

## Written submissions on Copyright Amendment Bill B13B-2017

### The Anton Mostert Chair of Intellectual Property Law

The Anton Mostert Chair of Intellectual Property Law (the “Chair”) is an independently financed entity that forms part of the Department of Mercantile Law of the Law Faculty at 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](http://www.sun.ac.za/iplaw). Its focus is on intellectual property law and achieving excellence in that regard. Two of its members, Professors Owen Dean and Sadulla Karjiker, are the authors of the *Handbook of South African Copyright Law*, the standard work on South African copyright law, which has been quoted as authority in the South African courts, including the Supreme Court of Appeal. Accordingly, it can speak with authority on matters pertaining to intellectual property, and, in particular, concerning copyright law.

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

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

### Background

In the letter to the National Assembly Speaker, dated 16 June 2020, President Cyril Ramaphosa referred the Copyright Amendment Bill B13B-2017 (the “Bill”) back to the

National Assembly. Amongst the reasons cited by the President for doing so were concerns about the constitutionality of the Bill and the negative effects on the rights of authors and copyright owners.

In December 2021, the Portfolio Committee on Trade and Industry (the “Portfolio Committee”) again invited stakeholders and interested parties to submit written submissions with reference only to specific clauses of the Bill, namely, clause 1 (proposed new definitions), “new clause” (amending sections 11A and 11B), clause 13 (proposed new sections 12A, 12B, 12C and 12D), clause 20 (proposed new section 19C), clause 27 (amending section 27), clause 33 (amending section 39). These comments are submitted in response to such invitation.

### **Initial remarks concerning the process**

It really is difficult to be restrained (let alone complimentary) about the Bill, given the amount of resources that continue to be wasted in trying to fix something that should never have been considered by the Portfolio Committee (let alone parliament), because of its fundamentally flawed nature, substantively and procedurally. So much time and effort could have been saved if the Portfolio Committee — from the time of the Honourable Jo Fubbs’ term as chair of the Portfolio Committee — performed its oversight roll over the Department of Trade and Industry (“DTI”) in an appropriate and responsible manner.

It remains a matter of grave concern that the Portfolio Committee’s approach remains to be an attempt to “panel beat” the Bill, which, from the first draft released to the public for comment in 2015, was very poorly drafted, and contained some deeply problematic proposals. Given the troubled passage of the Bill, and, most importantly, given the President’s action of (and reasons for) referring the Bill back to the National Assembly, there appears to no valid reason why the public’s right to submit comments continues to be limited to specific clauses. Whose interests are being served by this deeply flawed process? This is certainly not in the best interest of the country.

In a constitutional democracy, legislation needs to follow a credible and inclusive process, and should evidence a balanced and considered approach. Instead, the DTI appears to have followed a highly questionable process. For example, the passage of the Bill appears to have come about in the absence of the involvement of the Statutory Advisory Committee on Intellectual Property, which is provided for in the Copyright Act 1978 (the “Copyright Act”). The lack of expert involvement has been more than evident. Apart from the questionable substantive provisions, the technical quality of that first draft — which was pointed out in previous submissions — should *itself* have led the Portfolio Committee to demand accountability from the DTI about how such a shoddy, and skewed, piece of draft legislation was even put into the public domain.

The Portfolio Committee has been made aware of the serious concerns concerning process to date by the Chair in its previous written submissions and during the public hearings held by the Portfolio Committee. These concerns have not only been raised by the Chair. For example, as recently as 15 November 2021, the Copyright Coalition of South Africa addressed an open letter to the late Honourable Mr Duma Nkosi, the previous chair of the Portfolio Committee, detailing serious concerns about the legislative process either having been captured by a particular lobby or being seriously biased as a consequence of such lobbying.

In summary, the process thus far has been so problematic that any reasonable person should have, by now, found it difficult to ignore the concerns, and refuse to put his or her weight behind the legislation. Instead, the Portfolio Committee (through its persistent and protracted involvement in the Bill) is, in effect, condoning the DTI’s failures (or, worse still, the possible capture of the DTI in relation to the Bill) by itself acting in a highly problematic fashion, namely, trying to rush through an ill-considered amendment, in a high-handed, and highly questionable manner. To date, neither the DTI, nor the Portfolio Committee, has provided a credible account of the origin of the Bill, yet the Portfolio Committee has taken responsibility for getting it passed by parliament. Why?

As far as can be ascertained, the Bill was not the product of any policy decision, following a comprehensive review process. The only recognised review of copyright law leading up to the draft Bill was the Copyright Review Commission Report (2011) (“Farlam Report”), which was focused on the regulation of collecting societies. If anything, the Farlam Report and government remarks leading up to the Bill suggested that the overriding concern was to protect South African artists and creatives so as to ensure that they receive their due entitlements under copyright law. The Bill, if anything, only pays lip service to those objectives, and does not lay the foundation for us to meaningfully enter the so-called fourth industrial revolution, which government also claims we seek to do.

