

SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW: COPYRIGHT LAW COMMITTEE

SUBMISSIONS ON SELECTED CLAUSES OF THE COPYRIGHT AMENDMENT BILL [B13-2017]

(Published for comment on 20 June 2018)

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. 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. 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 drafts of the Copyright Amendment Bill, being the version as published in Government Notice 646 Government Gazette 39028 on 27 July 2015 (that draft will be referred to in these submissions as the "2015 Bill") as well as the version that was presented to parliament in 2017 ("the 2017 Bill"). The version that has now been circulated, and on which commentary has been invited in respect of specific clauses and the Memorandum on the Objects only, will be referred to in these submissions as the "B-Bill"). The Copyright Act no 98 of 1978 shall be referred to as the "Principal Act".

2. **Introduction and comments on the Memorandum on Objects of the Bill**

2.1 We appreciate the invitation to comment on the recently published and specific clauses of the B-Bill and the Memorandum on the Objects of the Bill. We do so later in these submissions.

- 2.2 For the many reasons set out below, however, it is our collective, professional opinion that the Bill is not ready for submission to the National Assembly and we would recommend that further research and economic impact assessments be conducted and increased legal and industry stakeholder engagements be pursued to determine how the proposals contained in the B-Bill would likely impact upon the sustainability and growth of our copyright industries and our economy.
- 2.3 It is imperative that the copyright reform process be undertaken in a manner which will ensure that South Africa is aligned with international best practices and that South Africa will remain true to the international treaties to which it is presently a member. Many of the proposals advanced in the B-Bill place us at risk of steering into uncharted and murky waters and this could have dire consequences for the investment into and the growth of our already vulnerable creative sectors.
- 2.4 Our copyright industries have collectively voiced strong concerns about a lack of meaningful stakeholder engagements. It is clear from many of the legislative proposals that there exists a disconnect between the drafters' understanding of how copyright functions in commerce and how our different copyright industries operate and depend on the integrity of our copyright laws to thrive. In fact, the 2015 Bill was so fundamentally flawed that it was expected to be referred back to the Department of Trade & Industry (DTI) for a complete overhaul. Instead, an approach was adopted to attempt to rather correct some of the cosmetic and most visible technical errors and this unfortunately ensured that many of the fundamentally flawed principles remained and found their way into the 2017 Bill. This places the Portfolio Committee and its appointed panels of technical experts in a challenging situation indeed and perhaps unnecessarily so.

- 2.5 Additional red flags have been raised regarding the question as to whether it can be said that 'due process' has been followed in this legislative process and whether the process may be challenged from a legal or Constitutional sense. The non-compliance with government's own SEAIS-policy guidelines for adopting new legislation that may affect our economy has attracted large-scale criticism and concern.
- 2.6 Certain provisions in the B-Bill may also invite Constitutional challenges as they seek to restrain or deny the Constitutionally enshrined right of freedom to trade and serve to disrespect the sanctity and enforceability of contracts that were legally concluded in the past.
- 2.7 Examples of such provisions include:
- 2.7.1 Clauses 6A – 8A of the B-Bill which seek to provide for perpetual (for the life of copyright) royalty payments made to authors of literary, musical, artistic and audiovisual works, notwithstanding the transfer of copyright in a work;
- 2.7.2 a contract override provision which would invalidate contractual terms which amount to a repudiation of any rights afforded by the Act (as envisaged in Clause 21 of the 2017 Bill);
- 2.7.3 a 25-year reversion right of copyright which would invalidate contractual terms seeking to transfer copyright under different terms (as envisaged in Clause 33 of the 2017 Bill).
- 2.8 As it stands, we submit that many of the objectives of the Copyright Amendment Bill, as expressed in the Memorandum, would not have been achieved.

- 2.9 In Clause 2.1 of the Memorandum, it is stated that the purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of works against infringement. Mention is made of the recommendations contained in the 2011 Copyright Review Commission (CRC) report that increased legal protections should be enacted to improve the plight of our local artists, musicians, composers and authors.
- 2.10 The abovementioned proposals (that amount to restrictions on freedom to contract) would likely introduce increased challenges for our vulnerable creatives, as they would change the landscape of how commercial deals would look for them in the future and restrain their ability to freely negotiate terms in respect of their works. Artists can expect to receive less (or no) advance payments and lower royalty rates in respect of works where they receive statutory royalties for the full duration of the copyright. This could also lead to a disinvestment into our local creative industries, especially from international and foreign businesses as they look to rather do business with artists in jurisdictions where similar statutory restrictions do not apply.
- 2.11 Provisions which would serve to further weaken the legal protections afforded to our creatives include:
- 2.11.1 the introduction of a number of vague, broad and open-ended copyright infringement exceptions which would provide for additional instances where users can access, distribute, reproduce and adapt copyright protected content without paying license fees for use (as envisaged in Clause 14 of the B-Bill);
- 2.11.2 the lack of appropriate digital enforcement mechanisms (such as the ability for rights holders to obtain interdicts against websites that allow file sharing between users for the primary

purpose of facilitating copyright infringement and increased obligations placed on digital platforms to prevent infringements and to pay market-related royalties for the commercial use of protected content) without which our creatives are powerless to prevent the unauthorized use and commercial exploitation of their works in the digital age; and

2.11.3 the lack of civil infringement remedies and punitive / prescribed statutory damages available to creatives to effectively recoup financial losses from unauthorized commercial uses of their protected content.

2.12 If the Bill were to be enacted in its current form, the legal protections afforded to our local artists, creators, authors, composers, musicians, performers, etc. would clearly not be improved upon. It would rather introduce further injury to our already vulnerable creative sectors - especially the music and publishing businesses. Digital platforms are nowadays the world's largest users of copyright protected content and elsewhere in the world it is already recognised that broad, open-ended and vague copyright infringement exceptions have contributed to the creation of the so-called 'value-gap' which poses a clear and present danger to creatives and content owners on a global scale. Digital platforms (with combined user-bases of billions of people) simply refuse to pay market-related royalties for making protected content available for use online by their rampant consumer bases and artists are left with no option but to attempt to negotiate fractions of what would constitute market-related royalty payments for the use of their works as they do not find themselves in fair negotiating positions.

2.13 Without clearly formulated copyright infringement exceptions, the introduction of effective digital enforcement mechanisms, civil remedies and availability of punitive / prescribed statutory damages awards, our local artists, authors and composers would remain unable to

protect and commercialise their works in a manner that would enable them to uplift their plight from vulnerable and struggling artists to a position where they can participate freely and thrive in the global, digital marketplace.

2.14 In Clause 2.2.1 of the Memorandum one of the objectives of the Bill is to develop a legal framework on Copyright which would promote accessibility to producers, users and consumers in a balanced manner which includes flexibilities in the digital space that would empower all citizens of SA. It is important that a balance is struck between the interests of those who create and commercialize original, copyright protected works on the one hand and those who seek to access and use protected content on the other. The B-Bill appears to have been drafted with the view of establishing a 'user-access oriented copyright system' which disturbs the mentioned balance greatly and favours so-called 'users' instead of addressing the core issues that were identified in the 2011 CRC report, namely improving the plight of our creatives and providing for increased protections against the unauthorized use of protected works and the commercial exploitation thereof by users who refuse to pay market-related royalties for the use and access to those works.

