
COMMENTARY ON THE COPYRIGHT AMENDMENT BILL
2015

by
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1. THE 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 pre-eminently on intellectual property law and achieving excellence in that regard.

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 nor 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 similar laws anywhere in the world. Its ultimate goal in pursuing this objective is the welfare of South Africa and all its people.

The Chair has a complement of four professors and other academic staff who are nationally and internationally recognised as being experts in the field of intellectual property law. It is regarded as one of the foremost sources of inspiration and knowledge in respect of intellectual property law in South Africa. It is thus submitted

that it can speak with authority on matters pertaining to this field of expertise and in particular in regard to Copyright Law.

2. INTRODUCTION

A draft Copyright Amendment Bill has been published for comment in Government Gazette no. 39028 dated 27 July 2015. The public at large have been given an opportunity until 16 September 2015 to comment on the Bill. Given the controversial nature of the Bill, and its complexity, it is submitted that this period for comment is not overly generous and it does not afford interested parties much of an opportunity to formulate and voice their opinions. A question mark must thus be raised as to whether this process constitutes proper consultation with the public regarding the Bill and its consequences and implications.

The purpose of this brief is to provide the Chair's comments on, and critique of, the Bill. These will follow in detail below. At the outset, however, some preliminary and general observations will be made.

Members of the Chair have disseminated articles in which comments on the Bill are offered. Copies of these articles, entitled "*Let's Pray for Mediocrity: Another Case of Legislative Diarrhoea*", "*DTI Dishes Up A Hopeless Curate's Egg*" and "*A Diamond in the Rough – Technology and the Copyright Amendment Act*" are annexed and marked "A", "B" and "C". The Chair adopts and endorses the views expressed in these articles and they are hereby incorporated in this document.

Without detracting from the contents of these articles, it must regrettably be said that the Bill is extremely badly drafted and is very difficult, if not virtually impossible, to comprehend. The use of language and grammar is poor and it is riddled with editorial errors. It is full of contradictions and anomalies and it pays scant regard to many of the basic principles of copyright law (and indeed other laws). It is also at variance with the South African Constitution in many respects. With the greatest respect, it is ill-conceived and very badly executed. This makes the document a very poor basis for conducting a meaningful discourse on what the Bill is actually seeking to achieve. It is also a nigh impossible task to comment properly in specific terms on the contents of the document.

This situation is most unfortunate because certain of the topics addressed in the Bill are matters which are crying out for redress (which is long overdue) and the Bill does well to deal with them. There is thus considerable value in principle to the Bill. The pity is, however, that the Bill is so fraught with blemishes that the potential good that it may do is lost. Moreover, such is the poor state of the Bill that it is not really capable of being repaired on a piecemeal basis. What is required is that it should be completely re-drafted to bring it up to an acceptable standard and thereafter it can provide the basis for useful discussions and debates which could lead to it developing into competent draft legislation suitable for submission to Parliament for its consideration and adoption.

As copyright law is a technical subject, it is imperative that the appropriate language should be used. For example, the Bill is littered with references to the “creator” of one or other type of copyright work. However, the appropriate terms are the “author”

or “owner” of a copyright work. The Copyright Act 1978 (the “Copyright Act”) does not use the term “creator”. Another example of the poor drafting is the use of “license” instead of “licence”. In UK and South African English (and indeed in the Copyright Act), the noun is “licence” and not “license”.

While we abide by the opinion expressed above that the Bill is ill-suited for a proper and rational discussion of the issues that it addresses, we will use it as best we can to convey our views.

The reference to “sections” below are to the sections in the Copyright Act, as it is proposed to be amended by the Bill, unless the context indicates otherwise. Sections requiring comment will be addressed *seriatim* below

3. DEFINITIONS

“accessible format copy”

This definition should be amended to read as follows:

“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, including to permit the person to have access as feasibly and comfortably as a person without disability. The accessible format copy is for use exclusively by a person with a disability and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the person with a disability;”

“audio-visual fixation”

As will be discussed below this category of work is superfluous and should be excised from the Bill. The definition is thus superfluous and should be deleted.

“craft works”

This definition and section 11C should be deleted. See the comments below concerning section 11C.

“digital rights systems”

The term “digital rights systems” does not appear anywhere in the Bill or the Act except in the definitions clause. This definition is therefore superfluous and creates uncertainty about its application. The underlying technological measures that this definition attempts to describe are adequately and fully addressed by the definition of “technological protection measure”. The definition of “digital rights systems” should therefore be deleted.

“orphan works”

The definition should be amended to read as follows:

“orphan works’ means works in which copyright still subsists but where the copyright owners of such works are unknown or cannot be located;”

The references to “right holder” and “creator” in the existing draft are inappropriate. Furthermore, the reference to “the successor in title” is unnecessary because it is

irrelevant how copyright ownership was obtained. See the further comments below relating to section 21(3).

“parallel importation of goods”

This definition and the corresponding section 12A(7) should be deleted. See the further comments below relating to section 12A(7).

“phonogram”

There is no definition of “phonogram” in the Copyright Act, and, therefore, there is no definition requiring substitution. The definition referred to is in fact in the Performers Protection Act and this Act can of course not be amended in this manner. The work in contemplation is already catered for in the Act in the category “sound recording” which is universally recognised. Furthermore, see the comments below relating to section 20C below, which also indicate why this definition is unnecessary.

“reproduction”

This definition should be deleted. There is no conceivable reason why the current non-exhaustive definition (covering a several categories of works and necessary in that regard) should be replaced by a restrictive definition which relates only to one category which is, in any event, inappropriate.

“technological protection measure”

This definition is the cornerstone of all the technology-specific amendments in the Bill and must therefore be capable of the widest possible application to protect the rights of the author or owner. The wording of this provision, which substantially

matches that of Article 6(3) of the Information Society Directive [2001/29/EC], refers to any process etc. that *is designed to prevent or restrict infringement* of copyright work.

This severely narrows the protection afforded by all of the technology-specific provisions of the Bill. Currently the definition allows a person who engages in circumvention of these measure to avoid liability on the argument that the measure applied to the work was *not designed to prevent or restrict infringement*. In many cases such measures form part of technology designed for several purposes (such as personal indexing, update tracking, reformatting and/or storage in addition to applying technological protection measures). Where such a process was used to apply the technological protection measure, the measure was arguably not designed for that purpose and the circumvention limitation would therefore not apply. The wording of this definition is also in conflict with that of a “technological protection measure device” which refers to such a device that is “primarily” designed to aid in circumvention.

Furthermore, where the measure is applied to a work in order to simply safeguard the other interests of the author (and not to prevent or restrict infringement), a party who circumvents the measure would not be liable.

The definition should be amended to match the provision of the Information Society Directive and consider the meaning of a technological measure in §1201 Title 17 of the US Code (the American Copyright Act) to read as follows:

“technological protection measure’ means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is primarily designed to prevent or restrict any act in relation to a copyright work, or any other right provided for by this Act, which is not authorised by the author or owner of copyright in the work.”

“technological protection measure work”

This definition is overly narrow and limits the rights conferred by the Bill. It should be amended to read as follows:

“technological protection measure work’ means any work or part of a work that is protected by a technological protection measure.”

“technological protection measure circumvention device”

This definition is unnecessarily complicated and burdensome. It is furthermore already out-dated and not capable of application to all circumvention devices. The defined term should be shortened to “circumvention device” and the definition should be amended to read as follows:

“circumvention device’ means any device that is promoted, advertised or marketed for the purpose of circumvention, or is primarily designed, produced or adapted to enable or facilitate the circumvention of any effective technological protection measure, or any device that has a limited commercially significant purpose or use other than to circumvent a technological protection measure.”

4. SECTION 3(3)(c)

This proposed section should be deleted. There is no reason why the duration of copyright protection of an orphan work should be perpetual. Orphan works should fall into the public domain, like all other copyright works. Protecting orphan works in perpetuity is contrary to the basic principles and policy of copyright law.

5. SECTION 5(2)

This proposed section should be deleted. First, it is doubtful whether the addition of the words “or funded by” are desirable. What does it intend to deal with? Does it mean that the state will now own all works of copyright produced at a university, because universities are state funded? If it is felt that it is necessary to add anything, the words “or funded by” should be replaced with “or commissioned by”. The remainder of the section should not be altered. Second, the issue of ownership of the copyright in such a work is already dealt with in section 21(2).

It is necessary that the sub-section should confer copyright on the works is question (as it does at present) as there is no other section that does so. Otherwise no copyright will subsist in them. No provision is made in the Act for works made by International Organisations to be protected in general and it is therefore necessary for those being awarded the benefit of protection to be specified. On both the above accounts the deletions in the section should be reversed.

6. SECTION 6(h)

First, this section should be inserted as section “6(f)”, and **not** “6(h)”. The current sections 6(f) and 6(g) should become 6(g) and 6(h), respectively. The current section

6(g) should then be amended so that its application concerning adaptations also applies to the new subsection to be inserted, as section “6(f)”.

Second, the proposed new subsection should be amended to read as follows (in order to be consistent with the rest of section 6):

“communicating to the public of the work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access the work from a place and at a time individually chosen by them.”

7. SECTION 7(g)

First, this section should be inserted as section “7(e)”, and **not** “7(g)”. The current sections 7(e) and 7(f) should become 7(f) and 7(g), respectively. The current section 7(f) should then be amended so that its application concerning adaptations also applies to the new subsection to be inserted as section “7(e)”.

Second, the proposed new subsection should be amended to read as follows (in order to be consistent with the rest of section 7):

“communicating to the public of the work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access the work from a place and at a time individually chosen by them.”

8. SECTION 7A

While a resale royalty right, or *droit de suite*, has been introduced in a number of European jurisdictions, there is no universal consensus on its benefits, even for the artists it supposedly seeks to benefit. What empirical evidence is there to suggest that the South African art market, and indeed artists, would benefit from a resale royalty right? Has an analysis been done to assess whether there is the risk of an adverse effect on the South African art market? There is no desperate need to introduce a resale royalty right. It would be better to first conduct a study on the pros and cons of a resale royalty right.

Moreover, there are some real concerns regarding the manner in which the proposed resale royalty right has been drafted, and is sought to be implemented.

Bearing in mind that “originality” is a key concept in copyright law and all artistic works must be original in order to qualify for copyright, the use of the terms “original works of art” is confusing and undesirable. Some other term should be used to describe the envisaged works. Would a photograph be included in the relevant category? Perhaps the term “fine art” would be appropriate. Whatever terminology is adopted should be defined so as to clearly demarcate the ambit of the category of artistic works envisaged. The resale royalty right ought to be confined to certain specific types of artistic works.

Again, what is a “commercial resale”? Would this cover a sale between two private individuals? In other jurisdictions, privately negotiated sales tend to be excluded from the resale royalty right, as the right is confined to sales involving an intermediary

such as an auction house or gallery. Accordingly, it is necessary to provide clarity on what is meant by “commercial resale.” Does the resale royalty right only come into existence if the copyright *author* has transferred the work of art? In other words, must the author have transferred the work of art in his or her lifetime? That is what section 7A(1) seems to suggest, but this contradicts section 7E(2).

As currently drafted, the proposed section seeks to levy a royalty on every sale of an artwork (s 7A(2)), irrespective whether the subsequent sale is at a loss or profit. The resale royalty right is generally considered necessary on equitable grounds so as to allow an artist to share in the *profit* (or, more precisely, excessive profit) — adjusted for inflation — which his or her work has yielded for a subsequent owner thereof. Accordingly, there is no justification for levying the royalty on every sale, even those where an artwork was sold at a loss. Furthermore, because of the additional administrative costs which such a right introduces, a minimum threshold is usually provided before the right applies. In other words, artworks which are sold for lower than the threshold amount are excluded. Some jurisdictions have also stipulated a maximum royalty that an artist may receive. Has that possibility been considered? There is also no indication of who has the obligation to pay the royalty, the seller or the buyer of the artwork, or the art market intermediary that facilitates the sale?

Furthermore, references to “creator” or “artist” should be removed. The right, if introduced, should belong to that of the “author”. Also, the concept of a “charge” as used in this section (see s 7A(4)) is an English-law concept. The equivalent South African term is probably “pledge” or “hypothecate”.

The principle of “national treatment” is firmly entrenched in both the Berne Convention and the TRIPS Agreement, of which South Africa is a member. National treatment requires that foreign works should enjoy exactly the same protection as domestic works. Benefitting domestic works over foreign works, as happens in subsection (3), is contrary to these treaties and breaches our obligations under them. The provision in question is thus contrary to the South African Constitution and is liable to be set aside on that basis

In summary, the section should be reconsidered, and redrafted.

9. SECTION 7B

The section should be amended to read as follows:

“The person, or persons, identified by a mark or name appearing on an artistic work which purports to identify the author, or authors, of such work, shall, unless the contrary is proved, presumed to be the author, or authors, of such work.”

Subsection (2) is unnecessary as the Copyright Act already deals with works of joint authorship.

The section creates a presumption and as such belongs as a sub-section in section 26 which contains all the other presumptions provided for in the Copyright Act.

10. SECTION 7C

This section can be simplified immensely by simply providing that the duration of the resale right shall correspond to the term of the copyright in the relevant artistic works, as that is the essence of the section.

