be deleted. To this extent both sections will be consistent with the First Sale Doctrine. However, the wording proposed to be introduced above introduces a new principle into section 28(2) but this is not being done in section 23(2), which makes no sense. The new wording prevents trading in foreign produced infringing copies. This is supported, but then a similar provision should also be introduced in section 23(2). It makes no sense for a particular activity to constitute criminal infringement but not civil infringement. It necessary to note a *caveat* that, where there are different territorial copyright owners (as is often the case), goods can be infringing copies in a foreign country but not in South Africa. There has been a case where a South African rights owner caused goods for the South African market to be produced in Lesotho. In that country the rights owner was someone else, who had not authorised the production of the goods locally. In the light of the proposed amendment this would mean that goods that are legitimate in South Africa are infringing copies where they were produced; in terms of the proposed amendment trading in them in South Africa, even by the local copyright owner, would be unlawful and indeed a criminal offence. This is a policy issue but consistency is required.**]]

(b) by the substitution for subsection (5) of the following subsection:

“(5) This section shall [*mutatis mutandis*] with the necessary changes, apply with reference to an exclusive licensee who has the right to import into the Republic any work published elsewhere, which would be an infringing copy of the work in the country in which it was made.”.

Insertion of sections 28O to 28S in Act 98 of 1978

NOTE: In the Act section 28 is followed by section 29. There are no sections 28A to N.

It is apparent that the draftsman is under the misconception that such sections have been inserted in the Act by the IPLAA. This is of course not the case since that Amendment has not been brought into operation. Accordingly section 28O cannot logically follow immediately after section 28. O to S should be renumbered A to E.

29. The following section is hereby inserted in the principal Act after section 28N:

“Prohibited conduct in respect of technological protection measures

28O. (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a technological protection measure circumvention device if such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technologically protected work.

(2) No person may provide a service to any other person if—

(a) such other person intends to use the service to circumvent an effective technological protection measure; or

(b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright in a technologically protected work.

(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.

(4) No person may, during the subsistence of copyright in a work and without a licence of the owner of the copyright in such work, circumvent an effective technological protection measure applied by the owner of the copyright to such work.

(5) A technological protection measure shall be deemed to be effective if the use of the work is controlled by the exclusive licensee or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

(6) The provisions of this section must be read together with the provisions of

sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

Exceptions in respect of technological protection measure

28P. (1) For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform any of the following:

- (a) An act permitted in terms of any exception provided for in this Act; or
- (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).

(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—

- (a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or
- (b) if the copyright owner has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.

(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—

- (a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and
- (b) purpose for which the services of such other person has been engaged.

Enforcement by Commission

28Q. The Commission must enforce this Act by—

- (a) performing all the relevant functions contemplated in section 187 of the Companies Act in respect of this Act;
- (b) referring matters to and appearing before the Tribunal; and
- (c) dealing with any other matter referred to it by any person, Tribunal or any other regulatory authority.

Prohibited conduct in respect of copyright management information

28R. No person may—

[[**NOTE: This section should be made subject to section 28S because the categorical prohibitions provided for are subject to exceptions enunciated in section 28S.**]]

- (a) in respect of any copy of a work, remove or modify any copyright management information; and
- (b) in the course of business make, import, sell, let for hire, offer or expose for sale, advertise for sale or hire a copy of a work if any copyright management information has been removed or modified without the authority of the copyright owner.

Exceptions in respect of copyright management information

28S. The prohibition in section 28R does not apply if a person—

- (a) is authorised by the performer or copyright owner to remove or modify the copyright management information;
- (b) does not know and has no reason to believe that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work; or
- (c) does not know or has no reason to believe that the copyright management information has been removed or modified without the authority of the performer or copyright owner.’’.

Substitution of section 29 of Act 98 of 1978, as amended by section 26 of Act 125 of 1992

30. The following section is hereby substituted for section 29 of the principal Act:

“Establishment of Tribunal

29. (1) The Chief Justice shall designate—

(a) five judges;

(b) five acting judges; and

(c) five retired judges,

as members of the Tribunal.

(2) The Minister must designate one of the persons contemplated in subsection (1) as chairperson and one as deputy chairperson.

(3) The members of the Tribunal contemplated in subsection (1) shall serve for a period not exceeding five years, which period shall be renewable for a further five years.

(4) The chairperson may, on one month written notice addressed to the Minister and the Chief Justice—

(a) resign from the Tribunal; or

(b) resign as chairperson, but remain as a member of the Tribunal.

