

SUBMISSIONS ON THE COPYRIGHT AMENDMENT BILL, 2017

(Tabled in Parliament 16 May 2017) [B13-2017]

1. The South African Institute of Intellectual Property Law

1.1 The South African Institute of Intellectual Property Law (SAIPL) was established in 1954 and represents some 187 patent attorneys, patent agents and trade mark practitioners in South Africa who specialise in the field of intellectual property law, which includes copyright law.

1.2 The SAIPL is widely regarded as the custodian of South Africa's intellectual property rights and comprises practising attorneys, academics, practitioners in businesses and other parties and persons interested and experienced in the protection and enforcement of intellectual property rights.

1.3 The members of the SAIPL represent a wide variety of national and international businesses which have built their businesses on brands, innovation and technology and which protect their interests through our country's intellectual property laws. These include both large and small businesses. The members of the SAIPL also represent and have represented numerous individuals who are creators of original works, including local artists, musicians and song-

writers, such as Atang Tshikare (designer), Biblack Thabo Ivan Khunou (singer), Solly Mahlangu (singer), Songezo Baleni (jewellery designer), Kobus Hatting (the creator of the Nelson Mandela statue in Sandton Square), and the heirs of Solomon Linda (the singer and composer of “Mbube” which later became “The Lion Sleeps Tonight”). These artists/designers are often represented by SAIPL members on a reduced fee or pro bono basis.

1.4 These submissions have been prepared by the SAIPL’s Copyright Law Committee (“the Copyright Law Committee”), a committee of SAIPL members which was established to monitor, protect, consider and advise on developments relating to copyright law. The committee members are all specialists in copyright law and most of them have many years (in some instances, decades) of experience in advising clients on aspects of copyright law and conducting copyright litigation. These submissions also include commentary from SAIPL members who are not permanent members of the Copyright Law Committee, but who have an interest in the Copyright Amendment Bill as tabled in parliament on 16 May 2017 (referred to in these submissions as “the Amendment Bill”). All contributors have considered the Amendment Bill from an impartial standpoint; they do not represent any clients in preparing these submissions and the preparation of these submissions have not been funded by any clients or any of the firms that the members are employed by or partners of.

1.5 The Copyright Law Committee also made submissions on the previous draft of the Copyright Amendment Bill as published in Government Notice 646 Government Gazette 39028 27 July 2015. That draft will be referred to in these submissions as the “2015 Bill”.

2. Introduction

- 2.1 The Copyright Law Committee has considered the Amendment Bill and, at the outset, and as it was in relation to the 2015 Bill, is generally in support of its admirable objectives. The Copyright Law Committee is aware of, and has considered, the 2011 report of the Copyright Review Commission (the “CRC”) which was established in 2010 by the Minister of Trade and Industry, Dr Rob Davies, to investigate and assess concerns and allegations about the efficiency of the collecting societies model that was in place at the time, for the distribution of royalties to musicians and composers of music, and to authors and artists. In the report, the CRC made numerous recommendations regarding adjustments to be made in the application and enforcement of existing laws, and also recommended that certain changes be effected in the existing laws. The laws under discussion in the CRC report were not limited to the Copyright Act no. 98 of 1978 (referred to in these submissions as “the Principal Act”).
- 2.2 Regrettably, however, for reasons which will appear below, the Copyright Law Committee must respectfully submit that the Amendment Bill, in its current format, will not give effect to many of those recommendations. It is also not, in its present form, suitable to be signed into law and will, in the view of the Copyright Law Committee, have far-reaching consequences which will lead to the undermining of the principles and objectives of copyright law, legal uncertainty and, most importantly, the undermining of the rights of the authors, creators, songwriters, artists and other individuals whose rights the Amendment Bill is ostensibly aimed at improving and protecting. The reasons for these views will be addressed in more detail further in these submissions.

- 2.3 Rather than making submissions on each and every clause of the Amendment Bill *ad seriatim*, this document will deal with the respective topics and/or issues contained in the Amendment Bill under general headings, with specific commentary on certain clauses and suggestions as to how to increase excellence in the Amendment Bill.
- 2.4 In addition, the Copyright Law Committee has proposed the introduction of additional changes to the Principal Act through the Amendment Bill, recognising that the CRC had a limited mandate and that it considered the Amendment Bill with the advancement of the interests of the owners of only certain types of copyright in mind. There are, however, other amendments that the Amendment Bill should seek to introduce in order for the Principal Act to operate better in today's digital world.

3. **General Comments**

- 3.1 Throughout the Amendment Bill, terms which are both foreign and undefined have been used to describe the various persons involved in the creation and exploitation of a copyright work. The terms "author" and "owner" are properly defined in and used throughout the Principal Act. There is a wealth of case law regarding those terms. There is no need to deviate from them and, indeed, doing so will only lead to unnecessary contradictions and legal uncertainty, at least if the provisions are left in their current form.
- 3.2 There are also however, repeated references to the "user" of a copyright work, a term which has also not been defined either in the Principal Act or the Amendment Bill. The restricted acts relating to copyright works are, broadly speaking and depending on the nature of the work, reproduction of the copyright work, making an adaptation, broadcasting it, publishing

it, performing it, communicating it to the public or letting, offering for sale or hiring out a reproduction of the work. The term “use” has not been employed previously, and is undefined. Perhaps most significantly, it is not an infringement to make unauthorised use of a copyright work, and the introduction of the term “user” now will only lead to uncertainty and confusion.

- 3.3 It is therefore the Committee’s view that all references to undefined terms such as “user”, “performer” and “producer” should be replaced by either “author” or “owner” as the case may be. The consequences of granting rights to the “user” of a copyright work, and the unfortunate provision to this effect in the Amendment Bill, are dealt with in detail later in these submissions. The suggestion to replace the terminology used is not necessarily made in each section of these submissions to avoid repetition, but should be applied throughout.

4. **Copyright in orphan works**

- 4.1 A definition for orphan works has been retained in the Amendment Bill, yet has been amended from the definition included in the 2015 Bill. The recognition of orphan works remains a positive development.

- 4.2 The concept of orphan works, and the difficulties they create in modern society, are well-known and have been addressed in the legislation of various territories, including the European Union, Australia, Canada, the UK and the United States (although the provisions in the latter country have not yet been enacted).

- 4.3 The main purpose of recognising and managing orphan works is to facilitate the digitisation of works in which copyright subsists by, *inter alia*, public libraries, educational establishments, museums, heritage institutions and public broadcasting organisations. Such digitisation serves a valuable purpose in that it ensures the preservation of original works and facilitates record keeping. It is for this reason that the introduction of the definition and the recognition of the need to deal with these types of works, are welcomed.
- 4.4 However, it is to be noted that this purpose is, to a large extent, served through the general exceptions relating to libraries, archives, museums and galleries sought to be introduced in Clause 18 of the Amendment Bill.
- 4.5 The transfer of copyright ownership in orphan works to the State has been removed and this is welcomed. However, the problematic wording of the licensing scheme provided for in the 2015 Bill has been retained and it is again suggested that such a licensing scheme be properly researched and investigated before such provisions are included. It is again suggested that provision should be made for a Register of orphan works or other form of record keeping which is available for public inspection and from where details of such works and any licences granted can be obtained.
- 4.6 Furthermore, it is suggested that the right of the copyright owner to take action against any infringing acts should expressly be retained in circumstances where an orphan work was licensed and evidence shows that no diligent search was conducted.
- 4.7 What follows are comments on the specific clauses of the Amendment Bill relating to orphan works.

4.8 Clause 1(f): the wording of the definition of “orphan works”, though amended, remains problematic. The person who can take steps against the infringement of copyright is the owner thereof. The owner of the exclusive right which is sought to be licensed, is therefore the only relevant right holder. Reference to “rights holders” is both incorrect and unnecessary. The definition should be limited to the owner of the copyright.

4.9 Clause 22 contains contradictions and repetitions and is unintelligible in its current form. It is suggested that this provision be retracted and re-drafted with the required accuracy and with specific reference to the requirements set for diligent searches in the territories mentioned. For instance, Clause 22(6) stipulates that an applicant for a licence must show that he has *“conducted a search of the records of the database of the register of copyright in the Commission that are available to the public through either the internet or any other means relevant to identifying and locating registered copyright author”* (sic). It is difficult to make sense of this provision as a whole. But for cinematograph films, South Africa does not have a copyright registration system, or a register. Cinematograph films are not registered with the Companies Commission. It is therefore unfathomable what or where an applicant is to search. Furthermore, the last word in this provision read “owner” in the 2015 Bill. It is reiterated that the owner is the only relevant rights holder. The substitution of the word “owner” for the word “author”, and the requirements to take steps to locate the copyright author, in general, cause this provision to be even more impractical and nonsensical than what it was previously.

- 4.10 The reference to author throughout this Clause (see 22(8) and 22(9)) is misplaced. It is only the owner of copyright that can grant assert rights under the Act. The owner is not necessarily the author. As they have been drafted, these provisions are also extremely burdensome and the purpose of having orphan works recognised will not be fulfilled. Without clear, concise and understandable provisions relating to the functioning of any licensing scheme, it will not serve any practical purpose.
- 4.11 The Copyright Law Committee recommends that the definition of orphan work simply read:
- “ ‘orphan work’ means a work in which copyright still subsists but the owner of the copyright cannot be identified or located”*
- 4.12 The word “Assignment” should be deleted from the heading of Clause 22 and it should read *“Licences in respect of orphan works”*.
- 4.13 In fact, Clause 22 must be re-drafted as in its entirety to contain cohesive provisions governing the licence scheme, the application process, and what is required of the applicant in conducting a diligent search. It is suggested that the latter could be dealt with in Regulations as opposed to being listed ultimately in the Act.
- 4.14 In the event that a complete re-draft of Clause 22 is not considered, at the very least, the word “author” in Clause 22 should be replaced with the word “owner” and clarity should be provided as to how the money held will be dealt with following the expiration of the five year period.

4.15 An express provision should be included in Section 24 of the Principal Act which retains a copyright owner's rights of action where an orphan work has been licensed in the absence of a diligent search.

4.16 Provision should be made for a Register or other publicly accessible record that contains details of works that have been licensed as an orphan work.

5. **State-owned copyright**

5.1 The Amendment Bill provides, in Clause 3, for the State to own copyright in every work eligible for copyright, which is *“made by, funded by, or under the direction or control of the State or an international organization or local organizations”*.

5.2 Unfortunately, the amendments proposed by this Clause are hampered by wording which is confusing; and moreover, what appears to be intended by this provision conflicts not only with the provisions of the Principal Act, but also with other legislation. In particular, this provision is at odds with Section 21 of the Principal Act and also with the provisions and intention of the Intellectual Property Rights from Publicly Financed Research and Development Act, no. 51 of 2008 (“the IPR-PFRD Act”).

5.3 The proposed amendments to Section 5 of the Principal Act are at odds with Section 21 of the Principal Act, which reserves for a commissioning party of only certain copyright works, ownership of the copyright, where the creation of the work was paid for. The effect of the proposed clause will be that the copyright in any work created by, or under the direction or

control; or funded by (assuming that this is the intended wording) the State, prescribed international organization, or any local organization, will transfer to either the State or such organization. There is no justification for including all local organizations but only including certain, prescribed international organizations. In fact, excluding organizations from countries that are signatories to Berne Convention and/or TRIPS would be contrary to the obligation to provide the minimum rights and protection as prescribed by these treaties to nationals of all member states, and to afford such nationals treatment no less favourable than what is given to its own nationals.