Section 7C(2)(b) provides that the resale right of an unknown artist shall expire at the end of a term consistent with section 3(3)(a) of the Act, dealing with anonymous and pseudonymous works. This makes sense. However, a further provision consistent with section 3(3)(b), dealing with the term of copyright in the situation where the identity of the author becomes known, should be added and the proposed subsection (3) should be deleted. Likewise, the provisions of section 3(4) of the Act, dealing with the case of joint authorship, should be replicated in the Bill. The situation contemplated in this section is substantially identical to the position of anonymous and pseudonymous works and it should be regulated in the same way in the interests of consistency – there is indeed no reason for it to be any different.

In general it is best to simply provide that the duration of the resale royalty right shall correspond with the term of the copyright in respect of artistic works. The effect of introducing the resale right into the Copyright Act is simply to create an additional economic right in respect of artistic works and there is no reason why this specific right should have a different duration of protection to the other economic rights.

In the case of both anonymous or pseudonymous works and orphan works to whom will the royalty be paid?

11. SECTION 7D

The section should be amended to read as follows:

“(1) An assignment, waiver or hypothecation of the resale royalty right is prohibited.

“(2) A term of an agreement which purports to assign, waive or hypothecate a resale royalty right is unenforceable.”

Section 22 of the Act deals generally with assignments of copyright and this provision should be placed there as a sub-section.

12. SECTION 7E

Section 7E(1) should be amended to read as follows (similar to s 22(1) of the Copyright Act):

“(1) Subject to the provisions of this section, on the death of the author the resale royalty right shall be transmissible as movable property by testamentary disposition or operation of law.”

As the resale royalty right will be for the duration of the copyright, what is the position after death? Can the person to whom the copyright in the work is transferred by testamentary disposition or operation of law (for example, intestate succession) freely assign or transmit the right?

Section 7E(2) should be amended to read as follows:

“(2) In the case of the transfer of an [original work of art] (of which the author did not transfer ownership of in his or her lifetime) pursuant to a testamentary

disposition or by operation of law, the transfer to the transferee will be deemed to include the resale royalty right, unless the testamentary disposition provides otherwise.”

See the earlier comment concerning s 7A(1) and when the resale royalty right comes into existence.

Section 7E(2) should be amended to read as follows:

“If a resale royalty right passes to more than one person as contemplated in subsection (1), it may be exercised by each of them independently of the other. The payment of the resale royalty made to a co-owner (or some of the co-owners) of the resale royalty right shall be deemed to have discharged any obligation to make any payment to any other co-owners.”

There are a number of issues which are unclear in section 7E(4). What collecting agency is being referred to? Where does it fit into the picture? What if the estate of an author has been wound up? Why can the royalty not be paid directly to the holder(s) of the resale royalty right?

This section also properly belongs as a sub-section in section 22 of the Act, which deals generally with transmissions of copyright.

13. SECTION 8(h)

First, this section should be inserted as section “8(e)”, and **not** “8(g)”. The current sections 8(e), 8(f) and 8(g) should become 8(f), 8(g), and, 8(h), respectively. The current section 8(f) should then be amended so that its application concerning adaptations also applies to the new subsection to be inserted, as section “8(e)”.

Second, the proposed new subsection should be amended to read as follows (in order to be consistent with the rest of section 8):

“communicating to the public of the film, by wire or wireless means, including the making available to the public of the film in such a way that members of the public may access the film from a place and at a time individually chosen by them.”

14. SECTION 9(e)

The proposed new subsection should be amended to read as follows (in order to be consistent with the rest of section 9):

“communicating to the public of the sound recording, by wire or wireless means, including the making available to the public of the sound recording in such a way that members of the public may access the sound recording from a place and at a time individually chosen by them.”

15. SECTION 9A

The proposed amendments to section 9A (namely, sections 9(aA) to 9(aE)) are fundamentally flawed, and inefficient. Incidentally, there are two sets of proposed amendments which are to be inserted as the same sections of the Copyright Act!

See the proposed sections 9(a), (b), (c) and (d), on the one hand, and sections 9(f), (g), (h) and (i), on the other hand, of the Amendment Bill. The proposed section 9(f) of the Amendment Bill merely contains an additional subsection (which, incidentally, is either unintelligible or a statement of the obvious). Irrespective of which of the two amendments (both cannot be done) are sought to be inserted, the proposed amendments should be rejected in their present form.

Section 9A(1) of the Copyright Act currently creates a liability rule (as opposed to a property rule) in relation to the broadcasting of sound recordings. In other words, a copyright right owner does not ordinarily have a right to prevent the broadcast of a sound recording, but it can insist on the payment of a royalty if its sound recording has been broadcast. This is obviously socially beneficial and also eminently practical.

The proposed amendments effectively seek to establish (or re-establish) a property rule by requiring a broadcaster, such as a radio station, to obtain the copyright owner's prior consent before broadcasting a sound recording. Why? What harm is sought to be prevented? What purpose is there in seeking to make such matters potentially contentious, by requiring that there be a prior agreement on the content to be broadcast, and therefore the need for the possible resolution of a dispute by the Tribunal? Does this mean that a radio station can no longer have a phone-in request show where the listeners randomly select music they want to hear because the broadcaster has not obtained the prior consent of the copyright owner to broadcast the particular song?

Section 9A(aB) to (aD) seeks to establish additional requirements for the broadcaster to satisfy when wishing to broadcast a sound recording. At first blush, it appears as if the broadcaster may not broadcast the sound recording without first obtaining the consent of the copyright owner or a Collecting Society. This would be consistent with section 9A(1)(a) of the Act. However, sub-section (aD) of the amended section states that, in the event that an appropriate agreement cannot be reached between the parties, the Tribunal must attempt to adjudicate the matter; in terms of sub-section (aE) this should be done **where possible**, before the performance. This contemplates that the broadcast can take place before the issue of consent to broadcast and payment of royalties has been finalised. If this is indeed the case, it means that the broadcaster may broadcast the sound recording legitimately once having given notice, but without the consent having been finalised. However, only if there is failure to perform the obligations imposed by the terms and conditions, i.e. the payment of the royalty, (once they have been finalised) will the broadcaster be held liable. These provisions are ambivalent and are far from clear. The desired regulation of the question should be stated with greater clarity. In the event that the whole process of obtaining consent must be completed before the broadcast can lawfully take place, the situation is very cumbersome and impractical and is likely to prove to be a considerable disincentive to the use of sound recordings for broadcasting..

The proviso in the proposed new section 9A(1)(b) is superfluous: it seeks to repeat what the current section 9A(1)(c) of the Copyright Act already provides. It should therefore be deleted, which means that the replacement of paragraph (b) is unnecessary. In actual fact in any event the current section 9A(1)(c) is rendered

redundant and unnecessary by the proposed new sub-section 9A(2)(a) which prescribes that the needletime royalty must be divided equally between the copyright owner and the performer. There is thus no need to provide for a mechanism to overcome the difficulty of the failure of the parties to reach agreement on a split of the proceeds of the royalty payments. Moreover, the Collecting Societies Regulations provides that if a collecting society (as is the case with South African Music Performance Rights Association) represents both performers and copyright owners, it must distribute the royalties on an equal basis between such rights holders.¹

The inclusion of equal royalties in the proposed subsection (2)(a) will be well received by the music industry, but this good news is instantly thwarted by the following subsection (2)(b) which states that the performer's share will still be determined by agreement. So the question posed to the drafters is whether or not the royalties will be shared equally between the copyright owners and performers, or may it still be determined by agreement? Subsection (2)(b) should be deleted to accommodate the welcome amendment in section 9A(2)(a).

Sections 9A(4) and 9A(5) have nothing to do with sound recordings (section 9A is concerned with the needletime right in sound recordings) and have no place in this section, where they are also meaningless. They should be deleted as amendments to section 9A. Indeed, they are non-sensical in this context as they deal with the copyright in virtually every other category of work, besides sound-recordings. They deal with authors' rights notwithstanding an assignment of copyright. It is surmised

¹ Regulation 8(5)(b).

that these sub-sections actually belong in the amended section 20 dealing with moral rights. They will be dealt with substantively below when section 20 is discussed.

Section 9A(5) in particular is out of place. Section 7A deals with resale royalties. Should resale royalties become part of our law it would make more sense if section 9A(5) was introduced as part of section 7A. Subsection (b) appears to place an almost impossible burden on the person who sells the author's craft work. It states that the person selling the craft (the vendor) work *must ensure* that the person to whom the craft work is sold, must pay a royalty to the author should that person re-sell the work. How can the vendor possibly ensure that any future buyers pay the resale royalty to the author? At the very best, the vendor can create a contractual obligation with any future buyers providing for the payment of a royalty should the work be re-sold, but there is no mechanism by which this obligation can be enforced in view of the fact that there is no contractual relationship between a first purchaser and a third and further purchaser. Furthermore, a first purchaser who resells a work may never know if the second purchaser in turn resells the work.

16. SECTIONS 9B - 9F

While there are several drafting issues concerning the proposals relating to collecting societies, the main focus of these comments will relate to issues of principle. There seems to be inconsistencies in the proposed amendments, and confusion as to the purpose being served by the suggested changes.

First, what is the purpose for insisting that there be separate collecting societies for performers' rights, needletime and mechanical rights? At present, for instance, the

South African Music Performance Rights Association (SAMPRO) is a collecting society in respect of both performers' rights and needletime, without there being any indication that this situation is problematic or undesirable. It is almost inevitably the case that forcing a split will increase costs as the administrative burden of managing a repertoire will no longer be shared. Moreover, in most instances the various rights will be embodied in a single physical article, namely a CD and the like, which is used for rendering the performance of all the protected elements at the same time. For instance, a broadcaster may use a single CD in a broadcast to deliver a rendition of a performer's performance and a sound recording embodying that performance. Why should a multiplicity of collecting societies be involved in the collection of the royalties for this manner use of a single CD? The performance and the sound recording are inextricably merged in the CD and cannot be separated. Common sense dictates that it by far preferable and more practical for the royalties to be collected together by the same person.

Second, the new section 9D provides that a collecting society should be controlled by the owners of the rights it administers. If that is the case, why is there the requirement that a collecting society should also have to comply with BEE measures (see s 9B(6))? If a collecting society is controlled by the owners of the relevant rights, its "membership" will be determined by the repertoire it administers and so will the composition of the body of owners. It is important to note that due to reciprocal agreements between collecting societies in various jurisdictions, a South African collecting society will also administer the repertoire of rights holders from other jurisdictions. In fact, the majority of a South African collecting society's repertoire may concern the rights of foreign rights holders. Therefore, the

requirements that a collecting society should be controlled by the owners of the rights it administers, and that it should comply with BEE measures, appear to be completely at odds with each other. Indeed, a situation is created where the majority of the controlling body of a collecting society can vest with foreign copyright owners (where, as is likely, they own the copyright in the majority of the repertoire). It comes as a surprise that it is desired that “South African” collecting societies should have foreign majority control.

It may, of course, be the case that the government wants to see a change in the control of existing collecting societies, and to transform the controlling body to increase the stake held by previously-disadvantaged groups. In principle, that may not be objectionable given the fact that there is probably only room for one collective society in relation for each set of rights that require management. However, it is submitted that a radical change of copyright legislation is not the most effective means to achieve that goal. Nor is equating the share of the control of a society with the proportion of the amounts of copyrights owned by individual members as provided for in the amendment. Perhaps that issue should best be pursued through industry codes relating to the music industry or the relevant legislation promoting BEE.

Third, given the various contracts a collecting society has to enter into with record companies and rights holders, the administrative infrastructure required, and the reciprocal agreements with foreign collecting societies, it is probably not sensible (or viable for collecting societies) that the term of authorisation be limited to five-year periods (see s7B(1)). It may be problematical for a collecting society to make the

required substantial investment to provide the infrastructure for its operations if it can only be assured of the right to operate for a period of five years. Furthermore, as the control of a collecting society is essentially determined by the composition of its repertoire, any new collecting society which takes over from a previous one at the end of a five year period, and administers the same repertoire, will have the same ownership as its predecessor. What conceivable useful purpose will be served by appointing a new collecting society every five years in these circumstances?

As stated before, there is nothing to indicate that the current collecting societies are dysfunctional. Also, the experience from other jurisdictions is that the same collecting societies have been allowed to operate for decades. Again, as indicated above, if a better spread of equitable ownership of collecting societies is desired, there are more effective ways of achieving that goal than by upsetting the whole apple cart.

Sections 6 to 11B of the present Act deal *seriatim* with the restricted acts comprised in the copyright of each of the types of work eligible for copyright. This is a logical and systematic way of dealing with the economic rights comprised in the various copyrights. This cohesive pattern is interrupted and set asunder by suddenly introducing into the Act, in the midst of provisions detailing the restricted acts, a batch of sections dealing with the operation of collecting societies, which is essentially a commercial licensing question. This is interposed between the catalogues of restricted acts in respect of sound recordings and broadcasts. This is totally illogical. The provisions dealing with the operation of collecting societies do not belong here but should rather be introduced into the Act at a more appropriate place such as before the present section 29 dealing with the Copyright Tribunal. Like

this body, collecting societies are involved with the practical aspects of licensing of copyright. This is where the provisions dealing with collecting societies should properly be placed.

The following section should be amended as indicated. The present wording of the section is garbled, confused and mixes terminology and concepts:

“9B. Registration

(1) There shall be one Collecting Society, to be registered and regulated by the Commission, for each of, respectively, the performance in public and broadcasting of musical works and performers’ performances, the performance in public and broadcasting of records of performers’ performances, musical works and sound recordings, and the reproduction in material form of performers’ performances, musical works and sound recordings”.

