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# COMMENTARY ON THE COPYRIGHT AMENDMENT BILL 2017

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Submitted by  
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## **The Anton Mostert Chair of Intellectual Property Law**

The Anton Mostert Chair of Intellectual Property Law (the “Chair”) is an independently financed entity that forms part of the Department of Mercantile Law of the Law Faculty of Stellenbosch University. Further details of the Chair, its objectives and its activities can be obtained from its website.<sup>1</sup> Its focus is on intellectual property law and achieving excellence in that regard. Accordingly, it can speak with authority on matters pertaining to this field of expertise, and, in particular, in regard to copyright law.

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

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

### **Introduction**

Another draft of the Copyright Amendment Bill, version B13-2017 (the “2017 Bill”), was published by the Department of Trade and Industry (“DTI”) on 16 May 2017, pursuant to a notice published approximately a year ago in the Government Gazette (Notice 799 of 2017 (GG 40121, 5 July 2016)). This draft follows the previous draft Copyright Amendment Bill published in the Government Gazette in 2015 (GG 39028, 27 July 2015) (the “2015 Bill”). The Portfolio Committee on Trade and Industry (the

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<sup>1</sup> Which can be accessed at [www.sun.ac.za/iplaw](http://www.sun.ac.za/iplaw).

“Portfolio Committee”) has invited interested individuals and stakeholders to submit written comments on the 2017 Bill by 19 June 2017, and these comments are submitted in response to such invitation.

As with the 2015 Bill, the sudden appearance of the 2017 Bill raises real concerns about whether there has been proper consultation and engagement with the relevant stakeholders. Given the controversial nature of the 2017 Bill (and how badly the 2015 Bill was drafted), and its complexity, it is, once again, necessary to question the time period allotted for comment; it smacks of another attempt to pass ill-considered, and ineptly drafted, legislation, without affording interested parties adequate opportunity to formulate and voice their concerns about the consequences and implications of the proposed legislation. It is even arguable that this type of *modus operandi* could leave legislation of this nature open to constitutional challenge, given the fact that there is flagrant disregard for the substance and spirit of the constitutionally-enshrined principles, with a mere veneer of procedural formality being applied.

Despite the length of these comments, these comments do not represent a comprehensive set of issues concerning the 2017 Bill. However, the issues highlighted below should amply illustrate to the DTI, and the Portfolio Committee, how ill-conceived the current draft legislation is.<sup>2</sup> In fact, it should be clear to any person who has a basic understanding of copyright law that the proposed legislation is a shoddy, and worrying, piece of work. To pass the legislation in its current form would amount to a dereliction of duty, and would fail to send a clear message to those responsible for the drafting the 2017 Bill that they are expected to do their work competently, let alone strive to meet the highest standards. There is ample evidence to suggest that the drafting of the 2017 Bill was done by persons who, quite frankly, do not understand the basics of copyright law. It also displays a lack of familiarity with the existing legislation!

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<sup>2</sup> We have, for example, decided not to concern ourselves with the various editorial matters, such as, grammatical, or punctuation, issues in these comments.

The Memorandum on the Objects of the Copyright Amendment Bill (the “Memorandum”) accompanying the 2017 Bill is, once again, singularly unhelpful. Perhaps the 2017 Bill could have been read more sympathetically if the Memorandum was more comprehensive, or, at least, informative. At a minimum, the Memorandum should have clearly indicated, first, the particular issue to be addressed by a proposed amendment, and, second, how the relevant provision addressed those concerns. Having said that, as already mentioned, the poor quality of the drafting in the 2017 Bill indicates a rather more fundamental problem: a lack of understanding of copyright law on the part of the drafter(s).

The first step to remedy this problem in the next draft of the bill is to draft a meaningful memorandum explaining the rationale for the various amendments, and the intended purpose of those amendments. Then there has to be the technical implementation of those matters in draft legislation, namely, the ability to properly transpose those matters into the various statutory provisions. Clarity of expression follows clarity of thought.

Please note, given the short period in which we have had to submit these written comments, we have not considered the issues in the proposed amendments to the Performers’ Protection Act, 11 of 1967. It is highly unlikely that the proposed amendments to the Performers’ Protection Act do not also require substantial redrafting.

Furthermore, the Chair has published and submitted extensive commentary on the 2015 Bill to the DTI. The 2015 comments<sup>3</sup> should be read with the comments below. While some of the Chair’s comments have been addressed by the 2017 Bill, many of the concerns raised in relation to the 2015 Bill remain and will only be repeated or summarised again in relation to the 2017 Bill if necessary.

References to proposed section numbers of the 2017 Bill are to the proposed section numbers they will have in the Copyright Act 98 of 1978 (the “Act”).

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<sup>3</sup> Available at: <http://blogs.sun.ac.za/iplaw/files/2015/08/CIP-Formal-Comments-Copyright-Amendment-Bill-2015-Online1.pdf>

## **Intellectual Property Laws Amendment Act**

It is indeed regrettable that the DTI still seems intent on bringing the Intellectual Property Laws Amendment Act 28 of 2013 (“IPLAA”) into effect, despite wide-spread criticism of IPLAA, and warnings about the damage it would cause to the integrity of our existing intellectual property laws. While the Memorandum to the 2017 Bill alleges that the 2017 Bill “seeks to ensure consistency and coherence in aligning the approach of various Government Departments to IP matters”, the fact is that, on the issue of the protection of indigenous, or traditional, knowledge (“indigenous knowledge”), there still seems to be a difference of opinion concerning the best way forward. The Department of Science and Technology (“DST”) still appears to have a preference for protecting indigenous knowledge by way of special (*sui generis*) protection for indigenous knowledge. In other words, the DST does not seek to protect indigenous knowledge in terms of any of the recognised types of intellectual property, such as, patents, copyright, designs or trademarks, which is the DTI’s proposal. There is a sound reason for the DST’s aforementioned approach: indigenous knowledge simply does not conform to such types of intellectual property, and should be dealt with in legislation specially dealing with that subject matter.

### **Copyright 101: Authorship and ownership**

The basics of copyright law are not very difficult to comprehend. Key to copyright law are two concepts: authorship and ownership. Although it is possible for the author of a copyright work to also own the copyright, and, in fact, that is the default situation, unless one of the exceptions apply (or the copyright has been assigned), it is not necessarily the case that the author is also the copyright owner. Authorship and ownership are distinct concepts in copyright law and it is important to appreciate the distinction. Failing to appreciate this basic distinction can lead to rather embarrassing consequences, and displays a lack of knowledge of copyright law.

The term “author” in copyright law is a term of art. In other words, it has a technical meaning as the Act defines who the author of a particular type of eligible work is. The author has, rightly, been described as the “corner-stone” of copyright law, because ownership of copyright either vests in the author or is derived from the



author. Importantly, it is a fundamental fact in copyright law that whoever is, as matter of law, the author of a copyright law, *remains* the author of that copyright work. It is an immutable situation. While the ownership of copyright may change multiple times over the term of copyright protection, the author does not change. One would, thus, expect a person charged with the drafting of copyright legislation to have a firm grasp of such a basic notion. Drawing the this distinction should not be difficult. It is when this basic distinction is not recognised, that we get the type of garbled drafting evidenced in the 2017 Bill.

A glaring example of the type of non-sensical provision one gets when there is no appreciation for the basic concepts of authorship and ownership occurs in respect of the proposed introduction of a resale royalty right (“royalty right”). The royalty right is stated as being triggered following the first transfer by the “user” of an artistic work.<sup>4</sup> The use of “user” exhibits a lack of understanding of what it is that this right is meant to achieve. There is, unfortunately, ample evidence that this was not due to an error. The proposed section 9B(3) goes on to state that any of the “user, performer, owner, producer or author” will be entitled to receive the royalty. This is, of course, nonsense in the context of copyright law, particularly the type of artistic work which this type of provision is meant to deal with. The 2017 Bill is replete with this type of shotgun approach, as the Bill uses the phraseology of “user, performer, owner, producer or author”, or other incorrect descriptions of the relevant person, in several places,<sup>5</sup> which suggests that the drafter does not understand the relevant relationships in the context of copyright law and thinks it appropriate to adopt this “catch-all” approach. This is not only worrying and unacceptable, but fundamentally problematic.

This level of ignorance when it comes to drafting of legislation is unacceptable. If the drafter does not have an appreciation for the basic concepts of the subject matter of the law, how was that person assigned this task?

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<sup>4</sup> Proposed section 9B(1).

<sup>5</sup> See further the proposed sections 9A(1)(aA), 9B(4)(a), 9C(1), 9D(1), 13B(2)(b), 19B(2), 19C(9), 19C(11), 19D(1), 19D(3), 22A(6)(b), 22A(7), 22A(9), 22B(1), 22B(7), 22C(1), 22C(3), 22D, 22F, 23(1)(c), paragraphs 3 and 4 of Part A of Schedule 2 and paragraphs 3 and 4 of Part B of Schedule 2.

