

RE: COPYRIGHT AMENDMENT BILL AND THE CONSTITUTION

OPINION

A. INTRODUCTION

1. Our consultant is ReCreate. ReCreate is a non-profit organization established to advocate for a balanced Copyright Act that protects modern creators' rights. ReCreate is a coalition of writers, filmmakers, photographers, educational content producers, software and video game developers, technology entrepreneurs, artists, poets, producers of accessible format materials and other South African creators.
2. We have been instructed in connection with the Copyright Amendment Bill B13B of 2017 (**'the Bill'**). The Bill amends the Copyright Act 98 of 1978 (**'the 1978 Act'**). On 29 March 2019, the National Council of Provinces (**'the NCOP'**) passed the Bill, completing its passage through Parliament. The Bill has been referred to the President for assent in terms of section 79 of the Constitution. ReCreate supports the Bill.
3. We have been requested to furnish our opinion on whether the President is under a constitutional obligation to assent to the Bill. We are asked to do so in light of certain objections raised by stakeholders who seek to persuade the President not to assent to it.
4. We have concluded that objections considered in this opinion do not provide any impediment to the President assenting to the Bill. Subject to any other valid objection

that may be raised, the President is in our view under a constitutional duty to assent to the Bill and to do so within a reasonable time. Indeed, in our view, the Bill respects, protects, promotes and fulfills important constitutional rights including, amongst others, the right to dignity, equality, freedom of expression and the right of access to education.

5. We deal with the following issues in turn.

5.1. First, we provide background information to the Bill.

5.2. Second, we set out the President's constitutional obligations in terms of section 79 including important constraints on the President's power.

5.3. Third, we explain how the Bill's fair use provisions advance constitutional rights including the rights to dignity, equality, freedom of expression and the right of access to education.

5.4. Fourth, we consider five constitutional 'objections' to the Bill.

5.4.1. We consider whether the Bill was correctly tagged as a section 75 Bill in light of a suggestion that it should have been tagged a section 76 Bill due to its impact on trade and custom. We conclude that the Bill was not incorrectly tagged.

5.4.2. We consider whether Parliament complied with its duties in respect of public participation in light of the complaint raised that Parliament should have called for further submissions after introducing certain

amendments to the fair use provisions. We conclude that the objection has no merit and that Parliament complied with its duties in respect of public participation.

5.4.3. We consider whether the fair use provisions violate section 25 or section 22 of the Constitution. We conclude that they do not.

5.4.4. We consider whether the provisions that import an inalienable statutory right to a fair share in royalties in respect of existing contracts or assignments violate the rule of law, contain impermissible delegations of legislative power or breach section 25 or section 10 of the Constitution. We conclude that they do not.

B. BACKGROUND INFORMATION

The Legislative Process

6. The Bill is a product of the Department of Trade and Industry (**DTI**). We are instructed that the Bill is informed by multiple sources including, amongst others, international treaties, international, regional and local reports and research findings and proposals generated at an international level.¹

¹ For example: the Berne Convention for the Protection of Literary and Artistic Works (**the Berne Convention**); The Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**); The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (**the Marrakesh Treaty**); The Proposed Treaty on Limitations and Exceptions for Libraries and Archives; The Proposed Treaty for Limitations and Exceptions for Research, Education, Libraries and archives and Disabilities by the Africa Group (in which South Africa plays a leading role); The Civil Society Proposed Treaty On Copyright

7. The copyright system in South Africa has been the subject of wide-ranging criticism for many years including regarding its failure to facilitate access to education and to cater for persons with disabilities.² We are instructed that the DTI has engaged affected sectors on possible reform over the past two decades.³ We are instructed further that the Bill was proposed after several studies concluded that South Africans pay *significantly* more for access to copyrighted content than we receive to provide access.⁴ In South Africa, the cost of knowledge – essential for economic development – is high.
8. On 18 November 2010, Rob Davies, then Minister of Trade and Industry (**‘the Minister’**)⁵ established a Copyright Review Commission headed by retired Judge Ian Farlam ‘to assess concerns and allegations about the collecting societies model that is in place for the distribution of royalties to musicians and composers of music’ (**‘the Farlam Commission’**). A key finding of the Commission included that South African musicians

Exceptions And Limitation For Educational And Research Activities; The Electronic Information for Libraries Model Copyright Law