We are all now painfully aware of the consequences of the erosion of good government over the past 15 years, and the failure to ensure a functioning, properly staffed Statutory Advisory Committee is yet another casualty of a dysfunctional system. That kind of vacuum leaves the custodianship of our IP legislation vulnerable to abuse, and to possible capture by particular interests. The DTI has not been held accountable for its dereliction of duty, but, on the contrary, is currently being supported by the Portfolio Committee in its attempt to have the fundamentally flawed Bill passed by parliament. To compound matters, the drafting process followed by the Portfolio Committee, arguably, itself raises serious concerns. First, the parliamentary legal advisers are not recognised copyright experts (if they are subject experts at all). Secondly, to the extent that can be ascertained, the particular group of outsiders that have been “consulted” by the Portfolio Committee (and, troublingly, been permitted access and opportunities to influence the Portfolio Committee, not afforded to others) clearly represent a particular lobby and hardly constitute a balanced, representative cross-section of stakeholders. For convenience, this group of outsiders, who were named in the aforementioned open letter to the chair of the Portfolio Committee will be referred to as “the Lobbyists”.

Thankfully, the President responded appropriately by referring the Bill back to Parliament, but what we are currently witnessing is the Portfolio Committee’s continued attempt to pass the Bill. Instead of appreciating the significance and essence of the issues raised by the President, the Portfolio Committee appears to be

stubbornly trying to defend the Bill in the face of what any reasonable person would recognise as an emphatic rejection of the Bill.

The Portfolio Committee's piecemeal approach, arguably, amounts to wilful blindness. In fact, the piecemeal approach to submissions on the Bill has now reached farcical proportions: no longer are we asked to only comment on specific statutory sections, we are now being limited to comment on specific provisions within statutory provisions, coloured in blue! If the re-tagging of the Bill is not the most significant indication that the Bill must be scrapped and that DTI must be told to conduct a thorough review of the Copyright Act, what is the Portfolio Committee's rationale for continuing with the Bill? One cannot help but think that, through these calls for written submissions, we are being strung along, and that the Portfolio Committee is simply going through the motions, and seeking to create a veneer of legality.

Over the past six years, the Chair's views in opposing to the Bill have been confirmed elsewhere; the challenges posed by the digitisation of copyright works and the Internet require enhanced copyright protection, not the erosion of protection, which is evident in the Bill. For example, the European Union — which comprises 27 countries — has passed the Directive on Copyright in the Digital Single Market (2019), which provides copyright owners with enhanced protection and fairer remuneration, in an attempt to address the so-called "value gap". Similarly, Google's attempt to hold Australia to ransom for also seeking to address the value gap failed, and Google was forced to agree to pay media outlets for news content that it was using.

In contrast, under the Bill, our creatives and copyright owners are left at the mercy of technology companies, such as, Google, and they will have little to no chance of receiving remuneration comparable to their European and Australian counterparts. So much for a promise to improve the lives of South African artists. There is no justification for eroding the rights of South African (and more broadly, black African) authors and owners, when compared to the legal protection afforded to their counterparts in Europe and the US. What is the basis for this distinction? Race?

A good rule of thumb to determine whether the proposed provisions in the draft Bill are appropriate is to ask what their likely effect to be on the incentives on authors or copyright owners to create or invest in copyright works in the future. Against that yardstick, there is plenty of issues of concern in the draft Bill.

## **Clause 1 - Insertion of new definitions in section 1 of the Copyright Act**

### ***“authorized entity”***

The introduction of the “authorized entities” definition should facilitate the application of the proposed section 19D, as it obviates the need for the relevant persons to be specifically authorised (i.e., have to be prescribed entity). However, the beneficiaries of section 19D are potentially too broad. The words “as *one* of its primary activities or institutional obligations” should be changed to “as its primary activity or institutional obligation” or “as its principal activity or institutional obligation”. The current definition is potentially open to abuse by persons who are not really concerned with persons with the relevant disabilities. Also, see the comments in relation to section 19D below.

### ***“broadcast”***

The proposed amendment of the definition of “broadcast” is, once again, a good illustration of the lack of technical competence of the drafters of the Bill in the field of copyright law. First, there is no recognition of the relationship between the definitions of “broadcast” and that of “programme-carrying signal”. At present, the so-called “up-leg” of a broadcast to a satellite is, for copyright purposes, a broadcast (see the definition of “broadcast” in s 1(1) of the Copyright Act), while the so-called “down-leg” of a broadcast from a satellite is a programme-carrying signal (see the definition of “programme-carrying signal” in s 1(1) of the Copyright Act).<sup>1</sup> In fact, a programme-carrying signal is a distinct category of copyright work.<sup>2</sup> Given the fact that paragraph (b) of the proposed definition states that a broadcast includes a “transmission, partially or wholly, by satellite”, does this suggest that the definition of “programme-carrying

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<sup>1</sup> O Dean & S Karjiker *Handbook of South African Copyright Law* ed (2015) 5-16.

<sup>2</sup> Section 2(1) Copyright Act 98 of 1978.

signal” is now redundant, and that programme-carrying signals will no longer be distinct form of copyright work? This cannot be the case. The provisions of the Copyright Act relating to programme- carrying signals cannot simply be ignored. The effect of the proposed amendment is to cause an overlap between these two categories of works. Amongst the unacceptable consequences of this aberration is the fact that the two categories of works can have different authors, and, thus, different copyright owners. Thus, two different parties could own the copyright in the same work. This cannot fail to cause manifest confusion and chaos. Furthermore, why is paragraph (b) not qualified as being “for public reception”?