5.4 The amendments also contradict the provisions of the IPR-PFRD Act which (save for the exception of copyright in conventional academic work) grants intellectual property rights to the recipient of public funding, including funding by the State. Therefore, in terms of the IPR-PFRD Act, the recipient will own the copyright in works created by such funding. The proposed amendments in Clause 3 grant those rights to the State, in the same circumstances. It is unclear which of these Acts will prevail and the future of such rights will be cast in uncertainty. It is therefore submitted that the amendments brought about by Clause 3 should be reconsidered.

5.5 In the event that Clause 3 is retained, the placement of the words “or funded by” creates uncertainty and should be reconsidered. Section 5 of the Principal Act seeks to retain for the State, ownership of the copyright in works which are made by the State, or under its direction or control. Left as it is currently drafted, the words “under the direction or control of the State” could be seen to attach to the words “funded by” as opposed to the words “made by” and the State could lose the opportunity to own copyright in works made under its direction or control as it would only own such rights in works funded under its direction or control. On the other

hand, the amendments go unduly far by also, as currently worded, granting to the State (or such other organization) copyright in works which are funded under their direction or control. The uncertainty created by the wording is patently evident.

5.6 Furthermore, the addition of the last sentence in this Section that confers ownership is unnecessary and will lead to uncertainty. Section 21(2) of the Principal Act already states that the ownership of copyright conferred by Section 5 of the Principal Act shall vest in the State or such other international organization.

5.7 Clause 21, which provides for an amendment to Section 22 of the Principal Act by providing that the State may not assign copyright that is owned by it does not make commercial or economic sense. It places an absolute prohibition on the State to transact with its copyright as it pleases. The State may want to exploit its rights by selling them but will be precluded from doing so for no sound reason.

5.8 The recommendation of the Copyright Law Committee is that, if Clause 3 is to be retained (which is submitted will create legal uncertainty), it should at least be amended to read as follows:

“Copyright shall be conferred by this Section on every work which is eligible for copyright and which is funded by, or made by or under the direction or control of the State or such international organizations as may be prescribed”

5.9 The qualification in Clause 21 (the amendment of Section 22(1) of the Principal Act) should be reconsidered.

5.10 Further, the phrase “funded by” is a particularly loose and indefinite concept, so use of the term will create unnecessary uncertainty, and is not desirable given the possible differing results.

6. **Scope of copyright protection**

6.1 Clause 2 of the Amendment Bill proposed the insertion of a proposed Section 2A into the Principal Act. The Explanatory Memorandum accompanying the Amendment Bill gives no rationale for the inclusion of the proposed Section 2A. It simply records that it “circumscribes” the extent of copyright protection. The DTI’s presentation to parliament on 30 May 2017 went no further, whilst the Copyright SEIAS Report does not address the proposed amendment.

6.2 In reality, the proposed insertion creates more difficulties than perhaps envisaged. In the first place, however, it must be queried why such an insertion is necessary at all. Our Courts have never experienced difficulty with understanding or implementing the protection afforded by the Principal Act. It is trite, and Section 2 of the Principal Act makes it plain, that what is protected is the creation in expressed form – “*written down, recorded, ... or otherwise reduced to a material form*”.

6.3 Nevertheless, the following analysis will hopefully highlight problem areas.

- 6.4 Proposed Section 2A(1) will stipulate that “*copyright protection extends ... not to – (a) ideas, procedures, methods of operation or mathematical concepts*”. This is potentially misleading. Of course, *in vacuo*, copyright doesn’t extend to those mentioned notions; there again, it doesn’t extend to anything unless it is written down ... etc.
- 6.5 The difficulty comes in where a method of operation, say, is written down – as in a factory manual, for example. That recordal will (if imbued with the requisite originality) have copyright protection. The protection will not extend to prevent the exploitation or implementation in the factory of that method, but that is also trite.
- 6.6 The proposed amendment, however, could be interpreted to mean that the recordal of a method of operation will not enjoy protection. That would be wrong in principle.
- 6.7 Similarly, the exclusion of “*interface specifications*” is undesirable. Given that it is not (sought to be defined) in the Act, one considers the ordinary meaning of “interface specifications”. In basic computer terminology, an interface is a device or program enabling a user to communicate with a computer, or for connecting two items of software.¹
- 6.8 A ‘program’, of course, is protectable. Why should it not be so, because it constitutes an interface? Rather, why should the specifications for the program not be protectable? A cursory internet review indicates that there are open source interface specifications, but there are also those in which proprietary rights are claimed. At least, as one forum² notes, the

¹ Concise Oxford English Dictionary.

² blog.robortelder.org/interfaces-most-important-software-engineering-concept

source code of an interface should be copyrightable.

- 6.9 Proposed Section 2A(2) is not problematic, but it is superfluous as copyright already extends to tables and compilations. Unnecessary legislative instrumentation is to be avoided. Proposed Section 2A(3), which stipulates that copyright protection does not extend to the content of tables and compilations is ridiculous. Often, individual elements of a compilation are very original and worthy of copyright (see the PCNS table in the BHF/Discovery Health³ case, and the Payen Components⁴ case, for example, or consider a compilation of poems, each of which is capable of copyright protection). Both of these proposed new subsections should be deleted.
- 6.10 It is impossible to divine what proposed Section 2A(4)(i) is aimed at. It is also undesirable, if it means that ideas cannot be protected. If it is intended that, where an idea can only be expressed intelligibly in one way, then that expression will not enjoy protection it is comprehensible. However, poor drafting results in this aim not being achieved – *“such that the idea”* should be deleted, and replaced by *“which”*. Better still, the subsection should read as follows, for it to be clear: *“(i) which is the only intelligible way of expressing an idea”*.

³ Board of Healthcare Funders v Discovery Health Medical Scheme and Others (35769/2010) [2012] ZAGPPHC 65 (15 May 2012)

⁴ Payen Components South Africa Ltd. v Bovic Gaskets CC and Others (448/93) [1995] ZASCA 57; 1995 (4) SA 441 (AD); [1995] 2 All SA 600 (A) (25 May 1995)

- 6.11 To provide for a limited number of ways of expressing the idea is undesirable. What does 'limited' mean? It means not infinite, restricted; but to how many is it limited? Surely different artistic versions of expression of (the idea of) the sun setting behind Table Mountain can deserve copyright protection?
- 6.12 Proposed Section 2A(4)(ii) is undesirable. First, if the expression mirrors *exactly* the regulatory direction, then it is not original. But, as was the case in Biotech,⁵ whilst this may be appropriate in the content of compilations, it may not be in the case of the content. If it is the intention to deny copyright protection to the former, then it is not.
- 6.13 Proposed Section 2A(4)(b)(ii) is problematic. A 'speech' in legal proceedings may be a reading of counsel's Heads of Argument, in which substantial creative effort has been invested. Is the intention to deny copyright protection to the Heads of Argument?
- 6.14 Similarly, the facts reported in news of the day should not be copyrightable, but the mode of recitation of such facts should be. The provision may well give rise to uncertainty. Again, anyway, it is not necessary to legislate this.

⁵ Biotech Laboratories (Pty) Ltd v Beecham Group PLC 786 JOC (A).

7. **Extension of restricted acts**

7.1 The extension of restricted acts introduced by clauses 4, 5, 6 and 7 to cover the communication of certain types of work to the public by wire or wireless means is a welcome addition in the digital era. It was previously not clear that copyright infringement also takes place where copyright works are streamed over the internet, and where it is arguable that no reproduction of the copyright work occurs, but the proposed new s6(eA), 7(dA), 8(dA), and the proposed amendment to s9(e) will now help guard against this type of infringing and harmful activity. The Amendment Bill does not, however, extend this exclusive right to the owners of copyright in broadcasts, programme-carrying signals and computer programs, presumably because the CRC was looking specifically at the music industry when it recommended this amendment in its 2011 report. Broadcasts, programme-carrying signals and computer programs are, however, vulnerable to the same infringement through streaming over the internet. It accordingly makes sense that the rights of all copyright owners should similarly be extended in the digital age to adequately address the transmission of works on networks and the online streaming of content.

7.2 If this restricted act is not extended to the other types of copyright works, then the specific omission for these works will be interpreted as having been an intentional omission, with the result that broadcasts, programme-carrying signals and computer programs could be freely reproduced and streamed over the internet, which is arbitrarily unfair to the creators of those works and surely could not be the desired outcome.

7.3 Similar new sub-sections should therefore be introduced to the existing sections 10, 11 and 11B of the Principal Act to extend this type of restricted act to broadcasts, programme-carrying signals and computer programs. This would be in line with similar legislation in other countries, such as the United Kingdom.

8. **Retention of the right to royalties (introduction of a user royalty right)**

8.1 Clauses 4(c), 5(c) and 6(c), in their current form, cannot be supported and the Copyright Law Committee strongly opposes their inclusion. One can only assume (as these clauses are not dealt with in the explanatory memorandum which accompanied the Amendment Bill) that the intention was for authors to retain a right to receive royalties even after they assign their copyright. This would at least be in accordance with one of the stated objectives of the Amendment Bill (ie. to prevent artists dying as paupers). What the clauses in their present form seek to introduce into sections 6, 7 and 8 of the Principal Act, as provisos, however, are effectively user royalty rights for the use of copyright works, ie literary, musical and artistic works.

8.2 Unlike the 2015 Bill, which sought to introduce the user royalty right by way of a single general provision (a new section 9A(4)) to apply in respect of a list of categories of copyright works, the Amendment Bill introduces the provisions regarding the user royalty into three sections of the Act, namely to apply to literary and musical works (section 6), to artistic works (section 7), and to cinematograph works and audiovisual fixations (section 8). Although section 9 (applying to sound recordings) is amended by the Amendment Bill, there is no provision for a user royalty right. Likewise, no provision for a user royalty right has been introduced in respect of published editions or computer programs.

- 8.3 Apart from the problematic nature in principle of such a user royalty right, which will be addressed in more detail below, the wording of these provisions is not correct and must be reformulated. For example, the current wording in respect of the amendment to Section 6 of the Principal Act states that *'notwithstanding the transfer of the copyright in a literary or musical work by the user, performer, owner, producer or author'*. It is not clear how the user or the performer or the producer can have the right to transfer the copyright in a literary or musical work; only the author or the owner can have that right. This must be corrected.
- 8.4 Furthermore, the paragraph states that *'the user, performer, owner, producer or author'* shall have the right to claim an equal portion of the royalty payable for the use of such work. Many aspects of this provision are not clear: for instance, it does not make sense for the user of the work to be entitled to a portion of the royalty; the user is supposed to pay the royalty. The same applies to the performer and the producer: why should these parties be entitled to a user royalty? Further, who must pay the royalty? Must the user pay – but the user is entitled to claim an equal portion of the royalty? These provisions simply make no sense.
- 8.5 It is also not clear to whom the claim for an equal portion of the royalty must be addressed, and who must then pay the user royalty and to whom: must the user pay the user, or the owner pay the owner, or the author pay the author, or the author pay the user, or the owner pay the user?