(5) A member of the Tribunal other than the chairperson may resign by giving at least one month written notice to the Minister and the Chief Justice.

(6) In the event of the expiry of the term of office of a member of the Tribunal, the member has a matter pending for adjudication before the Tribunal, the member may continue to act as a member in respect of that matter only.’’.

Insertion of sections 29A to 29I in Act 98 of 1978

31. The following sections are hereby inserted in the principal Act after section 29:

“Functions of Tribunal

29A. (1) The Tribunal must carry out the functions entrusted to it in terms of this Act or any other legislation.

(2) The Tribunal may—

(a) **adjudicate any application or referral made to it in terms of this Act,** the Companies Act or any other relevant legislation, and may make any

appropriate order in respect of an application or referral;

[[**NOTE: It is not clear whether it is contemplated that the Tribunal should have jurisdiction to adjudicate on copyright infringement claims. On a strict interpretation of the highlighted wording this does not appear to be the case. The section should state the position, whatever it may be, unequivocally. It is submitted that the best approach would be for the Tribunal not to have jurisdiction over these matters. One of the reasons for this is that in terms of the proposed section 29F the Tribunal must conduct its proceedings in an inquisitorial manner. Such a procedure is not appropriate in our legal system for the adjudication of contentious matters where there may be a dispute of fact or the weighing up of conflicting evidence. It is alien to the process of enforcing positive rights.**]]

- (b) hear matters referred to it by the Commission, a dispute resolution institution or any regulatory authority, only if the dispute relates to Copyright;
 - (c) review any decision of the Commission, dispute resolution institution or any regulatory authority if it relates to Copyright;
 - (d) adjudicate any application or referral made to it by any person, institution or regulatory authority where the dispute can only be directly referred to the Tribunal in terms of this Act and such dispute relates to Copyright;
 - (e) settle disputes relating to licensing schemes, payment of royalties or terms of agreements entered into as required by this Act or agreements entered into in order to regulate any other matter in relation to Copyright; and
 - (f) settle any dispute that relates to Copyright.
- (3) The Tribunal does not have the power to review any administrative action by the Commission that does not relate to Copyright.

Qualifications for appointment

29B. To be eligible for designation as a member of the Tribunal and to continue to hold that office, a person must, in addition to satisfying any other specific requirements set out in this Act—

- (a) be a fit and proper person;
- (b) have adequate knowledge in commercial law, intellectual property law or copyright law;
- (c) have experience in dispute resolution; and
- (d) not have, or through a related person acquire, a personal financial interest that may conflict or interfere with the proper performance of the duties of a member of the Tribunal.

Removal or suspension of members of Tribunal

29C. The Minister may at any time, after consultation with the Minister of Justice, remove or suspend a member of the Tribunal from office if such a member—

- (a) no longer qualify to be a member of Tribunal as referred to in section 29B;
- (b) repeatedly fails to perform the duties of the Tribunal;
- (c) due to a physical or mental illness or disability becomes incapable of performing the functions of the Tribunal;
- (d) is found guilty of a serious misconduct; or
- (e) engages in any activity that may undermine the integrity of the Tribunal.

Conflict and disclosure of interest

29D. (1) A member of the Tribunal may not represent any person before the Tribunal.

(2) If, during a hearing in which a member of the Tribunal is participating, it appears to the member that the matter concerns a financial or other interest of the member contemplated in section 29B(d), the member must—

- (a) immediately and fully disclose the fact and nature of such interest to the chairperson, deputy chairperson and the presiding member at that hearing, as the case may be; and
- (b) withdraw from any further involvement in that hearing.

(2) A member must not—

- (a) make private use of or profit from confidential information obtained as a result of performing his or her official duties as a member of the Tribunal; or
- (b) divulge any information referred to in paragraph (a) to a third party, except as required and as part of the official functions as a member of the Tribunal.

Proceedings of Tribunal

29E. The Minister must prescribe—

- (a) the form and procedure to make an application or referral to the Tribunal;
- (b) rules that determine the form and manner of proceedings before the Tribunal;
- (c) the fees applicable to proceedings before the Tribunal; and
- (d) any other matter necessary for the proper functioning of the Tribunal.

Hearings before Tribunal

29F. (1) The Tribunal must conduct its hearings in the prescribed manner and must specifically conduct its hearings—

- (a) in public;
- (b) in an inquisitorial manner;
- (c) as expeditiously as possible;
- (d) as informally as possible; and
- (e) in accordance with the principles of natural justice.