It is not suggested by the foregoing that the principle espoused in the section is acceptable. The purpose of redrafting the section is to express in proper terms what it appears to be getting at.

The following sub-section is confused and is unacceptable.

“(2) In cases where there is no Collecting Society, contractual arrangements between copyright owners and creator shall be allowed as prescribed by the Minister”

Collecting Societies perform the function of commercial licensing agents and collectors of royalties. Arrangements between authors (not creators!) and copyright owners relate mainly to the incorporation of works in means by which they can be communicated and disseminated. The two situations have nothing to do with each other and the sub-section is thus a non-sequitur. Why should authors and copyright owners not be able to contract freely with one another. If an author (e.g. a composer of music) wishes to have his music incorporated in the sound track of a television broadcast, why should the Minister have the right to intervene or to play any role in the matter. This is a gross invasion of the individual's right of freedom to contract or to do business. This sub-section should be deleted.

It is pointed out that, as drafted, the sections under discussion (in particular section 9B) deal only with collecting societies in respect of a limited range of copyright works (musical works and sound recordings) and performers' performances, and then only in respect of a circumscribed ambit of restricted acts (broadcasting, public performance and reproduction in a material form). No provision is made for collecting societies for other types of works such as literary works. Any collecting societies that may operate in respect of those other types of works can do so free from the constraints imposed by the amendment.

Section 9B(6) currently poses a threat to the long standing Collecting Society SAMRO (South African Music Rights Organisation). It requires any Collecting Society be compliant with the Companies Act 71 of 2008. This is problematic because SAMRO makes distributions of non-royalty revenue, as well as payments to their Retirement Fund despite the fact that SAMRO is a non-profit organisation.

Schedule 1(3) of the Companies Act states that no portion a non-profit organisation's income may be paid to members.

SAMRO may have temporarily avoided the operation of this exception by making use of a purposive interpretation of the provisions, but the issue remains that SAMRO is technically not entitled to make some of the distributions discussed above, and the possible entrenchment of the above provision only highlights this fact.

It is unclear what the DTI meant by "discrimination" in section 9C(2). Why would a foreign Collecting Society discriminate against right holders of South African Collecting Societies? And furthermore, why would a local Collecting Society ever allow it? Any contracts permitting discrimination would surely be rendered void. Perhaps what the drafters meant to say is as follows:

"[...] Provided that no such Collecting Society or organisation shall permit any prejudice in regard to the terms of license or the distribution of royalties collected to the members."

The envisaged operation of section 9D is not clear and it does not contemplate all relevant factors. What if a deadlock should occur between the members entitled to approve certain acts? Although this is not likely, the Bill should nevertheless provide for such a situation, perhaps by referring the matter to the Tribunal. Furthermore, what percentage of the members must approve something before it is implemented? Is it a mere 51%? And if so, is there any type of relief for the dissenting members? What if they are dissatisfied with the results, and wish to have it changed? Is there

any solution in place for them? The Bill does not provide any answers to these questions.

In section 9E, subsection (1), the word “such” should be deleted. In fact, the Bill is too liberal with its use of the word “such”, and should reconsider each one. Otherwise it creates confusion, as is clearly the case in this section, considering it is not known which ‘such’ report or return is being referred to. The use of such also makes the sentences more difficult to read and interpret.

In section 9F the Bill provides that, should a Collecting Society be suspended or cancelled, a suitable person may be appointed to assist the Commission in dealing with the “administration and discharge of functions” of the Society. Does this mean the Commission will administer the functions of the Collecting Society, by administering all the members’ rights, or does it mean that it will administer the actual discharging of functions? This section needs clarification. If the former interpretation is correct, then how exactly does the Commission intend to administer the functions of the Collecting Society? What exactly does the Bill mean when it says administration – i.e., what is the scope of this duty? Given the magnitude of the functions of a Collecting Society, the already overloaded Commission cannot be expected to attend to the administration of its members.

17. SECTION 10A

It is self-evident and trite that a Copyright Act should deal with matters relating to the protection of works by means of copyright. Regulatory matters pertaining to works which have nothing to do with copyright and the protection of such works have no

place in a Copyright Act. The fact that the section refers to the “broadcasting industry” and places obligations on it, and not to “broadcasters” as a recognised group of authors and owners of copyright works, and the context in which this term is used, is a clear indication that the situation being addressed is not a copyright issue, but rather an question of social or economic policy relating to an industry. The requirement that broadcasters broadcast a minimum amount of local content, or any type of regulation of this kind, not being a matter of copyright law, does not belong in the Copyright Act. It is a matter that should be dealt with by the relevant regulatory authority that regulates broadcasters and issues the broadcasting licences, or in legislation pertinent to such issues.

Furthermore, given South Africa’s obligations under international treaties, such as the Berne Convention, which stipulate the principle of national treatment, copyright law cannot discriminate against foreign owners of copyright law. The section thus breaches our obligations under these international treaties and is for that reason contrary to the South African Constitution. It is therefore invalid. Accordingly, this proposed section should be removed from the Bill. How does section 10A have retrospective application, as claimed in section 10A(2)?

18. SECTION 11C

There is no need for the introduction of “craft works” as a new category of copyright work. The Copyright Act already protects “works of craftsmanship” as a species of “artistic works.” Why is there a concern that the types of work which the Bill seeks to protect as “craft works” are not already protected as this species of “artistic works”? If there was to be any doubt about the matter (which is not the case), the term being

defined could be changed to “works of craftsmanship” and the definition could be led in by the word “includes [...]”. This would completely obviate the necessity to create the new category.

In any event, if it is desired (irrationally) to create such a new category this cannot be achieved by simply giving a list of restricted acts. They deal only with the content of the copyright in the category of work and say nothing about the creation, subsistence, authorship, ownership and duration of the category of work, all of which must be addressed for copyright to be enjoyed under the Act by this new category. In order to address these issues it would also be necessary to make appropriate amendments to sections 2, 3, and 4 to bring this category of work into line with the existing categories.

Aside from fact that there is no need to create this type of work, if it is introduced this work should probably not appear in section 11. It would be more appropriate to have craft works under section 7. Section 11C(1)(a) should be redrafted, as it makes little sense, as well as making obvious statements. For example, it states that the craft work is “automatically protected by copyright from the time they are created”. This is not true, given the fact that, as mentioned above, there are no provisions in the Bill dealing with the creation of copyright in this type of work; the Bill simply provides for certain restricted acts.

19. SECTIONS 12(14), 12(15) AND 12A

At the outset, it is worth stating that the open-ended type of fair-use exception which the Bill *purports* to introduce (s 12A(5)) is to be welcomed. However, the manner in

which it is introduced results in confusion, or, worse, renders it ineffective. The same s12A largely repeats the specific exceptions in section 12 of the Copyright Act. This duplication, expressed in different language, cannot fail to cause confusion and is largely redundant. It amounts to bad draftsmanship and must be eradicated. Sections 12 and 12A must be properly consolidated so as to ensure a single rational and intelligible provision dealing with the subject matter. As section 12A currently stands 12A(5) is not applicable to the specified exceptions currently provided for in section 12, which is anomalous.

In effect s12A is, therefore, not a genuine open-ended fair-use exception as exists in the US, or in Australia (which, by way of clarity, lists specific exceptions which would be considered to amount to fair use). There appears to be the suggestion that the Australian approach is being followed (s 12A(2)). However, the Bill needs to be clear about the type of exceptions regime it intends to create. This will also require a reassessment of the current section 13 of the Copyright Act, particularly in relation to factors which are to be used to assess whether the permitted exceptions are fair. There is no reason why these should be different to s 12A(5). Incidentally, the purpose and effect of section 12A(1) is also not clear. The language is tortuous and confused and it is not possible to ascribe any intelligible meaning to it. The meaning of section 12A(3) is unclear and the provision is inappropriate. There is no justification for copyright law to classify and restrict all digital material for educational use and it is wholly inappropriate for South Africa to categorise all of the Internet. The intention of section 12A(3) is presumably to restrict the fair use of digital material for educational purposes only, but the wording of the provision fails to make that clear. It is also unnecessary to include this provision which effectively and inappropriately

distinguishes between digital and analogue works. The justified need for additional protection in relation to digital works is adequately addressed elsewhere in the Bill. It is also nonsense in that an exception is obviously not required where the activity is covered by a licence. The section therefore only functions to impose a duty on authors or owners of copyright in digital works to attach a specific copyright notice to the work. The section contributes nothing to copyright law and should be deleted.

Of particular concern are the types of blanket exceptions to copyright protection (and the compulsory licensing) which the Bill seeks to introduce; they are unwarranted, and materially undermine, or expropriate, the property rights of copyright owners. There is no evidence to suggest that copyright law is a material impediment to the provision of textbooks and learning material. If government would like to provide cheaper textbooks without having to negotiate with the commercial publishers, it is at liberty to commission, and print, its own material. Again, if there is a desperate need for translations of copyright works into other languages, why is government not partnering with the relevant copyright owners in getting the required works translated. A commercial copyright owner, who has the prospect of selling thousands of books to government, should be quite an amenable counterparty. Instead, it appears that government seeks to expropriate property rights in order to reduce the costs of its constitutionally-mandated obligations to provide education. Interestingly, there is no suggestion that the relevant copyright owner, whose rights have been expropriated to produce the relevant translations, will be allowed to produce (i.e. print and distribute) the translations. The contracts to print and distribute the translations will no doubt be put out to tender, if we are lucky.

The implications of what is proposed under the new fair-dealing exceptions are staggering. For example, under the exception allowed for by section 12(15), an institution like UNISA can make a copy of a textbook freely available as an “e-book” to its students. What about the interests of the copyright owner? This type of disregard of copyright protection risks South Africa being seen internationally as facilitating wholesale piracy, rather than legitimately seeking to address a real need for access to educational material.

Sub-sections (14) and (15) evidence an aberration. The references to “musical work” are misplaced. How does one “translate” a musical work, which is defined in the Act to mean “a work consisting of music, **exclusive of words** or action intended to be sung, spoken or performed with the music.” (emphasis added). The words or lyrics of a song constitute a literary work. In consequence, the term “musical work” should be deleted from the texts.

Please also see the comments in relation to section 13B.

While the exception in relation to a parody or pastiche work has been long overdue, the manner in which it is cast again leaves much to be desired. First, there is no reason why a “cartoon” should be included alongside a parody and pastiche work. A cartoon is just a medium for telling a story, and should not be lumped together with a parody and pastiche work. It is merely one of several forms in which a parody or pastiche can be expressed (why single it out and not also mention all the other forms of expression such as slogans, poetry etc.?). A cartoon does not necessarily amount to a parody or a pastiche work. Accordingly, the reference to a cartoon should be

deleted (see also s 12A(5)). Second, why should the exception be limited to non-commercial purposes? There is a suggestion that only the use of an entire copyright work for commercial purposes is not allowed (see also s 12A(5)(d)).

Given the fact that section 12A(5) is meant to introduce a more flexible approach to fair use, there should be no absolute exclusion of the use of an entire copyright work (for example, a photograph or painting) in a parody or a pastiche work. Whether such use amounts to fair use should depend on the particular circumstances of a relevant case. Third, why is there a closed list of media in which parody and pastiche are permitted to be expressed? The list is arbitrary and ill-considered (what is the difference between a film and a video clip and a photograph and visual art?) and includes the unlikely medium of electronic research reports (why only electronic?), and omits media such as broadcasts; use in all forms of media should be permitted. Fourth, there is no need for the reference to any schedule, as it merely serves to confuse the drafting. Fifth, issues of format shifting have nothing to do with a parody or a pastiche work (see s 12A(4)(b) and (c)) and cannot serve as examples of fair use. In most cases, according to the Bill in its current form, format shifting will amount to a criminal offence for circumventing a technological protection measure. Last, the specific stipulations concerning a parody or a pastiche work in section 12A(5)(d) should be deleted.

Section 12A(6) unnecessarily narrows the existing fair-dealing exceptions, such as criticism, or reporting current events, by restricting such use to non-commercial purposes.

Section 12A(7) completely fails to deal with the use of copyright law to prevent parallel imports, which is presumably its objective. It is unintelligible. The term “parallel importation” exists in trade jargon and it does not have a specific legal meaning. If it is desired to use it, it should be defined. The section places the emphasis on trade marks. Parallel importation is specifically allowed under the Trade Marks Act and this issue does not require to be dealt with in addition in the Copyright Act, which is not the appropriate vehicle for dealing with trade mark issues. As a copyright issue, why only permit parallel importation of **trade marked** goods? What about goods not bearing trade marks? Why are they distinguishable and given preferential treatment from a copyright perspective?

Section 12A(8) purports to create a fair use exception that allows the encryption of data for the purpose of decrypting protected data. This provision is wholly incorrect and ignores the realities of information technology law and practice. Firstly, encrypting data may amount to copyright infringement as an adaptation of a work. Permitting such encryption for the purpose of decrypting the data erodes the protection afforded to digital works and databases (collections of copyright work) in particular. Secondly, it is contrary to the protection afforded to works protected by technological measures and seems to create a defence to the criminal offences in sections 23(4)(e) and (h). However, most forms of circumvention are conducted, at least in part, by or with the aid of encryption. This provision will therefore effectively counteract and nullify the protection afforded by the introduction of anti-circumvention measures. Thirdly, encrypting computer-generated data that has been lawfully obtained is not prohibited by the Act or the Bill. There is thus no need to provide a fair dealing exception to permit an act that is already lawful.