2.15 While increased accessibility to works for persons with visual impairments and related disabilities is to be welcomed, the introduction of a number of vague and open-ended exceptions to copyright infringement would imperil our local creatives and the development of legitimate markets for their works. The proposed introduction of a version of the US-styled 'fair use' system which is much broader in application than even in the US, where their own system comes under constant criticism, also exceeds the degree of infringement exceptions and limitations permitted under the World Trade Organization TRIPS agreement and may also fall foul of our obligations in terms of the Berne Convention (that establishes that exceptions to copyright infringement may be allowed in respect of 'special cases'). In addition, as no

digital enforcement mechanisms have been introduced in the Bill, it cannot be said that the objective expressed in Clause 2.2.1 has been satisfied.

2.16 Clause 2.2.2 of the Memorandum states that one of the core objectives of the Bill is to address the licensing of copyright works to facilitate the commercial exploitation thereof. This objective cannot be achieved in a legal framework where statutory restrictions are placed on the manner in which rights holders can deal with their works and which restrict their rights to freedom of trade and ability to contract freely (as discussed above). Also, proposals to impose statutory contractual variations (through reciprocal introduction of perpetual royalty rights envisaged in Clauses 6A – 8A of the Bill) would directly affect and impact on existing license structures and contractual arrangements. As it stands, it cannot be said that the Bill introduces favourable provisions overall in addressing the licensing of copyright protected works. In fact, it proposes to enact provisions which could restrict licensing and reduce licensing revenues for local rights holders and authors. If the Bill is enacted in its present form, South Africa would likely be seen as a place not to do business.

2.17 We thank you for your consideration of our above-expressed concerns and now move forward with the presentation of our commentary relating to some of the specific clauses in respect of which public commentary was invited.

3. **Clause 1, par (i): The definition of “visual artistic work”**

3.1 It is not clear from the proposed definition of “visual artistic work” whether works of craftsmanship would be considered “artistic” works falling within the ambit of sub-section (a) or “commercialised” works excluded in sub-section (b).

- 3.2 The word “commercialised” should be replaced with the word “commercial” to align with the newly inserted definition of “commercial” provided in the definitions section.
- 3.3 The inclusion of certain works such as “fashion design” in the list of examples constituting “commercialised works” is potentially problematic. In some instances, such works could become collectible works of visual art that can be resold as collector’s items. This problem could be addressed by replacing the word “commercialised” with the defined term “commercial” and attaching weight to the intention of the author and the manner and circumstance in which the work was produced as well as the nature of the work itself, when assessing whether the work is a “visual artistic work” subject to a resale royalty.
4. **Clauses 5 and 7: Sections 6A(4) and 7A(4): Musical, literary and artistic works - The minimum content of the agreement**

General commentary

- 4.1 As the same proposals relating to the introduction of a perpetual royalty right in favour of authors for the life of the copyright in literary, musical and artistic works are presented in Clauses 6A and 7A of the Bill, and the same concerns and considerations are applicable to all three types of works, we are dealing with both clauses simultaneously.
- 4.2 It is our understanding that the intention behind these proposed amendments is to provide for a remuneration right for authors of literary, musical and artistic works in situations where

their copyright has been assigned and to allow them to continue to share in the profits generated from the further commercialization of the copyright protected works concerned.

4.3 Much has been made in the media and by stakeholders and commentators during the consultative processes relating to the copyright reform process in SA about the plight of our artists, authors and composers who are claimed to be at the wrong end of a deal relating to the commercial exploitation of their works – especially in the music industry.

4.4 The introduction of a statutory and perpetual (for the life of the copyright in a work) royalty right in favour of the author does not necessarily solve this problem. As a matter of fact, it could lead to a change in the landscape of what future deals for our artists, authors and composers might look like (especially in the international marketplace). For instance, a record company or a book publisher may well decide to no longer offer advance payments to artists, authors and composers (or to offer much reduced advances) and to offer reduced royalty payments, as they would now look to share the commercial risk of not recouping their investment with the author over a much longer period (for the life of the copyright).

4.5 Only those authors who share royalties on an ongoing basis with the copyright owner where a work becomes a commercial success would, in the long run, profit from the arrangement; while the majority of authors, whose works are not commercial successes, run the risk of not being remunerated at present market value for the creation of the work.

4.6 It seems clear that the ideology behind this proposal is based upon a rather limited understanding of commercial trends and developments within these relevant copyright industries. This also assumes that all copyright works would be successful and that monies will be generated when that is not the case.

- 4.7 In the publishing business, the proposed amendment does not recognize that the book publishing industry operates in a different manner than that of the music business and other copyright industries. Book publishers generally do not take assignment of copyright in literary works, especially in relation to fictional works, and therefore Clause 6A would be an example of 'dead law' in that industry. This is a further indication that, although the proposed royalty rate may be aimed at addressing a certain issue in the music business, the drafters of this proposal did not carry any knowledge of the differences in the manner in which the commercialization of literary works in the book publishing business occurs.
- 4.8 In respect of artistic works, the proposal that the author has an inalienable royalty right for the life of the copyright could lead to disastrous financial consequences for companies who engage third party graphic design companies to create the artwork for their marketing materials and their trade marks. For a graphic designer to have the right to share in royalties received from a business that licenses its intellectual property as part of a franchise system, for instance, is would not be commercially sensible or viable. Local artists would not be assisted by a provision such as this as companies would wise up to the risks and not employ outside design and marketing companies to develop new materials for them.
- 4.9 It appears that the proposals have in mind only very simplistic transactions where a single artist and copyright owner is involved and do not cater for situations where more complex copyright ownership issues are at stake and multiple creators were involved in the creation process relating to the same copyright protected work. There are many instances where it is absolutely necessary for an assignment to constitute a 'once-off' transaction where the author is engaged to produce a certain work in return for a once-off payment. Examples of this include the following:

4.9.1 The author of a literary work invites multiple graphic artists to contribute artistic drawings for a book. To propose that each and every artist should share in the proceeds generated from the commercialization of the book by a publisher or another rights holder may lead to problematic situations where the different graphic artists may demand an equal royalty to that paid to the author of the literary work. Questions arising here include, *'How would the royalty share be determined when multiple authors are involved?'* and *'Will it remain possible for the rights holder to commercialize the work further until each and every possible dispute relating to the royalty share arising from the different parties concerned has been resolved?'*.

4.9.2 Insofar as the music industry is concerned, there are usually many different authors involved in creating a sound recording. These include the author of the literary work (the song lyrics), the composer of the music, the producer contributing to the musical composition, the sound engineers responsible for mixing and mastering the recordings, the recording company or studio that may own the rights to the sound recording itself, the graphic artist who designs the artwork for the album cover, etc. As the proposal in the B-Bill extends the 'perpetual royalty right' to the authors of literary, musical and artistic works, it would be necessary for the copyright owner of the sound recording to make royalty payments to each and every author concerned from profits received from the commercialization of the album and to report on profits generated to all of those parties, including the artist who only contributed artworks to the album cover. Not only does this place a rather onerous burden on the rights holder in the album, who already remunerated the authors for their time and efforts, but it would also pose significant practical difficulties in determining what share of the royalty payment each of the authors should be allocated. One party

might feel that his or her 'contribution' was more significant than that of another (for the commercial success of the project) and, as such, a stalemate could develop which could impact negatively on the ongoing commercialization of the album itself.