## **Commentary on the 2017 Bill**

### **Section 1: Definitions**

Some of the other definitions will be dealt with in the course of the comments made in relation to the relevant sections in which they are used.

#### **“audiovisual fixation”**

As mentioned in relation to the 2015 Bill, the introduction of this category of work is superfluous and should be excised from the 2017 Bill. There appears to be no logical reason for its inclusion in the Act.

#### **“copyright management information”**

The only difference between this definition and the version in the 2015 Bill is the addition of the words “including meta-data”. Those familiar with the relevant technology may very well read over this nonsense addition, but legislation is not intended to be read only by those familiar with its subject matter. One may thus ask; why would the definition contain a self-defining term that also causes confusion? In the digital environment, copyright management information may take a wide variety of forms, all of which are used in some technical or technological manner to accompany a work and supply information about the work. This information is, therefore, by its nature *ancillary* to the information or content of the work itself. Hence the term “meta” as a collective term for all information that is not part of the body of the work. Therefore, when used in the context of copyright law, meta-data refers to all information or other expressions that are not part of, or intended to be part of, the copyright work. This creates the impression that all meta-data is, per se, copyright management information. This cannot be true, particularly considering the narrow scope of information intended by this definition. In short, while all copyright management information is meta-data, not all meta-data is copyright management information. The addition of this term is, therefore, both superfluous and inappropriate. It displays a fumbling attempt to update the law, without a proper understanding of the basic, underlying technology it seeks to regulate.

## **“technological protection measure”**

The addition of provisions for the enforcement of copyright in relation to digital works was welcomed in the 2015 Bill and is similarly appreciated in relation to the 2017 Bill. The addition of a qualification in subparagraph (b) is a step in the right direction toward balancing the interests of the copyright owner and the public. However, the rephrased subparagraph (a) now refers to measures that prevent or restrict “infringement of work”. This type of language, although frequently employed by laypersons, is wholly inappropriate in copyright legislation. It is not the work that is infringed, it is copyright in the work that is infringed. It bears repeating that the inconsistency between the wording of this provision and the definition of a “technological protection measure circumvention device”, first raised in relation to the 2015 Bill, remains. The addition of subsection (b) may alleviate some of the concerns in this regard, but it nevertheless remains a strained exercise in legislative interpretation.

## **Section 2A: Scope of copyright protection**

### *Protected expressions*

It is appreciated that, in pursuit of plain language drafting and more accessible legislation, the drafters of the 2017 Bill saw fit to define the scope of copyright. However, considering that the scope of copyright law has been the subject matter of law since 1710, and has never changed in nature, one would hope that the 2017 Bill would at least get this right.

The 2017 Bill states that copyright protection “extends to expressions”. This glaring error in phraseology is worrying, and symptomatic of the DTI’s consistent, and faulty, belief that it can squeeze any sort of expression into the confines of copyright law. Copyright protection does not *extend* to expressions, it *subsists* in expressions, and expressions only. Copyright does not exist prior to the creation of a qualifying expression, and, once it is established, its scope is confined to the scope of the expression measured in light of its originality. Prior to the expression, there is no

copyright. It is, therefore, nonsense to state that copyright “extends” to an expression.

Furthermore, the 2017 Bill then seeks to eliminate certain “expressions” from the scope of copyright.

The first list, namely “ideas, procedures, methods of operation of mathematical concepts” is, although technically true, unnecessary if the nature of copyright law, described above, is properly understood. However, considering the error above, perhaps it is indeed necessary to clarify.

The second exception, namely “interface specifications” for computer programs, is equally unnecessary and also incorrect. It is assumed that the drafters wish to address the uncertainty created by the equally ill-conceived and technologically stunted judgment of the court in the *Pastel* case<sup>6</sup>, which suggested that the visual appearance and/or layout of the interface may be protected as part of a computer program. However, the 2017 Bill elects to refer to “specifications” – a term of practice that, in the context of computer programs, bears a specific meaning that has nothing to do with visual appearance, function, design or other non-literal elements. Specifications for a computer program are, in simple terms, *needs or requirements* for operation. Thus, when coupled with “interface” the term “specifications” refers to the demands of the computer program or other software and/or hardware in order to produce the visual appearance of a part of the program, namely the interface. This is, clearly, a hollow provision that is far removed from the intention of the drafters.

### *Tables and compilations*

While the proposed section 2A(2) somewhat resembles the equivalent provisions under EU and UK law, there are some fundamental issues which are not dealt with. First, the Memorandum provides no guidance as to the intention or purpose behind the proposed section, which leads to possible uncertainty. For example, the proposed section does not expressly limit its application to “databases” (which should be specifically defined), as the equivalent provisions elsewhere have done.

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<sup>6</sup> *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd and Another* 1991 JOC (13) 398.

Second, the proposed section does not expressly indicate whether the originality requirement in relation to “tables and compilations” is being amended by the section. The section merely states that, in order for “tables and compilations” to receive copyright protection, they must “constitute the author’s own intellectual creation”. The expression “the author’s own intellectual creation” — which is a term of art in European copyright law — is understood to require a higher standard of originality than our sweat-of-the-brow standard. However, the expression has no accepted meaning in our law, and the Memorandum does not address the issue of how this expression should be interpreted. It should be noted that while European law explicitly determined that the aforementioned standard should be applied to databases, computer programs and photographs, the European Court of Justice has, through its judgments, determined that this standard now applies to all authorial works. Is that the intention for our law? Would it not have been easier if the section simply stated that a database will only be protected by copyright if the actual selection or arrangement of its content was original?

Third, importantly, the higher standard of copyright protection for databases was accompanied by a *sui generis* right of database protection introduced in the European Union. Is there an intention to provide such *sui generis* protection for databases, or is there simply the intention to require a higher threshold for their protection under copyright law?

The proposed section 2A(3) is, arguably, unnecessary and, if anything, simply creates uncertainty. First, if the drafter’s concern is that factual information should not be protected, that is already the case. The concern is that the section is overly broad, and potentially contradictory between its two subsections. For example, an anthology of poetry would, arguably, qualify as a “compilation” (as there is no further definition for such term). It would be inconceivable to suggest that the contents of such a compilation, namely, the individual poems are not protected by copyright. Second, if the contents of a compilation are not protected by copyright, what are the other “rights” referred to in section 2A(3)(b)?

### *Exclusions from copyright*

While the statutory recognition of the US “merger doctrine” in the proposed section 2A(4)(a)(i) is unproblematic, the rather limited recognition of the *scènes à faire* doctrine is unfortunate. While the express inclusion of both these exclusions from copyright protection are, strictly speaking, probably unnecessary, the inclusion is a good idea, subject to a better formulation of the *scènes à faire* excluded subject matter.

The proposed section 2A(4)(b)(ii) is largely a repetition of the existing section 12(8), with one very interesting difference. Section 12(8) of the Act provides that the *author* of the relevant speeches will have the exclusive right in relation to the making of a collection of such speeches. In contrast, the proposed section gives such a right to the “maker” of the speeches, presumably, the relevant politician. Thus, while the attitude of the DTI appears to be that copyright owners, such as, publishers should have their rights curtailed, it is perfectly acceptable for politicians to have the ownership of the copyright works created by others! Of course, nothing prevents a politician from writing his or her own speeches.

### **Section 5: Works by the state**

There needs to be further clarification of when a work can be said to have been “funded” by the state. Does the funding have to be direct? For example, we already have the Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 (the “Publicly Financed IP Act”). Currently, the Publicly Financed IP Act excludes conventional academic works which would enjoy copyright protection, such as, a thesis, dissertation, article, handbook or similar publication. While these types of copyright work will currently, almost inevitably, be owned by an institution, such as a university, because the author is an employee of such institution or because of contractual rights, there is the possibility that the new proposed section 5(2)(a) seeks to change the position. Due to the uncertainty of what “funded” potentially means, it may be arguable that the copyright in such works now belong to the state. If it is the latter situation, this is undesirable, and could result in the exploitation of such works being mired in unnecessary, and costly,

bureaucratic structures, given the fact that the 2017 Bill provides that state-owned copyright cannot be assigned (see proposed section 22). Unless there is a particular issue that requires attention, it is submitted that the reference to works “funded by” the state should be removed.

Again, the phrases “international organisation” and “local organisation” would, at the very least, need to be further defined. In fact, the reasons for the proposed amendments are unclear. While the existing provision was clearly aimed at clarifying the position in relation to recognised international organisations, such as the International Red Cross, the proposed amendments are likely to simply create uncertainty. As copyright ownership is generally dealt with in section 21, it is not clear why the issue of copyright ownership of, for example, local organisations, would not simply be dealt with in accordance with those provisions.

The issue of the ownership of copyright in works made by, or under the control of the state or international organisations has already been provided for in section 21(2) of the Act! Why is there duplication by the introduction of a proposed section 5(2)(b)?