²See for example, Rens, Prabhalá and Kawooya ‘Intellectual Property, Education and Access to Knowledge in Southern Africa’ in Intellectual Property and Sustainable Development, Development Agendas in a Changing World (Edward Elbar, 2012) ed Ricardo Melendez-Ortiz and Pedro Roffe, (ICTSD/UNESCO pre-publication available at IPRS Online) <https://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf>

³ Specifically, we are instructed that engagement of libraries and other public interest sectors in copyright reform goes back as far as 1998 when DTI considered proposals to amend the Copyright Regulations in 1998 and the 1978 Act in 2000. See Denise Nicholson, South Africa’s Copyright Amendment Bill: Its Genesis and Passage Through Parliament (June 7, 2019) <http://infojustice.org/archives/41167>. More recently, a demand for legislative review of this branch of law was made in 2009 after a ‘public outcry from the creative industry’ about the economic impoverishment of artists in South Africa despite the creative arts being a significant economic driver in other countries such as the United States. At that time, President Zuma convened a conference meeting with representatives from the creative industries to discuss the issue.

⁴ South Africa’s National Research and Development Strategy (2002) estimated that the “net cost” of copyright and royalties to South Africa had risen from R200 million in 1990 to R800 million in 2002 https://www.cepal.org/iyd/noticias/pais/0/31490/Sudafrica_Doc_1.pdf

Further, we are informed that the UK Intellectual Property Review Commission, receiving information about the impact of intellectual property on development cited the South African Dramatic, Artistic and Literary Rights Organisation which paid €74,000 to national copyrights holders but €137,000 to foreign copyright holders as an example of the problematic practices of collecting societies.

⁵ The Minister is now Ebrahim Patel

were not benefiting enough from copyright because of unfair contracts and abusive practices by collective management organizations. Its recommendations have informed subsequent policy development and some features of the Bill. Its 2011 report explains that the Commission's process included extensive research and public participation.⁶

9. In 2010, DTI commissioned a study through the World Intellectual Property Organisation ('WIPO') to research the benefits coming from the copyright-based industries in South Africa. This culminated in a report titled 'The economic contribution of copyright-based industries in South Africa', which concluded, amongst other things, that the industries are responsible for almost 4.11% of the total economy and 4.08% of the workforce is employed in the copyright-based industries. The industries also show a high contribution to exports of the economy (2.77%) and imports (7.85%).
10. In 2013, the DTI published the "Draft National Policy on Intellectual Property: A Policy Framework" for comment. The DTI received some 118 written submissions. An important recommendation in the draft policy relates to the issue of fair use of copyrighted material, which is one of the core controversial features of the Bill. The following appears: "To enhance access to copyrighted materials and achieve developmental goals for education and knowledge transfer, South Africa must adopt pro-competitive measures under copyright legislation. *The legislation must provide the maintenance and adoption of broad exemptions for educational, research and library*

⁶ The public participation process apparently entailed receipt of written submissions and public hearings in seven cities around the country. The Commission also undertook an international benchmarking exercise and visited seven foreign countries to assist it with making recommendations based on international best practice. It had regard to the reports of three foreign Commissions. It consulted specifically with collecting organisations active in South Africa, representatives from the music industry and government departments.

uses.” Notably, the call for comment elicited proposals regarding the appropriate scope of exceptions and limitations to copyright in the public interest.⁷

11. The DTI then commissioned Genesis Analytics to conduct an Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa. Their report, dated 31 July 2014, identified the purposes sought to be achieved by copyright reform, which included “to i) *enhance access to and use of copyright works and ii) to enhance access to information for the enhancement of education, research and free speech*” as well as the maximizing of flexibilities (i.e. limitations and exceptions) in copyright in line with South Africa’s international treaty commitments.
12. The report then posited a range of amendments to the 1978 Act before the likely impact of these amendments was considered. The report found that there would be broad social benefits that would outweigh the costs of the amendments. These would include support for the right to education, fairly-priced goods for consumers, enhanced freedom of expression, the stimulation of creativity, fostering the right of access to information and free speech and ensuring legal certainty.
13. In 2016, the DTI published the Intellectual Property Consultative Framework. Although this document dealt centrally with *health* and intellectual property and focuses on patent law, it dealt in part with copyright in that it promoted the need for the accession by South

⁷ See for example 17 October 2013 the Joint Submission by Dr Schonwetter and seven other academics in IP law accessed online.