- 4.9.3 In respect of artistic works, the design of a corporate logo for a company by a third party graphic designer, simply cannot qualify that designer to earn a royalty relating to the use of the logo by the company for the life of the copyright in the design and to demand reporting from the business on financials relating to royalty payments received from other licensed users of the brands (for instance within a franchise system).
- 4.10 Consequently, although the intention behind introducing a royalty for authors, composers and artists through the proposed insertion of Clauses 6A and 7A appears to be laudable, the commercial reality is that deals will likely be amended to mitigate the perpetual payments that will need to be made by copyright owners and this could cause further financial harm to an already vulnerable creative sector in this space.
- 4.11 It is quite possible that businesses may choose to rather create literary, musical and artistic works in jurisdictions where the rights holders can regulate their business relationships with such authors with absolute clarity. This would especially hold true for international publishers, recording companies and film studios. In the music business, local artists could miss out on significant payments relating to synchronization rights in television and film. So, even though the intention behind the proposed 'perpetual royalty right' may be focused on improving the plight of our local authors, artists and composers, it simply does not keep touch with commercial reality and more complex transactions and would undoubtedly lead to a negative change in the landscape for our artists, moving forward.

4.12 What casts even more uncertainty on whether the perpetual royalty right would benefit our authors, composers and artists and invite investment into our creatives sector, lies in the exception proposed in Clause 6A sub-clause 5(d)(i) and Clause 7A sub-clause 5(d)(i) which state that the royalty right would not be applicable in situations where a copyright owner commissioned the creation of the literary, musical or artistic work in question. This suggests that rights holders dealing with authors in these copyright industries would be able to exploit a loophole by simply updating the terms of their assignment agreement templates to stipulate that the author of the work to be created is commissioned to create that work. Even when an agreement does not clearly state that, it could be argued that in most, if not every situation where an author is instructed to create a work and is paid in pursuance of that instruction, that instruction amounted to a commissioning and therefore Clauses 6A and 7A would not apply and a perpetual royalty right will not become applicable for the author. This begs the question: *'To which transactions would Clause 6A and Clause 7A apply without question?'* The answer appears to be assignment contracts where an author created a work without any instruction or commission by a third party and, at a later stage, enters into an assignment agreement in respect of the copyright in that work with a third party. If the intention behind the proposed 'perpetual royalty right' is indeed to uplift the plight and rights of our local creatives, authors, artists and composers, it is not clear why only artists who create a work 'in a vacuum' or 'in commercial isolation' should benefit from the proposed perpetual royalty right. If an 'unsigned' author, composer or artist were to write a book or a song or develop an artwork, without commission from a publisher or a recording company or arthouse, and that work were to be successful, leading to a commissioning from a publisher or a recording company or arthouse for the second and third and fourth book, album or artwork to be created, then the artist would only have a perpetual royalty right in respect of the first work that was not created under a commissioning. Surely the intention behind this proposal could

not be to restrict the applicability of a royalty stream for authors only to their very first work(s). This illustrates the lack of understanding of the nature of commercial transactions and how our copyright industries function and how a proposal which no doubt originated from a place of good intention would simply become 'dead law' for the most part as rights holders can easily exclude its applicability.

4.13 Further, it is our recommendation that the proposal to legislate what contracts should look like in the creative sector (literary, musical and artistic works) be seriously reconsidered.

4.14 The plight of our creatives and artists and authors in these copyright industries would not be improved by statutory restrictions placed on the freedom of parties to contract. Freedom of trade is a right enshrined in the Constitution of the Republic of South Africa, 1996. If an author or creator of a copyright protected literary, musical or artistic work wishes to transfer all copyright in the work to a third party for the payment of a once-off fee, which fee might well be negotiated at a higher value if no future royalties are payable to the author for commercial usages made of the work, then it is the right of the author to negotiate such a deal and to dispose of their asset for a price they deem fair.

4.15 It is crucially important that South Africa is seen as an ideal place to do business and without contractual certainty where transactions involving copyright and other intellectual property assets are concerned, South Africa would not be able to take its rightful place in the global trade – especially the global digital trade where copyright protected works can be sold, licensed for use and traded online with parties from other jurisdictions. Any restriction on the freedom to contract and to trade in a manner in which the parties involved in the transaction wish to do should be scrutinized as the end-result of such provisions and over-regularization (by prescribing how such transactions should be structured) would simply lead to a decrease

in interest in doing business with our creatives in SA, especially in the international market place where other creatives are not restricted in a similar way.

4.16 Other proposed amendments contained in the B-Bill which would contribute to contractual uncertainty and which would impact on parties to commercial transactions and their ability to contract freely include the proposed Clause 39B which renders any contractual renunciation of a right afforded by the Copyright Act as unenforceable, as well as the proposed limitation of assignment terms relating to copyright in literary and musical works to terms of up to 25 years. Once again, even though these proposals appear to favour local artists, it would actually place them at a disadvantage when negotiating deals as the nature of deals will change as rights holders adapt to pass more risk onto creators and offer less money as authors of the relevant works would now have future royalty rights and would regain ownership of the works at a future date. It would also change the playing field for artists in SA when negotiating deals with rights holders from other countries and SA artists would receive more restrictive deals than international artists from jurisdictions where rights holders can establish their rights contractually with certainty for the duration of the copyright.

4.17 Our recommendation would therefore be that the constitutional right of freedom to trade and the fundamental principle of freedom to contract remain intact and that all proposals in the B-Bill (including Clauses 6A and 7A) which purport to restrict these rights be seriously reconsidered. The proposed restrictions on freedom to contract could have a negative impact on how the international market reacts to SA as a place to do business in copyright industries and this would mean less opportunities for SA creatives on the international scene and within the global, digital marketplace or, at the very least, more restrictive deals than would be awarded to authors, artists and composers in jurisdictions where such statutory restrictions do not exist.

- 4.18 The way to seriously address the plight of our local artists is not to impact upon and restrict the manner in which they can do business and trade with their copyright protected works through the introduction of statutory restrictions on contract terms and prescribed contract formats, but rather to ensure that authors' rights are properly defined and enforceable.
- 4.19 It is, for instance, imperative that our fair dealing copyright infringement exceptions not be opened up to possible abuse by so-called 'users' through the introduction of vague and open-ended infringement exceptions as proposed by the introduction of a US-styled fair use legal defence to copyright infringement. Other crucial factors to improve the plight of our vulnerable creatives which are not touched on in the Bill at all include the introduction of much improved digital enforcement mechanisms (this, despite the stated intention of bringing the Act up to date for the digital environment) and effective civil remedies (including punitive / prescribed statutory damages awards) for non-reporting of commercial usages of copyright protected content by users (also not touched on in the B-Bill at all).
- 4.20 In the light of the above, our recommendation is that Clauses 6A and 7A be removed from the Bill in their entirety.

Specific comments on the relevant clause(s)

- 4.21 Although it is our recommendation that Clauses 6A and 7A be reconsidered, we will nevertheless include comments relating to some of the specific clauses, as requested in the invitation to submit comments.