Therefore, it would seem that section 12A(8) is simply intended to allow encryption of computer data for the purpose of circumventing a technological protection measure (i.e. computer-generated data) in order to make fair use of the work (see section 28P(a)). This is entirely unnecessary and limits the operation of section 28P(a) to cases of circumvention by means of encryption only. The provision is fraught with difficulty, serves no real purpose and should be deleted.

The whole of section 12A should be completely redrafted, and in doing so it is recommended that the relevant provisions in the Australian legislation be used as a starting point.

20. SECTION 13A

This provision purports to limit the definition of reproduction where the work is reproduced temporarily as part of the working of the Internet or a part thereof or a private network. It is common provision in foreign copyright law intended to address the nature of digital communications technology which relies on temporary reproductions in order to function. It is therefore found in, amongst others, the Information Society Directive of the European Parliament, Title 17 of the US Code and the British Copyright, Patents and Designs Act 1988.

However, in all of these cases the provisions rely on existing jurisprudence to add essential meaning to these provisions and, crucially, limit its scope. For example, terms such as “integral and essential”, “technical process” and “independent economic significance” are all defined with reference to case law.

In South Africa no such precedent exists and the provision is therefore open to any interpretation. Furthermore, the needs of online service providers (that this provision seeks to address) are adequately provided for elsewhere. As a result, section 13A is wholly inappropriate and outright dangerous to the interests of copyright owners in South Africa.

Copyright infringement by temporary or ethereal reproduction is adequately and properly addressed by precedent and no purpose is served by introducing this provision.

Furthermore, it permits “anyone” to make reproductions in order for it to be distributed by electronic means provided that the party who relies on this provision is an intermediary to the transmission of the work. As a result, a party (such as an internet service provider) is not liable for infringement if the act of transmitting the work between its client (the user of the network) and the origin (whichever service the user is accessing) amounts to copyright infringement. This effect is of course welcome, but it is entirely unnecessary. Section 73 of the Electronic Communications and Transactions Act contains a far better, more judicious and advanced limitation on the liability of such parties. Section 13A therefore serves no purpose at all.

Furthermore, in the absence of local precedent to limit the application of this provision, it creates a dangerous exception to liability that may be, and will be, exploited by online service providers that provide access to or facilitate piracy. In every case of copyright infringement against such online service providers (eg. The

Pirate Bay, Napster, MegaUpload) the strongest defence raised was that the service providers were merely acting as a conduit for the information or works (i.e. in the words of the Bill transmitting the work “in a network between third parties”). Consequently, the Bill creates a glaring exception to liability that is guaranteed to stimulate piracy in South Africa. This section is currently an exemption from liability that does not provide protection to any lawful activity (which is already provided for elsewhere) and yet exempts all piracy service providers from all forms of liability.

It is impossible to redraft this provision to avoid the unintended consequences outlined above, short of reproducing entire sections from the Electronic Communications and Transactions Act. It is an illustration of the inherent danger of borrowing verbatim provisions from foreign law out of context.

Section 13A must be deleted.

21. SECTION 13B

Again, the comments concerning this section will principally be confined to matters of principle. However, it must be observed at the outset that the section contains an inherent contradiction and anomaly. It purports to grant an exemption from copyright infringement but yet in sub-section (1) seems to contemplate that permission has been granted for the manner of use (presumably by the copyright owner – who else?). If this is the case no exemption is required and the section is superfluous, if not, the sub-section is incomprehensible.

It is important to first note that the Copyright Act already provides for the possibility of a compulsory licence when a licence for the use of a copyright work is *required* (see s 30 of the Copyright Act). Thus, if the use of a copyright work is required for *any* purpose, not just for educational purposes, it is possible to apply to the Copyright Tribunal for the grant of a licence. In addition, there are existing fair-dealing exceptions for purposes of study, and education (see the regulations made pursuant to s 13 of the Copyright Act). Moreover, there now appears to be a move to a more open-ended fair use exception, rather than just the specified fair-dealing exceptions (see s 12A(5)). Accordingly, if further exceptions are considered necessary for educational purposes, or, indeed, for any other purpose, it has to be done on well-justified grounds.

Unfortunately, the current draft provisions do not evidence any coherence with the existing provisions of the Copyright Act, and there is nothing to suggest that the exceptions being sought are necessary. For example, there is no evidence that it has ever been suggested that the situations contemplated in section 13B(4) have been adversely affected by copyright law, and, therefore, have to specifically be dealt with in the Copyright Act. The other proposed exceptions do not appear to adequately balance the interests of copyright owners and the particular use sought to be made of their works. Most problematically, it is provided that the relevant rights of the copyright owner can effectively be expropriated if the copyright owner's price for the use of its work is considered to be excessive. There is no suggestion that the copyright owner will be compensated for the reproduction of its work. As stated above, if copyrighted material is considered too expensive (which seems unlikely), government is quite at liberty to commission the authoring, and production, of its own

material. After all, as there is no copyright in ideas or facts, apart from literature works, there should be no obstacle to producing the necessary educational material.

The provisions of sub-section (5) are incomprehensible. There is no reason why a permission to use a work as contemplated in sub-section (1) should be circumscribed in this manner. A copyright owner must be free to make his permission as wide as he chooses.

22. SECTION 13C

While the making of copies for the inter-library supply of material is to be welcomed, why should an electronic copy have to be deleted? The retention of a copy, in any form, should be allowed. It is anachronistic to require that the relevant document be printed before it is supplied to the user of the library. The section does not say what may be supplied and is thus materially defective.

23. SECTIONS 15 TO 19

Section 12(14), which is being made applicable to artistic works, cinematograph films, sound recordings, broadcasts and published editions, respectively, applies to translations. How does one translate these types of works bearing in mind their definitions in the Act and their natures for copyright purposes?

24. SECTION 19C

In subsection (2)(a), a request for permission must be made to entitle the format shift of any copyright works. This leaves open a loophole for applicants to merely make a request and then proceed to change the format in which the work is fixed, even

before the decision of the copyright owner on whether they are allowed to format shift the work or not has been communicated. The section creates a presumption that permission will be granted. What if permission is refused, what will happen to the works which have already been shifted? The danger in this section is that it applies to all pending applications. An essential principle of copyright law is the vesting of exclusive rights to the holder thereof, and it is the copyright owner's discretion to allow any changes to be made to his/her work, provided it is not done in terms of the fair dealing exceptions. This section unduly limits the copyright owner's discretion.

The section should be simplified to read as follows:

“(1) Archives, libraries, museums and galleries that are publicly funded, in whole or in part, may:

(a) make copies of works in their collection (in any format) for the purpose of back-up and preservation; and

(b) may make or procure a copy of a work from another institution if a copy of such work is missing or incomplete, provided the work cannot be reasonably acquired through general trade or from the publisher.

(2) The copies of a work made pursuant to this section may be lent to users of the aforementioned institutions for personal use, research or study, or for use on the premises of such institutions.”

25. SECTION 19D

Section 19D(1) should, in accordance with the Marrakesh Treaty, be amended to read as follows:

“(1) An authorised entity shall be permitted, without the authorisation of the owner of copyright, to make an accessible format copy of a copyright work for the benefit of a person with a disability, to supply that accessible format copy, or copies thereof, to persons with a disability by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, provided that the following conditions are met:

(a) the authorised entity wishing to undertake such activity has lawful access to that work or a copy of that work;

(b) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to a person with a disability; and

(c) such accessible format copies are supplied exclusively for use by persons with a disability; and

(c) the activity is undertaken on a non-profit basis.”

The Marrakesh Treaty provides that the aforementioned acts are allowed to be performed by an “authorised entity”. Accordingly, it is necessary to provide a definition of “authorised entity.”

The words “author or other” in section 19D(3) should be deleted. The author or other, unless he is also the copyright owner, in which case his position is covered, has no role to play in this situation.

Sections 19D(4) and (5) should be deleted as they repeat the provisions of the definitions of “accessible format copy” and “person with a disability,” respectively.

26. SECTION 19E

This section should be deleted because it either embodies statements which are completely obvious, or it is unintelligible. In any event, as previously mentioned the attempt to create “craft works” as a new category of work eligible for copyright is completely misguided and must be abandoned.

Sub-section (2) is a good example of why we say that the draftsmanship of the Bill is inept. The turn of phrase “covered in copyright” is neither appropriate nor has it been encountered in use anywhere in the world. If photocopying is for a use not stipulated in the Act it is not within the scope of the copyright in the work and there is no legal restriction on it. There is thus no need to obtain any permission for it. On the other hand, if permission is obtained, an exemption is never necessary. The provision, if capable of being understood, is superfluous. If the section is intended to say that, if photocopying (why only photocopying and not all the restricted acts) does not fall within the scope of an exemption, the permission of the copyright owner must be obtained, then it is stating one of the most obvious and self-evident principles of copyright law and is unnecessary, and why is the same point not made in respect of all the other types of works eligible for copyright because the same principle applies equally to them?

27. SECTION 20

This section deals with “moral rights.” They are a particular type of right provided for in the Berne Convention, and this is their genesis in the Copyright Act. The moral rights are distinct from, and are of a very different nature to, the economic rights comprised in copyright. Moral rights are in the nature of personality rights attaching to the author. They are the author’s residual rights which remain with him even after he has assigned copyright to another person. They comprise the rights of paternity and integrity. They have no economic component and are not designed to facilitate the commercial exploitation of a work or to play any role in that regard. There is no overlap between them and the economic rights provided by copyright.

Performers’ rights are not a species of copyright. Copyright protects, and grants to authors rights in respect of, **works** which exist in a material form. Performers’ rights protect the individual’s rendition of a work, i.e. his performance on the stage, in the recording studio or elsewhere. What is protected in the first instance is his actual live performance of a work. There is a relationship between copyright and performers’ rights as they interact with each other and in many instances can be embodied in the same article, for instance a CD. This does not, however, alter the fact that they are separate rights of a significantly different nature. To use a figure of speech, copyright and performers’ rights are apples and oranges. They must not be confused or elided together. There is no such thing as moral rights in a performance. Apart from any other considerations, performers rights cannot be assigned and there can thus never be a separation between those rights and the performer. Such a separation, which can occur with copyright, is the *raison d’être* of moral rights.

Performers' rights are created by, and are comprehensively dealt with, and regulated in the Performers Protection Act, 11 of 1967. The Performers Protection Act is derived from the Rome Convention while the Copyright Act is derived from the Berne Convention. If it is desired to alter performers rights this must be done in the Performers Protection Act and not in the Copyright Act, and vice versa. This principle was correctly applied in dealing with the question of needletime. Both types of rights (copyright in sound recordings and performers rights) were dealt with in their own respective statutes. By way of comparison, one does not regulate the question of mineral rights in a statute dealing with agriculture, and vice versa, even though they both have something to do with land.

The distinctions dealt with above have been confused, obfuscated and overlooked in this section and in section 20A, which will be discussed in due course below.

The suggested amendments in this section should be deleted, and discarded. First, "television" and "radio" are not defined categories of copyright works. As already indicated above, craft works are already protected as artistic works, and so are photographs. Thus, the relevant works sought to be protected are already protected under section 20(1). Second, section 20(4), which seems to give performers and authors a right to royalties (an economic right) if their works are rebroadcast, is not warranted nor is it competent. This innovation is completely contrary to the essence and nature of moral rights which are not economic rights, and, insofar as new rights are given to performers, this should be done in the Performers Protection Act and not in the Copyright Act. Performers whose rights are incorporated in, for example, sound recordings are already entitled to royalties each time their performances are

broadcast (in terms of the Performers Protection Act). The authors of the relevant works may have contractual rights to receive royalties which are linked to how many times their works are broadcast, or when their works are used. The proposed amendment seeks to transform moral rights into economic rights, and, essentially, create a system of joint ownership of the economic rights. An assignee of the copyright can exercise the economic rights while the assignor/author can exercise the (newly created) economic aspects of the moral rights. It also undermines the whole principle of an assignment of copyright. This is an undesirable and untenable situation.

Not only is it inconsistent with international practice, it threatens to undermine the value of copyright owners' rights. It is important to note that assignments of copyright from author-owners have always been negotiated on the basis that the author will no longer continue to have a direct interest in the copyright work. An author has to negotiate adequate compensation from the assignee of the copyright. Incidentally, given the amount of foreign content being broadcast in South Africa, it would mean that foreign authors and performers would be the principal beneficiaries of such a provision. Thus, the greater portion of such royalty payments will be remitted abroad, which will have a negative effect on the country's balance of payments. It is also another example of contradictory approaches: there is no concern that greater payments will be made to foreigners, but when it comes to compulsory translation licences (see the provisions in the Schedule to the Bill) accommodations are allowed for a licensee who struggles to pay a copyright owner due to changes in currency conversion rates.

As previously mentioned, it would appear as though the amendments dealt with in paragraph (k) on page 14 of the draft Bill, which purport to amend section 9A, in fact belong in section 20 because they appear to relate to moral rights. On this assumption they are equally objectionable on the grounds advanced above.

28. SECTIONS 20A AND 20B

Reference is made to the explanations given in paragraph 27 in regard to moral rights and performers rights. The comments made there apply equally to these sections.