## **Section 6: Nature of copyright in literary and musical works**

### *Communication of the work to the public*

The establishment of this new exclusive act was welcomed in the 2015 Bill, and its presence in the 2017 Bill is equally welcome. Unfortunately, the 2017 version now states that the unauthorised communication of the work to the public may not be done by wire or wireless means “including by means of internet access”. This latter part is a new addition and, frankly, nonsense. The DTI has been urged, on numerous occasions and in great detail, about the importance of technologically neutral drafting. Why then, when it copies from standard model law, should it wish to improvise further when, clearly, it has no technological expertise. The widely accepted, standard wording “wire or wireless means” is clearly as neutral and future-proof as possible and, obviously, includes the internet, regardless of the configuration applied to gain access thereto. Furthermore, the internet is only a small part of the world wide web. When a work is distributed by means of the internet

specifically, it will *always* occur by means of either wire and/or wireless communication – why then single out internet access? Furthermore, there is no such thing as *the internet* – it is not capable of being circumscribed. By including this superfluous term in the 2017 Bill, the drafters are counteracting its efforts to update the Act in relation to the digital environment and creating a ridiculous loophole.

### *The proviso*

The proviso which is proposed to be added to section 6 of the Act is a source of real concern. First, as indicated above, the proviso adopts the shotgun approach by, inexplicably, not simply dealing with a possible transfer of copyright by the owner or author (who the writer assumes is the real intended beneficiary of this provision), but mentions persons like the user, performer, and producer. What is the purpose of this section? If it is intended to suggest that an author may never fully divest himself from the copyright through an assignment thereof, which appears to be the intention, there needs to be a proper assessment of this type of restriction. What is the rationale for preventing a complete assignment? Furthermore, would this type of restriction also apply to copyright works created, for example, in the context of employment, or even works created for the state, given the fact that there now appears to be a prohibition on the assignment of works owned by the state? Of course, in the latter instances, it is arguable that there is in fact no “transfer” (more correctly “assignment”) of the copyright involved.

Second, the suggestion that the author will have a right to claim an “equal portion” of the royalty also appears to be a potentially vacuous statement? First, it envisages that an author currently has to share his royalty with somebody else. This, of course, is not necessarily the case as. In fact, it is probably fairly exceptional for an author to “share” his royalties. For example, publishers would tend to take assignment of the copyright and may remunerate the author by way of royalties based on the sales of the particular copyright work. Accordingly, it is, technically, *only* the author who gets royalties.

Third, given the fact that the relevant provisions relating to the transfer of copyright are set out in section 22 of the Act, it would have been better to have the relevant



limitations on transfers in that section. At present, it appears that this badly drafted, and questionable, proviso is being added to some of the sections dealing with the *exclusive rights* of the copyright owner.

### **Section 7: Nature of copyright in artistic works**

The comments above, in relation to section 6, regarding the right to restrict the communication of a work to the public by wire or wireless means, apply equally to section 7.

Once again, the proviso which is proposed to be added to section 7 of the Act is a source of real concern. Please refer to the comments above in relation to the proposed proviso to section 6 of the Act.

### **Section 8: Nature of copyright in cinematograph films**

The comments above, in relation to section 6, regarding the right to restrict the communication of a work to the public by wire or wireless means, apply equally to section 8.

Once again, the proviso which is proposed to be added to section 8 of the Act is a source of real concern. Please refer to the comments above in relation to the proposed proviso to section 6 of the Act.

As indicated above, there is no need for an additional category of work under the name “audiovisual fixations”. The existing definition of “cinematograph film” is sufficiently technologically neutral and encompassing.

### **Section 9: Nature of copyright in sound recordings**

The comments above, in relation to section 6, regarding the right to restrict the communication of a work to the public by wire or wireless means, apply equally to section 9 and section 9A.

While the proposed provisos to sections 6, 7 and 8 are a source of concern, it is interesting to note that there is no proposal to add the proviso to section 9, which deals with sound recordings. What is the rationale for drawing a distinction between cinematograph films and sound recordings? In other jurisdictions, both types of works would be considered to be so-called “entrepreneurial works”.

### **Section 9A: Royalties**

Before considering the detailed provisions, there is an important point of principle concerning the proposed section that should be noted. There is clearly a lack of appreciation for the practical application, and realities concerning how sound recordings are exploited by copyright owners. The proposed provisions envisage that a sound recording can only be broadcast if the broadcaster has sought *prior* permission for such broadcast. This is not only unduly cumbersome and bureaucratic, it also fails to recognise the realities faced by a broadcaster, such as a radio station. For example, it would mean that a radio station can no longer have a phone-in request show, where the listeners randomly select music they want to hear because the broadcaster has not obtained the prior consent of the copyright owner to broadcast the particular sound recording? The reality is that broadcasters would, almost invariably, broadcast sound recordings of copyright owners whose works are managed by a collecting society. These collecting societies would have established tariffs (or royalties) which they would charge for the broadcast of material which they manage. It is against this background, which represents the overwhelming majority of broadcasted material, that the regulation of the broadcast of sound recordings should be considered.

Given the aforementioned background, as stated in relation to the proposals in the 2015 Bill, section 9A(1) of the Act currently creates a liability rule (as opposed to a property rule) in relation to the broadcasting of sound recordings. In other words, the copyright right owner of a sound recording, who, almost invariably, has appointed a collecting society to manage its rights, does not seek to prevent the broadcast of its sound recording, but simply wishes to ensure that it is paid a royalty if its sound recording has been broadcast. This situation is obviously socially beneficial, and, also, eminently practical.

The proposed amendments effectively seek to establish (or re-establish) a property rule in respect of the broadcasting of sound recordings by requiring a broadcaster, such as a radio station, to obtain the copyright owner's prior consent to broadcast a sound recording. There is no reason for such change. What harm is being sought to be prevented? What purpose is there in seeking to make such matters potentially contentious, by requiring that there be prior agreement on the content to be broadcast, and, therefore, the need for the possible resolution of a dispute by the Tribunal? Copyright owners of sound recordings would, ideally, want broadcasters to broadcast their works as it results in increased revenues. In turn, broadcasters would generally only want to broadcast sound recordings which are managed by collecting societies, for which there are applicable fees, rather than having to seek the required consent from individual copyright owners. Should a broadcaster broadcast a sound recording which is not managed by a collecting society, it will face the risk of a claim of copyright infringement and will have to pay the necessary licence fees, or damages.

Section 9A(1)(aA) contains, probably, the most extreme example of the shotgun approach referred to above as it requires a broadcaster to obtain the required permission for the use of a sound recording from any one (or, presumably, more) of "the copyright user, performer, owner, producer, author, collecting society or indigenous community, community trust or National Trust". If this is not an example of the utter ridiculousness of the proposals, then nothing else will serve to convince anyone of the bad drafting. Incidentally, if a broadcaster is itself not a "copyright user", it is hard to think of another person who would qualify as such! In fact, later provisions, such as sections 9A(1)(b) and (c) clearly use the term "user" as referring to a broadcaster. Again, the litany of characters who may possibly receive the royalty payments in terms of section 9A(2)(a) is equally problematic. This right should be confined to the copyright owner. Moreover, the section requires that the listed persons (other than for the performer) must share the relevant portion of the royalty equally! On what basis should a collecting society or producer have the right to share equally with the relevant copyright owner? Does such a provision not erode the rights of copyright owners, and, indirectly, harm artists, rather than serve to benefit artists? While section 9A(2)(b) provides that a performer is entitled to a "fair and equitable" portion of the royalty paid to the copyright owner, the Tribunal, which has

to determine the performer's share of the royalty (in the absence of agreement between the parties), does not appear to be bound by this "fair and equitable" standard when making its determination. It may, in any event, be redundant to require that the parties come to an agreement concerning the split of the royalty, and require that such division be "fair and equitable".

In conclusion, the proposed amendments to section 9A are problematic, and inefficient.

### **Section 9B: Resale royalty right**

It is never a good start when the heading of a proposed section is incorrect! It is titled "Resale of royalty right". What makes the substantive issues highlighted below even more troubling is the fact there is legislation in other countries dealing with this particular concept. One would have thought that the drafter could have easily found useful examples of provisions which deal with the important shortcomings which exist in the proposed provisions. We should have expected that the draft provisions would take the best elements of these other legislative provisions to provide us with a workable, certain and clear, set of provisions.

First, in other jurisdictions, the resale royalty right ("royalty right") is limited to "original" artistic works, that is, the first physical embodiment of the artwork. This is how it should be. There is no such limitation on the right in the 2017 Bill (see s 9B(1)).