4.22 Clause 6A (1) and Clause 7A (1) provide for the perpetual (for the life of the copyright) right of the author of a literary or musical work to share in any royalty payments received by the copyright owner. Of course, when commercializing a copyright protected work, the copyright owner could have numerous revenue streams to exploit and profits generated would not all be received by the copyright owner in the form of a royalty payment. The intention should therefore be clarified. If the intention is for the author to only receive a percentage of a royalty payment received by the copyright owner for licensed use made of the copyright protected work by a third party, that should preferably be stipulated with clarity. If, on the other hand, the intention is for the author to share in all profits generated from commercialization activities (including a share of profits received from retail activities, movie deals, etc.) then that intention should also be clearly expressed. As it stands, it is uncertain in which profits the author would be entitled to negotiate a percentage share.

5. **Clauses 5 and 7: Sections 6A(5) and 7A(5): The issue of retrospective application**

5.1 The implementation of the retrospective application of the proposed Clauses 6A and 7A would not be commercially or legally recommended or viable.

5.2 Parties who entered into valid, contractual agreements in the past, entered into those contracts knowing full well what terms and conditions would be binding on their commercial and other relationships arising from those contracts. If there was no consensus on some of the fundamental terms to the point where it could be said that there was no 'meeting of the minds' between the parties, then the contracts can be challenged in a court of law by an aggrieved party.

- 5.3 The contracts that have been legally concluded in the past were only concluded on the basis of the facts before the parties at that given point in time. Many contractual rights would since have been ceded or assigned to other parties and many new ventures involving different parties would have been undertaken and initiated on the basis of existing contracts. For government to now pass legislation which seeks to forcibly disturb and modify existing and legally valid contractual relationships, would certainly be challengeable in a legal sense and possibly also a constitutional sense. From a legal perspective, we would caution against such a proposal as it does pose legal risk and could be seen as a form of government 'overreach'.
- 5.4 It would practically be impossible for all rights holders in the relevant copyright industries to trace all authors, composers and artists and to determine which royalty shares they should have been entitled to receive if Clauses 6A and 7A were enacted at the time by which they concluded their agreements with them. It would lead to a massive influx of possible litigation and disputes to be adjudicated by the Copyright Tribunal – so much so that it would likely cripple the Tribunal's functionality and ability to adjudicate on any other matters of importance.
- 5.5 The implementation of such a proposal would undoubtedly cause large scale harm to South Africa's growing reputation as a place to be considered in which to do business. It would send a message to local and international businesses and governments that the law of contract is not sacrosanct in South Africa and that government reserves the right to, at any point in time, implement legislation which would impact upon and forcibly amend the terms and conditions and contractual obligations and undertakings of parties who, in the past, concluded valid agreements in South Africa. The rights of freedom to contract and trade should be respected and valued and not be disturbed. The law of contract underpins private enterprise in SA and provides the legal framework within which parties can conduct business and trade and

exchange and license assets and resources, secure in the knowledge that our law would recognize, respect and uphold their agreements and, if necessary, enforce them. To disturb this important and delicate balancing of rights by the implementation of legislation which would alter the terms of existing agreements that were validly concluded in the past, would cause great harm to South Africa's reputation and economy, moving forward.

5.6 The rights of performers to share in so-called Needletime royalties with the rights holders of sound recordings, which was re-introduced into our copyright law in 2002 via Section 9A of Act 98 of 1978, was not introduced with any retrospective effect. It is difficult to envisage why a royalty right for authors of literary, musical and artistic works should be treated any differently, if a decision is taken to introduce such remuneration rights, despite our grave concerns mentioned above.

6. **Clause 11: Section 9A(4): Failure to record acts or to report constituting an offence and the penalty for that offence**

General comments

6.1 We commend the proposed insertion of this sub-clause as this is a positive development that would contribute to improving the plight of our authors, artists and composers – especially those who are engaged in the music industry.

6.2 The non-reporting of commercial usages of recorded music is one of the most significant problems encountered not only by our Collecting Societies, but of course also their very members that have been identified in the Memorandum on the Objects of the Copyright Amendment Bill as the highest ranking sector of dissatisfied persons who are not benefiting

from our current copyright system, namely our local composers, performers and artists, who are dependent upon royalty collections and distributions for commercial usages of their recorded music to make a living.

6.3 The non-reporting of commercial usages of copyright music in South Africa has led to monies not being collected and distributed (especially from large scale usages by broadcasters and telecoms companies) which monies have been reported to constitute a value of hundreds of millions of Rands. Just imagine what such a cash injection into our local music market would already have achieved to uplift the plight of our struggling artists, composers and authors.

6.4 The proposals relating to the regulation of reporting on the commercial usages of copyright protected music and the criminalization of non-reporting thereon are therefore very important and welcomed no doubt by industry and our local creative sectors. It would be important not to restrict the requirement of reporting to Collecting Societies responsible for collecting and distributing Needletime royalties in terms of Section 9A of the Act, but to broaden the application of this proposal to include all reporting on usages of copyright protected content to all Collecting Societies.

6.4 A further point of concern is the manner in which the proposal is presently drafted and that will have a crucial impact on whether or not the laudable objectives are to be achieved in the first place.

6.5 Although the invitation for public comments are only restricted to two specific clauses within Clause 9A, we have commented on some of the other clauses that were newly introduced on which we have not commented before and also clauses that are intrinsically linked to the successful implementation of the two mentioned clauses. We would appreciate some

leniency from the Portfolio Committee in this instance as we are of the view that this would add value to ensure that the above, commendable proposals would achieve their objective of improving the plight of our local authors, artists, composers and copyright owners who are to benefit from improved collections and distributions of Needletime (and other) royalties.

Comments on specific clauses

6.6 Clause 9A(aA) introduces the obligation on the commercial users of copyright protected music to keep a record of music usages for the purpose of reporting thereon and for them to submit a report to the performer, copyright owner or collecting society, as the case may be. Sub-clauses (i) and (ii) should be clarified to establish the minimum standards of record keeping and reporting which would, if not adhered to, cause an offence as envisaged in Clause 9A(4). As it stands, the sub-clauses merely mention that records should be kept and reporting attended to '*in the prescribed manner or form*'. Of course, this needs to be clarified to avoid situations where music users may attempt to hide behind the vagueness introduced by such broadly worded provisions to claim that they have complied with the provisions, when in fact they have not. It is our recommendation that the Portfolio Committee engages with the collecting societies responsible for administering Needletime royalties on behalf of copyright owners and performers, namely the South African Music Performers Rights Association (SAMPRO) and the Performers Organization of South Africa Trust (POSA), in order to develop the minimum standards required to give proper effect to the introduction of the proposed criminalization of non-reporting on copyright protected music usages. It is also highly recommended that similar procedures be established to aid other Collecting Societies (not only those collecting Needletime royalties) to combat non-reporting on commercial usages made of protected content. This is one of the key factors which cause direct and significant harm to the flow of rightful royalties to our vulnerable creatives.

6.7 Clause 9A (1)(b) and (c) which stipulate that the Needletime royalty share shall be determined by agreement between the user of the sound recording, the performer, the copyright owner, the indigenous community or their respective collecting societies ignores the fact that the music industry has already settled on a 50% share between the copyright owner of the sound recording and performers featured on the recording. This settlement followed after more than a decade of legal disputes and litigation on this very issue and this matter has now seemingly been resolved by industry itself, following vague drafting around this issue when Needletime was reintroduced into our law. Therefore, in order to establish legal certainty and to respect the present industry standard which clearly represents a fair solution and generous offer to performing artists by the copyright owners of sound recordings, we would recommend that these sub-clauses be struck from the Bill and that further clarity be achieved by a rewording of Clause 9A (2)(a) as recommended below.