Secondly, the drafters have displayed their conceptual confusion. One of the exclusive rights given to copyright owners by the Berne Convention is the right to broadcast their works or to communicate them to the public, as provided for in Article 11*bis*. These rights were specifically defined and proved challenging with the transmission of copyright works via the Internet. Indeed, the Copyright Act is currently still based on giving effect to the right of communication (or broadcast) to the public, although it does not do so by explicitly referencing such exclusive right in the broad terms of the Berne Convention. Instead, the Copyright Act provides for specific grants of exclusive rights that would be covered by the more general right of communication to the public. For example, the Copyright Act grants the copyright owner the exclusive right to distribute its work by broadcasting it,<sup>3</sup> and to transmit its work in a diffusion service.<sup>4</sup>

The advent of digital technology, and the on-demand and interactive nature of the Internet, have blurred the lines between transmission, publishing and broadcasting.<sup>5</sup> This led to the *expansion* of the exclusive right of communication to the public, pursuant to Article 8 of the WIPO Copyright Treaty so as to include the so-called “making available” right.<sup>6</sup>

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<sup>3</sup> Ss 6(d), 8(c), 9(c), 10(b), 11B(d) Copyright Act 98 of 1978 (‘Copyright Act’).

<sup>4</sup> Ss 6(e), 7(d), 8(d), 9(d), 10(c), and 11B(e) *ibid*.

<sup>5</sup> Iftikhar Hussian Bhat ‘Right of Communication to the Public in Digital Environment’ (2013) 2 *International Journal of Engineering Science Invention* 7 at 7.

<sup>6</sup> Alexander Tsoutsanis ‘Why Copyright and Linking can Tango’ (2014) 9 *Journal of Intellectual Property Law & Practice* 495 at 499; Eleonora Rosati ‘Linking and Copyright: Easier at Last? First National Applications of the CJEU GS Media Judgment’ in Tatiana-Eleni Synodinou, Philippe Jougoux,

In contrast, the Bill proposes to introduce a right of communication to the public *and* a making available right.<sup>7</sup> Thus, the Bill regards the making available right as an exclusive right that is distinct from the right of communication to the public, rather than simply being a particular manner of communication to the public. In other words, the WIPO Copyright Treaty introduced the making available right as part of the right of communication to the public (which could include the right to broadcast), but that is not what the Bill proposes. It is, therefore, not clear what the right of communication is intended to cover (given the fact that the right to broadcast is being retained), as distinct from the making available right. In other words, despite the fact that the Bill will include a distinct right of communication to the public, it will still retain the specific exclusive rights in the Copyright Act that could be considered as falling under that umbrella right, such as, the broadcasting right<sup>8</sup> (and, of course, the making available right). This, at best, results in unnecessary duplication, but there is a real possibility that it may result in a lack of legal (or conceptual) distinction between the different exclusive rights. There is a danger that, in time, a court may consider that a given situation falls between the separately enumerated exclusive rights, or will draw artificial distinctions between the relevant exclusive rights, rather than recognising the umbrella, or overarching, nature of the right of communication to the public.

### ***“lawfully acquired”***

The proposed definition is potentially problematic, and may facilitate copyright infringement. First, a work cannot have been lawfully acquired if it is an infringing copy. To obviate this possibility, the qualification that the copy must not be an infringing copy should be added to the definition. Second, whether a “gift” of a copy of copyright work could constitute a lawful acquisition (and what would constitute a gift for these purposes) is potentially highly problematic, particularly in the case of a digital download of a copy of a work. This concern even extends to purchases of copies of copyright works, whether on the Internet or of a physical copy of a copyright work. The recipient of the gift (or purchaser) should only be protected if the recipient (or

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Christiana Markou & Thalia Prastitou (ed) *EU Internet Law in the Digital Era : Regulation and Enforcement* (2020) at 62.

<sup>7</sup> Cl 4(a), 6(a), 8(1)(dA) and (dB) and 10 of the Bill.

<sup>8</sup> Ss 6(d), 8(c), 9(c), 10(b), 11B(d) Copyright Act.



purchaser) reasonably has no reason to believe that such copy is infringing the copyright work.

This definition and its use, for example, in section 12B(3)(b), now also potentially creates confusion. See the comments below.

***“technological protection measure”***

No comment.

***“technological protection measure circumvention device or service”***

No comment.

**Proposed amendment to section 11A in the Copyright Act**

First, in relation to paragraphs (b) and (c), you are referred to the comments relating the proposed definition of “broadcast” above, more specifically, the conceptual confusion concerning the right of communication to the public, the making available right, right to broadcast and to emit a programme-carrying signal.

Secondly, it should immediately be noted that “original” is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic.

Thirdly, in relation to paragraph (d), it is not clear how, factually, an “original” published edition could be distributed (as there should presumably only be one such item). “Distribution” suggests that there needs to be multiple copies of something. Accordingly, paragraph (d) should only deal with publishing the work to the public, as with, for example, literary works. In any event, distribution of an unauthorised copy — namely, an infringing copy — currently already constitutes secondary infringement,

regulated by section 23(2) of the Copyright Act. An unauthorised copy of a published edition is already defined as an “infringing copy”.<sup>9</sup>

### **Proposed amendment to section 11B in the Copyright Act**

First, in relation to paragraphs (dA) and (dB), you are referred to the comments relating the proposed definition of “broadcast” above, more specifically, the conceptual confusion concerning the right of communication to the public, the making available right, right to broadcast and emit a programme-carrying signal. The same concern also affects paragraph (e), namely, transmission by diffusion service, which is, in essence, a broadcast by non-wireless means.

Secondly, it should immediately be noted that “original” is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic.