The sections appear to be derived from the Beijing Treaty on Audiovisual Performances. They are beyond the pale because the provisions, if desirable at all, belong in the Performers' Protection Act and not in the Copyright Act. Performers' rights are simply not copyright and cannot be provided in the Copyright Act. Indeed the section largely reiterates provisions which already exist in the Performers' Protection Act, in which case they are superfluous, or to the extent that they are different, they are likely to create confusion and uncertainty. If it is desired to incorporate the principles of the Beijing Treaty into our law, the relevant provisions should be integrated into the Performers' Protection Act so as to make them compatible with the existing provisions of that Act and to avoid duplication or contradiction. To this end it will be necessary to amend the Performers' Protection Act.

The Beijing Treaty creates moral rights in performances and allows for performers' rights to be assigned or transferred, which is presently not the case in the

Performers' Protection Act. However, even in that Act moral rights should be kept separate and distinct from economic rights. This is done in the Beijing Treaty.

The sections should be deleted on the grounds that there is no good reason why substantive provisions relating to performers' rights are sought to be inserted in the Copyright Act. It would have the result that certain performers' rights are protected in the Performers' Protection Act (where they belong), while others are protected in the Copyright Act (where they would be an oddity and do not belong). This makes absolutely no sense and would make for ludicrous IP policy.

29. SECTION 20C

What the Bill seeks to protect by section 20C (and by the inclusion of the definition of "phonogram") is to create new category of copyright work, as is the case with craft works. It is not clear why such new category is sought to be created under the section dealing with moral rights, but that is not the biggest concern. The proposed section essentially covers the same ground as the existing provisions relating to the protection of "sound recordings" (see s 9 of the Copyright Act). A comparison between the definitions of "sound recording" and "phonogram" reveals that they are substantially identical and that what is being described in each case is the same item of property. They cannot co-exist as separate and distinct items of property. The comments made in paragraph 18 above in regard to the inadequacy of attempting to introduce a new category of copyright work into the Act by merely cataloguing the restricted acts, apply equally to the new category phonograms.

This is another instance of sight being lost of the difference between performers' protection and copyright. The term "phonogram" belongs in performers' protection law and is defined in the Performers' Protection Act. It derives from the Rome Convention. The definition of phonogram which the Bill purports to amend is indeed the definition in that Act. The term does not appear anywhere in the current Copyright Act. A "phonogram" is the performers' right equivalent of a "sound recording" in copyright law. They are the same thing.

The section seeks to give rights to the "producer" (author?) of a phonogram, and there is no indication why the existing rights granted in respect of sound recordings are inadequate. If this is indeed a new right being introduced, it is out of step with international practice. More importantly, there seems to be no economic justification for such a right. The section proposes a one-off payment for producers. Producers of phonograms (or sound recordings), if they are not also the copyright owners or authors, are generally remunerated for their work, either on the basis of a commission or as employees. To the extent that the right seeks to give performers rights (see s 20C(3)), performers are already granted rights (which are not limited to receiving a one-off payment) pursuant to the Performers' Protection Act 1967.

The proposed section has other specific provisions which defy logic. It seeks to place an obligation on broadcasters (see sections 20C(5)(a)(iii) to (vi)) to commercialise the performance captured in a phonogram (sound recording). Why would broadcasters want to broadcast content which imposes an obligation on them? Again, it seeks to create a property rule in relation to the broadcast of phonograms (sound recordings), rather than a liability rule. In fact, the proposed provisions are

likely to hurt performers and the copyright owners of phonograms (sound recordings) because they will serve as deterrent for broadcasters to broadcast them. If the aim is to increase the percentage of local content being broadcast, this is hardly the way to go about things. Yet again, it is important to note that the provisions may benefit foreigners more in that the greater portion of such royalty payments will probably be remitted abroad, which will have a negative effect on the country's balance of payments.

The entire section is completely misconceived and fundamentally flawed, and should be deleted. In the event that it is desired to bring about changes to performers' rights, this should be done in the Performers' Protection Act by means of appropriate amendments to it. It is incompetent to attempt to bring about changes to performers' rights by amending the Copyright Act in an untenable manner.

30. SECTION 20D

Commentary on this section should be read along with the comments delivered on section 28P below.

This section provides that the "contravention of the technological protection measure provisions" shall be a criminal offence. The aggressive stance of the Bill toward protecting digital works is welcomed and the DTI is commended for its efforts in this respect.

However, it must be noted that anti-circumvention measures are often cited across the world as a primary inhibitor to creativity and innovation and an undue limitation on

fair use. As a result, it should be implemented with care and circumspection to balance the rights of copyright owners and the public interest to make fair use of a digital work.

In this respect the Bill's approach to anti-circumvention must be amended to temper its effect and to avoid placing an undue limitation on the fair use of digital works protected by technological measures. The interaction between fair use and anti-circumvention is discussed below.

It is submitted that the act of circumvention should not culminate in criminal liability as a first resort. The international standard approach to anti-circumvention is to use the existing three-tier system of copyright infringement. In other words, any act of circumvention would firstly constitute direct copyright infringement. Secondly, any act of circumvention with guilty knowledge of the fact that the work (after circumvention) is or is likely to be an infringing copy would constitute indirect copyright infringement. Thirdly, performing any act of circumvention with actual knowledge of the fact that it would amount to an infringement would constitute criminal copyright infringement.

It is submitted that the existing approach to copyright infringement should be adopted in relation to any act of circumvention.

Furthermore, this provision should not be included in section 20 and must be moved to section 23 to be read in context with the existing forms of infringement.

31. SECTION 20E

There is an incorrect cross reference to section 28Q, which should be section 28S.

This provision should be moved to section 23.

32. SECTION 20F

The use of the term “digital rights management” to describe this provision is a misnomer. The term digital rights management (or DRM) is commonly used to refer to any technological protection measure (as defined by the Bill) and the use thereof.

This section does not deal with technological protection measures as such, and should therefore not be listed under the heading digital rights management. An alternative heading may be “Digital rights information and access control measures applicable to libraries and archives”.

The contents of this section are welcomed, but it must be noted that they are likely to place a significant economic and administrative burden on libraries and archives. In the case of subscribed archives or databases the library or archive will likely not be in a position to comply with the provisions of this section. Furthermore, although the section obliges libraries and archives to perform certain acts, the Bill does not introduce any sanction for failing in this duty.

It is, therefore, doubtful whether this provision will have any effect on the protection of copyright in the digital environment.

33. SECTION 21(3)

There is no reason why a copyright work whose owner has died should *per se* be regarded as an orphan work. The ownership of copyright is an asset in a person’s

estate, like any other asset, and will devolve in accordance with the law of succession. Thus, the mere fact that a copyright owner has died does not mean that there is no owner of the copyright work. Accordingly, the reference to a deceased copyright owner should be deleted. An orphan work is a copyright work whose owner is unknown or cannot be located.

There is no good reason why the copyright should vest in the state. It would be sufficient if the state (or some statutory body, like the Commission) were appointed as agent for the copyright owner. In effect this would mean that the unknown owner's title to the copyright is uninterrupted but that the state (or some other entity) will be the interim custodian of the copyright and can grant licences in respect of it. It could also be provided that the state is deemed to be an exclusive licensee of the copyright which would give it the power to enforce it. This would avoid the necessity of having to reassign the copyright to the copyright owner, should he or she reappear. In fact, the new proposed section 22(1) states that once the copyright vests in the state, it may not be assigned. So how is the copyright meant to be transferred to the copyright owner once he or she re-appears. Furthermore, if copyright vests in the state, it potentially also prevents the copyright work passing to the unknown copyright owner's successors after his or her death, as it is strictly no longer an asset in his or her estate.

34. SECTION 22

There are no good reasons for the proposed amendments. As already indicated, the new proposed section 22(1) states that copyright vesting in the state may not be

assigned. This being so, it is not clear how copyright in an orphan work owned by the state will revert to the copyright owner once he or she re-appears.

Why should an assignment of copyright be of limited duration? What is the intention? Is it the intention that the final 25 years should vest in the author as was the case with the reversionary interest provided for under the 1916 Act? This is not what the section says. In terms of this section the copyright will revert to the last assignor once the twenty-five year period has expired. The beneficiary will not necessarily be the author as he may never have owned the copyright (see section 21) or he may not have been the last assignor. The following situation can be postulated. A, the author, assigns copyright to B who in turn assigns it to C. Twenty-five years after the assignment to C, the copyright reverts to B who can hold it for the remainder of the duration of the copyright. Why should B be favoured in this manner? Why should he be in a better position than C? There is no logic to this provision and it is completely arbitrary.

On a strict interpretation of the section, it is mandatory that an assignment of copyright must transfer title for twenty-five years and for no longer nor shorter a period. It will be contrary to the section to purport to grant an assignment of copyright for, say, a ten year period. This is preposterous. There is no justification whatsoever to prescribe the duration of an assignment, unless perhaps the 1916 reversionary interest is re-instated but it is difficult to see why this should happen in the light of the fact that it was abolished in 1965. What has happened in the meantime to warrant reversing the 1965 decision?

The proposed amendment should be deleted.

35. SECTION 22A

Other than for cinematograph films, no registration system exists for copyright works. Section 22A(6) suggests that there will be a register of copyright works, or is it only for orphan works? This point requires to be clarified. It is probably not a bad idea for copyright works which have been identified as orphan works to be placed on a register, but then an applicant for a licence should not also have to satisfy the other requirements which indicate that it has unsuccessfully tried to locate the copyright owner (the “search requirements”). In other words, an applicant for a licence should only have to satisfy the search requirements if the copyright work is not on the orphan-work register. Thus, there should be a presumption that if the copyright work is listed on the register that it is an orphan work. If the copyright work is not listed on the orphan-work register, a prospective licensee will need to satisfy the search requirements, and if the copyright owner has not been located, the copyright work should be included on the orphan-work register. If the copyright owner re-appears, the copyright work should be removed from the register.

Sections 22A(7), (8) and (9), are repetitions of sections, 22A(2), (3), and (4), respectively, and should be deleted.

What happens to the royalties which have not been claimed by the copyright owner within five years? Section 22A(12) appears to be silent on the issue. Are those amounts forfeited to the state? This issue must be dealt with. If a licensee fails to pay the required royalties, or if infringement of an orphan work occurs, will the

Commission institute proceedings to enforce compliance with the licence or with the copyright? If the suggestion that the Commission should simply be the agent of the copyright owner is accepted, there should be specific provisions empowering the Commission to institute legal proceedings to enforce the licences and the copyright. As mentioned above, this could be achieved by deeming the Commission to be an exclusive licensee of the work.

Ironically, the process that the applicants must undergo to find the owner is so unreasonable that it will likely result in less applicants applying for a licence – which will of course diminish the commercial value of the copyrighted works. The State should promote access to, and the licensing of, orphaned works. Therefore the State should firstly take the responsibility of finding the true owner, alternatively, the requirements imposed on the applicants must be made significantly easier to satisfy in order to promote licence agreements.

In terms of subsection (13), should the owner of the work adduce evidence indicating ownership, then the work *may* be transferred to him/her. If this subsection is to be retained in the Bill, then “may” must be changed to “shall”. Any person adducing evidence proving ownership of a work must have the work transferred to him/her, otherwise this gives the State an undue discretion which may be exercised in an unreasonable manner. Copyright owners will be prejudiced by this provision should the State elect not to accede to a claimants request despite proof of ownership having been provided. Changing “may” to “shall” will remove any discretion given to the State in the matter.

36. SECTION 23

Section 23 deals with civil law infringement of copyright. By contrast section 27 deals exclusively with criminal offences. If it is desired to create new criminal offences this should be done in section 27. Section 23 is an inappropriate section for these provisions.

Intellectual property laws form part of the law of statutory delicts. Violations of the statutes pre-eminently give rise to civil law wrongs and civil proceedings to enforce rights. Copyright is something of an exception to this rule and there are certain circumstances in which infringements can give rise to criminal offences. None of the other main line IP statutes do this. The fact that copyright is exceptional in this respect has given rise to critical comment. The consensus is that only in very exceptional circumstances should copyright infringement amount to a criminal offence.

Against the foregoing background, why is there so much reliance on criminalising conduct? The criminal justice system is already overburdened. Hence, the fact that, for instance, section 23(4)(b) seeks to criminalise the failure to pay royalties appears to be ill-advised (besides the fact that it is not clear what section is being referred to as there is no “subsection 9(4)”). These are issues of contract law and should be resolved by civil remedies.

One of the most outrageous provisions in the Bill is the suggestion that the refusal to grant a licence in respect of specific uses should be criminalised (see s 23(4)(d)). Besides the fact that some of the uses, such as educational use or use in judicial

proceedings, are permitted pursuant to the fair-dealing exceptions, there is already provision made for the issuing of compulsory licences by the Copyright Tribunal (s 30 of the Copyright Act). Other grossly absurd provisions criminalise collecting royalties other than through a collecting society, failing to promote local content in broadcasts and failure to pay royalties due from the re-sale of artistic works. These are all rather mild transgressions and barely warrant any civil law liability let alone criminal liability. Accordingly, there is no good reason to criminalise these matters. In addition, the outright criminalisation of any act of circumvention in relation to technological protection measures is a draconian and out-dated approach to anti-circumvention protection (see commentary on section 20D above). The offences in sections 23(4)(a), (e) and (h) should be removed. The obvious contradiction between sections 23(4)(a) and (i) makes both provisions impracticable.