6.8 Clause 9A (2)(a) requires amendment in order to establish certainty on the performers' share of royalties received from commercial usages of recordings featuring their performances and to clarify the share between performers in situations where there is more than one performer featured on the sound recording. In most instances, there will be a performance from a so-called 'featured performer' and non-featured performers (back-up singers, musicians, instrumentalists, etc.). The industry standard is for featured performers to receive 65% of the performers' share of Needletime royalties received and for the remaining share to be divided equally between the remaining performers on a recording. It should be borne in mind that, in many instances, a large number of performances are featured on a single recording, and to simply divide the royalty received equally between all performers would not be a fair method of remuneration as it is the featured performer(s) whose performance(s) would, in most

instances, attract users and listeners and contribute the most towards the commercial value of the product.

6.9 Our recommendation would be that the clause be clarified and reworded as follows:

“The party receiving payment of a royalty in terms of this section, whether the owner of the copyright, an indigenous community or a collecting society shall ensure that such royalty is equally shared with all of the performers featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers’ Protection Act, 1967 (Act No.11 of 1967): Provided that such royalty payable shall be divided equally in shares of fifty percent (50%) between the copyright owner on the one hand and the performers featured on the sound recording on the other hand. The performers’ half share, as provided for herein, shall in turn be shared as follows: sixty-five percent (65%) of the performers’ share shall be paid to the ‘featured performer(s)’ (who shall, if there is more than one, share this amount equally), and the remaining thirty-five percent shall be paid to the ‘non-featured performer(s)’ (who shall, if there is more than one, share in this amount equally). The aforementioned sharing of the performers’ half share of the royalty is to be reflected in the membership rules of the relevant Collection Society or Societies”.

6.10 The criminalization of the non-reporting of commercial music usages of copyright protected recordings and not keeping accurate records on music usages is to be welcomed, but considering that there is no guarantee that any infraction would be prosecuted, it is necessary to introduce appropriate civil remedies as well. The criminalization of non-reporting should also not be restricted to the music industry, but to all copyright industries where Collecting Societies have been established to collect and distribute royalties to their members.

- 6.11 The objective is clearly to improve the collection and distribution of royalties and to improve the plight of our local authors, artists, musicians, performers and composers.
- 6.12 While the criminalization of non-reporting is to be welcomed, the penalties ascribed to the newly created offences require further consideration and perhaps consultation with industry as, at first blush, the penalties appear to be quite harsh, especially the penalty of 10% of the annual turnover of a company found to offend. Given the limited time available to us to present comments, we feel it would be irresponsible to suggest alternate penalties as more consultation with stakeholders, criminal lawyers and judges, etc., would be required to ensure that the correct balance is struck and to ensure that the punishment fits the crime.
- 6.13 What we can comment on, at this stage, is the need to go one step further if the objective is indeed as we understand it to be improving of the plight of our local artists, composers, musicians and performers by introducing the relevant criminal sanctions. It has to be borne in mind that the imprisonment of a commercial music user or the payment of a fine (or both) by a party found guilty of committing these offences would not immediately assist the copyright owner and the performer(s) featured on the sound recording(s) in question. Monies paid over to the State to satisfy a Court order in a criminal matter would not reach the pockets of the performers and artists featured on the recordings in question or the copyright owner for that matter.
- 6.14 To close the circle and to ensure that rights holders and artists have the means to recover financial losses suffered as a result of the unauthorized commercial usages of their copyright protected works, it is necessary for appropriate civil liability to also be incurred by the infringer. The addition of civil liability and punitive or, at least, prescribed statutory damage awards in favour of rights holders and performers for the non-reporting and non-record

keeping on commercial usages of copyright protected music should also form part of this clause. Even though the Copyright Act already makes provision for damages to be claimed in infringement matters, our Courts have rarely (if ever) been able to determine the actual quantum of financial losses in copyright cases and have resorted to not awarding damage awards in the overwhelming majority of infringement cases. The introduction of punitive damage awards or prescribed statutory damage awards, in addition to civil liability for those who offend against the newly proposed criminal sanctions, would close the circle and enable rights holders and performers to finally safeguard their Needletime royalty streams. This would assist greatly in achieving the objective of uplifting our local music industry and artists, performers, musicians and composers featured in sound recordings that are used commercially. As mentioned above, this proposal should be expanded upon to also be applicable to rights holders and authors of other types of copyright protected content – and not merely be restricted to application in the music business – as the scourge of non-reporting affects all rights holders where license fees for usages are negotiated with representative Collecting Societies – not only in the music industry.

7. **Clause 15: Section 15: Panorama rights**

7.1 Clause 15 of the B-Bill seeks to substitute subsection (1) of Section 15 of the Principal Act, with a new clause relating to the incidental and/or background use (previously inclusion) of an artistic work within another work.

7.2 Apart from the proposed semantic changes to subsection 1, it is proposed that this section no longer be limited to cinematograph films, television broadcasts or transmissions in a diffusion service. Instead, the B-Bill seeks to propose that the general exception relating to incidental /

background use of an artistic work should apply to all types of works, despite the fact that, from a practical perspective, this section simply cannot apply to all types of works due to the very nature of some of those works (for example, it is simply not possible to use an artistic work in a sound recording).

7.3 Additionally, it is difficult to see how the use of an artistic work in other works, such as for example, a literary work, can ever be considered to be by way of background, or incidental to the principal matters represented in the literary work. Therefore, there does not appear to be a need for such a broad extension of this exception and the B-Bill should rather broaden the application of this exception by specifying the additional types of works to which this exception will apply, such as photographs, drawings, engravings and/or paintings and sculptures.

7.4 Furthermore, by extending the application of this exception so broadly, there is concern that it may be open to abuse by infringers. For example, where an artistic work which is situated in a public place is used in a literary work and where the use of such artistic work would otherwise constitute an infringement, in terms of the proposed amendment, the mere fact that the artistic work happens to be located in a public place means that its use in the literary work would not constitute an infringement. The knock-on effect is that artists will not want to display their artistic works in public places, for fear that it may be used by other parties in their own works under this general exception.

7.5 It is, therefore, submitted, that this revised section should not be extended to all works and rather be rephrased along the following lines:

(1)(a) The copyright in an artistic work shall not be infringed by its use in a cinematograph film or a television broadcast or transmission in a diffusion service or a photograph or a drawing or an engraving or a painting or a sculpture if –

(i) such use is merely by way of background, or incidental to the principal matters represented in the film, broadcast, transmission, photograph, drawing, engraving or painting or sculpture; or

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

7.6 As for the proposed subsection 1(b), it is submitted that this proposed amendment in its current form is poorly phrased and therefore open to abuse. It is, therefore, submitted, that this subsection be rephrased along the following lines:

(b) The copyright in an artistic work which is used in another work whose making was, by virtue of this subsection, not an infringement of the copyright vesting in the artistic work so used, shall not be infringed by the lawful issue to the public of copies, or the lawful communication to the public of the work in which the artistic work is used.