Thirdly, as in the case of the new proposed section 11A, in relation to paragraph (dC), it is not clear appear how, factually, an “original” computer program could be distributed. “Distribution” suggests that there needs to be multiple copies of something (as there should presumably only be one such item). Accordingly, paragraph (d) should only deal with publishing the work to the public, as with, for example, literary works. In any event, distribution of an unauthorised copy — namely, an infringing copy — currently already constitutes secondary infringement, regulated by section 23(2) of the Copyright Act. An unauthorised copy of a published edition is already defined as an “infringing copy”.<sup>10</sup>

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<sup>9</sup> Section 1 sv “infringing copy” Copyright Act.

<sup>10</sup> Section 1 sv “infringing copy” Copyright Act.

## **Clause 13 - Insertion of new sections 12A, 12B, 12C and 12D in the Copyright Act**

Written submissions on these proposed sections were also called for in the last call for written submissions by the Portfolio Committee on 4 June 2021. Accordingly, some of the submissions below will necessarily simply be a repetition of previous concerns raised.

### ***General remarks concerning fair use***

Before dealing with the specific provisions, a few general remarks would be in order. It is clear that the Bill seeks to introduce the American fair-use approach to exceptions. There are two approaches by which the exceptions to the exclusive rights granted to copyright owners are provided for in copyright legislation in different countries, namely, fair dealing and fair use. It should immediately be noted that — despite the rhetoric of supporters of fair use, including the Lobbyists — the overwhelming majority of jurisdictions employ a system of fair dealing, so it would be inappropriate (and, quite frankly, dishonest) to suggest that fair use is a readily-accepted alternative to fair dealing. The fact that the Bill continues to seek the introduction of fair use is no doubt attributable to the skewed picture that the Portfolio Committee (and the DTI) has been led to by the Lobbyists.

Under a system of fair dealing, such as that which currently exists in South African law (and also in the overwhelming majority of countries in the world), there are a limited number (or a *numerus clausus*) of exceptions for specified purposes in respect of each category (or type) of copyright work. In contrast to the fair-dealing approach to copyright exceptions, fair use is an open-ended approach to possible exceptions to copyright protection. The fair-use approach is not confined to specified uses (or purposes) that are provided for in the legislation, and *any* unauthorised use of copyright works may be considered to be permissible, if a *court* (rather than the legislature) considers that the particular use amounts to fair use. In other words, copyright policy is, effectively, devolved onto the courts rather than being determined by parliament.

The introduction of fair use is highly problematic, and questionable, for two main reasons. First, fair use creates a level of uncertainty amongst copyright stakeholders that does not exist with fair dealing. In comparison with fair dealing, fair use greatly increases the threat of litigation, and the costs associated with it, as it does not provide sufficient clear guidelines about what is permissible. If anything, it simply favours parties with the greatest financial resources to litigate. Very significantly, even in the country of its origin, the United States, the fair-use doctrine has been the subject of sustained criticism. For example, it is said that “the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific cases are futile.”<sup>11</sup> On what basis is it then considered to be a superior approach to copyright exceptions than our current system of fair dealing?

Secondly, adoption of fair use may cause South Africa to breach its international treaty obligations under the Berne Convention and the TRIPs Agreement, in particular, the so-called “three-step test”. The three-step test provides that the exclusive rights of a copyright owner can be limited, provided the limitations satisfy the following requirements: they are confined to certain *special cases*; they do not conflict with the normal exploitation of the copyright work; and, they do not unreasonably prejudice the legitimate interests of the copyright owner. A broad, open-ended exception — which is what fair use amounts to — will not satisfy the first step of the test.

For the aforementioned reasons alone, the proposed introduction of fair use should be rejected. A more detailed critique of fair use has been provided in the only South African peer-reviewed article on the topic (S Karjiker, “Should South Africa adopt fair use? Cutting through the rhetoric” 2021 *TSAR* 2 240), which has been attached to these written submissions, and should be considered to form part thereof. The aforementioned article has also been included in a subsequent publication (O Dean, *A Gift of Multiplication: Essays on the Copyright Amendment Bill* (2021, Juta) containing a compilation of Prof Dean’s blog articles, which were published on the Chair’s blog (<https://blogs.sun.ac.za/iplaw/news-3/from-ipstell/>), concerning the

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<sup>11</sup> B Sookman & D Glover “Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations” (2009) 2 *Osgoode Hall Review of Law and Policy* 139 at 151 quoting Gideon Parchomovsky *et al* “Fair Use Harbors” (2007) *Virginia Law Review* 1483 at 1484-1486

proposed introduction of fair use and the Bill, which casts further light on the troubling possible consequences of the amendments. Nonetheless, specific submissions will now follow on the particular proposed provisions.

## **Section 12A**

Before dealing with some specific aspects of the new proposed section 12A, it is necessary to make some general observations. As already indicated, the overwhelming majority of countries provide exceptions on the basis of fair dealing, or — far less commonly — fair use. While the Bill seems to adopt both of these forms of exceptions, it now, in essence, introduces an open-ended, fair-use system. This fair-use approach cannot be supported, and the Bill should remove any attempt to introduce a system of fair use, for the reasons already stated. Any grounds for the expansion of the list of exceptions, such as, for the purposes of parody, should be expressly provided for. No other exceptions should be allowed to be created by the courts under an open-ended fair-use system.