8.6 It is submitted that these proposed provisions have many flaws: In the first place, a fundamental flaw is that it is not clear which of these parties (or all of these parties?) can claim a portion of the royalty, and why the user itself should have a right to claim a portion of the user royalty; and furthermore, if all of these parties will get 'an equal portion of the royalty', how will the royalty be determined and divided, and who will be liable to pay the royalty? In other words:

8.6.1 Would the user himself have the right to claim an equal portion of the user royalty, and from which party must the user claim his portion, eg from the author or the owner?

8.6.2 Or would only the author have such right, and should he claim his portion from the owner, or from the user, or from the produce or performer?

8.6.3 Or would the owner also have such right, and should he claim his portion from the author, or from the user, or from the producer or performer?

8.6.4 Or should the performer, producer, owner and author (all of whom appear to have the right to a portion) all claim their portions from the user, but the user himself also being entitled to an equal portion?

- 8.7 In the second place, another fundamental flaw is that the proviso does not specify which acts would amount to the 'use of such copyright work', nor does it specify whether any use which does not amount to infringement (ie 'fair use') would still be subject to the user royalty. In other words, would persons who use a book (a literary work) for entertainment purposes, for educational purposes, for study purposes, for private purposes, etc all be liable to pay a user royalty? Would the persons who play a musical work for entertainment purposes, or as part of a public performance, or for teaching purposes, or for relaxation in the privacy of one's home, etc all be liable to pay a user royalty?
- 8.8 In the case of an artistic work (which may be a painting or a sculpture or an item of silverware or jewellery), would the sale or auction of such an item constitute the 'use' of the work? If so, would the seller or auctioneer be the 'user' of the work and thus be liable to pay the user royalty? And if so, what would the amount of such user royalty be? And would the onus be on the seller or auctioneer (as the user) to identify and locate the owner and/or author and/or producer and/or performer, in order for the user royalty to be paid?
- 8.8 It is submitted that it would be essential for the concept of 'use', if any sort of user royalty right is to be retained (a notion which the Copyright Law Committee opposes) to be defined in a clear and legally justifiable manner.
- 8.9 It is submitted that the provisions regarding the payment of a user royalty right in respect of the 'use' of certain copyright works will have to be seriously reconsidered and removed from the Amendment Bill entirely.

8.10 If the intention was, as we have assumed, to retain for authors the right to receive royalties after they assign their copyright, this, too, needs serious and careful consideration. Firstly, one needs to take into account the provisions of Clause 33 of the Amendment Bill which seeks to make unenforceable any contract which purports to renounce a right afforded by the Act. What this means is that no contract between an author and assignee in terms of which the author renounces his right to receive royalties will be of any force and effect. While at face value this may provide a modicum of protection to artists, writers and musicians who assign their rights to publishers, record companies and the like, the reality is that many artists, writers and musicians will simply no longer be afforded any opportunities at all with those companies as, in respect of smaller and less successful artists, it might not be commercially viable for the company to spend money recording, marketing and otherwise developing the artist when it will have to share royalties equally with them.

8.11 Secondly, however, there is also a difficulty in having all authors retain a right to royalties (ie. in respect of all types of works). The Amendment Bill has clearly been drafted with the so-called creative industries in mind (ie. the authors of novels, writers of songs, musicians, visual artists etc) but the reach of the Principal Act is far wider. The definition of an “artistic work” in the Principal Act, for example, specifically grants protection to works, irrespective of their artistic quality, and includes, just by way of example, engineering and architectural drawings. A logo designed for a company by a graphic designer would also qualify as an artistic work. Imagine if Nike commissioned a graphic designer to design a new logo to replace its iconic SWOOSH device and that graphic designer, who would be paid for his services, were to then retain the right to receive an equal share of the royalty payable for use of the copyright work (the new logo) on millions of pairs of shoes per annum.

8.12 Likewise, the definition of a literary work includes, for example, text books, dictionaries and encyclopaedias. Typically, publishing companies would contract and pay writers (sometimes multiple individuals) to write those books. Their compensation would be an agreed salary, as with any other job. Agreements are also often reached for, by way of example, attorneys with knowledge in a specialist field, to write text books for students in that field, without any expectation of compensation and merely for the marketing value that having their name on the book will achieve. All of those sorts of deals would be stymied since the publishing company would have to share royalties with the writers, who have already received compensation for their efforts in some other way. These proposed clauses will accordingly have untold practical effects on the publishing, music and film industries in South Africa. A likely consequence is that these companies will simply begin contracting with artists, writers and musicians outside of South Africa to avoid these problems, thus taking livelihoods away from the very people the Amendment Bill is seeking to protect.

8.13 Thirdly, however, the insertion of the author's inalienable right to a royalty as a proviso to, therefore a qualification of, the exclusive rights of copyright is problematic. By adding the author's inalienable right to a royalty in these terms (that the right can be exercised against anyone who makes a copyright protected act in respect of the work) as a *proviso* to the Principal Act's grant of exclusive rights, it means that those rights are no longer exclusive. Imagine a copyright owner trying to license such a right in these circumstances – would the licensee not demand that all authors, producers and performers, etc, of the work be joined as licensors; or an indemnity against claims by authors, producers and performers, etc, that the prospective licensor may well be unwilling to make? And what would happen in infringement claims? The qualification of the exclusive rights of copyright by the “inalienable right to a royalty” is a fundamental error and the introduction of all of these provisos must be removed.

8.14 It should be noted that the Committee does not *per se* object to a policy proposal that authors, musicians, performers, etc, should receive fair remuneration – indeed, the right to fair remuneration is enshrined in some of the treaties. The problem is that the solution currently proposed by the Amendment Bill incorrectly detracts from rights of copyright owners that are meant to be exclusive and thereby makes them non-exclusive. In addition, it gives persons who are not copyright owners rights to claim against the world, not against the party they contracted with.

8.15 Fair remuneration for authors and performers would be far better handled in a distinct chapter of the Act.

9. **Royalties in respect of sound recordings/needletime**

9.1 The purpose of section 9A of the Copyright Act is to establish the right of copyright owners of sound recordings to receive royalties (so-called needletime royalties) or licence payments for the broadcast of their copyright protected sound recordings, as envisaged in sections 9(c) – (e) of the Copyright Act. Also, the section establishes the right of performers whose performances are featured on the sound recordings to share in in needletime royalty payments received by the copyright owners of the sound recordings.

9.2 In practice, collecting societies have been established and accredited to administer and collect needletime royalties from music users. In particular, the South African Music Performance Rights Association (SAMPRO) collects needletime royalties on behalf of the copyright owners of recorded music. Typically, music users will obtain a licence from SAMPRO for the use of recorded music as envisaged in terms of sections 9(c)-(e) of the Copyright Act.

9.3 Some of the core issues that were identified in the CRC Report of 2011 insofar as the music industry is concerned, were concerned with ensuring that copyright owners and performers receive appropriate remuneration for the commercial use of their protected works and performances. Pertinent industry issues that were identified to be in need of formal clarification included the following:

9.3.1 whether royalty fees should be paid retrospectively for uses of recorded music and from what date that payment is due; and,

9.3.2 what would amount to a fair remuneration or split of the needletime royalties between copyright owners and performers featured on the recordings.

9.4 The Amendment Bill seeks to address some of these issues and, as discussed further below, it does achieve the commendable goal of establishing much needed clarity to the music industry that fair remuneration for performers would be a 50%-split of the needletime royalties.

9.5 The Amendment Bill goes further though and seeks to introduce an onerous additional burden on music users to provide prior and prescribed notices of their intended usage of recorded music as envisaged in sub-clauses 9A(1)(aA) – (aE). It is submitted that the establishment of a bureaucratic, lengthy and cumbersome prior clearance procedure for music users would not achieve the objective of growing income streams for copyright owners and the performers featured on recorded works as section 9A sets out to do. On the contrary, this would rather contribute to the discouragement of the commercial use of recorded music in many instances, which could lead to users rather turning away from the use of recorded music or from paying appropriate licence fees to begin with. Bureaucratic clearance processes could lead to an

increase in instances of music piracy and illegal use of recorded music. It could also drive music users to contact record labels and publishers, who are well equipped and have the infrastructure to deal with bureaucracy, while individual artists, who are not represented, may experience that their music is no longer used.

9.6 As pointed out above, SAMPRA has been collecting needletime royalties for over a decade now and commercial music users are well aware of their activities and the need to obtain licences from SAMPRA to play or communicate recorded music to the public. Most commercial users of music are already licensed by SAMPRA for the use of their members' music. Therefore, it is not necessary to establish a further, lengthy and cumbersome prior clearance procedure for all proposed or intended uses of copyright protected, recorded music. The use of recorded music should not be discouraged and the licensed use of recorded music should be a streamlined process so that music users would have quick and easy access to copyright protected music and the obtaining of licences should be a transparent and efficient process.

9.7 Most importantly, music users should be compelled to pay licence or royalty fees for the use of recorded music.

9.8 The mentioned sub-clauses, 9A(1)(aA) – (aE), also introduce a definition of parties who should receive prior notices by proposed music users to include "*the copyright user, performer, owner, producer, author, collecting society or indigenous community*". The inclusion of a '*copyright user*' in this definition is completely inappropriate as it is nonsensical to stipulate that the proposed user of copyright protected sound recordings should send a prescribed notice to the *copyright user*. Also, the phrase '*copyright user*' in itself is rather nonsensical as

although it is possible to make use of a copyright protected work, it is not the 'copyright' in that work that is used or utilized or reproduced or communicated to the public, but rather the work itself. It is therefore recommended that the term 'copyright user' be removed from the proposed amendments to Section 9A (and, as has already been suggested, from the Amendment Bill as a whole, wherever the term is introduced).

- 9.9 We submit that Clauses 9A(1)(aA) – (aE) be deleted as the introduction of a bureaucratic, lengthy and cumbersome prior-clearance procedure (which is not well defined to begin with) would only serve to discourage the use of recorded music, leading to the generation and collection of less needletime royalties for distribution to copyright owners and performers.
- 9.10 The introduction of Clause 9(2)(a) represents a positive development of the law insofar as it establishes that needletime royalties shall be split on a 50/50 basis between copyright owners of sound recordings on one hand, and the performers whose performances are featured on the recordings on the other hand. This settles a key dispute in industry since the reintroduction of needletime into our law and this development is therefore commendable.
- 9.11 It would be ideal if the amendment would go one step further to clarify that all performers who are featured on a recording shall share the performer's share of the needletime royalty on a 50/50 basis. As a sound recording could feature the performances of many different and numerous artists, singers, musicians, back-ground performers, etc., it is important to establish that every single performer featured will share equally in the performer's 50% share of the needletime royalty that is shared with the copyright owner of the sound recording. It could also be considered to introduce a different share in the performer's royalty for so-called

‘featured performers’ (main performers on a recording) as opposed to ‘non-featured performers’ (backing singers, musicians, etc.).

9.12 Also, the reference in the Clause to *‘the user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording’* is nonsensical as the user of a sound recording should never be entitled to receive a royalty for the use of the copyright protected material that he has had no hand in creating. The producer or collecting society also does not have the right to share in needletime royalties. These royalties are shared by the copyright owners of the relevant sound recordings and the relevant performers featured on the sound recordings.