(2) Notwithstanding the provisions of subsection (1), a Tribunal member presiding at a hearing may exclude members of the public, specific persons or categories of persons from attending the hearing if—

- (a) evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;
- (b) the proper conduct of the hearing requires it; or

(c) for any other reason that would be justifiable during proceedings in a High Court.

Right to participate in hearing

29G. The following persons may participate in a hearing before the Tribunal, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

- (a) The Commission;
- (b) the applicant, complainant and respondent; and
- (c) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Tribunal, such interest is adequately represented by any other person participating at the hearing.

Powers of member presiding at hearing

29H. The member of the Tribunal presiding at a hearing may—

- (a) direct or summon any person to appear before the Tribunal at any specified time and place;
- (b) question any person under oath or affirmation;
- (c) summon or order any person to—
 - (i) produce any book, document or item necessary for the purposes of the hearing; or
 - (ii) perform any other act in relation to this Act; and
- (d) give direction prohibiting or restricting the publication of any evidence adduced during a Tribunal hearing.

Orders of Tribunal

29I. In addition to the powers in terms of this Act and the Companies Act, the Tribunal may make any appropriate order in relation to a matter brought before it, including—

- (a) declaring particular conduct to constitute an infringement of this Act and as such prohibited;
- (b) interdicting conduct which constitutes an infringement of this Act;

[[**NOTE: See my comments above in respect of section 29A. Contrary to section 29A, the instant section does seem to suggest that the Tribunal has powers to adjudicate copyright infringement claims, although the matter is placed in doubt by the use of the expression ‘infringement of this Act’ as opposed to infringement of **copyright**.**]]

- (c) imposing an administrative fine in terms of section 175 of the Companies Act, with or without the addition of any other order in terms of this Act;
- (d) confirming a consent agreement in terms of section 173 of the Companies Act as an order of the Tribunal;
- (e) condoning any non-compliance of its rules and procedures on good cause shown;
- (f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;
- (g) suspending or cancelling the registrant’s registration or accreditation subject to any such terms and conditions the Tribunal deems fit; or
- (h) any other appropriate order required to give effect to a right contemplated in this Act or any other relevant legislation.’’.

Repeal of sections 30, 31, 32, 33 and 36 of Act 98 of 1978

32. Sections 30, 31, 32, 33 and 36 of the principal Act are hereby repealed.

Amendment of section 39 of Act 98 of 1978, as amended by section 4 of Act 9 of 2002 and section 5 of Act 28 of 2013

[[**NOTE: The 2013 Act is not in operation and it therefore has not amended section 39 of the Act. These provisions should be amended accordingly.**]]

33. Section 39 of the principal Act is hereby amended—

(a) by the deletion of the word “and” at the end of paragraph (cD);

(b) by the insertion of the following paragraphs after paragraph (cE):

“(cF)prescribing rules regulating the processes and proceedings of the

Tribunal;

(cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;

(cH) prescribing permitted acts for circumvention of technological protection measures contemplated in section 28B after due consideration of the following factors:

(i) The availability for use of works protected by copyright;

(ii) the availability for use of works for non-profit archival and educational purposes;

(iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or

(iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;

(cI) prescribing royalty rates or tariffs for various forms of use;

(cJ) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;

(cK) prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a collecting society; ”; and

(c) by the addition of the following subsection, the existing section becoming subsection (1):

“(2) Before making any regulations in terms of subsection (1), the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”.

Insertion of section 39B in Act 98 of 1978

34. The following section is hereby inserted in the principal Act after section **39A**:

[[**NOTE: There is currently no section 39A in the Act. The IPLAA is not in operation and it has thus not amended the Act. Consequential changes should therefore be made to this Bill.**]]

“Unenforceable contractual term

39B. (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.

(2) This section does not prohibit or otherwise interfere with open licences or voluntary dedications of a work to the public domain.’’.

[[**NOTE: Why are open licences elevated above any other form of licensing? Any good lawyer will know that not all “open licences” are equivalent. Some open licences are in fact very peremptory and have a “viral” quality, namely, the General Public License and the Share-Alike Creative Commons licence. **]]

Insertion of Schedule 2 in Act 98 of 1978

35. The following Schedule is hereby added to the principal Act, **the existing Schedule becoming Schedule 1:**

[[**NOTE: There is no Schedule to the current Act. The IPLAA is not in operation and it has therefore not amended the Act. Appropriate changes should be made to the Bill.**]]

[[**NOTE: The substantive criticisms and concerns relating to the issues in the schedules dealing with translation licences and reproduction licences remain. You are referred to our comments on the 2017 draft Bill.**]]

“Schedule 2

(Section 22(3))

Part A

Translation Licences

Application of provisions in Part A

1. The provisions in this Part apply to copyright works which have been published in printed or analogous forms of reproduction.