As stated previously, the broadcasting requirements relating to local content is not a copyright matter, and subsection 23(5) should in any event be deleted.

The proposed remedy of deregistration of an institution (which is probably a reference to the collecting societies) should not be conflated with criminal remedies.

37. SECTION 27A

The Companies Act deals comprehensively, and more than adequately, with the circumstances in which a director of a company can incur personal liability for the acts of a company. There is no reason why directors of companies which commit infringements of the Copyright Act should have a different degree, or level, of liability than normal. Their liability will be regulated and determined in terms of the

Companies Act. The Companies Act regulates the situation perfectly well. Accordingly, these provisions are unnecessary and undesirable. This section should therefore be deleted.

The reverse onus which the section seeks to create – that is, the presumption of guilt – is probably unconstitutional.

38. SECTION 28O

It has been submitted above that the circumvention of technological protection measures should amount to direct copyright infringement and may only result in criminal liability where it is performed with the intent to infringe copyright protection. In other cases related to the dealing in circumvention devices, criminal liability is welcomed and adequately addressed in section 27(5A), although this provision requires some editorial changes.

Therefore, the wording of section 28O(1) must be amended to match the wording in section 27(5A) with the necessary cross references.

The wording of section 28O(5) is important to the proper application of the anti-circumvention provisions and should include direct reference to the technological protection measure it is describing. It must also be amended to remove the difficulties associated with a deeming provision and the unnecessary reference to a copyright owner and an assignee. The provision should be amended to read as follows:

“(5) A technological protection measure shall be effective where the use of the work is controlled by the author of the work or the owner of copyright in the work or any other party who is lawfully entitled to exercise any right in relation to the work, through the application of an access control or protection process or any technological protection measure such as encryption, scrambling or other transformation of the work or a reproduction control mechanism which achieves or furthers the protection objective.”

The wording of section 28O(6) cannot be retained along with section 28P(a) of the Bill. There is no point in permitting circumvention for purposes of fair use or fair dealing, if the operation of sections 86 to 88 of the Electronic Communications and Transactions Act (ECT Act) takes preference over the Copyright Act. Furthermore, the provisions in the ECT Act were not drafted with copyright law or fair dealing in mind, and is primarily aimed at addressing cybercrime. It is therefore inconsistent with the anti-circumvention measures proposed by the Bill and cannot be read together with the Copyright Act. This provision must be deleted. See also the amendment to section 28P proposed below.

39. SECTION 28P

The intention of this section is welcomed as an attempt at balancing the public interest and the right of the author or copyright owner. However, the section fails to establish a fair balance and unnecessarily restricts the fair use of works protected by technological protection measures.

Subject to the comments above in relation to the fair dealing and fair use amendments proposed by the Bill, section 28P must be amended to permit circumvention in relation to fair dealing *and fair use*. Currently section 28P(1)(a) does not refer to section 12A, and circumvention is therefore not possible in relation to any of the fair use exceptions introduced by the Bill. This effect may be read into the phrase “a permitted act”, but if this is the DTI’s intention it would be better served by including a reference to section 12A as part of section 28P(1)(a).

It is unclear what is meant by “the general public interest exceptions” and this should be removed. The provision should be amended to read as follows:

“(a) any act listed in section 12, 12A, 13B, 13C, 14, 15, 16, 17, 18, 19, 19A, 19B, 19C or 19D of this Act;”

40. SECTION 28R

Subject to the comments above in relation to sections 23(4)(a) and (i), it must be noted that this section refers to “remove or modify” while section 23(4)(a) refers to “tamper” with copyright management information (despite the confusing disarrangement of the words between these phrases and the definition).

The act of tampering may include the removal or modification of such information, but it may also describe wider conduct such as obscuring the information or causing it to be displayed incorrectly without modifying the information itself.

Therefore, it is suggested that section 28R should be amended to read as follows:

“(1) No person may tamper with, remove or modify any copyright management information attached to, embodied in or displayed in relation to a work or a reproduction of a work.

41. SECTION 28S

This section refers to a prohibition in section 28Q. However, section 28Q does not contain a prohibition. It is assumed for purpose of this comment that reference is made to section 28R in stead.

If so read, section 28S is nevertheless too narrow to adequately protect the interests of the author or copyright owner. It creates an exemption from liability if the party who tampered with copyright management information was ignorant of the fact that the removal or modification will induce, enable, facilitate or conceal an infringement.

However, the act of removing or modifying the information is itself a copyright infringement. It is therefore suggested that the exemption should only be applicable if the individual was also unaware of the fact that the act or removal or modification is itself a prohibited act or likely to constitute an infringement.

The section should thus be amended to read as follows:

“(b) does not know and has no reason to believe that the removal or modification will induce, enable, facilitate or conceal an infringement of the copyright in the work or may constitute or amount to an infringement of the provisions of this Act;”

Furthermore, the section creates three *alternative* criteria. It is submitted that subsections (b) and (c) should not be alternatives, but should be read as two parts of a single criteria that must be met in order to qualify for the exemption contemplated by the Bill.

The provision should thus be amended to replace the word “or” at the end of section 28S(b) with the word “and”.

42. SECTION 29

Why is it considered necessary to replace the existing Copyright Tribunal with the proposed Intellectual Property Tribunal? Is there any need for a body to have powers more extensive than those of the existing Copyright Tribunal, and if so, what are the reasons therefor. There has been no suggestion that the Copyright Tribunal – which is currently a single judge – is overworked. Accordingly, the appointment of a 10-person body seems to be excessive and to place an unnecessary burden on the state’s finances.

It seems that it is the intention that the Tribunal is intended to act, *inter alia*, as an adjudicator in any and all disputes that relate to intellectual property in general and not only to copyright. In other words, it will be empowered to hear patent infringement and revocation matters, trade mark oppositions, rectifications and infringement matters and disputes relating to matters pertaining to intellectual property licences. If this is so, then amendments of a wide range of statutes will be necessary to confer jurisdiction on it in matters arising under those statutes. For example the Commissioner of Patents currently has exclusive jurisdiction to

adjudicate disputes arising under that Act. This will have to be changed. Even under the Copyright Act section 24 contemplates that civil enforcement matters must be brought before the court. The same is true of the Trade Marks Act, and all the more so in the case of trade mark oppositions. It is one thing to empower the IP Tribunal to act in certain matters, but a totally different thing to invest it with jurisdiction to determine certain causes. This issue is not even properly addressed in the Copyright Act let alone in the other intellectual property statutes.

If, as seems to be the case, it is the intention that the IP Tribunal should have jurisdiction to hear copyright infringement matters, appropriate amendments to cater for this should be introduced into section 24. Will the court and the Tribunal have concurrent jurisdiction? Will the person seeking relief have the choice of which forum to approach as in the case of rectification proceedings under the Trade Marks Act? This whole question must be properly regulated. It should be appreciated that copyright infringement proceedings frequently involve complicated non-intellectual property legal issues and it is doubtful, given the composition of the Tribunal, whether it will be properly equipped to deal with such other legal questions. The inquisitorial system envisaged for the conduct of proceedings before the Tribunal is not appropriate for dealing with infringement matters. Accordingly, it is submitted that only in exceptional circumstances should the Tribunal deal with infringement matters, if at all. It is preferable that the Tribunal should confine itself to dealing with licensing and practical commercial matters, and, thus, essentially with those types of matters that currently fall within the ambit of the existing Tribunal.

This section is largely reproduced from section 193 of the Companies Act, 2008. Therefore, the section should be drafted to reflect its counterpart in the Companies Act in order to promote uniform interpretation of the respective provisions as far as possible.

Subsection (3) should be amended to read as follows:

(3) In carrying out its functions, the Tribunal may –

(a) have regard to international developments in the field of intellectual property law; or

(b) consult any person, organisation or institution with regard to any matter.

The additional comments offered below in regard to the other sections dealing with the IP Tribunal are applicable in the event that the notion of such Tribunal is to be persisted with.

43. SECTION 29B

The cross-reference to *only* section 29G(1)(b) in section 29B(1)(b) appears to be incorrect. The required legal expertise of the members of the Intellectual Property Tribunal is not properly provided for. For example, the legal expertise is stipulated in section 29G(2). At present it appears that if someone is part of a three-member panel, he or she has to have the requisite legal expertise, but not if he or she acts as a single-member panel. Accordingly, the interaction between sections 29B(1), 29G(1) and 29G(2) needs to be corrected.

Section 29B(3) should be amended to read as follows:

“(3) The deputy chairperson shall perform the functions of the chairperson whenever:

(a) the office of chairperson is vacant; or

(b) the chairperson is for any other reason temporarily unable to perform those functions.”

In the event that the Tribunal handles infringement matters (which are by far the preponderance of disputes that arise under the Act and require adjudication) a large measure of the expertise of the panel ought to lie in the field of IP law and court practice. This is all the more so if the Tribunal is to deal with patent infringements, in which case technical expertise would also be a strong recommendation. This situation should be reflected in the section. The section is currently silent on the question of IP expertise.

44. SECTION 29C

The word “acquires” in section 29C(2)(b) should be changed to “acquired.”

The word “been” should be inserted after “time” in section 29C(2)(g).

45. SECTION 29D

Commas should be inserted after the words “including” and “deputy chairperson”, and the existing comma after “including” should be removed.

The word “month” should be changed to “month’s” in sections 29D(2) and (3).

The phrase “other than the chairperson” in subsection (3) is contrary to subsection (2)(a) and should therefore be deleted.

46. SECTION 29E

Which board is referred to in section 29E(1)(b)?

47. SECTION 29G

Reference is made to the above comments concerning the interaction between sections 29B(1), 29G(1) and 29G(2), which need to be corrected.

The commas after “If” and “chairperson” in section 29G(3) should be deleted. Section 29G(5) is unintelligible.

48. SECTION 29H

The cross reference in section 29H(2) should be to subsection “(1)” and not to“(l)”. Also, a comma should be inserted after “persons” in the same section.

49. SECTION 29I

It is not clear who the applicant will be if he is not the complainant in (1)(b). The latter term is probably superfluous

50. SECTION 29M

A semi-colon should be inserted at the end of section 29M(2)(b)(ii).

51. SECTION 29N

Reference is made to paragraph 42 above in which the question of the jurisdiction of the Tribunal is discussed.

The power of the Tribunal to grant licences, determine royalty rates and deal with disputes regarding the activities of collecting societies, which is the core of its current function, is not specifically addressed; this is anomalous and should be rectified in this section. In addition the indicated textual errors should be corrected.

29N. Orders of the Tribunal

(1) In addition to the powers conferred on the Tribunal in terms of this Act and the Companies Act, 2008, (Act 71 of 2008) the Tribunal may make any appropriate order in relation to a matter brought before it, including -

- (a) declaring particular conduct to constitute an infringement in terms of this Act and as such prohibited;*
- (b) interdicting conduct which constitute an infringement of this Act;*
- (c) imposing an administrative fine in terms of section 175 of the Companies Act, 2008, (Act 71 of 2008) with or without the addition of any other order in terms of this Act;*
- (d) confirming a consent agreement in terms of section 174 of the Companies Act, 2008, (Act 71 of 2008), 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 a registrant's registration or accreditation subject to any such terms and conditions the Tribunal deems fit;

(h) granting or refusing a licence to any person and determining the royalty to be paid by a licensee under any licence

(i) any other appropriate order required to give effect to a right, as contemplated in this Act or any other relevant legislation.

Subsection (1)(d) makes an incorrect cross reference to section 174 of the Companies Act. The correct section is section 173 of the Companies Act.

52. SECTION 29O

Why should a criminal standard apply in inquisitorial proceedings (see s 29O(2))?

The section should also enable witnesses to be issued with subpoenas to attend a hearing and give evidence.

53. SECTION 29Q

The word “contract” in section 29Q(1)(a) should be changed to “contracts”.

54. SECTION 39

Section 28B, referred to in section 39(cH), does not deal with permitted acts for circumvention of technological protection measures. The correct reference in the Bill as it presently reads is probably to section 28P. What appears to have caused the

confusion is that the numbering of the sections after section 28 takes account of sections 28A to 28N which have been inserted into the Act by the Intellectual Property Laws Amendment Act. If one discounts these sections, then section 28P would have been 28B.

Also, paragraph (c) of the section (i.e. of section 36 of the Bill) is incorrect. The reference in it to “paragraph (cK)” should be a reference to “paragraph (d),” namely to that paragraph of the existing text of section 39 of the Act. On this basis the new paragraph being introduced is correctly given as “(e).”

55. SECTION 39A

The word “purport” in the third line of section 39A(1) should be changed to “purports”.

56. SCHEDULE

Translation provisions

Besides a host of issues which can be referred to relating to sloppy drafting (a lot of the language used can be described as pidgin English and is unacceptable), as already indicated above, there are serious fundamental concerns about the need for such provisions. There is no evidence to suggest that copyright law is seriously preventing the production of translations (or reproductions) of copyright works, or the provision of textbooks or learning material. Authors and copyright owners are keen to increase the readership of their works, and if someone seeks permission to translate their works on reasonable terms, there is no reason to suggest that such request will be refused by a copyright owner. As indicated above, the existing Copyright Act already provides for the possibility of a compulsory licence when a licence for the use of a copyright work is *required* (see s 30 of the Copyright Act). There is, thus, no need for licensing provisions relating to translations (or reproductions) in terms of the existing Act. Moreover, the Intellectual Property Tribunal created by the Bill has a general power to grant licences if a dispute has occurred in respect of them. These special provisions are therefore redundant. Why single out translations and reproduction licences? It would seem that it is felt that the general power to grant licences is sufficient for all other licences so why should translation (and reproduction) licences be any different?