9.13 It is therefore recommended that this very important Clause be reconsidered and amended to ensure that the positive development of establishing clarity on the 50/50 split of needletime royalties between copyright owners and performers not be undone by vague and practically incorrect wording.

9.14 These two sub-clauses (b) and (c) appear to contradict Clause 9(2)(a) as the sub-clauses suggest that the copyright owner and the performer(s) need to agree on the needletime royalties applicable and, in the absence of such an agreement, the parties may take the matter to the Tribunal.

9.15 Following the commendable and good work done through the introduction of Clause 9(2)(a)'s clarity on a key dispute that has been ongoing in the music industry for nearly a decade, the sub-clauses that follow the commendable development of our law, may serve to undo that good work as it casts some doubt over whether performers would indeed be able to claim a 50% share of needletime royalties in situations where the copyright owners disagree.

9.16 It is therefore highly recommended to delete sub-clauses (b) and (c) as these clauses do not add anything to the positive development that performers are recognized in sub-clause (a) to have a right to receive 50% of needletime royalties. In fact, the mentioned sub-clauses may rather serve to reintroduce the situation of uncertainty and vagueness that presently plagues the music industry insofar as the split of needletime royalties is concerned.

10. **Collecting Societies**

10.1 Insofar as entities seeking to become accredited as collecting societies are concerned, it is suggested that the same wording be used as per the wording of the *Regulations on the establishment of collecting societies in the music industry (Government Notice No. 517)* and that reference be made to '*Any person or licensing body intending to act as a representative collecting society by*'. Presently, the wording of the relevant clause in the Amendment Bill only refers to '*any person who...*' and there does not appear to be any particular reason for the change from the wording contained in the mentioned Regulations.

10.2 Clause 22B(7) suggests that, where there is no collecting society for a right or related right granted under copyright, the user, performer, owner, producer or author may enter into such contractual arrangements as may be prescribed.

- 10.3 The wording and intended purpose of this Clause is rather vague. It appears to suggest that in instances where no collecting society has been accredited to collect royalties on behalf of the relevant copyright owners, or in instances where the copyright owner is not a member to the relevant collecting society, the parties concerned (e.g. user, performer, copyright owner, etc.) may only enter into agreements that are prescribed for such situations.
- 10.4 First, it is not clear what is meant by '*contractual agreements that are prescribed*' as this is not defined further. It is uncertain what the format of the relevant agreements need to take and by which body the format would be approved or prescribed.
- 10.5 Secondly, copyright owners should be free to contract in any manner in which they are comfortable doing so. Any attempt to restrict the right to enter into agreements that the individual parties deem fit, insofar as the use of copyright protected works are concerned, does not appear to be good in law.
- 10.6 As this Clause 22B(7) of the Amendment Bill does not add any positive development of our copyright law, and may only serve to introduce vagueness and ambiguity, it is suggested that it be deleted.
- 10.7 The definition of parties Clause 22C(1)(a) – (b) who may decide to exclusively authorize a collecting society to administer any right in any work and to issue licences and/or collect royalties on their behalf should not include a 'user' as a user who is not the copyright owner himself would under no circumstances have any right to authorize the licensing of the rights in the relevant works or the collection of royalties on behalf of the user. To avoid a possible situation whereby the user of copyright protected materials could claim to have competing

rights to the copyright owner of those materials, it is highly recommended that the term '*user*' be deleted from the definition of parties in this Clause. The term '*owner*' should also be developed to read '*copyright owner*', which would negate the need to include the term '*author*' as well as an author who assigned their copyright may not have a claim to receive royalties from a collecting society and may not have any rights for that society to administer.

10.8 The same amendment is suggested for Clause 22C(1)(b) as a '*user*' who is not also a copyright owner, would not have the right to authorize a collecting society to administer rights in the recorded works on the user's behalf.

10.9 Following on from the above comments relating to the erroneous and possibly problematic inclusion of the term '*user*' in the definition of parties who may authorize collecting societies to administer their rights and collect royalties on their behalf, it is submitted that the term '*user*' should also be deleted from Clause 22C(3)(c). Needletime and other royalties for the use of recorded works will simply never be distributed to the users of those works. It is rather the users of the works that need to obtain appropriate licences to use or play the recordings and those payments are distributed to the copyright owners and to the performers featured on the recordings. There simply is no place for the '*users*' of sound recordings to be included in this Clause and the term should be deleted.

10.10 Following on from the above comments, the term '*user*' should be deleted from Clause 22D as well, for the same reasons as expressed above. It is incorrect (and potentially in conflict with the rights of copyright holders) to state that the '*user*' of a copyright protected work would have any right to authorize the administration of the copyright in that work, or to exclusively authorize a collecting agency to collect royalties on behalf of the user or, as

envisaged in this Clause, to state that a collecting society is '*subject to the control of the users*'. The inclusion of the term and the equation of the rights of users to the rights of copyright holders are deeply troubling and concerning inclusions in the Amendment Bill which should be deleted to ensure that the integrity of our copyright law remains intact.

11. **Resale royalty right**

11.1 Clause 9 of the Amendment Bill proposes to insert Sections 9B to 9F into the Principal Act.

11.2 At the outset, the title of the proposed section is misleading and should read "Resale Royalty Right" or "Right to Resale Royalty". The title currently proposed is "Resale of Royalty Right", but the proposed section does not describe the artist's royalty right being resold. Rather, the proposed section provides for artists to receive a royalty when their work is resold subsequent to first sale or transfer of ownership.

11.3 The nature of the "artistic work" to which this section applies should be restricted to include only specific works of visual arts. Following best practices in other jurisdictions, it would be prudent to insert a section that specifically excludes the resale royalty right from being applicable to, for example, architectural and engineering drawings, circuit layouts, commercial logos, app icons and the like.

11.4 "Artistic work" means, irrespective of the artistic quality thereof, paintings, sculptures, drawings, engravings and photographs; works of architecture, being either buildings or models of buildings; or other works of craftsmanship. The current definition of "artistic work" therefore includes technical drawings, commercial logos or symbols and works of

architecture. It is common for these works to be commissioned by a third party and / or used for commercial purposes (other than in the circumstances of dealing in works of art). It is neither practical nor justifiable to grant authors of these works a royalty on the assignment or resale of these works in the same manner as is envisioned for works of art such as paintings and sculptures.

11.5 An “adaptation”, in relation to an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognisable. Presumably, the author of the “adaptation” is similarly entitled to a resale royalty. It is not clear whether the author of the original work is entitled to a royalty on subsequent sales of an “adaptation” of the artistic work. If so, it is not clear whether this royalty is in addition to the royalty claimed by the author of the “adaptation” or whether the royalty rate remains constant and is to be shared by these authors.

11.6 Proposed Section 9B repeatedly refers to the “user, performer, owner, producer or author of an artistic work”. This phrase, as elsewhere in the Amendment Bill, is problematic, particularly in the following circumstances:

11.6.1 Section 9B(3): As a description of persons being entitled to a resale royalty;

11.6.2 The definition of “artistic work” does not include any work for which a “performer” can be the author. The “author”, in relation to an artistic work, means the person who first makes or creates the work, namely a painting, sculpture, drawing, engraving and photograph; work of architecture, being either buildings or models of buildings; or other works of craftsmanship.

- 11.6.3 It is not apparent how the author of an artistic work cannot be the “first author” of the artistic work. If subsequent authors (presumably of adaptations or reproductions of the work) are to benefit from a resale royalty, this arrangement should be clarified and a distinction must be made in references to the first author and subsequent authors of a work.
- 11.7 Section 9B(4): “Whether or not the author is the first user, performer, owner, producer or author of an artistic work and has entered into an agreement ... to assign, waive or charge a resale royalty right in contravention of this Act”;
- 11.7.1 It is not clear how the author cannot be the first author of the work. If subsequent authors (presumably of adaptations or reproductions of the work) are to benefit from a resale royalty, this arrangement should be clarified and a distinction must be made in references to the first author and subsequent authors of a work.
- 11.7.2 This section does not permit artists / authors to negotiate a resale royalty rate that is higher than that prescribed by the Minister.
- 11.8 Section 9C: Proof of user, performer, owner, producer or author;
- 11.8.1 This section should refer only to the author or multiple authors of a work wherever reference is made to the “user, performer, owner, producer or author” of the work. It is not possible for an artistic work to be the work of more than one “user, performer, owner or producer” - it can only be the work of one or more “authors”. Furthermore, section 9B grants only the “author” of an artistic work a resale royalty

right and provides that this right is inalienable, while sections 9B(4), 9E(1) and 9E(2) invalidate any assignment or waiver of this right and render such actions unlawful and unenforceable.

11.9 Section 9D: Duration of resale royalty right:

11.9.1 This section should refer only to the author or multiple authors of a work wherever reference is made to the “user, performer, owner, producer or author” of the work. It is not possible for the “user, performer, owner or producer” to have a resale royalty right in an artistic work. Section 9B grants only the “author” of an artistic work a resale royalty right and provides that this right is inalienable, while sections 9B(4), 9E(1) and 9E(2) invalidate any assignment or waiver of this right and render such actions unlawful and unenforceable.

11.10 Section 9F(3) states that a resale royalty right that passes to one or more persons in consequence of a testamentary disposition, may be exercised by each of them independently. This section does not clarify whether these persons may each claim the prescribed resale royalty or whether they are entitled to the portion not yet claimed by the other party.

12. **Fair use and fair dealing**

12.1 Clauses 10 to 19D of the Amendment Bill seek to add to Section 12 of the Principal Act by substituting a new subsection (1). Section 12 of the Principal Act relates to general exceptions from protection of literary and musical works.

- 12.2 The term “fair use” has been introduced and is used interchangeably with the concept of “fair dealing”. There has been minimal South African case law dealing with the term “fair dealing” but, even so, fair dealing and fair use are different concepts so any interchangeable use of these terms may be problematic.
- 12.3 Fair use has its origins in the US, and was codified in Section 107 of the U.S. Copyright Act in 1976, listing a number of circumstances in which reproduction of a work may be considered “fair”. This US doctrine has evolved considerably over 200 years thanks to the role played by the judiciary and the many lawsuits that have taken place in the US. Proposed section 12(1)(b)(i) – (iv) lists the US styled “four-factor” test which can be applied to determine if a reproduction is subject to the ‘fair use’ exception.
- 12.4 If the “fair use” principle is adopted into South African Copyright law, international precedent will have to be relied on when interpreting whether use or reproduction of a work protected by copyright constitutes fair use. Furthermore, it is likely that introducing this concept will result in increased litigation where interpretation difficulties are likely to result in matters ultimately going to the Constitutional Court.
- 12.5 Proposed section 12(1)(a)(i) – (viii) lists eight specific instances where the fair use exception will apply and such list appears to be exhaustive. It is not clear why these specific instances have been selected. Works for educational purposes (12(1)(a)(iv)) are subject to the doctrine of fair use which will affect the publishing industry operating in the educational sphere negatively as they will not be rewarded or compensated for their works. Also, the inclusion of “expanding access for underserved populations” per section 12(1)(a)(vii) is not defined and

thus open to interpretation, particularly if no controls are put in place to avoid abuse of the section. This may open the floodgates to many groups of people attempting to rely on this provision when making reproductions of works without the copyright owner's consent.