Neither the DTI, nor the Portfolio Committee, has provided any basis to suggest that the adoption of fair use is in compliance with South Africa's treaty obligations. In fact, despite support amongst the Lobbyists for the introduction of fair use, there is no detailed analysis — other than bald assertions about its alleged compliance with the Berne Convention or the TRIPs Agreement. On the contrary, as detailed in the attached article, it has been rejected, amongst others, in the UK, Australia, New Zealand and the EU. The DTI and the Portfolio Committee are being misled, or are now willingly accepting a problematic narrative about the merits (and lawfulness) of fair use, and its level of acceptance internationally. In light of the aforesaid, simple questions need to be answered: Who is seeking this change, and why? It is not difficult to see that certain big technology corporations will be the immediate principal beneficiaries, at the cost of the livelihoods of South African authors and copyright owners.

Fair use in respect of a work covers all the restricted acts for literary (or musical) works included in section 6 and the corresponding sections for other categories of

work. So, for instance it will cover acts, such as, reproducing, publishing, performing, and broadcasting, the copyright work. While performing the copyright work may be an exclusive act given to the copyright owner (for example, section 6(c) of the Copyright Act), this is clearly not what is being referred to, as there is no good reason why only one specific exclusive right is mentioned. It is, therefore, unnecessary — and wrong — to make specific reference to performance of a work as that creates the anomaly that an exemption is given in the Copyright Act to performances protected under the Performers Protection Act.

The proposed section corresponds, to some extent, with the present section 12 of the Act, but with one important difference. It is clear that, as a consequence of the words “such as” in 12A(a), the specific examples of fair use listed are simply illustrative (and not a closed list), and gives the court an extremely wide discretion to exempt any uses of whatsoever nature of a copyright work. This is very far reaching and will probably make our range of exemptions from copyright infringement one of the widest in the world. The situation is now only aggravated by the proposed new section 12A(d).

The new proposed section 12A(d) now undermines the express limitations that are provided in relation to the permitted uses in section 12B. The effect of section 12A (d) is to render those limitations nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A(b). This underscores the fact that the Bill is not introducing some “hybrid system” of exceptions between fair use and fair dealing, but is a fully blown fair-use system. The net result is that tremendous uncertainty is created as to what a copyright owner can actually prevent. This uncertainty does not benefit copyright owners and creatives, and especially not South African copyright owners and creatives (who are purportedly among the main beneficiaries of the Bill). If anything, it only serves the interest of certain large technology companies, who have an interest in diluting the rights of copyright owners and authors.

An example (and this is but one of many examples) of the significant widening of the possible exceptions is paragraph (a)(i), which allows for the making of a personal

copy of a work, without qualification, and irrespective of whether the individual acts are reasonable or fair. In other words, the individual can legitimately make an exact reproduction of an entire book that he has borrowed, or taken out on loan from a library, in order to avoid having to purchase his own copy. If every potential reader (or a large number of readers) of a book was to adopt this approach (which is contemplated by the section), the author's entire market would be destroyed. This renders the whole purpose of copyright largely nugatory. Such conduct is clearly unreasonably prejudicial to the legitimate interests of the copyright owner. This situation is avoided under the present fair-dealing approach because the use for the specified exempted purpose must still be reasonable or fair.

For completeness, the portion of paragraph (a)(i) that, presumably, seeks to facilitate so-called "time shifting" and "format shifting" just causes confusion as to the scope of this exemption.

First, what is a "lawful copy"? Given that there is now a proposed definition of "lawfully acquired", are they interchangeable terms? If so, does it mean that the exception does not apply to, for example, a borrowed book, given the definition of "lawfully acquired"? This example shows how ridiculous it is to limit submissions to particular provisions, when there could be possible effects beyond those provisions. See also in this regard the comments in relation to section 19D.

Secondly, time shifting and format shifting should be regulated by separate provisions.

#### *Section 12A(a)(iv)*

While a fair-use exception for scholarship and illustrative purposes may be appropriate, the exception for "education" could have disastrous consequences for educational authors and publishers. It is the long-term impact of legislation that should be considered, rather than seeking to achieve populist (short-sighted) goals. Simplistic rhetoric, devoid of proper analysis is, unfortunately, the political *zeitgeist* of our times, whether in the US or elsewhere. There is a refusal to analyse issues

thoroughly, and to consider the interests of all stake holders. Where is the economic impact assessment that supports this exception? In time to come, we should not be surprised if we fail to produce sufficient authors and creatives, if we have failed to provide adequate copyright protection.

#### *Section 12A(c)*

This is yet another example of the poor understanding of copyright law. It does not make any sense to require that the source and the name of the author be mentioned in respect of *all* the permitted uses pursuant to paragraph (a), and such obligation in respect of paragraph (b) is sheer non-sense.

#### **Section 12B**

The new proposed paragraph 12A(d) really highlights the garbled thinking (if not outright deviousness) at work concerning the approach to copyright exceptions contained in the Bill. Without paragraph 12A(d), the exceptions provided by section 12B have express limitations, which would require that the use for a particular purpose be fair, as is currently the case under our system of fair dealing. For example, the exception for the purposes of quotation or illustration is only exercisable to the extent that it is justifiable. However, the effect of section 12A(d) is to render those limitations nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A(b). What then is the purpose of section 12B? Why should two sets of factors be considered to determine if the extent of use is lawful? This underscores the fact that the Bill is not introducing some “hybrid system” of exceptions between fair use and fair dealing, but is a fully blown fair-use system.