Application for licence to translate copyright work

2. (1) Any person may, subject to item 4, apply to the Tribunal for a licence to make a translation of the work (hereinafter in Part A referred to as “the licence”) into—

(a) any language that is an official language within the Republic;

(b) a foreign language that is regularly used in the Republic; or

(c) any other language,

for use by readers located in the Republic.

(2) Any person may apply to the Tribunal for a licence to translate a work in order to convert the work into a usable or analogous form of reproduction.

(3) No licence shall be granted until the expiration of the following applicable periods, commencing from the date of first publication of the original work:

(a) One week where the application is for a licence for translation into an official language;

(b) three months where the application is for a licence into a foreign language in regular use in the Republic; and

(c) one year where the application is for a licence for translation into any language contemplated in sub-item (1)(c).

Granting of licence

3. (1) Before granting a licence the Tribunal must be satisfied that—

(a) no translation of the work into the language in question has been executed by or with the authorisation of the copyright owner or that any previous editions in that language are out of print; and

(b) the applicant for the licence—

(i) has requested and unreasonably been denied authorisation from the copyright owner to translate the copyright work; or

(ii) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail or electronic mail sent a copy of his or her application contemplated in item 2(1), to the principal place of business of the publisher whose name appears on the copyright work;

(2) Where the copyright owner of the work in question is known and can be located, no licence shall be granted unless he or she has been given an opportunity to be heard.

(3) Where—

(a) the one week period referred to in item 2(3)(a) applies, no licence shall be granted until the expiration of a further period of two days;

(b) the three months period referred to in item 2(3)(b) applies, no licence shall be granted until the expiration of a further period of two weeks;
or

(c) the one year period referred to in item 2(3)(c) applies, no licence shall be granted until the expiration of a further period of three months,
calculated in accordance with sub-item (4).

(4) The further periods contemplated in sub-item (3) shall be computed from the date on which the requirements mentioned in sub-item (1)(a) and sub-item and sub-item (1)(b)(i) are fulfilled or, where the identity or the address of the copyright owner is unknown from the date on which the applicant also complies with the requirements mentioned in sub-item (1)(b)(ii).

(5) If, during any of the said further periods, a translation into the language in question of the work is published in printed or analogous form of reproduction by, or with the authorisation of, the copyright owner, no licence shall be granted.

(6) For works composed mainly of illustrations, a licence shall only be granted if the conditions stipulated in sub-item (1) have been fulfilled.

(7) No licence shall be granted when the copyright owner has withdrawn all copies of the work from circulation.

Scope and conditions of licence

4. (1) Any licence granted under this Part shall—

(a) be for the purpose of teaching; or

(b) be for training, scholarship or research.

(2) Copies of a translation published under a licence may be sent abroad by the government or a public entity if—

(a) the translation is into a language other than a language regularly used in the Republic;

(b) the recipients of the copies are individuals who are South African nationals or are organisations that are registered in the Republic;

(c) the recipients will use the copies only for the purposes of teaching, scholarship or research; and

(d) both the sending of the copies abroad and their subsequent distribution to the recipients are without any commercial purpose.

(3) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the Republic and copyright owners in the country of the copyright owner.

(4) If the licensee is unable, by reason of currency regulations, to transmit the compensation to the copyright owner he or she shall report the fact to the Tribunal who shall make all efforts to ensure that such transmittal is in internationally convertible currency or its equivalent.

(5) As a condition of maintaining the validity of the licence, the translation must be correct for the use contemplated in the licence and all published copies must include the following:

(a) The original title and name of the copyright owner of the work;

(b) a notice in the language of the translation stating that the copy is available for distribution only in the Republic or in accordance with item 4(2); and

(c) if the translated work was published with a copyright notice, a reprint of that notice.

(6) The licence shall terminate if a translation of the work in the same language allowed by the licence, is published—

(a) with substantially the same content as the original publication under the licence;

(b) by or with permission of the copyright owner; and

(c) in printed or analogous form of reproduction in the Republic at a price reasonably related to the price normally charged in the Republic for comparable works.