12.6 Proposed section 12(1)(c), contrary to the existing proviso to section 12(1) of the Principal Act, now states that source and name of the author shall be mentioned "to the extent reasonably practicable and appropriate". This is too vague and we submit that the existing wording in the Principal Act should remain.

12.7 The recommendations of the Copyright Law Committee are that:

12.7.1 If "fair use" and "fair dealing" are both to remain then we suggest that Section 12(1)(a) is reworded to read "In addition to uses specifically authorised, fair use in respect of a work or the performance of that work does not infringe copyright in instances such as:"

12.7.2 Proposed section 12(1)(c) should not be implemented and the wording of the existing proviso to Section 12(1) should be more closely followed. Our recommended wording would be: "For the purposes of paragraphs (a) and (b), the source and name of the author shall be mentioned".

13. **Extension of general exceptions from copyright protection: general exceptions and parallel importation**

13.1 Clause 11 of the Amendment Bill proposes a new addition to the Principal Act, namely Sections 12A and 12B.

13.2 The introduction of a General Exception Section that seemingly applies to “all works” is arbitrary and does not give due regard to the fact that specific exceptions are more relevant to some works than to others (hence why sections 12 – 19 of the Principal Act apply specific exceptions to different categories of works).

13.3 Proposed section 12A(1)(a) replicates that of existing section 12(3) which relates specifically to exceptions pertaining to literary and musical works. There is no mention that the existing Section will be repealed so this is essentially a duplication insofar as same applies to literary and musical works. Similar considerations relate to proposed Section 12A(1)(b) which is included under existing section 12(4) although the wording has been amended to include all teaching and all illustrations as opposed to just illustration for teaching so is more widely applicable, and appears to defy one of the main objectives of the Bill which is to better benefit authors of works in which copyright subsists.

- 13.4 Section 12(5) of the Principal Act is an exception that only applies to literary and musical works and has its roots in the Berne Convention – to cater for countries like Canada that have more than one time zone where broadcasters have to reproduce works such as musical works at the same time. Clause 11 of the Amendment Bill proposes to add a new Section 12A(1)(c) that will have an exception in about the same terms apply to *all* copyright works – without replacing Section 12(5) of the Principal Act.
- 13.5 Ephemeral copy exceptions are necessary to make technological applications work (e.g. broadcasting, as in this case, or computers), but the problem musicians have with Section 12(5) is that the copy only has to be destroyed after 6 months, which, in their view, is more than ephemeral and has been abused by, for example, the SABC (in that the SABC believes it has an inherent right to make copies *ad infinitum* for the six-month period for no apparent business reason). The response of the [music] publishing industry has been that the broadcaster must therefore show proof of destruction of copies after six months. Naturally, the broadcaster has been unable to do this, but nevertheless continues to use the exemption as a tool to negotiate for lower blanket licence fees in general.
- 13.6 The corresponding UK provision <http://www.legislation.gov.uk/ukpga/1988/48/section/68> deals with it as a statutorily implied term of a licence, applies to more categories of copyright works (but not all works) and the time period is 28 days.
- 13.7 Proposed section 12A(1)(d) is a repeat of existing section 12(6)(a) and (b) of the Principal Act so there will be duplication in the Act if amended unless existing Section 12(6) is repealed.

- 13.8 Proposed section 12A(1)(e) is an extension of existing Section 12(7) of the Principal Act the latter of which allows for reproductions of any articles published in newspapers or periodicals, or in a broadcast of any economic, political or religious topic only if the reproduction or broadcast has not been expressly reserved and the source is clearly mentioned. Proposed 12A(1)(e) of Amendment Bill now states that the name of the original source and author must be indicated “where practicable”. This is open to abuse and should be amended to be more in line with existing wording of section 12(6) of the Principal Act.
- 13.9 Proposed section 12A(1)(j) is a dangerous introduction in that it is too close to comfort to file sharing.
- 13.10 The recommendation of the Copyright Law Committee, if proposed Section 12A is to remain, is that, as section 12(5) of the Principal Act already has made provision for an ‘ephemeral copy’ life span of only 6 months before such reproduced work is to be destroyed, it is unclear as to why this has been duplicated in proposed 12A(1)(c) save for the fact that this section will now apply to “all works” under this generally applicable exception. It is proposed that the existing section 12(5) just be amended, *if it is to remain*, to now include the proviso which relates to a longer preservation in a broadcaster’s archives of works of an ‘exceptional documentary nature’ subject to obtaining consent from the copyright owner.
- 13.11 Proposed 12A(1)(e) of the Amendment Bill is open to abuse and should be amended to be more in line with existing wording of section 12(6) of the Principal Act in that the beginning of the sub-section should state: “subject to the obligation to clearly indicate the source and name of the author -”.

13.12 Proposed section 12A(1)(j) should be deleted in its entirety.

13.13 Further, Clause 13 of the Amendment Bill removes Section 16 from the Principal Act – *general exceptions regarding protection of cinematograph films*; Clause 14 removes Section 17 from the Principal Act – *general exceptions regarding protection of sound recordings*; Clause 15 removes Section 18 from the Principal Act – *general exceptions regarding protection of broadcasts*; and Clause 16 removes Section 19 from the Principal Act – *general exceptions from protection of programme-carrying signals*. These sections have presumably been removed by the Amendment Bill as they are now dealt with under Clause 11, which proposes the insertion of Section 12A in the Principal Act – *general exceptions from copyright protection*.

13.14 Due to the widely varying nature of the many types of copyright works, some of the general exceptions as proposed by Section 12A simply cannot apply to all works and it is for this very reason that there are currently different exception clauses for each type of work in the Principal Act. For example, it is unclear how the translation exception (proposed Section 12A(1)(f)) can apply to programme-carrying signals or how the media/current events/newspaper exception (proposed Section 12A(1)(e)) can apply to computer programs. Therefore, the commentary above relating to the proposed Section 12A should be taken into consideration.

13.15 Insofar as proposed Section 12B is concerned, our courts have prevented parallel imports by relying on copyright law⁶ and so this proposed insertion would conflict with existing case law in South Africa.

⁶ Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd 1993 (4) SA 279 (A)

13.16 If the provision is to remain, however, it is suggested that the issue of grey goods be dealt with by introducing an amendment to Section 23 of the Principal Act by the introduction of subsection (4) which should state “Notwithstanding the provisions in sections 23(1) to 23(3) above, nothing in this Act shall prevent parallel importation of goods”.

14. General Exceptions in respect of temporary reproductions and adaptations

14.1 Clause 12 seeks to add section 13A, which has now been better phrased than the previous draft Bill and the wording is more in line with that of Article 5 of the EU Copyright Directive. It is now clearer that internet service providers are not liable for the data they transmit on behalf of others, even if it infringes copyright, and further, that individuals may adapt and reformat works to enable use on different devices.

14.2 Based on the current wording and formatting of the new section however, only the latter exception appears to be subject to the condition that there must be no independent economic significance to the otherwise permissible conduct of adapting the work. It is recommended therefore that the new section rather be rephrased along the following lines:

13A (1) any person may make transient or incidental copies of a work, including reformatting an integral and essential part of a technical process, if the purpose of those copies or adaptations is-

(a) To enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or

(b) To adapt the work to allow use on a different technological devices, such as mobile devices and as long as there is no independent economic significance to these acts.

14.3 Alternatively, the section could be rephrased as follows:

13A (1) any person may make transient or incidental copies of a work, including reformatting an integral and essential part of a technical process, as long as there is no independent economic significance to these acts and if the purpose of those copies or adaptations is-

(c) To enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or

(d) To adapt the work to allow use on a different technological devices, such as mobile devices.

15. **General Exceptions in respect of reproduction of works for educational and academic activities**

15.1 Clause 12 of the Amendment Bill also seeks to add Section 13B to the Principal Act. The introduction of this section is concerning as it will have a massively negative impact on the South African publishing industry. The exception supersedes and goes beyond any other international exceptions in the educational sphere in any country in the world. The new proposed section seems to allow unrestricted reproduction of text books for educational use and appears to apply to *all* works. Copying is allowed if the copying “does not exceed the extent justified by the purpose”. Although offering free or minimally priced textbooks will have a massive benefit for South African educational institutions and for learners, particularly in the lower income brackets, allowing free copying for such purpose will stifle innovation and educational development for learners, as publishers will have no incentive to publish new works.

- 15.2 The exception contained in proposed Section 13B(1) of the Amendment Bill applies to “*any person*” which is open to abuse.
- 15.3 In accordance with proposed Section 13B(2)(a) “Educational establishments” are not defined. Could this include course-pack service providers whom make copies of study materials for a profit – if so, this allows such parties to benefit from such exception.
- 15.4 The introduction of proposed 13B(4)(a) allows authors of publicly funded (at least 50% publicly funded) works which appear in collections to make this work available to the public under a public licence or by means of an open access institutional repository in the final manuscript version despite granting any exclusive rights to a specific publisher. Again, this does not incentivise publishers to invest in the development of such works if no reward/financial incentives will be forthcoming. The use of this exception in relation to articles published in subscription journals will undermine the subscription business model and will ultimately cause scientific publishers to be dis-incentivised from publishing the work of South African scientific authors, which in turn will expose South African scientific authors to low-quality Open Access publications who publish quickly and without proper peer review (so-called predatory publishers).

- 15.5 Although the introduction of a proviso is included to the proposed exception in Section 13(B)(6) in that the reproduction exception doesn't apply to reproductions for commercial use, it goes a step too far when it implies that a reproduction for educational but commercial purposes is allowed if the commercial product is over-priced when compared to books of a similar nature. Factoring price considerations into the Copyright Act will have massive interpretation implications as it will open the door to the abuse of this provision.
- 15.6 Proposed section 13B(6) of the Amendment Bill refers to "permission under subsection (1)" which appears to be erroneous as there is no reference to permission under subsection 1 as this was omitted in this version of the Amendment Bill from the 2015 Bill.
- 15.7 The recommendation of the Copyright Law Committee is that proposed section 13B should be removed or reworded so it is more limited in its application.
16. **General exceptions regarding protection of computer programs**

Clause 17 of the Amendment Bill seeks to replace Section 19B of the Principal Act in its entirety. The proposed exceptions appear to be aimed at allowing persons, having the right to use a copy of a computer program, to do certain acts, in relation to that authorised copy of the computer program, necessary to achieve interoperability with another computer program. It appears to be a beneficial addition to the Act.

17. **General exceptions regarding protection of copyright works for libraries, archives, museums and galleries and persons with disabilities**

Clause 18 of the Amendment Bill seeks to add Section 19C and 19D to the Principal Act. The Copyright Law Committee supports the introduction of Section 19C. Whilst the introduction of Section 19D is also beneficial and gives persons with disabilities access to “an accessible format copy” of presumably *all works* for his/her benefit, the definition of “person with a disability” includes a person who has “a perceived” physical, intellectual, neurological or sensory impairment. This is open to abuse and we recommend that the definition of “person with a disability” must exclude the words “a perceived or”.