Africa to various international agreements that regulate copyright, a commitment that was subsequently re-iterated in government policy going forward.⁸

14. The Minister introduced the Bill in the National Assembly on 16 May 2017 as B13-2017.⁹ The Joint Tagging Mechanism of Parliament tagged it as a section 75 Bill. The Bill was referred to the National Assembly's Portfolio Committee on Trade and Industry. The Portfolio Committee called for written submissions on 26 May 2017. It held public hearings on the Bill over several days in August 2017.
15. On 30 May 2017, the Portfolio Committee was presented with a Phase 2 Socio Economic Impact Assessment Report undertaken in terms of the Socio-Economic Impact Assessment System that had been introduced in July 2015.
16. On 11 September 2017, the Secretary to Parliament referred the Bill to the National House of Traditional Leaders in accordance with section 18(1) of the Traditional Leaders and Governance Framework Act 41 of 2003 (**'the Framework Act'**) noting that that body must, within 30 days from the referral make any comments it wishes to make (i.e. by 11 October 2017). We have been unable to confirm whether any comments were made or not.
17. From 10 October 2017, there were multiple meetings of the Portfolio Committee during which the Bill was discussed both technically and substantively. During this process the

⁸ On 25 August 2017, The Minister published for public comment a Draft Intellectual Property Policy for comment. The Intellectual Property Policy was adopted by Cabinet in May 2018. Its significance for present purposes is that it reiterates the commitment to bring South African law of copyright in line with international commitments and standards.

⁹ The Bill was introduced together with the Performers Protection Amendment Bill

Portfolio Committee was advised by a technical committee, including on matters relating to constitutional compliance and compliance with international copyright law. The Bill was amended substantially before the Committee adopted it.

18. According to the Portfolio Committee's report, and after its initial deliberations, on 29 June 2018 the Portfolio Committee made a second call for submissions on specific clauses.¹⁰ The proposed clauses were substantive 'new matters' that warranted further consultation and were informed by public submissions. Some 60 submissions were apparently forthcoming at that stage. A third call for submissions was made on 3 September 2018 when the Committee introduced an amendment making it an offence to act as a collecting society if not accredited. A further two submissions were apparently received at that stage. There was, however, a fourth call for submissions on 12 October 2018 with a closing date of 26 October 2018 on various new clauses. Sixteen submissions were received. We are instructed that the issue of exceptions and limitations to copyright, including for educational uses and a general fair use provision remained under debate.¹¹
19. On 14 November 2018, the Portfolio Committee adopted the Bill subject to various amendments (**B13B-2017**). On 5 December 2018, the National Assembly passed the Bill as amended and it was transmitted to the NCOP for concurrence.

¹⁰ The call was apparently advertised on Parliament's social media platforms through a media statements and communication to identified stakeholders with a closing date of 9 July 2018 extended to 20 July 2018. The issues in respect of which further consultation was called for are set out in the report.

¹¹ We were referred to Commentary on the Copyright Amendment Bill 2017, submitted by the Anton Mostert Chair of Intellectual Property Law, Department of Mercantile Law, Faculty of Law Stellenbosch University at p. 18 <http://blogs.sun.ac.za/iplaw/files/2017/06/CIP-Comments-Copyright-Amendment-Bill-2017.pdf> The following appears: "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."

20. In the NCOP, the Bill was referred to the Select Committee for Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour. The Select Committee was briefed on 13 February 2019. On 14 February 2019, it called for submissions. It considered submissions received on 6 March 2019 together with DTI responses. At this stage, Adams and Adams Attorneys lodged submissions on behalf of industry stakeholders (supported by trade associations) who now seek to persuade the President to decline to assent to the Bill.¹²
21. It is important to note upfront that although the submissions were drafted by counsel, they are drafted in a manner that makes it clear to a legal reader that they are not supplied as counsel's opinion. Rather, counsel self-consciously has framed the objections as their clients' objections, in other words they have compiled their client's views. While this probably means that the counsel who signed the submissions regard the points made to be arguable,¹³ it does not mean that these counsel regards them to be correct or even strong arguments. Indeed, the views of counsel on the submissions cannot be ascertained