Second, the royalty right is triggered following the first transfer by the "user" of that work. As mentioned above, with some very limited exceptions, the key concepts in copyright law are the author and the copyright owner. The reference to "user" exhibits a fundamental lack of understanding of what it is that the royalty right is meant to achieve. This is further underscored by the proposed section 9B(3), which inexplicable states that any of the "user, performer, owner, producer or author" will be entitled to receive the royalty! This is, of course, nonsense in the context of copyright law, particularly given the type of artistic work with which the royalty right is concerned. Just for good measure, as if the aforementioned shotgun approach is not

enough bad enough, the proposed section 9F, which deals with the transmission of the royalty right, inexplicably states that it is transmissible by the of “holder”. The absolute low point in this exhibition of a lack of understanding occurs in the proposed section 9F(2). Section 9F(2) contemplates a transfer of “authorship”! As indicated previously, the concept of “author” is distinct from “owner”, and there is no mechanism for changing, or transferring, authorship.

Third, the proposed section 9F is a great example of the drafter’s failure to serve the interests which it is supposedly seeking to protect. The manner in which the section is currently drafted means that the royalty right is only transmissible where there has been a testamentary disposition. It fails to address the situation where an artist has died intestate, or where his or her purported will is void due to some form of invalidity. It does not require much consideration to appreciate the fact that a struggling artist could die without a will, and, therefore, that his heirs would be deprived of any benefits under the proposed royalty right. What is required is that the right should generally be transmissible to beneficiaries through the law of succession, and should not be limited to testamentary dispositions.

Fourth, in regards to concepts such as “author”, the 2017 Bill again exhibits a lack of understanding of the *existing* statutory provisions and concepts. Our law, and indeed the Act, has a recognised concept of “joint authorship”. Instead, the 2017 Bill, in the proposed section 9C(2) potentially gives a royalty-right claim to an artist “linked with” the particular artistic work. Is this some new form of relationship, as yet unrecognised by copyright law, or is this meant to be a reference to joint authorship?

Fifth, the royalty right in other jurisdictions is generally limited to sales via the so-called professional art market (for example, galleries and auction houses) and in respect of sales above a stipulated minimum threshold amount. While the 2017 Bill contemplates the Minister establishing the *rates* at which the royalty will be payable, there appears to be no basis for establishing a minimum threshold and for confining the right to sales via the professional art market. To compound the practical efficacy of this section, the proposed section 9B(3)(c) appears to give the section extraterritorial effect. How this provision will be given effect to, particularly if it conflicts with a similar right in a foreign jurisdiction, has not been clarified.

Sixth, the new proposed section 9D could be simplified by providing that the royalty right shall exist for the same term as the copyright term. Of course, the issue of the right pertaining to an anonymous, or pseudonymous, work needs to be clarified. At present, the 2017 Bill seeks to “revive” the royalty right in the case of an unknown author where, in fact, such author’s work may no longer protected by copyright (see the proposed section 9D(3), as read with the proposed section 9D(2)(a) and section 3(3) of the Act).

Last, the proviso to the proposed section 9F(3) makes no sense. The drafter needs to think about what is intended to be regulated by the provision, and then to clearly express those thoughts.

## **Section 12: General exceptions from copyright protection**

The introductory wording to section 12(1)(a), namely, “[i]n addition to the uses specifically authorised”, means nothing. If a particular use is authorised by the copyright owner, it will, *ipso facto*, not constitute copyright infringement! More importantly, sections 12(1)(a) and (b) are potentially confusing as they fail to distinguish “fair dealing” from “fair use”. To date in South Africa, as is the case in the UK, we have adopted a system of *fair-dealing* exceptions, rather than *fair use*. In a system of fair-dealing exceptions, they are specified forms of exceptions, namely, acts for particular exempted purposes. A further qualification on such exceptions is that the particular use must be regarded as being fair. In contrast, the US has adopted a “fair use” approach. This tends to be a potentially open-ended system of exceptions as a particular act has to be measured against a set of factors in order to determine whether it will constitute copyright infringement. Again, as with the 2015 Bill, it is not clear whether the proposed legislation would amount to a system of fair dealing or fair use. For the avoidance of doubt, it is perfectly possible to have a system of fair use, together with a list of exceptions which are stated to constitute, *prima facie*, fair use. In a sense, such an approach would be a hybrid approach. However, it is important to be clear as to the point of departure of our system of exceptions to copyright infringement. The comments below, given our current system, will refer to the particular exceptions as “fair-dealing exceptions”.

Besides providing for a greatly expanded list of fair-dealing exceptions, which will be commented on below, the 2017 Bill seeks to repeal sections 16 (1) (cinematograph films), 17 (sound recordings), 18 (broadcasts) and 19A (computer programs) in their entirety. The structure of the Act currently is that section 12 of the Act sets out the broadest list of fair-dealing exceptions, which are applicable to literary works and musical works, and in respect of the other types of copyright work, cross-references are made in the relevant sections, such as, section 17, to section 12 to identify the particular fair-dealing exceptions applicable to those types of works. Repealing these other sections has the consequence that certain fair-dealing exceptions, which ought not to be allowed in respect of a particular type of copyright work (if copyright protection is to provide the necessary incentives for which it is designed), will now be applicable to such works. For example, as presently proposed, given the fact that there is fair-dealing exception for “personal use”, it would now be lawful for any person to make copies of sound recordings (such as CDs) or cinematograph films, if it is for personal use. In other words, the proposed changes creates a “private piracy” charter. This is, of course, deeply ironic given the fact that the DTI, and state organs such as the SABC, seem to be obsessed with improving the lot of artists such as musicians.

***Section 12(1)(a)(i): Research, private study or personal use***

In light of the extent to which the 2017 Bill seeks to introduce restrictions on the circumvention of technological measures applied to enforce copyright, and the necessary limitations in pursuit of fair dealing in digital works, this provision is unnecessarily wide and, simultaneously, confusing. The provision seeks to permit research, private study or personal use of a “lawfully possessed” (one must assume this means an authorised copy) of a work “at a different time or with a different device”.

The intention is to permit certain forms of time shifting and format shifting so as to overcome the digital rights management tools applied to restrict, for example, the use of an eBook on a device manufactured by a party other than the supplier of the eBook. This is wholly unnecessary, considering that the 2017 Bill already provides

for the removal or alteration of any measure that would prevent such format shifting in section 28P.

***Section 12(1)(a)(iv): Scholarship, teaching and education***

The proposed fair-dealing exception is unacceptably broad. First, the issue of “scholarship” is, arguably, already covered under the terms “research” or “private study”, provided for in subsection 12(1)(a)(i). Second, provided that the “teaching” fair-dealing exception is limited in nature, similar to that provided for in the Copyright Regulations 1978,<sup>7</sup> there should be no problem. Given the fact that section 13 has not been amended (or repealed), and that there is no proposal to repeal the aforementioned regulations, it would be preferable if the “teaching” fair-dealing exception is explicitly linked to the current regulations. Third, given the aforementioned fair-dealing exceptions, there appears to be no sound basis for the “education” fair-dealing exception, which is probably intended to be unacceptably broad, given the tenure of the 2015 Bill.

As with many issues concerning intellectual property law (and indeed indigenous knowledge), those persons who are critical of intellectual property law and seek to undermine property rights are adept at making rather sensational claims, but they find it difficult to substantiate their criticisms with good evidence. As stated previously, there is no evidence to suggest that copyright law is a material impediment to education. If government would like to provide cheaper textbooks without having to negotiate with copyright owners, it is quite at liberty to commission, and print, its own material. Again, if there is a desperate need for translations of copyright works into other languages, why is government not entering into arrangements with the relevant copyright owners in getting the required works translated. A commercial copyright owner, who has the prospect of selling thousands of books to government, should be a quite amenable contractual counterparty. The publishing industry is hardly monopolistic. Publishers, like any other commercial

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<sup>7</sup> GN R2530 in GG 6252 of 22 December 1978 (as amended by GN R1211 in GG 9775 of June 1985 and GN R1375 in GG 9807 of 28 June 1985).



firms, are vying to get government contracts, and would be eager to offer attractive rates.

Instead, government seeks to expropriate property rights in order to reduce the costs of its constitutionally-mandated obligations to provide education. It is clear that the failure in the education sector is due to non-delivery of services by government, rather than a problematic copyright-law system.

***Section 12(1)(a)(vii): Expanded exceptions for underserved populations***

Copyright exceptions, such as fair dealing exceptions, relate to specific acts, which in the absence of the particular exceptions, would possibly constitute copyright infringement. In what sense is “expanding access for underserved populations” a specific exception? The proposed provision is, arguably, in contravention of international obligations under Berne Convention for the Protection of Literary and Artistic Works (Article 9 (2)) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 13). Both these treaties, of which South Africa is a member, require that exceptions be confined to special cases. A sweeping exception of the nature proposed, arguably, does not constitute a special case.

There is no indication of what would be regarded as an “underserved population” and how this provision will be used to address the particular concern. Who must have “underserved” a particular population, and in what way must a population have been “underserved”? Is this a licence for government to have commercial publishers pay the price for its own in competencies and failures? Moreover, who is entitled to rely on this particular exception? For example, could a commercial publisher rely on this exception to produce cut-price copies of another publisher’s works, and thereby serve the “underserved populations”? Or, does this give the government licence to simply reproduce the works of a publisher, given the fact the provision is sufficiently vague? As previously noted, there should be no shortage of commercial publishers eager to offer government preferential rates in exchange for large purchases of their copyright works. There really is no need for property rights to be violated in this manner.