(7) Any copies of the work already made before the licence terminates may continue to be distributed until stocks are exhausted.

Licence for broadcasting organisation

5. (1) A licence under this Part may also be granted to a domestic broadcasting organisation if the following conditions are met:

(a) The translation is made from a copy made and acquired in accordance with the laws of the Republic;

(b) the translation is for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialised technical or scientific research to experts in a particular profession only;

(c) broadcasts are made lawfully and are intended for recipients in the Republic;

(d) sound or visual recordings of the translation may only be used by broadcasting organisations with their headquarters in the Republic; and

(e) all uses made of the translation are without commercial purpose.

(2) A broadcast contemplated in sub-item (1) includes a broadcast made through the medium of lawful sound or visual recording, made for the sole purpose of such broadcast.

(3) A licence may also be granted to a domestic broadcasting organisation under all of the conditions provided in sub-item (1) to translate any text incorporated in an audiovisual work that was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Part B

Reproduction Licences

Application of provisions in Part B

1. The provisions in this Part apply to copyright works which have been published in printed or analogous forms of reproduction.

Application for licence to reproduce and publish copyright work

2. (1) Any person may, subject to item 4, apply to the Tribunal for a licence to reproduce and publish a particular edition of the work in printed or analogous forms of reproduction (hereinafter in Part B referred to as “the licence”).

(2) No licence shall be granted until the expiration of the following applicable periods, commencing from the date of first publication of the particular edition of the work:

- (a) Three years for works of technology and the natural and physical sciences including mathematics;
- (b) seven years for works of fiction, poetry, drama and music, and for art books; and
- (c) five years for all other works.

Granting of licence

3. (1) Before granting a licence, the Tribunal must be satisfied that—

- (a) no distribution by, or with authorisation of, the copyright owner of copies in printed or analogous forms of reproduction of that particular edition has taken place in the Republic to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the Republic or that, under the same conditions as contemplated in the licence to be granted, such copies have not been on sale in the Republic for a continuous period of at least six months; and
- (b) the applicant for the licence—
 - (i) has requested, and unreasonably been denied, authorisation from the copyright owner; or
 - (ii) after due diligence on his or her part, was unable to find such copyright owner and can prove that he or she has by registered mail or electronic mail sent a copy of his or her application contemplated in item 2(1), to the principal place of business of the

publisher whose name appears on the copyright work.

(2) Where the copyright owner is known and can be located, no licence shall be granted unless he or she has been given an opportunity to be heard.

(3) Where the three-year period referred to in item 2(2)(a) applies, no licence shall be granted until the expiration of six months calculated from the date on which the requirements mentioned in sub-item (1)(a) and sub-item (1)(b)(i) are fulfilled or, where the identity or the address of the copyright owner is unknown, from the date on which the applicant also complies with the requirements mentioned in sub-item (1)(b)(ii).

(4) Where the seven-year or five-year periods referred to in paragraphs (b) and (c) of item 2(2) apply and where the identity or the address of the copyright owner is unknown, no licence shall be granted until the expiration of six months calculated from the date on which the copies of the application referred to in sub-item (1)(b)(ii) have been mailed.

(5) If, during the period of six or three months referred to in sub-item (3) or (4), any distribution or sale as contemplated in sub-item (1)(a) has taken place, no licence shall be granted.

(6) No licence shall be granted if the copyright owner has withdrawn all copies of the edition which is the subject of the application from circulation.

(7) Where the edition which is the subject of an application for a licence under this Part is a translation, the licence shall only be granted if the translation is in a language required by, or was made with the authorisation of, the copyright owner.

Scope and condition of licence

4. (1) Any licence under this Part shall—

(a) be for use in connection with systematic instructional activities only;

(b) allow publication only in a printed or analogous form of reproduction at a price reasonably related to or lower than that normally charged in the Republic for comparable work; and

(c) allow publication within the Republic only and shall not extend to the export of copies made under the licence.

(2) If the Tribunal is satisfied that facilities do not exist in the Republic to do

the printing or reproduction or that existing facilities are incapable for economic or practical reasons of ensuring such printing or reproduction, and the contract between the prospective licensee and the establishment doing the work of reproduction so requires, the Tribunal may allow reproduction outside the Republic: Provided that—

- (a) all copies reproduced are to be sent to the prospective licensee in one or more bulk shipments for distribution exclusively in the Republic;
- (b) the contract between the prospective licensee and the establishment doing the work of reproduction shall—
 - (i) include a stipulation regarding delivery and distribution as contemplated in paragraph (a); and
 - (ii) provide a guarantee by the establishment engaged for doing the work of reproduction that the work of reproduction is lawful in the country where it is done;
- (c) the prospective licensee may not entrust the work of reproduction to an establishment created to reproduce copies of works in respect of which a licence has already been granted under this Part;
- (d) the licence is non-exclusive; and
- (e) the licence is transferable.