¹² Adams and Adams instructed Steven Budlender and Ingrid Cloete to prepare submissions. The submissions were made centrally for industry stakeholders. These are Juta and Company (Pty) Ltd, Media24 Boeke (Pty) Ltd, Music Publishers Association of South Africa (MPA-SA), Pearson South Africa (Pty) Ltd, Schuter and Shooter (Pty) Ltd; Sony Music Entertainment Africa (Pty) Ltd, Universal Music SA (Pty) Ltd and Warner Music SA (Pty) Ltd. The submissions were apparently supported by various trade associations being Academic and Non-Fiction Authors' Association of South Africa, Animation South Africa, the Independent Black Filmmakers Collective, Music Publishers Association of South Africa, Publishers Association of South Africa and the Recording Industry of South Africa.

¹³ See Owen Rogers 'The Ethics of the Hopeless Case' *Advocate* Vol 30 No 3 Dec 2017 pp46 to 51. The view is expressed that ethically counsel should not advance a hopeless legal or factual argument. They may argue a weak case or even one that they consider likely to fail. Rogers states *inter alia* the following as his view: 'It is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts. Counsel must be able to formulate a coherent argument consisting of a sequence of logical propositions for which there is reasonable foundation in the facts and on the law and which, if they are all accepted by the court, will result in a conclusion favourable to the client. Counsel may properly act even though she thinks one or more of the essential links are likely to fail. But if she is quite satisfied that one or more of them will fail, the case is hopeless.'

from the document, which simply does not purport to reflect their opinion, let alone a reasoned opinion.

22. The NCOP Committee adopted the Bill and the Performers Protection Amendment Bill unamended. On 28 March 2019, the Bill was passed by the NCOP without amendment and sent to the President for assent in terms of section 79 of the Constitution.

23. As mentioned above, various stakeholders including Adams and Adams' clients now seek to persuade the President to decline to assent to the Bill and rather to refer it back to Parliament in terms of section 79 of the Constitution.¹⁴ Reliance is placed on the submissions that were lodged in the [NCOP (referred to above), an opinion by Marcus SC and Yacoob dated 19 July 2012 in respect of the tagging of the Intellectual Property Laws Amendment Act 28 of 2013 (IPLAA)¹⁵ and submissions on international law compliance by Andre Myburgh.

The purposes of the Bill

24. The purpose of the Bill is relevant to its constitutionality for at least three reasons. First, all law must be rational which means at least that the measures must be rationally related to a legitimate government purpose. At times there must be a 'sufficient' relation. Second, where a law limits a right, courts assess whether the limitation is reasonable and

¹⁴ In this regard, we have to hand a copy of a letter dated 4 April 2019 (with supporting documents) from Adams and Adams attorneys, representing a number of trade associations (Association of Non-Fiction Authors of South Africa, Animation South Africa, Independent Black Filmmakers Collective, Music Publishers Association of South Africa, Publishers Association of South Africa, PEN Afrikaans (authors), Recording Industry of South Africa, Visual Arts Network of South Africa and Writers Guild of South Africa).

¹⁵ IPLAA introduces amendments that make traditional works (which include indigenous works) subject to copyright protection. IPLAA has been assented to and signed by the President but has not yet come into force as the commencement date remains to be proclaimed. We are instructed that this is because there are no regulations yet in place to give effect to its provisions.

justifiable in an open and democratic society in light *inter alia* of the purpose of a limitation. Third, the purposes of the Bill have some impact on assessing if the Bill was correctly tagged.

25. When considering the Bill's purposes, it is appropriate to be mindful that the manner in which any country protects copyright and allows for exceptions and limitations reflects features of its economic policy. In turn, copyright law has ramifications for a country's social and economic development.¹⁶

26. We are also mindful that the government has framed its own policy responses in light *inter alia* of the insight of economist and Nobel Laureate Joseph Stiglitz that:

*'IP has become one of the major issues of our global society. Globalisation is one of the most important issues of the day, and IP is one of the most important aspects of globalization, especially as the world moves toward a knowledge economy. How we regulate and manage the production of knowledge and the right of access to knowledge is at the centre of how well this new economy, the knowledge economy works and who benefits.'*¹⁷

27. We are of the view that the following broad purposes of the Bill (amongst others) could be advanced by the Minister if called upon to defend the Bill¹⁸ and that these can be regarded as *legitimate*, indeed important, government purposes.