8. **Clause 22: Commissioned Works**

8.1 By way of introduction, subsection 21(1)(c) of the Principal Act deals with the principle of the commissioning of copyright works. It thereby provides an exception to the general rule, as set out in subsection 21(1)(a) which provides that ownership of copyright generally vests in the author or co-authors of a work.

8.2 We note that it is proposed that the term “an audiovisual work” is inserted in subsection 21(1)(c) to replace “a cinematograph film”. This term has been newly defined in the Bill in a manner that does not expressly include digital works but from its broad wording one can construe that it includes such works in a digital format. The term, as now defined, expressly includes “a cinematographic film”, and is a welcome updating of the Act to be relevant and to function properly in the digital era.

8.3 By contrast, the term “making of a gravure” in subsection 21(1)(c) is a printing term and process that dates back about 150 years, and that has somewhat thoughtlessly been carried over successively from earlier Copyright Acts. The term is factually no longer in use, or even understood, in the printing trade. This term, although outdated, has been retained in the B-Bill, and it remains the Copyright Law Committee’s submission that the term should be removed by deletion from this subsection.

8.4 The proposed amendment at the end of section 21(1)(c) that deletes the wording that the commissioning party shall be the owner of copyright, and that proposes instead to introduce the following wording:

“...the ownership of any copyright subsisting in the work shall, subject to subsection (3), be governed by agreement between the parties.”;

introduces a severe limitation to the principle of commissioning of copyright works in respect of the specified categories of works identified in the sub-section. The effect of this amendment will be uncertainty as to who will own the copyright in a commissioned work, and this will be a fundamental departure to the present position where the commissioning party is the copyright owner. Every commissioning of a copyright work will carry with it the

uncertain element of the copyright ownership because this will depend on the agreement that the parties have to reach on this basic and highly important issue. This opens up the aforementioned practical difficulties, and in addition, it does not provide a default position when no agreement has been concluded. This begs the question: What if the commissioning party and the author do not enter into an agreement, then who owns the copyright in and to such work?

8.5 All of the Copyright Law Committee's members are attorneys who specialise in the field of copyright law, and from experience, parties that contract on the basis of commissioned works, quite often do not enter into a copyright assignment agreement. This happens because firstly they do not understand that copyright will come into existence when the work is completed, and secondly that this subsection of the Copyright Act will determine the ownership of such copyright.

8.5 For the most part, and as a commercial and business reality, commissioning parties believe that once they have paid for a work to be created by an author, they own both the work and the copyright in and to such work essentially because they have paid for the creation of such a work. This belief is particularly prevalent and problematic in the area of software development as third party developers are often commissioned to develop software for another entity without the parties appreciating the implications of that software being classified as a literary work or a computer program - neither of which is included in the list of copyright works for which the commissioning party is deemed the first owner of copyright. Another commercial reality is that, when a business commissions an author/designer to create a unique logo for that business (such as Nike's "swoosh" logo) it is imperative for the business to own and enjoy exclusive rights in and to that logo (*inter alia* as a trade mark) and the author/designer cannot, as a matter of fact, have or enjoy any interest at all in using that logo

for whatever purpose. It is therefore unlikely that the introduction of such a broad commissioning principle that ownership of the specific categories of works identified in the sub-section must be governed by agreement between the parties, will in fact change the present position and result in parties entering into such agreements. Without a default position being introduced, complete uncertainty of ownership will result.

8.6 It is this Committee's view that both the existing wording and proposed amendments to Section 21(1)(c) need to be re-worked, and unfortunately it has not been given enough time to properly research and formulate an alternative and workable solution for the Portfolio Committee to meaningfully consider. We therefore propose that the Committee be afforded an extension to advance argument in respect of this Section; after consulting with stakeholders and clients that operate in a variety of industries and thus that will be affected by the commissioning principles to be adopted; that supports a workable alternative to the existing and proposed wording of section 21(1)(c). The Committee is fully committed to engaging with the Portfolio Committee to find a workable solution going forwards that will remove uncertainty around copyright ownership of works that are created in a commissioning context.

8.7 The amendment of subsection 21(2) that is also proposed is the inclusion of the words "or local" after "international", and a revision of the spelling of the word "organisation". These amendments appear to be in order and are not in issue.

8.8 A major amendment proposed is the addition of clause 21(3)(a) – (d) to section 21 of the Principal Act, which contemplates limiting the rights of copyright. The introduction of a concept of limited ownership rights is likely to cause major practical difficulties that will

possibly result in increased litigation, particularly if no mention is made in the contemplated agreement (in terms of subsection 21(1)(c)) of which acts the copyright owner can perform in relation to a work) and are not accurately specified in the agreement. Unless attorneys astute in copyright law and who are familiar with the proposed amendments to the Principal Act are briefed by the parties looking to enter into an agreement contemplated by section 21(1)(c) as amended, they will not know which acts necessary for the purpose of the commission or otherwise are owned by whom nor will they know that their ownership rights are limited even if they enter into a basic agreement as contemplated under section 21(1)(c). In principle, this limiting provision cannot be supported by the Copyright Law Committee.

8.9 The proposed clause 21(3)(c)(i) will allow an author of a work contemplated in section 21(1)(c) to potentially acquire a licence to use the commissioned work for a fee payable (in terms of a tariff to be determined by the Tribunal) to the copyright owner, in the event that the work is not used by the copyright owner for the purpose commissioned. Clause 3(c)(ii) will potentially require the copyright owner to make payment of royalties over and above the agreed tariff in the event that the work is used for a purpose other than that for which it was commissioned. The practical difficulties that are likely to arise in enacting, interpreting and enforcing these subsections in a context that is relevant to the specific work in question and the way in which a work has been used (for a purpose for which it was commissioned or otherwise) are likely to be complex and considerable. It will unfortunately lead to litigation, and also allow for exploitation by authors of works contemplated under section 21(1)(c). Accordingly, this provision cannot be supported by the Copyright Law Committee.

8.10 The inclusion of clause 21(3)(d) appears to introduce an adjudication procedure and a dispute resolution procedure (in terms of clause 29A) that will assist the Tribunal in considering a licence or tariff contemplated by clause 21(3)(c)(i). This provision is to be welcomed.

8.11 Clause (3)(e) introduces a provision relating to work of a “personal nature”, but this term is not defined and is hence uncertain. Accordingly, this uncertain provision will lead to different interpretations and thus further disputes, and hence it cannot be supported by the Copyright Law Committee. It should therefore not be included in the Bill.

9. **Clause 25: Collecting societies**

9.1 It is noted that the proposal put forward in Clause 22B (6) of the 2017 Bill that the Commission (CIPC) shall only register one collecting society for each right or related right granted under copyright was deleted from the text of the so-called B-Bill that is presently being commented on.

9.2 It is uncertain why this provision was excluded from the B-Bill as the accreditation of different and unrelated collecting societies in respect of the same rights, whether performance rights, mechanical rights or needletime rights would not only lead to increased license fees and confusion for music users (as they may need to obtain additional licenses for music usages and pay additional fees as a result), but it would cause even further confusion amongst artists, composers, performers and songwriters as to which entities are responsible for collecting and distributing royalties on their behalf. What would be highly recommended is for one collection society to be accredited to collect all royalties on behalf of members so that rights holders have a ‘one stop shop’ where they can obtain reports on royalties collected and receive consolidated royalty distributions. Also, this would assist users, as they could negotiate license fees with a single entity (which could lead to a reduction of costs as only one blanket license fee could be negotiated per right licensed).