## **Section 12A: General exceptions from copyright protection**

Please see our comments in relation to the issue of “fair dealing” and “fair use” in relation to the proposed amendment to section 12 of the Act. There needs to be consistency in terminology in relation to the specified exemption in the proposed section 12A. For example, section 12A(1)(a) states that the specified use must be compatible with “fair use”, whereas section 12A(1)(b) states that it must be compatible with “fair practice”, and section 12A(1)(e)(ii) states that the extent of the use must be “justified by the purpose”. It would help to ensure that the appropriate fairness standard is incorporated in all of the specified exemptions. In addition, it would have been preferable to have all the specific exceptions listed under one section, rather than being spread over two sections.

### ***Section 12A(1)(b): Illustration***

The change in emphasis in this proposed section, compared to the current exception in section 12(4), creates an unnecessarily wide exception. The main purpose of the exception is the use of copyright work *by way of illustration* for teaching purposes. What is now proposed is a much wider “teaching” exception.

### ***Section 12A(1)(c): Reproductions by broadcasters***

It is not clear what types of copyright work this exception is meant to pertain to. The current section 12(5) of the Act, which appears to be the corresponding section to the proposed section, applies specifically in respect of literary or musical works.

### ***Section 12A(1)(e)(iii): Political speech, lecture, address or sermon***

There appears to be a potential contradiction between this section and the proposed section 2A(4)(ii). Subject to the specified exception, the latter section provides that no copyright shall subsist in speeches delivered during legal proceedings or those of a political nature.

### ***Section 12A(1)(f): Translation and Translation Licences***

This proposed section cannot be considered in isolation from the new proposed Part A of Schedule 2 (*Translation Licences*) (“Part A”). Having said that, there does not appear to be any direct link between section 12A(1)(f) and Part A. In fact, the title to Part A suggests that it is pursuant to section 22(3)! While the section 12A(1)(f) exception allows translations for purpose of education, that is not provided for in paragraph 4(1) in Part A, but it does mention “teaching”. It is clear that from the drafter’s perspective “teaching” in this context has a much wider meaning than using material in the course of a lesson for illustration purposes, and is to be regarded as analogous to “education”. It would be highly unusual for teachers to want to translate entire literary works, such as, textbooks, simply to teach a class.

Apart from the aforementioned disconnect, there are other serious concerns. First, It is not clear what types of copyright work the exception in section 12A(1)(f) is meant to pertain to, presumably, literary works and cinematograph films (see Part A). Second, as in the 2015 Bill, there are proposals to create wide exceptions concerning translations of literary works. It is not clear why the existing provision in section 12(11) — which, essentially, provides that any use pursuant to a fair-dealing exception will also extend to a translation thereof — is not sufficient. The proposed section casts the exception in considerably wider terms than that which is allowed for in section 12(11).

There is no reason for the, essentially, unqualified right to permit translations for purposes such as education, teaching, or professional advice (which is entirely new). The fact that the translated work can be freely communicated to the public, which would include distribution in digital form, means that the purported restrictions in paragraphs 4(1) and 4(2) in Part A are of no consequence. The copyright owner’s market for the relevant translation will be destroyed, and it is unlikely that another translation will appear, thus, resulting in a termination of the translation licence (see paragraph 6 of the proposed Part A).

However, for interest sake, it would be good to understand what is meant by “organisational groupings that are nationals in the Republic” (see 4(2) in Part A).

Also, it would be interesting to see which foreign government will be bothered to be burdened with having to approve the importation of translations of works for South Africans living in its territory (see paragraphs 4(2)(e) of the proposed Part A). The time periods within which someone may seek to translate a copyright work in terms of paragraphs 2(3) and 3(1)(f) of the proposed Part A are arbitrary, and, quite frankly, absurd.

Arguably, the most socially-important uses mentioned listed in the proposed section are education or teaching. Even in respect of these types of use, there does not appear to good reasons for a broad right to permit the making of translations. It is hard to understand why, if there is a sufficient demand for a translation of a particular work, the copyright owner would not be keen to satisfy that demand. If the concern is that there may not be a sufficient demand due to an insufficiently large potential market (presumably an indigenous language with a relatively small population), there is nothing to prevent someone (even a government department) approaching the copyright owner and offer to fund (or partly fund) the translation. Again, any copyright owner — subject to being satisfied the translation will be of a satisfactory standard — should be quite amendable to a potentially increased market, particularly if it does not have to bear the full costs of developing that market.

The answer is not to deprive the copyright owner of its right to authorise translations of its copyright work. As already noted, what makes the broad nature of the exception even more of a concern is that copies of translation may be distributed to the public, which could destroy the copyright owner's market for such a translation. Ridiculously, the way a copyright owner can avoid having its work translated without its consent is to withdraw all copies from circulation (see paragraphs 3(3) of the proposed Part A)!

In essence, the only thing that an applicant for a translation licence has to establish is that the copyright owner has refused it a licence (see paragraphs 3(1)(b) of the proposed Part A). There is no requirement that the applicant show that the refusal was unreasonable. Incidentally, the process of making a translation is not a mechanical process. Great care needs to be taken that appropriate words are chosen to ensure that nuances are not lost, or that certain idiomatic expressions,

which do not directly exist in the other language, are appropriately translated. More importantly, the logic concerning the basis for compensating the owner of a copyright owner whose work has been translated is perplexing, and calls into question the very need for a broad translation-licence mechanism (see paragraphs 4(3) of the proposed Part A).

The copyright owner (again, the references to users, performers, producers or the author are inappropriate) is entitled to compensation which is consistent with the royalties that would be paid in the case of freely negotiated licences. If that is the basis of compensation, why would a rational copyright owner refuse to grant the appropriate translation licence? The only other rational basis for refusing a licence would be because of a concern that the relevant translation is not of an acceptable quality.

If the translation-licence provision is motivated by pedagogical considerations, it sounds like an eminently reasonable consideration. Rather absurdly, the one basis on which one would have thought a compulsory licence for a translation would be appropriate is expressly excluded, namely, when the copyright owner cannot be located (see paragraph 3(1)(e) of the proposed Part A)! So much, for trying to deal effectively with orphan works.

Moreover, the existing sections 30 and 31 of the Act make provision for the granting of compulsory licenses by the Tribunal, which are, arguably, capable of broader application than merely translation licences. It would be more appropriate to retain the more open-ended compulsory licence system which currently exists. The fact that these sections are being repealed indicate that, while the DTI is prepared to play to the galleries about the perceived negative impacts of copyright law, in reality, its proposals adversely affect copyright owners and the public interest.

As already alluded to, again, from a technical drafting perspective, in paragraphs 3 and 4 of the proposed Part A there are further examples of a failure to identify the relevant party. The only relevant party whose authorisation should be sought is that of the copyright owner, not the author, user, performer or producer.

The garbled provisions of paragraph 6 of the proposed Part A, which appear to deal with licences to dub cinematograph films into other languages, are so incoherent and unclear, that no good purpose would be served in trying to decipher what is intended.

Would we be as supportive of a corresponding translation right in Europe, giving European educational authorities the right to translate the works of African authors? It would, almost certainly, result in cries of exploitation and “cultural appropriation”.

***Section 12A(1)(h): Judicial proceedings***

In addition to judicial proceedings, provision should be made for the use of copyright works in quasi-judicial proceedings, such as, arbitrations and tribunals.

***Section 12A(1)(j): Individual copying***

This provision makes no sense. As elsewhere in s12A, it refers to “such work” without any indication which, or what, work is referred to. Since sections 12A(1)(a) and (b) do not contain this wording, one may interpret it to mean only quoted works or works reproduced for teaching or illustration. This interpretation is clearly incorrect.

If the term “such work” in s12A(1)(j) is simply intended to mean “a work”, the provision remains nonsense. It seeks to permit the making of a copy of one’s own work (an act that copyright law has never, and will never, prevent), the making of a copy of a work that one has already copied (which is neither here nor there and repeated in section 12A(2), which creates a triple repetition) or the making of a copy for personal non-commercial use (which is already addressed in section 12(1)(a)(i)).

This section should be deleted, or its intended purpose made clear.

It bears repeating that the Act, and indeed copyright law everywhere, refers to a copy as a reproduction and the act of copying as the act of making a reproduction. There is good reason for this – copying and reproducing is not necessarily the same

and, in copyright infringement disputes, a distinction with a very important difference. Why this should change is unclear.

### **Section 12A(2): Personal use**

It has been pointed out above that this section is inconsistent with section 12(1)(a)(i).