#### *Section 12B(1)(c) and 12B(2)*

Section 12B(1)(c) is rather perplexing, and its purpose is unclear, and all the more so when read with section 12B(2). Yet another example of the poor understanding of copyright law.



First, the fixation of a performer's performance for purpose of broadcasting is dealt with in section 8(3) of the Performers' Protection Act (11 of 1967) in a different manner to that set out in the Amendment. The protection of performances (and exceptions thereto) belongs in the Performers' Protection Act and is not properly dealt with in the Copyright Act. Performers' rights and copyright are two entirely different forms or species of intellectual property and must be dealt with in separate laws.

It is not clear whether the copyright work that is being performed (or sound recording used in the performance) has to be owned by the performer, as the phrase "performer's performance or work" in the first line of section 12B(1)(c) is potentially ambiguous. Does the section also relate to the performance of a third party's copyright work? The section should remove all references to "performer's performance", as the provision should only deal with copyright works.

Secondly, what is the difference between a fixation (or record) and a reproduction? Presumably, a reproduction requires a prior fixation (or record).

#### *Section 12B(1)(i)*

See the earlier comments concerning the definition of "lawfully acquired".

#### *Section 12B(3)*

The inclusion of the word "include" means that the list of examples is not exhaustive, and is, in fact, open-ended. There is no justification for making this provision open ended. Accordingly, the word "include" should be deleted.

The effect of the inclusion of the new proposed section 12B(3)(b) may be far-reaching. In effect — given that section 12B(1)(i) requires that the exception allowing the making of personal copies is only applicable if the relevant work copied was lawfully acquired — section 12B(3)(b) now seemingly allows the exceptions to be relied upon even if the work was not lawfully acquired. While this may be appropriate in respect of some types of exceptions, which should be permitted if the work was, for

example, borrowed, it does mean that it creates potentially problematic situations and causes confusion.

This is yet another example of the mess the drafters have made of the exceptions to copyright infringement. The drafting displays technical incompetence in the area of copyright law, with the drafters clearly being fixated on introducing fair use at all costs, while trying to create the impression that not much is being changed by largely repeating the previous fair-dealing exceptions.

#### *Section 12B(4)*

What is the purpose of this provision? It either creates uncertainty, or an even wider, unwarranted, dilution of copyright. For example, why should someone who translates a work for non-commercial purposes have the right to make adaptations of the work, or use the work in any other language? This is far-reaching as such other uses of the work are also not limited to only non-commercial use. This provision should be deleted.

#### *Section 12B(7)*

This subsection is incomprehensible in its present form and should be re-drafted. It demonstrates that the drafters lack understanding of the applicable law and the relevant legal principles.

Presumably, what is intended is to make provision for the so-called first-sale doctrine (or exhaustion). On this assumption, what the sub-section should say is something along the following lines:

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

Of course, there is an even simpler solution to deal with the problem of parallel importation, and that is to amend section 23(2) of the Act. However, it does require the drafter to know what the current law in South Africa is, which does not appear to be the case.

### **Section 12C**

The addition of the proposed section 12C(2) does not address the fundamental concerns about the overly broad exemption from liability for copyright infringement that section 12C(1) seeks to bestow on intermediaries. This is yet another example of a provision that could only benefit large technology companies, such as, Google, at the expense of South African copyright owners. Substantively, the addition of a “three-step like” test in section 12C(2) does not sufficiently narrow the exemption from liability. If the drafters are having problems in getting this right, they should just look at Article 5 of the EU’s Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29) (“Article 5 of the InfoSoc Directive”).

First, the section is cast in the form of giving someone the right to make transient copies, which should be the case. It should be an exemption from liability, not a positive right.

Second, the exception should be limited to “reproductions”, and not extend to adaptations. There is no conceivable reason why an intermediary should need to benefit from an exemption in respect of adaptations, unless it is intended to provide an even broader exemption from liability for technology companies, such as, Google, who have earned vast sums of money off the exploitation of third parties’ copyright works, without any (or adequate) compensation to the relevant copyright owners.

The purpose of an exception of this nature is simply to facilitate reproductions made as a consequence of a technological process and must be interpreted strictly so as to ensure fair balance between the rights and interests of rights holders and of users of protected works, because it is a derogation from the general rule that the

copyright holder must authorise any reproduction of its work.<sup>12</sup> As alluded to earlier, the EU passed the Directive on Copyright in the Digital Single Market (2019) to narrow the exemptions that aggregators and intermediaries were previously afforded, which now provides copyright owners with enhanced protection and possible (fairer) remuneration, by addressing the value gap.

Thus, if anything, given that intermediaries are, at present, adequately protected by sections 73 and 74 of the Electronic Communications and Transactions Act 25 of 2002, the focus should rather be on enhancing the rights of copyright owners in the digital environment.

Last, but by no means the least, as already mentioned, the effect of section 12A(d) is to render the “limitations” in section 12C(2) nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A(d). What then is the purpose of section 12C(2)?

## **Section 12D**

### *Section 12D(1)*

Again, as already mentioned, the effect of section 12A(d) is to render the “limitations” in section 12D(1) nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A(d). What then is the purpose of section 12D(1)? For the record, in case this is not obvious to the drafters, the proposed subsection is subject to: section 12D(3), the new subsections 12D(1)(a) to (d), and section 12A(d)! Who knows what that actually means in the end?