Here are some examples of the poor drafting. The provisions seemingly allow for someone to seek a licence to translate a copyright work into a foreign language, such as French or Spanish. Why? Paragraph 3(c) is incomprehensible, and there are

contradictory statements about whether a translation licence can be sought in respect of orphan works. All works must be original in order to enjoy copyright – being one of the fundamental requirements for copyright to subsist in a work. What therefore is intended with the use of the term “original copyrighted work”. The periods within which someone can seek a licence indicates that someone can contemplate applying for a licence even before a work has been published. Why would a third party appreciate that such the demand for a translation might exist, but the copyright owner would not seek to address such demand? On the other hand, why should there be a concern that a licensee cannot pay due to currency conversion rates? The simple answer would be to stipulate the royalties in the local currency, if these provisions are to be persisted with!

Section 3(2) makes no sense while section 3(3) is non-sensical and indeed describes a situation in which there would perhaps in fact be some justification for granting a compulsory licence!

As already indicated, it is concerning that the proposals seek to undermine a copyright owner’s property rights without good reason.

Reproduction licences

The proposals for reproduction licences are questionable for much the same reasons as those stated in respect of the translation licences.

It is not clear what is meant by “systematic instructional activities” in section 4 and a definition should therefore be added to section 1.

In subsection 4(1)(d)(i) reproduced copies made outside the country must be shipped in “one or more bulk shipments”. Why must the shipment specifically be in bulk? What form of liability will follow if the copies are not delivered in a manner that constitutes one or more “bulk shipment”? The phrase “in one or more bulk shipment” should be deleted, unless the reasons for its inclusions are made obvious.

The spelling of the word “favor” in subsection 4(2) should be corrected to “favour”.

The termination of a license in subsection 4(5) is obfuscated by many nonsensical requirements and should be deleted, or at the very least, redrafted.

57. ANNEXURE A

LET'S PRAY FOR MEDIOCRITY: ANOTHER CASE OF LEGISLATIVE DIARRHOEA

On 27 July 2015 the Department of Trade and Industry (“the DTI”) published the Copyright Amendment Bill 2015 (the “Amendment Bill”) in the Government Gazette, asking for public comment within 30 days from such date. Given the number of issues contained in the Amendment Bill that needs to be addressed, it will be almost impossible for one person to give comprehensive comments within the allotted time, unless that is their only task. It never ceases to amaze me how much time now has to be dedicated, by myself, and other academics and professionals, in trying to get legislation which is even vaguely coherent and workable. If that is not enough as a source of frustration, most of the comments which experts painstakingly submit are probably destined for the waste-paper basket, judging by past experience.

The legislative process, particularly in a technical field such as intellectual property law, appears to be a shambles, and it would be farcical if the consequences were not so significant. Most of our time seems to be spent trying to get the DTI (the custodian of such legislation) to abandon some hare-brained, or, at best, half-baked, proposal. Moreover, the quality of the legislation (or proposed legislation) implementing its proposals demonstrates a level of incompetence which induces a sense of shock, if not despair. We should not have to suffer fools gladly. If you consider my criticism to be unduly harsh, ask yourself this question: As a partner of a law firm, would you consider this standard of work acceptable if it was delivered to a client by a lawyer in your firm? If you as a client were rendered services of this quality, would you pay for it? So why should we, as the citizens of this country, be expected to be satisfied that our taxes are being used to pay people for delivering work of this standard? This is

yet another example of service-delivery failure, and this is my service-delivery protest.

As has been recognised by our courts, copyright is a technical subject. Apart from plain sloppiness in the actual drafting process of the Amendment Bill, there is ample evidence to suggest that the drafting was done by persons who, quite frankly, first need to learn the basics of copyright law, and take the time to read the Copyright Act 1978 (as amended). I cannot be more blunt about this. It is astounding how “easily” legislation is drafted nowadays, without any regard to legal principles, clear legislative objectives (however ill-informed they may be), or just literal clarity. Even ill-informed, or downright immoral, objectives can be drafted in a manner which exhibits clarity of thought and technical competence, as was done in the past in a host of pieces of Apartheid legislation. Not only do we now get legislation which is substantively garbled, we have to waste time in first deciphering it, and give it some sort of meaning. The fact that legislation, even major legislation like the Companies Act 2008, and the Consumer Protection Act 2008, is never accompanied by any form of detailed explanatory memorandum setting out the goals and objectives, is no coincidence. No discernible, and coherent, account (other than a concocted *ex post facto* one) exists for the various provisions, and we have to wrestle with legislative diarrhoea. Let me illustrate my point with reference to the Amendment Bill.

Seeking to substitute a definition (“phonogram”) in the Copyright Act that is not even a defined term in the Act should already get the alarm bells ringing. The Amendment Bill is littered with references to the “creator” of one or other type of copyright work; in the Copyright Act the technical terms are the “author” or “owner” of a copyright work. Nowhere in the Copyright Act is the term “creator” used, so why does it appear in the Amendment Bill? The fact that the Amendment Bill seeks to introduce a new category of copyright work, namely, “craft works,” is just perplexing. The Copyright Act already protects “works of craftsmanship” as a species of “artistic works.” There is nothing to suggest, or explain, why what is sought to be protected as “craft works” is not *already* protected as “artistic works.”

A stunning example of a lack of any coherence of objectives, or clarity of thought, are the proposed provisions concerning so-called “orphan works,” which are

copyright works the copyright owners of which cannot be located. As copyright law requires the copyright owner's authorisation for the exploitation of a copyright work, it is considered socially undesirable that a demand for such works remains unsatisfied where a demand for such works exists. Accordingly, while such a work is still under copyright protection, countries are permitting persons to, inter alia, print and distribute copies of such works against payment of royalties into a fund, which can compensate the copyright owner should he or she reappear. What the Amendment Bill does is to vest copyright in the state, and to provide that copyright in orphan works shall be perpetual! Instead of allowing the copyright work to pass into the public domain, like all copyright works, the state seeks to continuously earn an income from such works. This not only runs contrary to the fundamental notions of copyright protection, it should infuriate those, such as supporters of the Creative Commons, who seek to make copyright works more accessible. The other kicker in relation to orphan works is that the compulsory licensing provisions (again, problematic in themselves) which allow for translations to be made of copyright works, without a copyright owner's authorisation, *expressly* excludes the possibility of such a licence for orphan works. Why? Of course, given the abysmal level of drafting, it should now come as no surprise that the very same licensing provisions later implicitly contemplate the licensing of orphan works. So which is it?

In relation to the compulsory licensing provisions, there does appear to be a worrying undertone. It seems that the government wants to provide educational material without having to negotiate with copyright owners in the normal course of business. While there is no doubt a case to be made for making educational material more accessible, it is hoped that the government is not seeking to undermine the principles of copyright law as a quick fix to its well-publicised failure to provide adequate schooling provisions. On the other hand, there appears to be no hesitation to waste money on the creation of institutions of questionable value, or size, such as the National Trust for Indigenous Knowledge, and the new Intellectual Property Tribunal envisaged under the Amendment Bill. No reason has been given for replacing the Copyright Tribunal – which is currently a single judge – with an Intellectual Property Tribunal consisting of at least 10 members! To date there has been no suggestion that the Copyright Tribunal is overworked. There appears to be no lack of desire to create new statutory bodies, which will no doubt be staffed by

suitably well-connected appointees. If cronyism and nepotism was not the order of the day, we would not be facing government failure on this scale.

This is by no means the full extent of drafting failure in the Amendment Bill but I hope it serves to illustrate what the legislative process in South Africa has been reduced to.

Lest there be any misunderstanding, or doubts about my motives: I was raised on the Cape Flats, and received my schooling under the days of so-called gutter education during the turbulent 1980s. We should not have to endure gross government failure with good grace in a democratic society, which was achieved at great human cost. Government should fulfil its mandate. Those tasked to do something should do so competently. We do not require that those persons “#BeMoreMadiba” or some such popular refrain. Being mediocre would be enough for now.

58. ANNEXURE B

DTI DISHES UP A HOPELESS CURATE'S EGG

The figure of speech used in describing something as a “*curate's egg*” derives from a cartoon by G du Maurier published in the British humorous magazine *Punch* in November 1895. It depicts a meek curate, faced with a bad egg at the Bishop's breakfast table, commenting that it is partly good. In other words it is something that is thoroughly bad but is discreetly said to be partly good.²

“The term relies on an objective analysis and intuitive understanding of the depicted scenario: a self-contained egg cannot be both partially spoiled and partially unspoiled. To pretend to find elements of freshness in a bad egg is thus a desperate attempt to find good in something that is irredeemably bad.”³



TRUE HUMILITY

Right Reverend Host: "I'M AFRAID YOU'VE GOT A BAD EGG, MR. JONES!"

The Curate: "OH NO, MY LORD, I ASSURE YOU! PARTS OF IT ARE EXCELLENT!"

Picture source: The Study June 2013

http://from-bedroom-to-study.blogspot.com/2013_06_01_archive.html

² <http://dictionary.reference.com/browse/curate%27s%20egg>

³ <http://encyclopedia.thefreedictionary.com/Curate%27s+egg>

The Copyright Amendment Bill published by the Department of Trade and Industry in GG no. 39028 of 27 July 2015 is an archetypal curate's egg. I will commence by making a desperate attempt to find some good in it, which indeed there actually is.

The Bill addresses certain issues that have been crying out to be dealt with for decades. It thus in principle makes laudable strides to modernise the Copyright Act, 1978 which has become badly out of date, having received scant substantive attention from the legislature for some two decades while the world, particularly in the technological field and more particularly the internet, has been moving forward at a terrifying pace. The Act has simply become outdated and is in grave need of modernising and being brought into line with contemporary reality. The worthy issues that it confronts and seeks to regulate include the control of collecting societies; broadening the scope of exemptions from copyright infringement by providing for instances of so-called "fair use" of copyright works, particularly in the field of education; creating facilities for making works available to persons with disability on equitable terms; making provision for access to and use of so-called "orphan works" (i.e. works in respect of which the ownership of copyright is unknown); providing for sanctions for abuse of digital rights management measures built into copies of works. In so doing it is purporting to give effect the report of the Copyright Review Commission dating from 2011. So far so good.

On a perhaps less favourable level, the Bill introduces the European "*droit du suite*" in terms of which an artist can claim to receive a portion of the resale price of his artwork when onward sales of it are made; it provides for performers to have the moral rights of being acknowledged when their performances are publicly commercially exploited and of objecting to distortions of their performances (which provisions belong in the Performers Protection Act, which is their home); there is a provision prohibiting the purported granting of licences in situations where no right capable of being licensed exists.

But that is where the illusion of goodness in the Bill ends. I say this because, although the sentiments of the draftsman are commendable, the execution is abysmal. With more than 40 years of specialising in the practice of copyright law and having done a doctorate and written a text book on the subject, which has been cited

with approval by the court on many occasions, as well as having pursued an academic career in the field, I can safely say that I know my way about the copyright world. I regret to say that I have not come across a piece of intellectual property writing that is as badly formulated and presented, and that exhibits such a lack of understanding of the basic principles of the subject as is evident in this Bill. The draftsmanship and usage of grammar and language in writing it are appalling. On a substantive level, it is as though the author of the Bill did not take the trouble to read, let alone understand, the Act that he is purporting to amend. It contains terminology which is foreign to the Act and rides roughshod over the basic principles of copyright law. The Bill is riddled with contradictions and anomalies; it is frequently non-sensical or downright incomprehensible even to someone who can claim expert knowledge of the subject matter. If, as a Professor of Intellectual Property Law, this Bill was served up to me as an answer to an examination question or as a dissertation, I would award it an assessment or mark of less than 20%. I would suggest to the student that he rather goes and pursues some other avenue of study as he clearly has no aptitude for copyright law.

I have described the good part of the egg as best as I can find it. Let me now go on to the bad part. In the interests of keeping the length of this epistle within reasonable bounds, I will deal with examples and will not seek to catalogue all the defects. This latter task will be undertaken in the comprehensive commentary which the Anton Mostert Chair of Intellectual Property Law will submit to the DTI within the thirty days from publication of the Bill (by 26 August) which has been laid down for the submission of comments, a ridiculously short period given the amount of work involved in formulating rational and constructive comment on this lengthy piece of balderdash (some 50 pages of taxing and perplexing text).

At the outset it must be borne in mind that our copyright law is determined to a significant extent by the Berne Convention and the TRIPS Agreement by which we are bound and with which our copyright legislation must comply. One of the fundamental principles of these treaties is “national treatment” in terms of which our law must give the same protection and benefits to foreign works as it gives to its domestic works. We cannot give preferential treatment to domestic works over foreign works. Furthermore, the fundamental approach of both our and foreign

copyright law is to have a restricted selection of works eligible for copyright that are mutually exclusive. There is no overlap between the various categories of works.