18. **Moral Rights**

18.1 Clause 19 of the Amendment Bill seeks to amend section 20 of the Principal Act, which deals with moral rights. First, the Amendment Bill seeks to substitute subsection 20(1) of the Principal Act with wording that confirms the existing rules that the moral rights to accreditation and integrity are indivisible from the persona of the author. The provision once amended will extend to all works. This proposed amendment is welcomed. With reference to the proposed amendment to subsection 20(1), in addition to the deletion of the "a television broadcast", we recommend that the word "an" is inserted before "audiovisual fixation".

18.2 The Amendment Bill then seeks to substitute subsection 20(2) of the Principal Act with wording that restates the standing of the author with regards to claims for the infringement of moral rights. We are of the respectful view that the proposed amendments to subsection 20(2) are unnecessary. The proposed amendment does not change the provision that it is the author who can take action for an infringement of moral rights, but weakens the author's

rights by using the term "complain". Furthermore, Chapter 2 of the Principal Act refers to the rights available to the "owner" of the copyright. We recommend, therefore, that this subsection remain unaltered as it is already clear that the author has the same rights that the owner of copyright has in Chapter 2 of the Principal Act.

18.3 It appears that the drafter's intention behind the proposed new subsection 20(3) is to confirm the current position in law that moral rights last for the lifetime of the author, and it is an action that only an author can take. The proposed new subsection 20(4) goes on to confirm that the transmission of moral rights is expressly denied. We are of the respectful view that the reference to moral rights of the author in respects of joint works being extended until the end of the lifetime of the last surviving author, without the possibility of transmission of the moral rights from the previous authors, is unnecessary and confusing. We respectfully recommend that the new subsection (3) simply read as follows: "*An author's right to claim infringement under subsection (2) lapses on the date of the death of the author.*"

18.4 The referencing of the exceptions in Section 12 of the Principal Act in a new subsection 20(4) takes away the moral rights of authors in the event that exceptions apply, something which has never applied in South African law. We also note that many of the exceptions weaken the authors' right to be credited for their works (from a requirement that the name of the author "*shall be mentioned*" to "*shall be indicated as far as is practicable*"). We submit that weakening authors' rights in this manner are not in accordance with the underlying principles of the Amendment Bill to improve the position of authors and recommend that the wording of the Principal Act be retained. We therefore respectfully recommend that the proposed wording of new subsection 20(4) be limited to: "*A right contemplated in subsection (1) is non-transferable.*"

19. **Ownership of Copyright – commissioned works**

- 19.1 Subsection 21(1)(c) presently provides that when a person commissions an author to make one of certain (limited) categories of works (hereinafter “the specified work(s)”), and, subject to payment or agreement between the parties to pay for it in money or money’s worth, the person commissioning the work shall be the owner of copyright in the specified work. This provision is an exception to the general rule provided by subsection 21(1)(a) namely that the ownership of copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.
- 19.2 The specified works or categories of works stipulated in subsection 21(1)(c) and hence affected by the commissioning provision, are the following: “the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording.”
- 19.3 The first, and somewhat minor, aspect of the amendments proposed to this subsection is the addition after “cinematograph film” of the term “or audiovisual fixation.” Although this term is not defined in the Principal Act, its meaning is reasonably clear as a digital alternative to “cinematograph film” and is to be welcomed in the digital era, and accords with commercial reality.
- 19.4 In further support of such widening of this subsection, it is proposed that, although it falls outside the scope of the Amendment Bill, the Legislature and the Portfolio Committee should consider in principle the widening of this subsection further to apply to all works (or categories of works) subject to copyright protection. This would give the person commissioning any work the right not only to own the work itself but also to the ownership of all copyright attached to

such work either by contract or through default (as set out in the proposed proviso to this subsection).

19.5 Before commenting on the further aspects of the proposed amendment, it is pointed out that the subsection as it stands, and as proposed to be amended, includes the term “the making of a gravure.” This is a term of printing art that dates back about 150 years and is no longer used or understood in the field of printing. It is proposed that this term should be deleted from the Principal Act because it is no longer used or understood.

19.6 The principle and major amendment that is proposed to this subsection is that the ownership of copyright for the specified works shall be governed by contract. Although this changes the position as at present, it is not objectionable or undesirable, more particularly when taking in to account the proviso to the proposed amendment (that will be discussed in the paragraph below). The proposed amendment contrasts with the present determining position *ex lege* where the person commissioning the specified work will own the copyright in that work. However, the position at present can be varied by the parties, if they so wish, and they can by contract voluntarily assign the copyright in the work, whether the specified work or not, to the other party.

19.7 The second and major amendment that is proposed is the addition of a proviso to the amended subsection, which firstly provides that, in the absence of a valid contract (between the parties), ownership shall vest in the person commissioning the work. This provides a default position that in effect corresponds with the present subsection. Accordingly, this is an acceptable provision.

19.8 The third and major amendment that is proposed is a second (and novel) provision in the abovementioned proviso providing that, following on the circumstances set out above, the author of the work shall have a licence to exercise any right which by virtue of the Principal Act would, apart from the licence, be exercisable exclusively by such author. This is a novel provision and a major departure from the present commissioning position. There is no good reason for this provision *inter alia*, firstly, because the person commissioning the work will usually choose, if so desired, a suitable person to commercialize the work; and secondly because such author(s) usually do(es) not have the interest or means to commercialize the work. Thirdly, it appears that the author would be granted rights wider than those generally granted to a licensee ie the full economic rights of a copyright owner, which would be totally unacceptable. Hence this novel provision should be deleted *in toto* from the proviso in the proposed amendment.

20. Validity of assignments limited to 25 years

20.1 The amendment provided for in Clause 22(b) follows from the recommendations set out in Chapter 10.12.10 of the 2011 CRC Report where it was reported that a significant amount of royalty distributions do not accrue to the relevant authors of musical works (“musicians”) due to the fact that their rights were assigned to third parties in, it is assumed, desperate circumstances. The introduction that the period applicable to assignments of copyright relating to musical works be limited to a 25 year period has been recommended by the CRC in an attempt to address the apparent imbalance of fairness of the valuations placed on these assignments. Such an amendment will thus provide for automatic reversions of assigned rights after 25 years (from the date of agreement of such assignment).

- 20.2 It appears that the Legislature's intention is to afford musicians a second opportunity to negotiate a higher royalty rate for the particular musical work. However, the current wording of the proposed amendment to Section 22(3) of the Principal Act creates ambiguity and uncertainty on a number of issues as discussed below. Furthermore, as the amendment is said to follow the US Copyright Act, it is suggested that the wording from the US Copyright Act be used.
- 20.3 Firstly, the amendment does not provide that the copyright will revert to the author upon completion of the 25 year duration, and so would need to be expressly provided, if indeed that is the intention and the clause is to remain.
- 20.4 The second shortcoming in the current wording is that the limitation of the assignment period is not limited to musical works. This could have severe and unconscionable consequences. One of the practical difficulties of this amendment in its current form, could cause is if, for example, the DTI commissions a design to a company to design the DTI's new logo, the designer would assign the copyright subsisting in the logo to the DTI on completion of the commission (as such an artistic work does not fall within the existing section 21(1)(c) of the Principal Act nor the proposed amendment of section 21(1)(c) of the Principal Act). However, under its current wording, this amendment provides that the copyright in the logo would revert back to the designer after the 25 years, being long after the DTI has acquired substantial goodwill in the trade mark. One could extrapolate this example to all industries (e.g. the commissioning of a website where the copyright would revert to the website designer after 25 years; the commissioning of engineering or architectural drawings where the copyright would revert to the draftsman after 25 years, etc.). In the result, the potential damage as a result of the unintended consequences would dramatically outweigh the possible benefits

arising from the Legislature's initial intention behind the proposed amendment. Incidentally, all these examples also demonstrate the unfairness of the artist's retention of a right to share equally in the royalties paid for use of these types of copyright works (clauses 4, 5 and 6 of the Amendment Bill). Not only would the copyright revert to them after 25 years, even though they were commissioned and paid for the work initially, but they would be entitled to share equally in the royalties in the meantime.

- 20.5 Thirdly, further uncertainty arising from this proposed amendment is whether it would be possible for the author to assign the copyright again for the remainder of the term of protection of the copyright and whether the assignment would again be limited to 25 years. If the provision on the initial 25 years limitation is to remain, it is recommended that no further limitation is placed on the assignment duration because after the first 25 years, the author of the copyright should be in a stronger negotiating position as to negotiate a more equitable royalty rate or assignment fee. Clarity on this point needs to be included in the wording of the proposed amendment.
- 20.6 Fourthly, with regard to the introduction of the reference to the Schedule, the assignment and licensing provisions of the Principal Act are already read with the provisions of the Schedule, which make the reference superfluous.
- 20.7 Finally, regarding the principle of the amendment, one cannot ignore the potential damaging consequences that this amendment could have on the South African economy and musical industry. For example, a method of avoiding this 25 year limitation on assignments would be to purchase musical works not created in South Africa or by South Africans in order to ensure that there would be certainty as to the ownership of the copyright in the musical work for the duration of the period of protection. This difficulty would extend to all categories of copyright,

including in the art industry, software development industry, literary industry, etc. Therefore, in the interests of not deterring economic activity away from South Africa and rather supporting local industry, it is suggested that this amendment be removed in totality.

20.8 The proposed amendment to Section 22(4) of the Principal Act attempts to distinguish verbal and tacit non-exclusive licences from written non-exclusive licences, by providing that a written non-exclusive licence may not be revoked unless provided for in the contract, in a further contract or by operation of law. The same limitation on revocation is not imposed on verbal and tacit non-exclusive licences and it is unclear why this distinction has been made. There does not appear to be any reasonable or practical reason or basis in law for this distinction. It is recommended that Section 22(3) of the Principal Act not be amended and that it remain in line with the Principal Act

20.9 If the amendment is to remain, it is recommended that the following wording be inserted in Clause 21(b):

“(3)(a) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub-licensor.

(b) The author of a musical work which was subject to an assignment of copyright, as referred to in subsection (3), shall be entitled to terminate the assignment after a period of twenty-five years from the date of the agreement of such assignment.

(c) *Termination of the assignment may be effected at any time during a period of five years beginning at the end of the twenty-five years from the date of execution of the assignment.*

(d) *The termination referred to in subsection (3)(b) shall be effected by serving notice in writing upon the owner of the relevant copyright, signed by the author of the copyright and the notice shall state the effective date of the termination, which shall fall within the five-year period specified by subsection (3)(c), and the notice shall be served not less than two or more than five years before that date.*

(e) *Upon the effective date of termination, all rights under this title that were covered by the terminated assignment revert to the author of the relevant copyright and no further limitation on the duration of the assignment of such copyright shall apply.”*

20.10 It is further recommended that Section 22(4) of the Principal Act not be amended and that it remain in line with the Principal Act, alternatively that the proviso to the limitation on the revocation of written non-exclusive licences be removed.

21. **Additional acts of infringement**

21.1 Clause 24 of the Amendment bill seeks to introduce additional acts of infringement that include the tampering of copyright management information, which is defined in a new definition, and is essentially the information that is conveyed with a work that identifies the owner, and specifies the nature of the copyright. It effectively acts as a notice of the protection afforded to a copyright work in order to give recognition to the owner and to try deter infringement of that copyright. The inclusion of the new definition for ‘copyright

management information’ and the related new Section 23(1)(b) that specifies that tampering with this information amounts to an infringement of copyright is a welcome addition to the Principal Act.