In addition, the plethora of fumbling technological terms used in subsection (c) must be revised. Firstly, electronic storage does not occur in an “area”, it is carried out in relation to a work in an electronic storage *medium* or, at least, *facility*. Secondly, electronic storage may be accessed in any number of ways, many of which do not fall within the scope of “internet or similar means”. If this provision is to have any enduring meaning, the means through which, or by which, the electronic medium is accessed should not be described by the Bill at all.

### **Section 12B: Parallel importation**

While the introduction of the doctrine of international exhaustion by way of a new proposed section 12B is to be welcomed, the proposed provision may possibly not achieve its objective. Parallel imports have been successfully prevented using copyright law as a consequence of the particular interpretation section 23(2), in particular, the expression “would have constituted such an infringement if the article had been made in the Republic”. It may, therefore, be more correct to amend section 23(2) and the definition of “infringing copy” (which contains the same expression), and to draft section 23(2) with direct reference to the concept of an “infringing copy”.

### **Section 13A: Temporary reproduction and adaptation**

The real and present danger posed by section 13A was extensively addressed by us in relation to the same provision in the 2015 Bill. Although the wording of the 2017 Bill is somewhat different, it does not address any of the concerns already raised and these concerns will not be repeated here. The drafters have clearly decided to ignore the fact that this provision creates the strongest possible defence to wholesale

copyright infringement (piracy), which has been proven to be successful, and has decided to burden the court with healing the defects on a case-by-case basis.

In addition, the version in the 2017 Bill continues the DTI's attempts to appear technologically expert. It permits the adaptation of a work to enable it to work on a "different technological device, such as mobile devices". The fact that there is no definition for a technological device, and that anything that is physically capable of being moved is potentially a mobile device, seems to have escaped the notice of the drafters. The fact that on this day, in 2017, there is, according to advertising media, some arbitrary difference between so-called mobile devices and devices not intended to be carried about on one's person, is irrelevant for those who must apply the law tomorrow or the day thereafter. This is the opposite of technologically neutral drafting and entirely unnecessary.

### **Section 13B: Educational and academic activities, and Reproduction Licences**

The need for this section, given the fair-dealing exception provided for in the new proposed section 12, is questionable, at best, but serves to illustrate the DTI's agenda of scapegoating intellectual property law in relation to the government's service delivery in education. The proposed section clearly demonstrates that the government intends to go far beyond accepted fair-dealing, or fair-use, standards to deflect from its failures. Briefly put, it gives educational institutions a free hand to copy the copyright works.

When section 13B(1) is read with section 13B(6), it clearly allows for the copying of entire textbooks, on the basis that, inter alia, that the particular textbook was not "priced reasonably" in relation to the price "normally charged" in the country "for comparable works." Who will be the arbiter of whether the copyright owner is licensing its works "on reasonable terms and conditions" (see section 13B(2)(b)). It does not require much examination to appreciate that the criteria laid down for overriding a copyright owner's rights are extremely problematic. It probably never occurred to the drafter of the provision that, if there really was a comparable work which was available at a reasonable price, there should be no need to have to rely



on a statutory provision to override a copyright owner's rights. It does appear that we have descended into an Orwellian era.

The other ironic consequence of provisions such as those contemplated in the proposed section is that it devalues what it seeks to promote. In other words, while these measures purport to make education more accessible and improve the intellectual abilities of our citizens, they send a clear message that intellectual creations will not be rewarded and protected in this country, to the extent that they are protected elsewhere. What is the incentive to develop one's intellectual abilities and seeking to disseminate what one has created under the proposed dispensation?

Again, the level of irony extends to greater depths in relation to contributions to academic "collections". The reference to "collections" is, in itself, ambiguous as academic contributions are normally published in journals. The proposal is that contributions to collections should be freely available within one year of their publication in such collections. Furthermore, there is a blanket right given to third parties (not confined to librarians) to ensure that research outputs are made publicly available after the one-year period (see section 13B(4)(e)). While there may be much to be said in favour of making publicly-funded outputs more widely available, in reality, publishing quality journals requires a financial investment to deal with the editorial processes and publishing.

Most universities (or faculties) have chosen not to publish their journals in-house due to the fact that they either do not have the resources to do so, given their already-constrained budgets, or because it is not efficient for them to do so. They have chosen instead to rely on partnerships with commercial publishers, who have built up the necessary structures and efficiencies, to produce quality publications. However, there is no such thing as a free lunch. If copyright law does not allow these publishers a sufficient opportunity to earn a return on their investments, we run the real risk of producing academic publications of an interior quality.

If government is serious about ensuring that the outputs from public funds should be made more widely available, it must make the necessary funding available to universities in order that they can build the necessary capacity for publications. It

should not expect that commercial publishers should be prepared to carry the costs of that exercise. While it is easy to broadcast the rhetoric, attention to the detail and the realities of financing these gestures would indicate that a more sober and cautious approach is what is called for. Do not be surprised if academics simply decide to publish in foreign journals, where they can, because local academic journals have collapsed. That, of course, will be the cause for another common refrain: foreign publishers are ripping off poor Africans.

Again, from a technical drafting perspective, in section 13B(2)(b) there is another example of a failure to identify the relevant party. In fact, the most important relevant party, namely, the copyright owner, is not mentioned at all! The necessary authorisation should only involve the copyright owner or authorised collecting society. What is a “public licence” for purposes of section 13B(4)(a)?

It is unclear whether the schedule in Part B of Schedule 2 (*Reproduction Licences*) (“Part B”) relates to the provisions of the proposed section 13B. There does not appear to be any direct link between section 13B and Part B. It is the reference in paragraph 4(1)(a) to “systematic instructional activities” which suggests that there may be a link with section 13B. The provisions of section 13B do not indicate that the particular institution needs to apply for a reproduction licence, but simply grants the institution such a licence if there has been no authorisation from the copyright owner.

As can be expected, given the aforementioned comments, there are similar concerns relating to these reproduction licences, as there are with the translation licences, and you are referred to our comments above on translation licences. Again, the time periods within which someone may seek a reproduction licence are arbitrary, and, quite frankly, absurd (see paragraphs 2, 3(3), 3(4) and 3(5) of the proposed Part B of Schedule 2). In fact, the provisions of paragraphs 3(3), 3(4) and 3(5) are not even properly aligned with the earlier paragraphs of Part B. Rather farcically, as with the translation licences, the one basis on which one would have thought a compulsory licence for reproduction would be appropriate is expressly excluded, namely, when the copyright owner cannot be located (see paragraph 3(2) of the proposed Part B of Schedule 2)! If that smacks of ridiculousness, the provisions of paragraph 3(7) are even more mystifying. It appears (as the language is a bit garbled at the end) that

the reproduction licence can only be granted in respect of work in respect of which there is an authorised translation. If that is the case, why all the fuss about providing for compulsory translation licences?

Again, as with the translation-licence mechanism, the rationale in these provisions seems to flounder when the compensation provided for is considered (see paragraphs 4(2) of the proposed Part B). The copyright owner (again, the references to user, performer, producer or the author are inappropriate) is entitled to compensation which is consistent with the royalties that would be paid in the case of freely negotiated licences. If that is the basis of compensation, why would a rational copyright owner refuse to grant the appropriate reproduction licence? Also, the fact that the reproductions can be distributed in digital form means that the market of the copyright owner for the relevant work may be destroyed, and it is unlikely that another reproduction will appear, thus, terminating the reproduction licence (see paragraph 5 of the proposed Part A).

The garbled provisions of paragraphs 5 of the proposed Part B, which appear to deal with “audio-visual” (which is not a recognised category of work) licences, do not even warrant the time for further consideration!

Again, from a technical drafting perspective, in paragraphs 3 and 4 of the proposed Part B there are more examples of a failure to identify the relevant party. The only relevant party whose authorisation should be sought is that of the copyright owner, not the author, user, performer or producer.

At the risk of being repetitive, if government considers copyright owners to be an obstacle to education, it is quite at liberty to commission writers to produce the required educational material and donate such works to the public domain.

### **Sections 16(1), 17, 18 and 19A: Fair dealing in copyright works**

We refer to the comments above in relation to the proposed amendments to section 12 of the Act. It is necessary to consider the appropriateness of the various fair-dealing exceptions in relation to each type of copyright work.

## **Section 19B: General exceptions regarding computer programs**

This section replaces the current section 19B entirely. It repeals all current forms of fair dealing in computer programs for no reason. Yet again the DTI's manifest lack of technological knowledge is striking. While it may not be obvious to some how a computer program may be used for criticism, review, quotations, judicial proceedings, illustration, demonstration or broadcasting, it is indeed highly relevant to the balancing of copyright and public interest. Furthermore, the very long list of new fair-dealing exceptions proposed by the 2017 Bill are not available in relation to computer programs. Why should most other types of work be made available for teaching purposes, educational use or providing disabled access but not computer programs? While the 2015 Bill had too much of the one, the 2017 Bill has far too little of the other.

Furthermore, the new section 19B establishes a list of sui generis exceptions for computer programs aimed at reverse engineering and decompilation. At least here the drafters have heeded our call, to some extent.