As already mentioned, the exception for education could have disastrous consequences for educational authors and publishers, if the cannibalisation of educational material is permitted without any compensation to the copyright owners. Something less than “substantially the whole of a work” could still amount to a

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<sup>12</sup> *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd & Others* 2014 C-360/13 (5 June 2014) [23] and [24].

substantial part of the work for copyright law. It is not very difficult to see how a cynical use of this section could result in an institution reproducing parts of copyright works in such a manner as to totally obviate the need for students to purchase any books at all, or for the institution to pay no compensation to copyright owners (because it is argued that the portion copied does not conflict with the normal exploitation of that copyright work). While currently such owners may be entitled to compensation, this would not be the case if the Bill is enacted in its current form. Where is the economic impact assessment that supports this exception?

This is a great example of a provision that appeals to the simplistic, “feel good” rhetoric that is devoid of proper analysis. On a more cynical note, it scapegoats intellectual property protection in relation to the government’s service-delivery failures in education over two decades. Briefly put, it now gives educational institutions a free hand to copy educational material protected by copyright.

This does not build a knowledge economy because the message is clear: intellectual endeavours are not compensated. The ironic consequence of provisions such as the proposed section is that it devalues what it purports to promote. In other words, while these measures purport to make education more accessible and improve the intellectual abilities of our young people, they also send a clear message that intellectual endeavours will not be rewarded and protected in this country, to the extent that they are protected elsewhere.

If this type of erosion of copyright is permitted, as a country, intellectual impoverishment is our future.

### *Section 12D(3)*

The Act contains no reference to “indigenous communities” and confers no rights on such groups. This problem is exemplary of a wider fundamental problem, namely that the Bill is based on the erroneous premise that the Copyright Act has already been amended by the Intellectual Property Law Amendment Act 2013 (“IPLAA”). This misconception has the effect, inter alia, that the numbering of the new sections sought

to be introduced by the Bill is awry and the entire numbering system in the Copyright Act, once amended by the Bill, will be confusing and non-sensical.

The IPLAA has not, and should never, be brought into operation due as it fundamentally distorts the legal principles in the statutes it seeks to amend. All references and allusions in the Bill to the IPLAA should be eradicated.

#### *Section 12D(6)*

The “instruction” should take place at a recognised educational institution. “Incorporate” is not a restricted act under Act. “Reproduce”, which is a restricted act, should be substituted for it. The effect of an exemption is to authorise the performance of a restricted act under Act.

“Assignment” has a recognised specific meaning in copyright law, namely, to transfer the ownership of copyright. It should not be used in this context as it is potentially misleading and could cause confusion.

#### *Section 12D(7)*

It should be noted that the impact of the proposed section on the viability of South African academic publishing needs to be properly investigated. Given the fact the academic publications form a significant part of funding of tertiary institutions, which is funded by the state, it is important that there remain viable publications to promote such academic publishing. Of course, arguably, the greatest beneficiary of this proposed provision are websites like Google Scholar and SSRN, who have not invested in the academic publications, but will benefit from them. Unless a service like Google Scholar financially contributes directly to academic publishing in South Africa, why should it be granted this type of benefit?

## **Clause 20 - Insertion of section 19C in the Copyright Act**

### *Section 19C(1)*

What is meant by “library”, “archive” or “gallery” in this context? These terms should be construed strictly, as recognised institutions, so as to prevent the wholesale abuse of these provisions by so-called “digital” libraries, archives or galleries.

However, there should probably also be an exception for “art market professionals” to enable them to market or advertise the artworks that they are selling. For example, they should be able to display photographs of these artworks on their websites or other marketing material. This is particularly the case now that it is proposed that a resale royalty right be introduced (see section 7B).

### *Section 19C(2) and (3)*

If one of the listed institutions owns a tangible article embodying a copy of a copyright work (such as, a book), this activity is not restricted by copyright, and, consequently, no exception is required. In fact, that is what the listed institutions, such as, libraries, have been doing for centuries! As already mentioned, if the terms “library”, “archive” or “gallery” in this context are not narrowly construed, this provision may be used for rampant piracy. Accordingly, the aforementioned terms should be narrowly defined.

### *Section 19C(4)*

This provision, prior to the latest amendment, did not involve any activity restricted by copyright, and, consequently, no exception was required. The present amendment, while providing some clarity, does not add anything in substance, and the provision should be deleted. If anything, it simply introduces a potential conflict with the possible fair-dealing exceptions.

### *Section 19C(7)*

The passage “without the consent of the copyright owner” is redundant and should be deleted as it may cause confusion. First, the point has already been made in subsection (1) and does not need to be repeated. Second, the phrase is not repeated in the other relevant subsections, and this makes the current subsection different for no apparent reason. This may give rise to serious issues of interpretation of the section.

### *Section 19C(9)*

The Copyright Act makes no reference to “indigenous community”, nor does it confer any right on such group. This is a consequence of the IPLAA not being in force. The phrase should be deleted.

### *Section 19C(10)*

The opening words, namely, “Notwithstanding any other section” is most inelegant, and unusual drafting. The conventional, and better, expression would be to substitute it with “Notwithstanding the provisions of this Act”.

### *Section 19C(13)*

The subsection creates a necessary exception in favour of the dispatching library: it is authorised to make a reproduction of a work. However, the receiving library also makes a reproduction of the work and requires a similar exception in its favour. This should be provided. Also, the subsection appears to place an obligation on the dispatching library to ensure that the receiving library carries out the requirements of paragraph (b), and that the dispatching library’s right to rely on the exception is conditional upon this being done. If this is the intention, it should be stated more clearly. What is the dispatching library’s liability if the receiving library fails to carry out the requirements of paragraph (b)?