(2) The licence shall provide for just compensation in favour of the copyright owner that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the Republic and copyright owners in the Republic.

(3) If the licensee is unable, by reason of currency regulations, to transmit the compensation to the copyright owner, he or she shall report the fact to the Tribunal who shall make all efforts to ensure such transmittal in internationally convertible currency or its equivalent.

(4) As a condition of maintaining the validity of the licence, the reproduction of that particular edition must be accurate and all published copies must include the following:

- (a) The title and name of the owner of the work;

(b) a notice in the language of the publication stating that the copy is available for distribution only in the Republic; and

(c) if the edition which is reproduced bears a copyright notice, a reprint of that notice.

(5) The licence shall terminate if—

(a) copies of an edition of the work in printed or analogous form of reproduction are distributed in the Republic in connection with systematic instructional activities, at a price reasonably related to that normally charged in the Republic;

(b) by or with the authorisation of the copyright owner; and

(c) such edition is in the same language and is substantially the same in content as the edition which was published under the licence.

(6) Any copies of an edition of the work already made before the licence terminates may continue to be distributed until stocks are exhausted.

Licence for audiovisual works

5. Under the conditions provided in this Part, a licence may also be granted—

(a) to reproduce in audiovisual form a lawfully made audiovisual work, including any protected work incorporated in it if that audiovisual work was prepared and published for the sole purpose of being used in connection with systematic instructional activities; and

(b) to translate any text incorporated in that audiovisual work into a language generally used in the Republic.’’.

Amendment of certain expressions in Act 98 of 1978

36. The principal Act, save for sections 26(9) and 43, is hereby amended by the substitution for the expressions “cinematographic film” and “film” where it appears in the Act, of the relevant expressions of “audiovisual work” and “work” respectively.

Transitional provision

37. Any reference in the Copyright Amendment Act, 2019, to the phrases “indigenous cultural expressions” or “indigenous community” shall only be effective upon the date on which the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013)

becomes operational.

Short title and commencement

38 . This Act is called the Copyright Amendment Act, 2019, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COPYRIGHT AMENDMENT BILL

1. BACKGROUND

- 1.1. The Copyright Amendment Bill (“the Bill”) seeks to align copyright with the digital era and developments at a multilateral level. The existing Copyright Act, 1978 (Act No. 98 of 1978) (“the Act”), is outdated and has not been effective in a number of areas. The creative industry is impacted upon; educators are hampered in carrying out their duties; researchers are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. For this reason, a need exists for Intellectual Property (“IP”) legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with disabilities; and to ensure that artists do not die as paupers due to ineffective protection. The latter is supported by the experience of the power imbalance, vulnerabilities and abuse taking place in the music industry which Government was called to address.
- 1.2. The Bill is consistent with the Draft National Policy as commented on and the recommendations of the Copyright Review Commission (“the CRC”) chaired by retired judge Ian Farlam, and is linked to the National Development Plan (“NDP”), in that it seeks to ensure consistency and coherence in aligning the approach of various Government Departments to IP matters. The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual Property Organisation (“WIPO”) digital treaties namely the WIPO Copyright Treaty (“WCT”); the WIPO Performance and Phonograms Treaty (“WPPT”); the Beijing Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The alignment is for purposes of ensuring effective governance, social protection, employment creation and reduction of inequalities.
- 1.3. The amendment of the Act means that South Africa will be able to accede to international treaties and conventions which require domestic legislation to be

consistent with international imperatives.

2. OVERVIEW OF BILL

2.1. The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. It is also envisaged that the proposed legislation will reward and incentivise authors of knowledge and art. Various sectors within the South African Copyright regime are dissatisfied. Ranking highest are local performers and composers, who have not benefitted due to the lack of access to the Copyright system. (CRC report 2011). Thus, the Bill aims to make copyright consistent with the digital era, developments at a multilateral level, international standards and introduce improved exceptions and limitations into Copyright law. The Bill also aims to enhance access to and use of copyright works, to promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creative industry.