¹⁶ Ruth L Okediji 'The Limits of International Copyright Exceptions for Developing Countries' at p691 to 692, see Part IIA

¹⁷ Stiglitz (2008) at p 1695 cited in the IP Policy 2018

¹⁸ The general purposes of the Bill and the detailed purposes of its core provisions must be gleaned through a process of statutory construction. In the process of discerning legislative purpose, courts will consider the language of a statute, its context and history and the background to the legislation. Courts will have regard to material such as policy documents, South African Law Reform Commission reports and explanatory memoranda attached to Bills introduced in Parliament. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18. At common law it was not permissible to have regard to background information but the enactment of the Constitution signaled a departure from this principle as evidenced in the first case heard by the Court, *S v Makwanyane* 1995(3) SA 391(CC) at paragraphs 17 to 18 followed in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006(2) SA 311 (CC) at paragraphs 199 to 201. See generally, Currie et al *The Bill of Rights Handbook* at p 143, fn 44. A court may also have regard to evidence adduced from the

- 27.1. To modernize South African copyright law and update the 1978 Act, including to bring our legislation in line with the needs of the fast-evolving digital age;¹⁹
- 27.2. To bring South African law in line with international standards and to implement the content of international treaties relating to copyright (both those to which South Africa is already a party and those it intends to accede to).²⁰
- 27.3. To promote socio-economic development and poverty reduction, innovation and a knowledge economy in the interests of all South Africans.²¹
- 27.4. To balance the need to incentivize creativity and knowledge development with the need to facilitate access to works in the public interest;²²
- 27.5. To protect and advance the interests of authors and creators;²³
- 27.6. To promote the rights of others including the right of access to education and the right to equality especially to protect the rights of persons with disabilities.²⁴

Minister The Constitutional Court did so in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 at paragraph 15 fn 11.

¹⁹ The Memorandum says: '[The Bill]' seeks to align copyright with the digital era and developments at a multilateral era. The [1978 Act] is outdated and has not been effective in a number of areas.'

²⁰ This is identified as an objective in the 2013 Policy and in the Preamble. See to the Explanatory Memorandum The Constitutional Court has previously recognized that compliance with international obligations is a legitimate government purposes. See *Prince* 2001(2) SA 388 (CC) at para 12, para 52 and 72 cited in The Bill of Rights Handbook at p 168.

²¹ This is identified in the IP Policy 2018. See Explanatory Memorandum

²² See Explanatory Memorandum.

²³ The memorandum of the Bill states that it is 'to ensure that artists do not die as paupers due to ineffective protection.' It continues that (this objective) 'is supported by the experience of the power imbalance, vulnerabilities and abuse taking place in the music industry, which Government was called on to address.'

²⁴ The Constitutional Court has previously recognized that protection of the rights of others can serve as a legitimate government purpose when limiting rights. See The Bill of Rights Handbook at p 167 with reference

28. The language of the Bill sheds light on its more *specific* purposes in its preamble.²⁵ Five of these are of particular relevance for present purposes: a) to allow for further limitations and exceptions regarding the reproduction of copyright works; b) to provide for the sharing of royalties in copyright works; c) to provide for the payment of royalties in respect of literary, musical, artistic and audio-visual works; d) to provide for resale royalty rights; e) to provide for access to copyright works by persons with disabilities..

Key controversial provisions of the Bill

29. The Bill introduces a range of amendments to the 1978 Act. We highlight below only those that have directly or indirectly attracted the specific constitutional objections we address below: the inalienable right to share in royalties and the fair use provisions.

The right to share in royalties

30. First, various provisions of the Bill introduce amendments designed to protect creators' right to a fair share in royalties. This is through amendments to sections 6, 7, 8 and 9 of

to *inter alia* De Reuck v DPP (WLD) 2004(1) SA 406 (CC). The Memorandum expressly states that the Bill is intended 'to allow reasonable access to education' and 'ensure that access to information and resources are available for persons with disabilities'