### *Section 19C(14)*

The phrase “protected from any claim for damages, from criminal liability and from copyright infringement” is contorted and should be simplified. It can simply be provided that those persons are “absolved from [or, have immunity against] any claims of copyright infringement”. If they are absolved from any claims of copyright infringement, there can be no question of damages or criminal liability being incurred.

As for paragraph (b), if the work is in the public domain, there is no copyright protection, and it is incorrect to make reference to “the copyright work”. In addition, the Copyright Act only protects copyright and not “related rights” (whatever this may mean in this context) and such reference is inappropriate and should be deleted. Accordingly, the phrase “the copyright work, or material protected by related rights” should simply be replaced by “the work”.

### ***Section 19D***

As indicated in previous submissions, the introduction of the proposed section is to be welcomed. However, from a technical drafting perspective, this is another example of a failure to identify the relevant beneficiaries. The Portfolio Committee is referred to the submission by Prof Owen Dean to the Portfolio Committee, dated 14 December 2021, dealing with the application that he has made to the Constitutional Court to join the proceedings pending before that court in which Blind SA has sought this proposed section to be read into the Copyright Act notwithstanding that the Bill is still pending before Parliament.

The contents of Prof Dean’s supporting affidavit to his application are endorsed and supported. In particular, we concur that the section should be redrafted along the lines that he has suggested, subject to it being updated to also deal with the additional restricted acts that will apply to the works in question once the Copyright Act has been amended by this Bill (assuming that such amendment actually takes place and the Bill remains substantially in its present form). The comments on this section that follow

are, therefore, in addition, and alternative, to the proposals contained in Prof Dean's aforementioned affidavit.

As pointed out by Prof Dean, the current proposed section is not in compliance with the Marrakesh Treaty and will thus not facilitate South Africa acceding to the treaty, which is understood to be the desire and intention of the government. It is arguably thus not in conformity with the three-test rule. The section is thus inappropriate and inadequate.

While the introduction of the definition of "authorized entity" does make pragmatic sense, the amendment to section 19D(1) is now potentially too broad. The beneficiaries of the provision should be "any person that *principally* serves persons with disabilities". While it may, naturally, be acceptable for persons with the relevant disabilities to also be beneficiaries of the provisions, other persons who wish to benefit from the provision should have serving persons with disabilities as their principal purpose, otherwise it could result in the provision being abused. For example, a provider of unauthorised (or pirated) material may wish to benefit from the protection of section 19D by simply claiming to (also) do so for the benefit of a person with a disability. Accordingly, the beneficiaries of the provision should be limited to persons with a disability or the "authorized entities" (subject to the required revision).

#### *Section 19D(1)(a)*

What is "lawful access to the copyright work or a copy of that work"? Given that there is now a proposed definition of "lawfully acquired", are they interchangeable terms? If so, does it mean that the exception does not apply to, for example, a borrowed book, given the definition of "lawfully acquired"?

#### *Section 19D(2)(a) and 19D(3)(a)*

As already indicated, while the introduction of the definition of "authorized entity" does make pragmatic sense, this provision does not limit the beneficiaries to persons that *principally* serve persons with disabilities. See the earlier comments in this regard.

## **Clause 27 - Insertion of section 27(5A), (5B) & (5C) in the Copyright Act**

### *Section 27(5A)*

You are referred to the earlier comments relating the conceptual confusion concerning the right of communication to the public, and the making available right. The same concern also affects sections 27(4), which deals with broadcasts, and 27(5), which deals with programme-carrying signals.

This, of course, demonstrates the absurdity of allowing only piecemeal submissions on a fundamentally flawed Bill.

### *Section 27(5B) (and section 28P)*

Section 28P should allow the circumvention of a technological protection measure only for the purposes of the following situation: after the person, who seeks to use a technological protection measure circumvention device, has requested the copyright owner to allow access to the copyright work for purposes of the relevant exception; and, the copyright owner has failed — within a reasonable time — to provide the necessary access to the copyright work (in whole or in part) so as to reasonably satisfy the purpose for which access to the copyright work is sought.

### *Section 27(5C)*

First, the language in sections 27(5C)(a) and (b) needs to be fixed to agree with the singular subject. For example, it should be say “removes or modifies”, and “makes, imports, sells, lets” etc. Secondly, you are referred to the earlier comments relating the conceptual confusion concerning the right of communication to the public, and the making available right. The section does not refer to the making available right, which is particularly relevant in the digital environment. Thirdly, the section contains no knowledge (or constructive knowledge) requirement, which may make this provision potentially liable to a constitutional challenge, as it results in criminal liability.

The concerns relating to section 27(6) bear repeating. The fines imposed on juristic persons in this, and other paragraphs, are draconian and are minimum penalties. While strong copyright protection is to be welcomed, a balance needs to be maintained. This also clearly demonstrates that there is no consistency in the Bill. While, on the one hand, the draft Bill threatens to seriously dilute copyright protection, on the other hand, it introduces draconian minimum penalties for copyright infringement. It will no doubt leave these measures open to challenge, and may also lead to a reluctance to convict persons.

### **Clause 33 - Amendment of section 39(2) in the Copyright Act**

No comment.

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