2.2. The objectives of the Bill are—

2.2.1. to develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa;

2.2.2. to address the licensing of copyright works or material in relation to commissioned work to facilitate commercial exploitation by any person so licensed.

2.3. The Bill introduces provisions which deal with matters pertaining to Collective Management. Collecting Societies will only be allowed to collect for their registered members, and all Collecting Societies have to be accredited with the Companies and Intellectual Property Commission (“CIPC”).

2.4. The Bill deals with the protection of works and rights of authors in the digital environment.

2.5. The Bill provides for the availability of accessible format copies of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind but to other disabilities such as learning disabilities,

dyslexia etc.

2.6. The Bill introduces an Artist Resale Royalty. This resale right means that an artist could be entitled to a royalty even when their work is resold.

2.7. Scope is left for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty. Limited circumstances have been provided for in this regard. Furthermore, this provision stipulates the factors that need to be considered in determining whether the use of a copyright amounts to fair use.

2.8. The Bill proposes the strengthening of the Copyright Tribunal.

3. ANALYSIS OF BILL

3.1. Clause 1 of the Bill proposes the insertion into the Act of a range of new definitions necessitated by certain amendments embodied in the Bill.

3.2. Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.

3.3. Clause 3 of the Bill proposes an amendment to section 5 of the Act by also providing for ownership by local organisations that may be prescribed.

3.4. Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a literary or musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

3.5. Clause 5 of the Bill inserts a new section 6A specifically providing for royalty sharing after assignment of copyright in a literary or musical work.

3.6. Clause 6 of the Bill proposes an amendment to section 7 by providing for communication to the public of an artistic work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

3.7. Clause 7 of the Bill inserts a new section 7A specifically providing for royalty sharing after assignment of copyright in an artistic work. It also provides in

sections 7B to 7E for the resale, duration, assignment or waiver of royalty rights. It also provides for authors to enjoy the inalienable resale royalty right on the commercial resale of his or her work of art, subsequent to the first assignment by the author of such work of art.

- 3.8. Clause 8 of the Bill proposes an amendment to section 8 of the Act by providing for communication to the public of an audiovisual work by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.9. Clause 9 of the Bill inserts a new section 8A specifically providing for royalty sharing after assignment of copyright in audiovisual works.
- 3.10. Clause 10 of the Bill proposes an amendment to section 9 of the Act providing for communication to the public of a sound recording by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.11. Clause 11 of the Bill proposes the substitution of section 9A of the Act. It requires the recording and reporting of any act contemplated in section 9(c), (d) or (e) and makes the failure to do so, an offence. It also make certain amendments related to the parties involved in determining the royalty amount, and for referral to the Tribunal.
- 3.12. Clause 12 of the Bill substitutes section 11 to also provide for communication to the public of a programme carrying signal by wire or wireless means, including internet access and making available to the public the work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.
- 3.13. Clause 13 of the Bill proposes the repeal of section 12, in order to provide for exceptions in all works, rather than only in literary and musical works.
- 3.14. Clause 14 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection, section 12B providing for

specific exceptions and section 12C providing for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process. It also proposes the insertion of section 12D providing for exceptions related to educational and academic activities.

- 3.15. Clause 15 of the Bill proposes an amendment to section 15 of the Act to provide for panorama and incidental use exceptions.
- 3.16. Clause 16 of the Bill proposes an amendment to section 16 of the Act, providing for the deletion of subsection (1).
- 3.17. Clauses 17 and 18 proposes the repeal of sections 17 and 18 of the Act, respectively.
- 3.18. Clause 19 of the Bill proposes the repeal of section 19A of the Act.
- 3.19. Clause 20 of the Bill proposes the insertion of sections 19C and 19D into the Act by providing general exceptions regarding protection of copyright work for archives, libraries, museums and galleries, also exceptions regarding protection of copyright work for persons with disability.
- 3.20. Clause 21 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author.
- 3.21. Clause 22 of the Bill proposes an amendment to section 21 of the Act by providing for the ownership of any copyright subsisting in the work between the person commissioning the work and the author who executes the commission. It further provides for the protection of the author by allowing an application to the Tribunal where the work is not used, or not used for the purpose of the commission.
- 3.22. Clause 23 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned. It also provides a reversion right for where copyright in a literary or musical work was assigned by an author to a publisher.
- 3.23. Clause 24 of the Bill proposes the insertion into the Act of a new section 22A, making provision for assignment and licences in respect of orphan works.