With scant regard to the latter principle, the Bill appears to have created two new categories of copyright work, namely “craft works” and “phonograms”. These categories of works will have to co-exist with the existing categories of “works of craftsmanship” and “sound recordings” from which they are virtually indistinguishable. There is no conceivable justification or logic in creating these two new categories of works eligible for copyright when the Act already has two identical categories which have been part of our law for the best part of a century and which operate perfectly well. What the Bill does is to provide for the content of the copyright in these two new categories without laying the ground work for their coming into existence as occurs with all the existing categories. There is thus no way of knowing how and whether works of this nature qualify for copyright. The category “phonogram” is foreshadowed in the Bill by purporting to amend a definition that does not occur in the Copyright Act but is to be found in the Performers Protection Act (which is thankfully not addressed in the Bill).

The Bill requires the “broadcasting industry” to meet certain local content requirements in their broadcasts and even to **oblige** the institution regulating broadcasting to use measures to ensure compliance with the local content requirements. How can the broadcasting industry compel ICASA to do anything? This is putting the cart before the horse. What all this has to do with copyright is beyond my comprehension and provisions of this nature have no place in a Copyright Act which is concerned with the protection of original works, one category of which is broadcasts, the copyright in which is vested in the broadcaster who makes a broadcast – rights of a monopolistic nature in respect of its broadcasts are conferred on a broadcaster (that is the nature of copyright). In any event giving preference to local content (literary and musical works, sound recordings and cinematograph films that are locally made) in the Copyright Act brings the Act into conflict with the national treatment principle discussed above and is thus in conflict with our international obligations and probably unconstitutional.

Another breach of our international obligations is created in the provisions introducing the *droit du suite* principle in relation to artistic works. This right on the part of the “creator” of an artistic work (the Act does not use this term at all and one can but wonder who the “creator” of a work is as distinct from the “author”, the term used throughout the Act and internationally) is limited to an “artist” (someone different to the “creator” or the “author”?) who is a citizen or resident of South Africa. This is a clear abrogation of the national treatment principle, with its attendant consequences. The provisions of the Bill dealing with this issue in general leave a lot to be desired and are unacceptable in their present form.

Section 9 of the Bill amends the existing section 9A of the Bill dealing with “needletime”. Sub-clause (b) to (d) of the amendment is completely duplicated by its sub-clauses (g) to (i), thus creating considerable confusion and evidencing shoddy draftmanship. Sub-clause (k) of the amendment has nothing whatsoever to do with needletime and probably belongs in section 23 of the Bill dealing with section 20 of the Act (moral rights). Aberrations such as this contribute to the unintelligible nature of the Bill.

The live performances by performers of works, i.e. singers, musicians, dancers and the like, are protected by the Performers Protection Act. Performers’ rights under this act are not copyright – they are rights somewhat akin to personality rights held by performers. A performer’s right is a cousin of copyright. These two types of rights often come together in a sound recording, which is a separate copyright work. A sound recording carries the performer’s rendition of a work (usually a literary and/or musical work). The Performers Protection Act creates economic rights in a specific performance, which rights vest in the performer. Protection of performance rights are dealt with internationally in a separate treaty (the Rome Convention) to the Berne Convention and our Performers Protection Act is closely based on the Rome Convention, as is performers protection legislation throughout the world. Performers rights and copyright are different animals. However, the author of the Bill has thought it good to reiterate some of the provisions of the Performers Protection Act dealing with the economic rights and their enforcement in the Bill. Apart from amounting to mixing apples and oranges, this will create enormous confusion and will undermine

the integrity of both pieces of legislation. This is of course entirely unnecessary and undesirable and indeed makes no sense whatsoever.

The Copyright Act confers upon authors both economic and moral rights in their works. This is in accordance with the Berne Convention. Moral rights comprise the right to be identified as the author of a work and the right to object to alterations or mutilations of his work. In addition to conferring copyright economic rights on performers' performances, the Bill also bestows moral rights on performers in respect of their performances. A moral right in a performance is a strange and remarkable concept and is not provided for in the Rome Convention. If it is to be provided at all it should be catered for in the Performers Protection Act and not in the Copyright Act.

The Bill introduces provisions allowing for permission to be obtained for the use of "orphan works". Such works include works whose owner is deceased. The Copyright Act creates a right of property in a work and like all other forms of property this right of property can pass to an heir in terms of the Copyright Act and the law of succession. Accordingly, if a particular owner dies, his heir(s) acquire the ownership of the copyright. It is thus difficult to see why a work should become an orphan work when its owner dies. To make matters worse, the ownership of the copyright in an orphan work is vested in the State which can grant licences in respect of it and generate income for the State from its use. The copyright in an orphan work is perpetual, in complete abrogation of one of the basic principles of copyright law that a work should fall into the public domain after the effluxion on a specific time period. There is no reason why an orphan work should be in a preferential position as compared to a work that has a "parent". Having provided that the copyright in an orphan work vests in the State, the Bill then goes on to provide in section 27 (introducing section 22A into the Act) that a licence can be granted in an orphan work and that royalty payments can be deposited into a particular account so as to enable **the owner of the copyright or his heirs or executors** to claim such royalty. This cannot be reconciled with ownership of the copyright in an orphan work (especially a work in respect of which the owner has died) vesting in the State. It makes no sense and is typical of the confusion and obfuscation that exists in the Bill.

Draconian criminal offences are created by the Bill for mild transgressions. For instance someone who contravenes the provisions relating to the payments due in terms of the *droit du suite* is guilty of a criminal offence! Likewise anyone who contravenes the provisions relating to orphan works. As a general rule infringements of intellectual property rights are civil law wrongs and only in exceptional cases do they constitute criminal offences. These rather innocuous transgressions do not warrant being criminal offences when more serious infractions are mere civil wrongs. Moreover, the newly created criminal offences are provided for in section 23 of the Act, which deals with civil copyright infringements, and not in section 27, which is devoted to criminal offences. This is but one instance of several where the existing format and system of the Act is disrupted and upset for no good reason. This is not at all conducive to coherent regulation of the law of copyright and interpretation of the Act.

There are a myriad of other problems attaching to the Bill that need to be addressed, but space does not allow for this here. In conclusion, the best approach would be for the DTI to go back to the drawing board and start all over again. Persons skilled in copyright law with drafting experience should be commissioned to draft the Bill to meet the Department's requirements and thereafter it should be published again for public comment. Once it is in a presentable and lucid form, proper constructive debate and consultation can take place in regard to its content. No fruitful intercourse is possible with the Bill in its present incoherent state. The egg that has been dished up should be consigned to the trash can.

59. ANNEXURE C

A DIAMOND IN THE ROUGH – TECHNOLOGY AND THE COPYRIGHT AMENDMENT BILL

The Copyright Amendment Draft Bill (GG No 39028, 27 July 2015) ('the Bill') is by all accounts a grave misfortune and a study in amateur law-making. Enough has been said on this point to make it clear that the DTI has tripped at the first hurdle and that a re-evaluation is the only hope of achieving a grade that would admit it to the Introduction to Copyright Law 101 examination.

However, it is noteworthy that the Bill contains a set of provisions that is worthy of (limited) praise and deserving of closer analysis. These are, among others, the proposed amendments to the Copyright Act ('the Act') that seek to incorporate anti-circumvention protection measures where a copyrighted work in digital format is protected by or controlled with the aid of digital rights management (DRM) tools or technological protection measures (TPM).

These provisions are long overdue and have been submitted to the DTI on numerous occasions in the past as proposed amendments to the Act that would update our desperately out-dated law and address the perennial piracy problem in a meaningful and coherent manner.

The application of intellectual property law in the digital environment is a technical, rapidly developing and highly skilled area of an already specialised field of law. The use of technology (such as TPM/DRM measures) in order to support copyright law adds a further layer of complication. It is therefore not surprising that the DTI has been slow to formulate South Africa's legislative approach to copyright enforcement in relation to digital works.

One would therefore be pardoned for imagining that once the proposed amendments did eventually appear, they would be flawless and state of the art. However, one must be disappointed.

The Bill introduces several provisions that address instances where a copyright work in digital form, such as a cinematograph film, broadcast, computer program or sound recording, is protected by technological means.

Common examples of this practice are the digital copy restrictions applied to audio CDs or films on DVD/Blu-Ray Discs, access control measures applied to databases of literary works, device specific limitations applicable to sound recordings or eBooks, geographically specific encoding and authentication measures applied to video-on-demand and pay-TV services and serial keys applied to computer software.

These measures are largely developed and maintained by private stakeholders in the digital content and cybersecurity industries and have long been applied to enforce copyright law on the Internet and in relation to the digital versions of copyright works disseminated by electronic means. It has evolved to reach a degree of general standardisation for each type of work, with a few variations on the same theme. As a result, the use of DRM or TPM is a common phenomenon and a standard bearer of copyright law in the battle against piracy.

Therefore, the international IP community and its leading expert (the World Intellectual Property Organisation) saw fit to propose that all nations should adopt national legal measures that prevent or restrict the removal of or interference with any of these protection measures. Why? Because in most cases of piracy the technological barriers must first be removed or modified before the work can be reproduced and distributed. Therefore, if the law prevents the removal of such digital measures, it may limit the proliferation of copyright infringement of digital works.

The WIPO Copyright Treaty proposed that all member states should implement measures to address the circumvention of digital and technological measures applied to copyright works, and South Africa paid some service to this suggestion by

enacting chapter 13, section 86 of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act).

However, the ECT Act addressed circumvention along with other conduct such as hacking, denial of service attacks and malicious software in general as criminal conduct or cybercrime. The result was that circumvention for purposes of copyright infringement is currently a criminal offence and absolutely prevents fair dealing of copyright works in digital form.

As a result, further attention was needed to balance the public interest with the economic interests of the copyright owner. Enter the Bill.

The Bill provides that, *inter alia*, it would be an offence to make, import, sell, distribute, advertise, use or advise on the use of any “process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is designed to prevent or restrict infringement of copyright work”.

In other words, if for example a person rents a movie on disc and copies that film onto his computer (a process that would require a series of steps to enable the computer to copy the content of the disc) he would be guilty of an offence in terms of the Bill (and the ECT Act). The same is true where a person modifies an EBook file to print it or makes a copy of a film downloaded from iTunes.

However, in this respect the Bill does nothing more than duplicate the effect of the ECT Act and continues to criminalise such conduct. At this point the diamond in the rough begins to lose its sparkle.

The mere fact that a work is recorded in digital form and protected against the threats of digital incursion, should not mean that the work is no longer available for lawful use in the same manner as its analogue version. A digital work is certainly deserving of greater legal protection against the greater threat of infringement posed by the Internet, but that does not mean that digital works are excluded from fair dealing.

In this respect the Bill should be welcomed. It has taken note of this fact and provides in section 28P that technological protection measures may be lawfully circumvented for purposes of fair dealing, but not for any of the purposes of fair use proposed by the Bill. In addition, it makes provision for individuals to seek help with circumventing such measures for a lawful purpose and establishes specific safeguards applicable to libraries.

Unfortunately, the Bill has not achieved the lofty goal it has set out to achieve. It falls desperately short of protecting the interests of the copyright owner of digital works and at the same time fails to provide sufficient freedom to the user of digital content.

Firstly, the anti-circumvention measures (with the exception of one) culminate in *criminal liability* in the same manner as the much criticised section 86 of the ECT Act. It therefore exposes each case of fair dealing with digital works to the threat of criminal sanction, as opposed to civil copyright infringement. It is difficult to understand why the DTI would amend the Copyright Act and fail to employ the existing three-layer approach to copyright infringement currently contained in the Act to enforce the anti-circumvention provisions. Nevertheless, the fact that anti-circumvention is criminalised outright means that the Bill had to introduce a convoluted set of provisions to address the level of guilty knowledge required on the part of the offender.

Secondly, the slapdash drafting of the Bill has caused a further undue limitation on the use of digital works. It provides that circumvention may be carried out for purposes of fair dealing (quotation, review, private use, research etc.) but it may not be carried out for purposes of fair use (such as cartoon, parody, pastiche, format shifting or educational activity as introduced by the Bill). This interpretation may be avoided by reading section 12A into the meaning of “a permitted act” in section 28P, but the question remains whether, if that was the DTI’s intention, why it was not expressly included by merely referring to section 12A. Furthermore, the Bill introduces a general fairness test in section 12A(5) against which all forms of fair use must be evaluated. The act of circumvention is therefore, on the above reading of the Bill, made subject to this test in section 28P(a). As a result, any lawful act of circumvention for fair dealing or fair use purposes may nevertheless amount to

criminal conduct if it is, for example, found to be an excessive or disproportionate amount of the work that was reproduced. Since the act of circumvention must necessarily relate to the whole of the work, it will in most cases amount to an excessive use of the work.

All of the defects in the Bill raised above may be cured with a modicum of care in drafting and a less aggressive approach to anti-circumvention. However, this does not mean that any lesser degree of protection for digital works is proposed. On the contrary, the digital environment requires the most comprehensive legal approach possible to safeguard intellectual property. All that is proposed here is a splash of spit and polish to allow the diamond in the rough to reveal its true colours.

How the Bill should be adapted to give effect to this sincere desire for effective and fair protection, is explained by the Chair of Intellectual Property in its official comments, available at www.sun.ac.za/iplaw.

It should be noted that this is not the only shortcoming of the Bill in relation to technology and IP in the digital environment. For example, a further glaring problem is the omission of the new exclusive right of communication to the public in relation to broadcasts and computer programs. The opportunity to tackle piracy and geo-blocking circumvention to its fullest extent has been missed. This is a significant and worrying lapse in concentration that should be addressed without delay.

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