However, instead of relying on the proper, supplied, wording for such provisions, the 2017 Bill persists in its attempts to sound tech-savvy, and ruin the effect.

First, it refers to reproduction of the code "and translation of its form". This makes no sense. A computer program in source code form is protected as a "set of instructions" according to the definition of this type of work. Any version of the code that is created thereafter, up to and including the object code and/or machine code, is protected as a translation of the source code. It is, therefore, the *code* that is translated and not the "form".

Second, it limits the decompilation exception to those "parts of the original program which are necessary in order to achieve interoperability". It must be noted that the process of decompilation is complex and computer-aided. Prior to the process being carried out, it is seldom possible (and usually impossible) to identify the parts that are needed. The entire program must, and will usually be, decompiled in order to find all the relevant parts.

Third, it is necessary to note that a computer program does not, and cannot be made to, “run”. A computer program, when instructed or caused to perform its function, is *executed*. The fact that the word “running” is used in other legislation does not give sufficient cause to repeat it in South Africa.

Last, this section is devoted to aiding those who seek to enable or ensure “interoperability” of their program with another program. Unfortunately, the Bill then seeks to define this concept without knowing what it is. It limits interoperability to the “exchange of information” and the use of that information. This is wholly inappropriate and counterproductive. While the inter-operation of two computer programs involves the exchange of information, it does not necessarily do so in a reciprocal manner. Computer programs are, by nature and definition, intended to perform a function. Therefore, interoperability means the ability to *perform its function* in concert with another program or number of programs.

### **Section 19C: General exceptions for libraries, archives, museums and galleries**

Once again, given the fact that section 13 has not been amended (or repealed), and there is no proposal to repeal the previous regulations concerning archiving made pursuant thereto, what is the point of the duplication? Why is the exchange of copies restricted to libraries in section 19C(13)? Also, while there is certainly an implication in the existing provisions that the archiving is being done by publicly-funded entities, the inclusion of “galleries” suggests that this this may now be done by for-profit entities. The proposed section needs to clarify whether a for-profit archiving facility is entitled to rely on the exemptions.

This section is riddled with technological terms as equally ill drafted, incorrect, pointless and/or dated as the rest of the Bill. What is the difference between “digital” media and “other intangible media”, and why refer to digital media here while using the term electronic media elsewhere in the Bill and “electronic file” in this section? How can copyright law possibly be tasked with determining what a “secure” computer network is? When does a website qualify as a “publicly accessible website” when, for example, it is only accessible to a part of the public? What is the “conversion of works” other than the adaptation of a work and, if there is a difference,

what is meant by it? In copyright law there is, and never has been, a difference between a copyright licence and a “public licence” or “open licence”, so why is it necessary to introduce these terms now if they have no meaning?

The Bill will be not worse off, and far better served, by removing these offending terms and phrases.

### **Section 19D: General exceptions for persons with disabilities**

The introduction of the proposed section is to be welcomed. However, from a technical drafting perspective, this is another example of a failure to identify the relevant party; the references to the “author” should be changed to “owner of the copyright”.

### **Section 20: Moral rights**

The proposed changes to section 20(2) introduce unnecessary ambiguity, and possibly problems. Infringements of moral rights are currently *deemed to be* infringements of copyright, and thereby the same remedies may, theoretically, be extended to an author in respect of breaches of his or her rights. However, infringements of moral rights are distinct from infringements of copyright, although there may be overlaps. The proposed amendments seemed to suggest that an author will have the right to institute claims in respect of copyright infringement generally. Unless the copyright owner cannot be located, there appears to be no good reason why an author, who is not the copyright owner, should be entitled to bring copyright infringement proceedings.

### **Section 21: Commissioned works**

Given the DTI’s seeming desire to make radical changes to the legislation, one would have expected a fairly comprehensive analysis of the ownership of commissioned copyright works, and for a proper consideration of the types of commissioned works justifying awarding copyright ownership to the commissioner. Instead, the proposed amendments only serves to introduce uncertainty, and

exhibits the lack of understanding of copyright law which pervades the 2017 Bill. Section 21(1)(c) (as with sections 21(1)(b) and (d)), provides for an exception to the default position stated in section 21(1)(a) (namely, that the author is also the copyright owner), unless the parties have excluded the operation of these exceptions by way of an agreement, as they are permitted to do pursuant to section 21(1)(e). In other words, section 21(1)(c) (as with sections 21(1)(b) and (d)) determines who the copyright owner is in the absence of an agreement concerning ownership. Accordingly, the phrases “the ownership of any copyright subsisting the work shall be governed by contract” and “[p]rovided that in the absence of a valid contract” are superfluous, as they are statements of the obvious! What follows the aforementioned phrases is also problematic.

In effect, while the commissioner is given ownership of the copyright in the listed types of copyright work, the author is given an unlimited licence to also exploit the work. Effectively, this amounts to also giving the author equivalent economic rights. This type of situation warranted a proper analysis of the types of copyright work to which this type of arrangement (commercially or otherwise) would make sense. For example, if a commissioner has paid an artist to paint a portrait of the commissioner, it may be undesirable for the default position to be that the artist can exploit that portrait to the full extent permitted by copyright law (which the proposed amendment would permit). For example, the artist could allow a copy thereof to be used for purposes of an advertising campaign in relation to a product with which the commissioner would not wish to be associated. Lastly, the expression “apart from the licence, the exercise will exclusively by such author”, strictly speaking, makes no sense. The only rights which an author (who is not the copyright owner) “exclusively” has under the Act are the moral rights referred to in section 20, while it is clearly intended that the author should enjoy all the associated economic rights under copyright.

## **Section 22: Assignment and licensing**

Why is there an absolute prohibition on the assignment of copyright owned by, or under the custody of, the state in the proposed section 22(1)? It appears to be unnecessarily restrictive. In particular, the prohibition in respect of works under the

“custody” of the state is something that may be problematic. When can copyright works be said to be in the “custody” of the state? For example, are orphan works (see the proposed section 22A) – for the period in which the copyright owner has not been located – under the custody of the state? It is certainly arguable that that is the case, particularly when someone has sought a licence to use the copyright work, and the Commission has granted the required licence. If that is case, then the copyright owner would not be able to assign its copyright in such work, should it later reappear.

What is intended by the phrase “as stipulated in Schedule 2” in the proposed section 22(3)? The proposed Schedule 2 does not appear to deal with assignments. Also, why limit assignments to 25 years? If the intention is that the final 25 years of copyright should revert to the author, as was the case with the reversionary interest provided for under the 1916 Act, this is not what the section says.

The proposed amendments to section 22(4) are problematic. It suggests that there is a distinction between a written and an oral (or verbal) copyright licence. In the case of an oral licence, the licence may be revoked at any time by the licensor, but this is not the case with a written licence. There is no legal basis for such distinction. A verbal copyright licence is as valid as a written copyright licence.

Why has the existing section 22(8) of the Act been replaced by a section which deals with a completely different issue? While there is no objection in principle to the proposed section 22(8), it should preferably be an additional subsection, namely, section 22(9). The existing section 22(8) should be retained.

### **Section 22A: Assignment and licensing of orphan works**

Except for cinematograph films, there is no system for the registration of copyright. What register is being referred to in the proposed section 22A(6)(a)? Again, there is another example of a failure to identify the relevant party in the proposed section 22A(6)(b); the references to the “authorship” should be changed to “ownership”. The relevant party able to authorise the use of a copyright work is the copyright owner, not the author. Similarly, in the proposed sections 22A(7) and (9), the references to



“author” should be changed to “owner”. Also, is the stipulated period of five years, after the expiration of a licence, to claim royalties by the owner not too short?

### **Sections 22B - 22F: Collecting societies**

Again, there are more examples of a failure to identify the relevant party: in section 22B(1)(a) the reference to “author” should be changed to “owner”; in section 22B(1)(b) the references to “or owners” and “or owners’ organisation” should be deleted as the concept of owner in relation to performers’ rights is inappropriate; in section 22B(7) the only relevant rights should be *ownership* under copyright and *performers’ rights*; in sections 22C(1)(a) and (b), 22C(3)(c), 22D and 22F, the only relevant parties should be copyright owners and performers (and not producers, authors or community trusts). There are also a number of references to “community trust” in sections 22C, 22D and 22E. To the extent that a community trust represents a group, should it not also comply with the stipulations for a collecting society, subject to the necessary changes required by the context? Although it may be implied, there does not appear to be an express provision that a community trust will be required to adhere to the requirements of a collecting society.

In the proposed section 22B(2), why is there only a specific cross-reference to “subsection (1)(b)” and not simply to “subsection (1)”? The implication under the proposed section 22B(7) is that a copyright owner, or performer, has to be represented by a collecting society, where one exists. In other words, a copyright owner, or performer, cannot choose to deal with their rights individually.