- 9.3 Alternatively, it should at the very least be only possible for the Commission to accredit one Collecting Society per copyright, including any neighbouring right that pertains to such copyright. By means of example, there should ideally be only one combined society collecting and distributing royalties generated from the public performance of sound recordings (Needletime royalties) for copyright owners of the sound recordings (e.g. record labels) and performers. Also, one combined society should administer copyright owners' and performers' rights to earn from the public performance of music videos (VPL income).
- 9.4 With regard to Clause 22B(7), it is highly irregular for Collecting Societies who have already been established and have been in transparent operation for many years and have been members of international organizations such as CISAC, SCAPR and IFRRO (such as SAMRO, CAPASSO, SAMPRA and DALRO, for instance) to re-apply for accreditation as envisaged in this clause. None of the collecting societies have objected to calls for improved regulation or transparency, but a re-application for accreditation risks the introduction of uncertainty amongst members locally, and also internationally amongst Collecting Societies and other organizations which collaborate and negotiate with our Collecting Societies insofar as royalty collections and distributions on a global scale is concerned.
- 9.5 The Commission already reserves the right in Clause 22E to call upon a Collecting Society to submit reports and records in order to satisfy the Commission, where the need arises, that the affairs of that Collecting Society are in order and that their functions are performed with sufficient transparency, accuracy and efficiency. The Commission further reserves the right to suspend the operations or cancel the accreditation of a Collecting Society in terms of Clause 22F and to institute an enquiry into the affairs of a collecting society, if and where the need may arise.

9.6 In the light of the above, the proposed clause 22B (7) is superfluous, would place an unnecessary administrative burden on our Collecting Societies that have been operating transparently and efficiently for many years and, since the introduction of a re-accreditation process could compromise the trust in the longevity of our Collecting Societies and harm their bargaining power as a result, we would recommend the deletion of this clause from the Bill.

10. **Clause 25: Section 22C (3)(c): Reciprocity applying to pay-outs of royalties by Collecting Societies to foreign countries**

10.1 This clause should be struck from the B-Bill since it is likely to contravene South Africa's obligation of 'national treatment' in terms of the Berne Convention and TRIPS.

10.2 It is recognized that the Copyright Review Commission (CRC) report of 2011 raised the consideration that our Collecting Societies should not be distributing Needletime royalties to countries such as the USA in instances where those countries do not reciprocate and distribute Needletime for SA music played on their radio stations.

10.3 While this was an important consideration in 2011, time has moved on and internet streaming of music will be recognized as a public performance once the Amendment Bill has been passed. In the USA, although Needletime royalties may not yet be collected for radio play of music, US Collecting Societies do collect and distribute royalties for public performances arising from internet streaming activities.

- 10.4 Laws in the US appear to be developing towards the adopting of provisions that will also allow their Collection Agencies to collect royalties for radio play and, once that occurs, money will also flow towards SA artists and rights holders for copyright protected works that are played on radio in SA.
- 10.5 In order to ensure that our copyright owners and performing artists do not miss out on receiving reciprocal royalties arising from radio play and internet streaming activities from the US, which is a massive music market, it is highly recommended that this proposed clause be struck from the Bill.
- 10.6 If there is a concern about the way that the USA treats re-uses of music of South African copyright owners, a better solution would be to consider steps that the Minister can take under section 37(2) of the Copyright Act.

11. **Clause 25: Section 22D(2)(b) and 22D(3): How Collecting Societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer**

- 11.1 Clause 22D(2)(b) appears to be in order.
- 11.2 Clause 22D(3) requires some improvements to cater for situations where the Collecting Society is unable to trace the party who is entitled to payment of the royalties. In instances such as this, the monies are kept in so-called 'undocumented' or 'undoc' accounts pending the determination of the identity of the rights holder/performer or their representatives. If, after a certain period of time, the Collecting Society remains unable to trace the relevant party or parties, then the monies in Undoc are distributed to all members. Collecting Societies

cannot be expected to keep such monies for an indeterminable time and to continue with efforts to trace the rights holder for years on end.

11.3 It would be recommended that an obligation be placed on Collecting Societies to attempt to trace the identity and whereabouts of the rights holder(s) concerned, but only for a limited time period (such as three years). Notices regarding the works should ideally be published online and distributed via newsletters to all members.

11.4 Where the identity of the rights holder is determined within the three year period, the royalties shall be paid over at the same rate as was applicable to other members when the distribution was made.

11.5 Where the identity of the rights holder cannot be determined within the three year period, the monies will be distributed to all members in proportion to that current distribution.

11.6 This is, of course, a very important aspect of the operation of Collecting Societies and the procedure should be reflected in the rules of Collecting Societies as well. It would be rather critical for the Portfolio Committee to engage further with the Collecting Societies on this point, in order to ensure that a proper understanding is established of how they currently process payments of unclaimed monies in their undoc accounts and what challenges they have when attempting to trace rights holders for unallocated payments.

12. **Clause 27: Penalties**

12.1 We welcome the increased penalties for infringement. However, it is noted that the quantum of the fine payable by a natural person has not been specified. This is, however, perhaps

something that could be prescribed by regulations to be issued by the Minister from time to time.

12.2 In addition, the wording of the clause is such that a corporate entity must be fined a minimum of five percent of its annual turnover for each article to which the offence relates. Although the Copyright Law Committee welcomes the imposition of stringent sanctions, if the intention is to fine a corporate entity a minimum of five percent of its annual turnover per infringing article, then cumulatively any fine in respect of copyright infringement involving multiple infringing copies, no matter the severity of the infringement, could easily put an entity out of business. By way of example, a corporate entity that sells twenty counterfeit DVD's must be fined its entire annual turnover, which would no doubt permanently cripple such an entity. The effect of such a penalty would therefore be disproportionate to the crime committed.

12.3 There does not appear to be any reason to provide for a penalty that is linked to an entity's turnover and this could just as easily be replaced with a set fine per infringing article. Alternatively, if the quantum of the fine is to be a percentage of annual turnover, we submit that the fines imposed in respect of each infringing article should cumulatively not exceed 5% of the entity's annual turnover (in respect of a first conviction) or 10% in respect of repeat convictions.

12.4 Furthermore, if the intention is for this penalty on entities other than natural persons to be calculated similarly to the penalty prescribed in the proposed section 9A(4), section 27(6) should similarly be restricted as in section 9A(4)(c) to a percentage of the "*income of that person during the year immediately preceding the calculation, under all transactions to which the Act applies*". Additionally, it is not clear why the relevant period is the year preceding the calculation and not the year preceding the infringing act.

13. **Clauses 29 and 30: Copyright Tribunal**

13.1 There are a few concerns arising from the proposed amendments to provide for an Intellectual Property Tribunal as contained in Clauses 30 to 33 of the B-Bill. The comments which follow address certain aspects of the proposal.

13.2 The greatest immediate concern is the removal of the provision that formally establishes the Tribunal. In the circumstances, the Tribunal very arguably cannot be properly constituted or recognised.