- 3.24. Clause 25 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the accreditation and regulation of Collecting Societies.
- 3.25. Clause 26 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright, omits to pay the author of the copyright work a royalty fee as and when the copyright work is used and omits to pay the author of artistic work royalty fees as and when the artistic work is sold as prescribed by the Act.
- 3.26. Clause 27 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author. It also provides for an increase in penalties for penalties where the convicted person is not a natural person.
- 3.27. Clause 28 of the Bill proposes amendments to section 28 of the Act, which provides for the copying of a work to constitute an infringement of copyright, if such copying would have constituted infringement in the country in which the work was made.
- 3.28. Clause 29 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, 28S in the Bill providing for prohibited conduct in respect of technological protection measures; exceptions in respect of technological protection measures; and prohibited conduct in respect of copyright management information and exceptions.
- 3.29. Clauses 30 and 31 of the Bill amends section 29 and propose the insertion of sections 29A to 29I into the Act, which provide for, amongst others, the strengthening of the Copyright Tribunal; its functions; appointment of its members; qualifications for such appointment; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal.
- 3.30. Clause 32 of the Bill proposes the repeal of sections 30, 31, 32, 33 and 36 of the Act.
- 3.31. Clause 33 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst others to the procedure for the conduct of Tribunal hearings and relating to Collecting Societies.

- 3.32. Clause 34 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purport to renounce a right or protection afforded by the Act will be unenforceable.
- 3.33. Clause 35 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for “Translation Licences” and “Reproduction Licences”.
- 3.34. Clause 36 provides for the amendment of the expressions “cinematographic film” and “film”.
- 3.35. Clause 37 provides for transitional provisions related to terms inserted in the Act by the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013).
- 3.36. Clause 38 of the Bill provides for the short title and commencement.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 4.1. The Department of Trade and Industry consulted various stakeholders in different sectors within the South African Copyright regime such as Departments and their agencies, local performers, composers, academics, non-government organisations, copyright consultants and the general public, through meetings and a conference. The consultation took place pre- and post-Cabinet approval.

5. FINANCIAL IMPLICATIONS FOR STATE

- 5.1. Any financial requirement will be accommodated within the existing budget.

6. PARLIAMENTARY PROCEDURE

Tagging

- 6.1. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) distinguishes between four categories of Bills: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it would be constitutionally invalid.
- 6.2. The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.
- 6.3. The crux of tagging has been explained by the courts, especially the

Constitutional Court in the case of **Tongoane and Others v Minister of Agriculture and Land Affairs and Others**¹. The Constitutional Court in its judgment stated as follows:

“[58] What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill ‘in substantial measure fall within a functional area listed in schedule 4’. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This ‘involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.’” (footnote omitted).

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”

- 6.4. In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.
- 6.5. The Act regulates copyright. In terms of section 2 of the Act, and subject to the provisions of the Act, the following works, if they are original, are eligible for copyright, namely literary works, musical works, artistic works, audiovisual works, sound recordings, broadcasts, program-carrying signals, published editions and computer programs.
- 6.6. The Bill, amongst others things, seeks to provide for certain exceptions in respect of infringement of copyright for educational purposes, e.g. the new

¹ 2010 (8) BCLR 741 (CC)

section 13B [clause 12 of the Bill] which regulates the making of copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose. “Education at all levels, excluding tertiary education” is a functional area listed in Schedule 4 to the Constitution. The Bill also proposes general exceptions regarding protection of copyright work for archives, libraries, museums and galleries. “Archives other than national archives”, “Libraries other than national libraries” and “Museums other than national museums” are functional areas listed in Schedule 5 to the Constitution. The question is whether or not the abovementioned provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4 or 5. The purpose of the Bill is to regulate copyright and not to regulate any matter falling under the functional areas in question. The Constitutional Court, in paragraph 71, stated the following with regard to the test for tagging:

“[71] . . . the ‘substantial measure’ test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.” (emphasis added).

- 6.7. The subject matter of the Bill is the regulation of copyright in the Republic and does not impact on matters that substantially affect the provinces.
- 6.8. Since none of the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4 or 5, the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

Referral of Bill to House of Traditional Leaders

- 6.9. According to section 18(1) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), “(a)ny parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.”.
- 6.10. Indigenous works will in terms of the Act be eligible for the payment of royalties. An “indigenous work” means a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or

knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community. The Bill provides for the registration of collecting societies to administer rights on behalf of copyright owners or authors. Since the Bill pertains to “customs of traditional communities” it would be necessary to refer the Bill to the House of Traditional Leaders.