There appears to be no reason why copyright owners, or performers, should be forced to licence their works via collecting societies. In fact, there would be very good reasons for not doing so. For example, copyright owners, or performers, should be able to withdraw their works from collecting societies (or not join a collecting society at all) if it is felt that a collecting society does not offer a good service. In this regard, the proposed section 22C(1)(b) suggests that copyright owners and performers may withdraw from collecting societies, but states that that will be “without prejudice to the right of the collecting society”. What “right” is being referred to in this context?

## Section 23: Infringement

The proposed amendments to section 23 of the Act has significantly increased the number of acts which would constitute copyright infringement. The current structure of the Act distinguishes between so-called acts of “primary (or direct) infringement” (section 23(1)), and “secondary (or indirect) infringement” (section 23(2)). Ideally, one should distinguish between those acts which directly infringe the exclusive rights of copyright owners (that is, primary infringement) — which should rightly be regarded as infringements of copyright — and those which indirectly affect a copyright owner’s ability to exploit its property. In the case of the latter type of conduct, there may be those acts which are so closely associated with the exclusive rights of the copyright owner (for example, the making of pirate copies of the copyright work), that they could be said to amount to secondary infringement of copyright. The Act, in section 24, sets out the types of remedies in relation to acts of copyright infringement, namely, damages (or a reasonable royalty in lieu of damages), an interdict, or the delivery of infringing copies or plates used or intended to be used for making infringing copies.

As far as the proposed section 23(1)(c) is concerned, the only person entitled to copyright royalties is the copyright owner. For the rest, it is yet another example of a failure to identify the relevant party in the context of copyright law. In particular, it is important to note that breaches of performers’ rights do not amount to copyright infringement, and should be distinguished from copyright. While a provision which stipulates that failure to pay any royalties *provided for in the Act* will constitute copyright infringement may be acceptable (and which should deal with, for example, the resale royalty right and needletime royalties), other issues concerning the non-payment of royalties pursuant to negotiated contracts should be treated as breaches of contract. For the aforementioned reason, sections 23(1)(c) and (d) could be combined.

As far as the proposed section 23(1)(e) is concerned, it is noted that the drafters have attempted to heed the call to introduce a graduated anti-circumvention structure in the 2017 Bill. However, the concern expressed in our comments on the 2015 Bill regarding the criminalisation of circumvention of technological protection

measures remains. The 2017 Bill still criminalises such conduct as a *first resort*, instead of restricting such conduct as civil copyright infringement in the first instance. This, overly draconian, effect is cured by the knowledge requirement introduced by section 27(7)(a) and section 28S(b) and (c).

However, circumvention without authorisation, and not in pursuit of fair dealing, must first of all amount to primary copyright infringement *per se*, and, only secondly, as a criminal offence in terms of the Act. From the perspective of the rights holder, an act of circumvention is not adequately addressed by criminalisation, particularly not in light of the difficulties associated with prosecuting specialist crimes of this nature. The interests of the copyright owner are best served by civil remedies for damages, and the threat of civil litigation is a significantly more realistic deterrent.

Regarding the wording of this provision, it is preferable that the word “misuses” be replaced with *abuses*. It is a reality, which section 23(1)(e) seeks to address, that a digital work, or an infringing reproduction, may be manipulated in order to obscure the fact that an unauthorised, restricted act has been carried out. Similarly, copyright management information or technological protection measures are open to abuse in order to prove an ostensible case of unauthorised reproduction or to escape liability on the basis of a self-manufactured failure of the technology disguised as a technical mishap. These are all cases of abuse, and should be referred to as such. Misuse implies that copyright infringement will occur also when the technological measures are applied, removed or amended in order to illustrate the unreliability of the measure (on which the case for infringement is made and by which it is evidenced) or any of its defects that may have a bearing on the case. This type of use of the technological measure is a misuse, insofar as it is not the intended use of the measure, but it does not amount to an abuse and should not be prohibited. To do so would obstruct the course of justice.

If the repeal of section 23(2)(b) of the Act is motivated by the proposed section 12B (*Parallel importation*), it is misguided. To do so would be giving a free hand to trade in the products of copyright piracy. As already indicated, it would be more correct to amend section 23(2) and the definition of “infringing copy” to deal with the issue of parallel importation.

## **Section 27: Technological protection measures**

Section 27(7) proposes the criminalisation of certain acts carried out in relation to a work that is, or was, subject to a technological protection measure. The commentary above in relation to the definition of a technological protection measure, and section 23 of the 2017 Bill, should be read along with the comments on section 27(7).

The primary concerns with this provision, expressed in relation to the 2015 Bill, were that it did not permit the fair dealing with a work protected by such measures and did not counteract the impact of the Electronic Communications and Transactions Act in such cases. These concerns are addressed by the proposed sections 28P and 28O(6), and this is welcomed.

However, the new wording of section 27(7) contain several worrying additions.

First, the application of section 27(7) is limited to cases where a work is protected by technological measures “applied by the owner of the copyright”. This is a significant concern that creates the risk of rendering section 27(7) defunct in most cases. Considering the variety and complexity of technological protection measures, very few copyright owners are in a position to apply such a measure in person and usually require that it be applied by another person. In this, the majority of cases, the circumvention of that measure would not fall within the scope of 27(7). Considering that this section imposes criminal liability, a wide reading of the provision is out of the question.

Furthermore, the section refers to “the” owner, as opposed to “an” owner. While it is clear that the DTI does not understand the roles of copyright authors and owners, it remains a fact that the author is also the first owner of copyright in the work (subject to certain exceptions). The effect is, thus, that unless the author him or herself applied the technological protection measure, the measure may be freely circumvented. This makes a nonsense of the intention of this provision and leaves publishers, editors, distributors importers and all other licence holders without recourse to section 27(7), despite the fact that they are the parties who apply the measures in most cases and are charged with the safeguarding of the work. There is

no reason to restrict the scope of this provision in this manner, and the offending wording should be deleted.

Second, section 27(7)(b) prohibits the publication of information that may enable or assist the act of circumvention provided that it is done “with the intention of inciting another” to carry out such an act. The use of the word “inciting” is problematic because it limits the scope of this crime to specific intent of incitement. In other words, where such publication is not actually shown to have been made to incite another, the crime did not take place. This would be the case even where the information serves no other purpose but as a handbook to circumvention. It is submitted that the word “incite” be replaced with “assisting”. The intention to assist in circumvention is usually clear from the nature of the instructions, while the intention to incite implies something more than merely providing instructions.

The proposed subsections 27(7)(a)(ii) and (iii) should be combined and should not be a subsection of subsection (a), but should be subsection “(b)”, with consequential changes to the “numbering” of the proposed subsections (b) and (c).

### **Section 28O: Prohibited conduct in respect of technological protection measures**

This section contains a long list of standard prohibitions on conduct in relation to the technological protection measures, but it is not subject to, or does not contain, any sanction for the contravention of these prohibitions. Any act contemplated by section 28O would thus amount to a contravention for which no punishment can be imposed.

The comment above, in relation to the word “incite” applies also to section 28O(3).

The comment above, in relation to the word “owner”, applies also the word “author” in section 28O(4).

The phrase “person assigned copyright in such work” in section 28O(5) is inconsistent with copyright law and must be replaced with the word “copyright owner”.

### **Section 28P: Exceptions in respect of technological protection measures**

This section seeks to permit the circumvention of technological protection measures where the work is used for a permitted purpose such as fair dealing. As pointed out before, this balancing of interests is essential to copyright law and the introduction of section 28P in the 2017 Bill is a marked improvement on the 2015 Bill.

However, section 28P(3) requires certain records to be kept when circumvention is carried out on behalf of another person. These records amount to personal information as defined by the Protection of Personal Information Act (POPIA). It is, thus, desirable that the 2017 Bill make clear the extent to which this section is subject to, or not subject to, the provisions of POPIA.

### **Section 28R: Prohibited conduct in respect of copyright management information**

This section contains a list of standard prohibitions on conduct in relation to copyright management information but it is not subject to, or does not contain, any sanction for the contravention of these prohibitions. Any act, contemplated by section 28R would thus amount to a contravention for which no punishment can be imposed.

### **Section 28S: Exceptions in respect of copyright management information**

Section 28S(b) is inconsistent with section 23(1)(e) and must be deleted. Regardless of the inconsistency, it is also overly wide and would significantly reduce the enforceability of section 28R.

The attempt, in sections 28P and 28S, to establish defences suggests that the prohibitions in sections 28O and 28R are contemplated as criminal offences. However, as pointed out above this is not clear from the relevant provisions.

### **Section 39B: Unenforceable contractual term**

The proposed section 39B(2) is highly problematic. First, the second part of the subsection, that is, the portion starting with the words “settlement agreements”, is incoherent. Second, why is there seemingly special treatment for “public and open licences”? For a start, there is no definition for what would be regarded as a “public or open licence”. More importantly, irrespective of how those terms may possibly be defined, there is no reason in law why they should be treated any differently to other licences. The same legal principles should apply to all licences.

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