13.3 It is notable that the provisions stipulating and regulating the constitution of the Tribunal in hearing matters, as well as the provisions relating to rules, forms and procedures have been removed and the obligation for such rules and procedures to be established has simply been shifted to the Minister. In the circumstances, a Tribunal which is intended to be vested with vast powers, including the ability to make declarator orders and grant infringement interdicts, is sought to be established without any framework or reference as to how it will function or what the status of its decisions will be.

13.4 It appears as though the constitution of the Tribunal, its jurisdiction, the manner in which the proceedings will be conducted and the rules that will regulate them have not enjoyed sufficient attention and, instead, the provisions governing these aspects as they appeared in previous versions of the bill have simply been removed so as to avoid having to incur more time on this issue. As a result, this section of the bill and, in fact, the entire existence of the Tribunal, has been cast in uncertainty.

13.5 It is submitted that, given the critical role which the Tribunal is intended to fulfil and the extent of the powers with which it is intended to be vested, its constitution, jurisdiction, rules, forms and procedures should be afforded the attention and scrutiny necessary to ensure a balanced, just and certain result.

Establishment

13.6 The provision formally establishing the Tribunal has been removed and with it the determination of the Tribunal's jurisdiction as well as its constitution. Such provisions should be included in order to establish and recognise the Tribunal in terms of the Principal Act, and as required by the Constitution.

Functions

13.7 The functions of the Tribunal, whilst limited to copyright, have been broadened to include settling any dispute relating to copyright, which is a very broad description and in contrast to the function such Copyright Tribunals are generally intended to perform, which is typically fairly focussed. It is to be noted that, for example:

13.7.1 in the United Kingdom, the Copyright Tribunal only deals with royalties and licence schemes in respect of copyright works, performers rights and databases;¹

¹ Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* 4th Ed. (Lexis Nexis) at 27.5 – 27.8.

13.7.2 in Australia, the Copyright Tribunal only deals with statutory and voluntary licences;²

13.7.3 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.³

Proceedings and the hearing

13.8 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.

13.9 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. 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).⁴

13.10 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.⁵ The procedure in Australia is (shown by reference to decisions of its Tribunal to be) adversarial.

² www.copyrighttribunal.gov.au/about

³ www.cb-cda-gc.ca s.v. “our mandate”

⁴ Section 29G(c)

⁵ Laddie, Prescott & Vitoria, *The Modern Law of Copyright and Designs* 4th Ed. (Lexis Nexis) at 27.17.

Rules of procedure

- 13.11 A source of delay and inefficiency in the matter between SAMPRA and the NAB⁶ was the lack of regulations and procedure,⁷ resulting in interlocutory hearings and disputes.
- 13.12 It is therefore of concern that no rules, forms or procedures have been provided for nor formulated for comment alongside considerations of the Tribunal's powers. Fifteen members will be appointed.⁸ However, it is not clear whether a matter will be heard and decided by one member or by a panel of members, or either.
- 13.13 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

- 13.14 The right of appeal against a decision of the Tribunal has been removed entirely and its status is cast in doubt. This should be clarified.
- 13.15 In view of the fact that the Tribunal is intended to be vested with powers far exceeding royalty agreements and licensing schemes, and in particular the extension of those powers to include

⁶ South African Music Performance Rights Association v National Associations of Broadcasters and Another Reference No. 0002(R) in the Copyright Tribunal

⁷ 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.

⁸ Section 29

declarators and orders relating to infringements and, therefore, defences to infringements, it is submitted that a right of appeal should be provided, at least in those instances.

Orders of the Tribunal

13.16 If the intention is to vest in the Tribunal the power to hear and pronounce on matters of copyright infringement, uncertainty is created in in Section 29I in the absence of provision for the other remedies provided for the in the Act, being delivery-up and damages (or, in lieu of damages, a royalty payment). Section 29I does not expressly grant the Tribunal the power to grant such relief.

13.17 This again illustrates the uncertainty created by the lack of proper provisions, and lack of clarity in those provisions that have been included, relating to the Tribunal's functions, jurisdictions and powers.

14. **Clause 37: Transitional Provision**

14.1 Clause 37 of the B-Bill states the following: -

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

- 14.2 The IP Laws Amendment Act, 2013, which has not been put in effect since it was signed into law five years ago, does not only introduce new defined terms to the Copyright Act, but also introduces new sections, which, in turn, affect the numbering of the new Sections for the Act to be introduced by the Bill. In that respect, the transitional provision is incomplete.
- 14.3 Both the IP Laws Amendment Act, 2013, and the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, No 6 of 2016, have the aim of protecting traditional works, the latter Bill currently undergoing the last phases of the Parliamentary process. We understand that there has been, for some time, a discussion underway between the DTI and the Department of Science and Technology as to which Department should take responsibility for the protection of traditional works and whether the IP Laws Amendment Act should be amended or even repealed once the Bill becomes law. It would be a far better solution to have this discussion concluded and a decision taken immediately so that either the numbering and definitions of the IP Laws Amendment Act remain, or that they are removed and the B-Bill adapted accordingly, with the result that a transitional provision covering this point will be unnecessary in either event.
- 14.4 There is a question as to how the transitional provisions will be implemented. Are all of the provisions to become effective at the date of implementation of the legislation? At such time will all of the provisions be put in place or will they be implemented over time to allow for industry to prepare for the legislative changes taking place?
- 14.4 It may be worthwhile to allow for a grace period or delay in the implementation so as to allow for industry to fully prepare for the implementation of legislation and the obligations that come therewith. This includes the registration of copyright in the various works as well as any new royalty agreements which will need to be implemented as a result of the new legislation.

14.5 As can be seen with the National Credit Act⁹, in order to allow for a more streamlined integration, a period was given in which the force of the legislation was delayed in order to give all those who were affected by the legislation chance to prepare and to understand the impact of the legislation. It may be necessary to give individuals a similar grace period to allow for a more successful integration of the new provisions. As such, there will be more of an opportunity to allow for the relevant industries to prepare themselves for the necessary changes which will be put into effect such as the resale royalty rights¹⁰ and the clauses pertaining to royalty agreements.

14.6 As copyright protection will require alterations to the various legislation currently in place, this grace period will allow for the affected parties to become accustomed to the changes which are being implemented by the legislation.

14.7 This includes the re-licensing of copyright under the current Act or the possible effect it may have on the administrative laws and/or the Protection of Indigenous Works Act¹¹. There may need to be additional measures which should be taken into account which will affect other types of intellectual property as well such as Trade marks and Designs¹² making use of indigenous works as these pieces of legislation may be directly affected due to the licensing and payment of royalties.

⁹ National Credit Act 34 of 2005

¹⁰ Addressed in earlier comments (clause 7D, etc.)

¹¹ The Act is as yet to be implemented but the bill is currently being evaluated.

¹² Both the Trademarks Act 194 of 1993 and the Designs Act 195 of 1993

15. Conclusion

The Copyright Law Committee appreciates that much work has gone into the B-Bill and its various previous iterations and remains of the view, as expressed in earlier submissions, that many of the objectives of the amendments are admirable. However, as is clear from these submissions, and our introductory paragraphs in particular, the present draft unfortunately represents an attempt to repeat what was a disastrous first attempt (the 2015 Bill). It needs a great deal more consideration. To the extent that the Copyright Law Committee or any of its members can be of assistance with the re-drafting of the B-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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