22. **Additional criminal offences**

22.1 Clauses 25 and 27 of the Amendment Bill seek to introduce certain new and additional criminal offences. They are a vast improvement on the various additional and inappropriate offences contained in the 2015 Bill and are restricted to the circumvention of technological protection measures only. Most of the ‘new’ criminal offences are already criminalised in section 86 of the Electronic Communications and Transactions Act No. 25 of 2002, and the appropriate penalties are prescribed by section 89 of that Act. Given that these acts deal with devices that are specifically designed and used to allow copyright infringement, however, it is submitted that the additional inclusion of these offences in the Principal Act is welcome.

22.2 The Amendment Bill does create additional offences regarding the importation and letting for hire of devices that circumvent technological protection measures, which is also welcomed. The provisions contained in clause 25 inserting section 27(7) into the Principal Act (and unnecessarily repeated in sections O(1) - 1(4)) should effectively contribute to a decrease in piracy if implemented as drafted. It does not, however, cover the procurement for use, the design, the adaptation for use or the mere possession of devices that circumvent technological protection measures, like the ECT Act.

22.3 Further, although it may not be desirable to further criminalise the mere possession or even the procurement for use of such circumvention devices, this clause should be further amended and expanded to include other prohibited acts to cover the creators and distributors of circumvention devices as follows:

“Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the owner of the copyright-

(a) makes, designs, adapts for use, imports, sells, distributes, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, a technological protection measure circumvention device if-“

22.4 Most of Clause 27 appears to be a repeat of Clause 25 in a slightly different guise. It is submitted that most of Clause 27 is unnecessary in light of Clause 25, in that both sections cover and criminalise the circumvention of technological protection measures.

22.5 The proposed new Sections 280 (1) – (4) are repeats of Clause 23 and are superfluous.

22.6 In addition, the proposed new Section 280(5) stipulates when a technological protection measure is deemed to be effective, and refers to a few specific examples. It is actually not necessary to stipulate when a technological protection measure is deemed to be effective, and the proposed new definition of technical protection measure adequately defines what is meant by the term without the need to refer to any specific examples that may quickly become outdated. This sub-clause is also therefore superfluous.

- 22.7 Further, the proposed new Section 28O(6) stipulates that the provisions of the Amendment Bill relating to technical protection measures should be read together with the provisions of Sections 86, 87 and 88 of the Electronic Communications and Transaction Act No. 25 of 2002. The general rules of interpretation of statutes already dictate that this is the case, and this subsection is also superfluous. Furthermore, where two separate clauses deal with the same subject matter, this creates unnecessary uncertainty and is likely to create difficulties in interpretation. The proposed new Section 28O should simply be deleted from the Amendment Bill.
- 22.8 It would appear that this section is intended to bring in exceptions in respect of technological protection measures akin to those in the European Copyright Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The manner in which the exceptions are proposed to be implemented in the Act is, however, problematic.
- 22.9 In its current form, these exceptions would effectively nullify the protections sought to be introduced by section 27(7) (and section 28O) for technologically protected works, and furthermore make access control measures ineffective and all content available on platforms with legitimate access control open to piracy.
- 22.10 The provisions of section 28P(2) effectively enable persons who wish to circumvent a technological protection measure to take the law into their own hands. All that they need do is to give notice that they intend to circumvent the protection measure (citing a provision of the Principal Act justifying their conduct, which may be entirely spurious and unfounded) and

they are then entitled, upon the owner's refusal or failure to grant consent, to proceed to circumvent the measure. This effectively entirely nullifies the protections sought to be introduced by Section 27(7) and Section 28O of the Principal Act for technological protection measure works.

22.11 Consent should be sought from the copyright owner, not the author. If the author has disposed of his ownership rights, or if say, he never had any such rights because the company employing him to create the work owns the rights, then it makes no sense that the author should give the consent to circumvent the technological protection measure. Further, in many instances, the author may not know how to circumvent the technological protection measure – it may have been his employer that applied the measure to the goods after the work was created.

22.12 The proposed Section 28P(2) should rather be rephrased as follows:

“(2) A person or user of a technologically protected work who wishes to circumvent a technological protection measure so as to perform an act permitted in this this Act but cannot practically do so because of such technological protection measure, may –

(a) apply to the copyright owner for assistance to enable such person or user to circumvent such technological protection measure in order to perform such permitted act; or

(b) if the copyright owner has unreasonably refused such person's or user's request or has failed to respond to it within a reasonable time, that person may apply to the Tribunal for an order that he or she be permitted to use the technological protection measure circumvention device in relation to the technologically protected work, and if the Tribunal is satisfied that the device is intended to be used to enable the performance of a permitted act, then it may grant such an order on such conditions as it deems fit.”

22.13 The proposed new Section 28R prohibits conduct and creates offences in respect of copyright management information, being the information that is conveyed with a work that identifies the owner, and specifies the nature of the copyright. It effectively acts as a notice of the protection afforded to a copyright work in order to give recognition to the owner and to try deter infringement of that copyright. The inclusion of the new definition for 'copyright management information' and the related sections that deal with prohibited conduct in respect of that copyright management information are welcome additions to the Principal Act. The reference to a 'user' that can give consent to remove or modify the copyright management information makes no sense and, along with other absurd references to 'user' throughout the Amendment Bill, should be deleted.

22.14 Section 27(6) of the Principal Act provides for the penalties relating to offences under that section (namely, in the case of a first offence, a fine of R5000 or imprisonment not exceeding three years, or both, and, in the case of a second offence, R10 000 or imprisonment not exceeding five years or both, in respect of each article to which the offence relates). The proposed Section 27(7) is out of kilter with that, making provision for an unspecified fine or imprisonment not exceeding five years. It is submitted that the penalties should all be aligned as there appears to be no reason to have different penalties apply to different offences.

23. **Copyright Tribunal**

23.1 There are a few concerns arising from the proposed amendments to provide for an Intellectual Property Tribunal as contained in Clause 29 of the Amendment Bill. The comments which follow address certain aspects of the proposal.

Functions

23.2 Proposed section 29A(2)(c) provides that the Tribunal may “*review any decision of the Commission ... if it relates to intellectual property rights*”. The ‘Commission’, once the Intellectual Property Laws Amendment Act 78/2013 has come into force, means CIPC. Accordingly, “*any decision*” of the Registrar of Trade Marks, Designs, Patents and Companies will be reviewable by the Tribunal. It is unlikely that this is intended; and it is undesirable.

23.3 It is to be noted that, for example:

23.3.1 in the United Kingdom, the Copyright Tribunal only deals with royalties and licence schemes in respect of copyright works, performers rights and databases;⁷

23.3.2 in Australia, the Copyright Tribunal only deals with statutory and voluntary licences;⁸

23.3.3 in Canada, the Copyright Board establishes the royalties to be paid for the use of copyrighted works, it can supervise agreements between users and licensing bodies, and can issue licences when the copyright owner cannot be located.⁹

⁷ Laddie, Prescott & Vitoria, The Modern Law of Copyright and Designs 4th Ed. (Lexis Nexis) at 27.5 – 27.8.

⁸ www.copyrighttribunal.gov.au/about

⁹ www.cb-cda-gc.ca s.v. “our mandate”.

Members

23.4 There must be at least eleven members appointed by the Minister.¹⁰ Experience or specialist knowledge in Intellectual Property Law is not a pre-requisite for appointment as a member.¹¹

23.5 However, any matter will be determined by a single member, or a panel of three.¹² Conceivably, the Tribunal thus constituted will have no experience of Intellectual Property (or copyright) – or of law, for that matter. Given the Tribunal's powers, this is of concern.

23.6 It is to be noted that:

23.6.1 in the United Kingdom, the chairman and deputy chairman must satisfy judicial appointment eligibility,¹³ whilst the additional (not more than) eight members need no special qualifications.¹⁴

23.6.2 in Australia, the President of the Tribunal is a judge of the Federal Court of Australia; the Deputy President must be (or have been) a judge; and members must be (or have been) a judge, or a legal practitioner of not less than 5 years, or have not less than 5 years high level

¹⁰ Section 29(1)(4).

¹¹ Section 29B(1).

¹² Section 29G(1).

¹³ Section 145 of the Copyright, Designs and Patents Act 1988.

¹⁴ A review of the Copyright Tribunal carried out by the United Kingdom Intellectual Property Office (amidst suggestions that ordinary members were more of a hindrance than a help to the Tribunal) recommended that the post of ordinary members be abolished. The House of Commons Select Committee on Innovation, Universities, and Skills also recommended that appointments be based on expertise relevant to the Tribunal. Laddie, *op cit*, at 27.4 fn 2.

experience in industry, commerce, business, public administration, education, or the practice of a profession; or have a tertiary qualification in law, economics or public administration, or special knowledge or skill relevant to the duties of a member.¹⁵

23.6.3 in Canada, the chairman is a judge.¹⁶

Proceedings and the hearing

23.7 The intention is that the proceedings be inquisitorial. Inquisitorial proceedings, generally, involve the Tribunal as the main investigator of fact. Given the experience of recent needletime royalty determinations, it is to be expected that this role of the Tribunal will hamper the adjudication of what are essentially opposing cases.

23.8 Whilst inquisitorial systems do function in administrative tribunals, this is also undesirable given the wide scope of powers the Tribunal will have – including the grant of interdicts for copyright infringement.¹⁷ Moreover, as opposed to shortening and facilitating resolution of contested issues, it could well lengthen them: for example, not only must the Tribunal then question witnesses but so can all participants (whether a party or not).¹⁸

¹⁵ Section 140 of the Copyright Act 1968 (Australia).

¹⁶ *Loc cit.*

¹⁷ Section 29N(e).

¹⁸ Section 29I(c).

23.9 The UK Copyright Tribunal, for example, either in general or in appropriate circumstances, can take on an inquisitorial role, but it is reluctant to do so.¹⁹ The procedure in Australia is (shown by reference to decisions of its Tribunal to be) adversarial.

Rules of procedure

23.10 A source of delay and inefficiency in the matter between SAMPRO and the NAB²⁰ was the lack of regulations and procedure,²¹ resulting in interlocutory hearings and disputes.

23.11 It is, therefore, of concern that proposed Section 29K merely provides that the Tribunal “*may determine any matter of procedure...*” subject to “*the rules of Procedure of the Tribunal*” - which, as yet, do not exist.

23.12 Again, with the width and depth of issues potentially at stake before the Tribunal, parties and participants should have greater clarity and certainty on the roll-out and framework of the proceedings.

Appeals and reviews

23.13 There is a potential conflict:

23.13.1 Section 29G(6) provides that a decision, judgment or order of the Tribunal is subject to ‘review or appeal’ to a High Court; whereas

¹⁹ Laddie, Prescott & Vitoria, The Modern Law of Copyright and Designs 4th Ed. (Lexis Nexis) at 27.17.

²⁰ South African Music Performance Rights Association v National Associations of Broadcasters and Another Reference No. 0002(R) in the Copyright Tribunal.

²¹ Contrary – at least on one interpretation – to what is stated in SEIAS, that the delays are because “*the whole process is entirely dealt with by Judges of the High Court*”. See para. 2 of the Report.

23.13.2 Section 29L(1) provides that participants²² may appeal against a decision of a single member to a full panel.

23.13.3 Section 29L(2) provides that a participant in a hearing before a full panel may apply to the High Court to review the decision, or may appeal the decision (“*subject to the rules of the High Court*”). This lack of clarity is clearly not ideal.

Jurisdiction/orders

22.14 Proposed Section 29N gives the Tribunal wide powers, including of judicial functions such as declarations of rights and findings of infringement. These powers are granted to the High Court in terms of the Superior Courts Act 2013, and it is possibly unconstitutional that a non-judicial authority has such co-extensive jurisdiction with a High Court.

23.14 Whereas judges undergo rigorous JSC scrutiny (not to mention training) prior to appointment, and acting judges are from the senior ranks of the profession, it is of concern that such powers are to be wielded by, potentially, lay-people. It is suggested that the powers (of issuing *declaratur*s and interdicts) be removed from the hands of the Tribunal.

²² Which, reading Section 29I, means the Commission, the parties, and any other person who has a material interest in the hearing.

Witnesses

- 23.15 Section 290 may contain provisions which conflict with the right (in Section 35 of the Constitution) of accused persons not to be obliged to give self-incriminating evidence.

Costs

- 23.16 The provisions in Section 29P(2) appear to be in conflict with the common-law. The question of costs ought to be entirely in the hands of the arbiter, whose discretion should not be fettered.

24. **Anticipated regulations to prescribe local music content on broadcasters**

- 24.1 Clause 32 amends section of the Principal Act and empowers the Minister to prescribe various regulations, including, in consultation with the Minister responsible for communication, to prescribe the local music content quotas for television and radio broadcasting.
- 24.2 The concept of content quotas does not fall within the parameters of copyright law, however, and does not fit in with the rest of the Principal Act. The Principal Act effectively creates exclusive rights for the authors/creators of original works in order to ensure that they are adequately rewarded for their labours and efforts by protecting their works against unauthorised copying, distribution and the making of their works available to the public. Broadcasters create a certain type of copyrightable work, and they also make other types of copyright works available to the public. The quota obligations that this clause empowers the Ministers to impose upon broadcasters, and the regulation of the amount of locally-produced

works that they must broadcast and make available to the public, are totally out of place and do not marry with the rights created for copyright owners by the rest of the Principal Act.

24.3 The proposed new section 39(cL) should be deleted in its entirety. This concept can be provided for in other legislation, if necessary.

25. **Contract override provision**

25.1 This provision is contained in Clause 33 of the Amendment Bill which seeks to insert clause 39B into the Principal Act. The Amendment Bill has retained the contract override provision which was contained in the 2015 Bill and states that a contractual term which purports to prevent or restrict the doing of any act which by virtue of the Principal Act would not infringe copyright, or which purport to renounce a right or protection afforded by the Act, will be unenforceable.

25.2 A second part to this clause has been included, which is to exclude from the provisions of this clause, public and open licences to do “any act which is subject to copyright or moral rights”, settlement agreements, terms of service licences and the voluntary dedication of a work to the public domain.

25.3 The inclusion of the contract override provision is a legislative amendment to the common law principles of contract and it is submitted that such a provision will lead to contractual uncertainty. It will also undermine the exploitation value of a copyright work, despite the inclusion of the exceptions.

- 25.4 In fact, the exception is entirely arbitrary and appears to have been included with reference to the examples provided in previous submissions of where uncertainty will arise. It is submitted that the inclusion of these arbitrary exceptions are unfair and without due consideration to the crux of the issue, being the contractual uncertainty arising from a contractual override provision. These exceptions will, in fact, lead to more uncertainty.
- 25.5 Sanctity of contract is a guiding principle of the law of contract but it is by no means absolute. The SCA has confirmed²³, on more than one occasion, that agreements which are in conflict with the constitution or public policy, or the enforcement of which violates public policy, will not be enforceable.
- 25.6 In the field of copyright law, licensing is a convenient and flexible manner of exploiting the rights granted by copyright to the owner's advantage and also granting access to such works to third parties. The proposed amendment remains likely to create doubt over the enforceability of typical licence terms and cause commercial uncertainty. The exceptions only appear to apply to public or open licences and what would constitute such a licence is uncertain.
- 25.7 For this reason, it is submitted that the principles relating to the freedom to contract and sanctity of contracts should be respected and the uncertainty which is likely to be caused by the contract override provision should be avoided. It should be left to general common law principles to decide in which circumstances contractual provisions will be unfair and unenforceable and there is therefore no need to introduce a blanket prohibition through legislation.

²³ Bredenkamp and others v Standard Bank of SA Ltd [2010] 4 All SA 113 (SCA)

25.8 Because of the flexible nature of fair use provisions, a party to a contract may hold the view that a contractual provision limits an exception, whilst the copyright owner may think otherwise. This, too, creates contractual uncertainty and will only have the unfortunate effect of forcing parties to litigate.

25.9 In other territories where similar contract override provisions have been considered (such as the UK and Hong Kong), numerous views were expressed against it, highlighting the risks of contractual uncertainty. With fair use provisions being so unfamiliar to the South African copyright landscape, and general common law principles available to disgruntled contracting parties, it is submitted that there is no justification for inhibiting the freedom to contract.

25.10 The recommendation of the Copyright Law Committee is that Clause 33 should be deleted.

26. **Translation licences**

26.1 It appears that the rationale behind Schedule 2 has merit in that the intention appears to be to make copyrighted works accessible to people in their own language, the latest version remains riddled with errors, inconsistencies, incomplete sentences, lacking definitions and a clear indication of what the intention with some of the clauses is.

26.2 Furthermore, the Schedules make references to instances where the owner (it is not always clear whether it is the owner of the right of translation or the owner of the copyrighted work)

cannot be found. In terms of the Amendment Bill, this could render the work an orphan work although this has not been pulled through to the Schedules.

- 26.3 The schedule inconsistently refers to the “Tribunal” and “the Commission” which should be rectified.
- 26.4 It is noteworthy that the languages in which a work may be translated, have been limited to official languages of the Republic. However, this has been extended to a foreign language that is regularly used in the Republic for use by readers located in the Republic. This is extremely vague and determining what would be “regularly used” for purposes of item 2(1) and what not for purposes of item 2(3)(c) will pose difficulty.
- 26.5 Under item 3(1)(a) and 3(1)(h), 4(3), 4(4) the phrase “user, performer, owner; producer or author of the right of translation / translation right” has been inserted. The aforesaid is unclear (e.g. the user of the right of translation / performer of the right of translation / author of the right of translation etc.) and the phrases “right of translation” and “translation right” should possibly be substituted by the wording “of the copyrighted work” as it appears in the remainder of item 3 alternatively, the insertion of the word “....holding/ holder of the right of translation....”.
- 26.6 Item 3(1)(b) is unclear as it refers to a request made and denied yet the applicant was unable to find the user, performer owner, producer or author. Hence, the latter part of this item should be deleted. The instance where the user, performer owner, producer or author cannot be find is dealt with under item 3(1)(d).

26.7 Item 3(1)(c) refers to a request made in paragraph (a). No request has been made in paragraph (a) and reference to “paragraph (a)” and should be deleted.

26.8 Item 4(3) of the 2015 draft requiring notification to WIPO of agreements pertaining to licence have been deleted. There were no prescriptions regarding such notifications and little therefor turns on its deletion.

27. **Reproduction Licences**

27.1 Under items 3(1)(a), 3(1)(b), 3(1)(d), 3(2), 3(3), 3(4), 4(2), 4(3), 4(4)(a) and 4(5)(a) of Schedule 2 Part B, the phrase “user, performer, owner; producer or author of the right of reproduction” has been inserted. The aforesaid is unclear (e.g. the user of the right of reproduction / performer of the right of reproduction / author of the right of reproduction etc.) and the phrases “right of reproduction” and “translation right” should possibly be substituted by the wording “of the work requiring reproduction” or the insertion of the word “.... holding/holder of the right of reproduction....”.

27.2 Item 3(7) is unclear as a licence for the translation is dealt with under Part A and the statement that the “licence shall only be granted if the translation is in a language required by or with the authorisation of the user, performer, owner, producer or author of the right of translation” is unclear and apparently inconsistent with Part A. Clarification of this paragraph is required to fully understand its meaning.

27.3 Item 5(b) refers to “a language generally used in the Republic” which is inconsistent with Part A which specify the languages as the official languages of the Republic and foreign languages that are regularly used in the Republic, which as pointed out under Part A is also too vague.

28. Additional recommendation – Website blocking

28.1 Although the Amendment Bill deals with a few advances in technology that have been introduced since the Principal Act was last amended, it notably does not introduce any clauses to deal with ‘Peer to Peer/P2P’ file-sharing websites such as Napster, BitTorrent and Pirate Bay. These websites famously exist for the primary purpose of allowing users to share and download copyright protected material without any compensation being paid to the copyright owners. P2P file sharing applications allow a computer to connect to a P2P network, and once connected, make it possible to download and share files, such as music and videos with other users on the network. It is practically impossible for copyright owners to take action against every user that uploads and/or downloads copyright protected material on the sites, and many P2P sites hide the identity of their members.

28.2 The UK has accordingly enacted the Digital Economy Act that, for example, obliges internet service Providers to at least issue warnings to customers that are seen file sharing unlawfully. Further, in terms of section 97A of the Copyright, Designs and Patents Act 1988 (UK), the UK High Court has the power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their services in order to participate in activities that will infringe copyright. Irish courts have a similar power in terms of sections 40(5A) of the Copyright and Related Rights Act 2000 (No. 28 of 2000). In Australia, the Copyright Act 1968 was recently amended to include a similar new section 115A that allows

copyright holders to apply to the Federal Court of Australia for an injunction that reasonable steps be taken so that access to overseas websites be blocked in Australia on the grounds that those websites have the "*primary purpose*" of facilitating copyright infringement.

28.3 In South Africa, clause 20 of the proposed Cybercrimes and Cybersecurity Bill does include some relevant provisions on this topic. In addition, the provisions of Sections 76 to 86 of the Electronic Communications and Transactions Act, 2002 provide certain remedies against for example, service providers that host the websites of third parties that contain infringing content. These Acts do not deal with copyright infringements through file sharing networks and applications directly though, and do not address online piracy sufficiently. It is submitted that these topics should more appropriately be included in the Principal Act. The Principal Act should therefore be amended so as to act as a real deterrent to parties that design and develop software that is intended to directly infringe copyright or to distribute infringing material, or that operate websites that have as their primary purposes the sale of infringing material or the enablement of copyright infringement by others on a commercial scale.

28.4 In this respect, an amendment could be proposed to introduce a new sub-section (5) to the current section 24 in the Principal Act as follows:

Section 24(5): The owner of copyright in a work may apply to the High Court for an interdict against an intermediary or service provider, where that intermediary or service provider has knowledge of another person using their service for conduct that may infringe copyright.

Conclusion

29. The Committee appreciates that much work has gone into the Amendment Bill and that many of the objectives are admirable. However, as is clear from these submissions, the present draft unfortunately needs a great deal more consideration. The removal of certain clauses and the re-drafting of others will be required in order to avoid very undesirable consequences. To the extent that the Committee or any of its members can be of assistance with the re-drafting of the Amendment Bill, we are more than happy to make ourselves available.

The South African Institute for Intellectual Property Law

Copyright Law Committee

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