²⁵ As follows: 'To amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for further limitations and exceptions regarding the reproduction of copyright works; to provide for the sharing of royalties in copyright works; to provide for the payment of royalties in respect of literary, musical, artistic and audio-visual works; to provide for resale royalty rights; to provide for recordal and reporting of certain acts; to provide for the accreditation of collecting societies; to provide for a mechanism for settlement of disputes; to provide for access to copyright works by persons with disabilities; to provide for the licensing of orphan works; to strengthen the powers and functions of the Copyright Tribunal; to provide for prohibited conduct in respect of technological protection measures; to provide for prohibited conduct in respect of copyright management information; to provide for protection of digital rights; to provide for certain new offences; and to provide for matters connected therewith.'

the 1978 Act and the introduction of new related sections in respect of each type of work, sections 6A, 7B to 7F and 8A and 9A.²⁶ The provisions are in substantially similar terms for literary or musical works, artistic works and audiovisual works. Accordingly, for present purposes we refer only to the new sub-section 6A, which is extracted in Annexure A for ease of reference.

31. Importantly, in respect of each type of work, a new section A is introduced that introduces an *inalienable* right to a fair share in royalties received from the commercial exploitation of a work. The section also makes that right apply to future royalties in respect of both new and existing contracts and assignments.

The fair use provisions

32. The second point of constitutional controversy flows from what are referred to as the new fair use provisions.
33. Section 12 of the 1978 Act recognizes various exceptions to copyright. For ease of reference, section 12 is extracted in Annexure B. The existing section 12 permits *fair dealing* with copyrighted material *in musical and literary works* for certain purposes, more specifically (a) for the purposes of research or private study by, or the personal or private use of, the person using the work; (b) for the purposes of criticism or review of

²⁶Sections 6 to 9 deal with the nature of copyright in literary or musical works (section 6), artistic works (section 7), cinematograph films (section 8) and sound recordings (section 9). Section 8 is to be expanded to deal generally with audiovisual works ‘**Audiovisual work**’ will mean the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which either can be perceived, reproduced or communicated through a device, and includes a cinematograph film;”

that work or of another work; or (c) for the purpose of reporting current events (i) in a newspaper, magazine or similar periodical or (ii) by means of broadcasting or in a cinematograph film.²⁷

34. There are other limited exceptions for literary and musical works too, more particularly relating to judicial proceedings, quotations, use for teaching and broadcasts. Other existing exceptions relate to texts of a legislative, administrative or legal nature, reproduction or broadcast of lectures and speeches for information purposes and reproduction in the press or broadcast of topical articles.
35. The Bill contemplates that section 12 will be repealed and new sections 12A to 12D will be introduced to govern exceptions from copyright protection. For ease of reference the new sections 12A to 12D are extracted in Annexure C.
36. On analysis, the central shift is that the Bill departs from the *fair dealing* provisions for musical and literary works, and introduces into South African law what are described as '*fair use*' limitations and exceptions for all works. In effect, the provisions introduce broader exceptions to copyright protection, which apply to any type of work. This is effected by:
 - 36.1. The inclusion of a list of use exceptions that is more expansive and includes purposes such as scholarship, teaching and education, comment, illustration,

²⁷ Section 12(1) continues: Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

parody, satire, caricature, cartoon, tribute, homage or pastiche and preservation of and access to the collections of libraries, archives and museums.

- 36.2. Introducing a measure of flexibility by introducing the list of exceptions with the words ‘such as’.
 - 36.3. Introducing a four-factor test for the determination of whether a use is *fair use* in a particular case.
37. There is nothing untoward about Parliament deciding to develop copyright law in a manner where the interests of users – as opposed to the interests of holders of rights in copyright – are advanced. Indeed, it is nothing more than express recognition of the very purpose served by statutorily-granted rights in various forms of intellectual property. As the UK Commission on Intellectual Property Rights explained in its 2002 report entitled “Integrating Intellectual Property Rights and Development Policy”:²⁸

“We therefore consider that an IP right is best viewed as one of the means by which nations and societies can help to promote the fulfilment of human economic and social rights. In particular, there are no circumstances in which the most fundamental human rights should be subordinated to the requirements of IP protection. IP rights are granted by states for limited times (at least in the case of patents and copyrights) whereas human rights are inalienable and universal.

For the most part IP rights are nowadays generally treated as economic and commercial rights, as is the case in TRIPS, and are more often held by companies rather than individual inventors. But describing them as ‘rights’ should not be allowed to conceal the very real dilemmas raised by their application in developing countries, where the extra costs they impose may be at the expense of the essential prerequisites of life for poor people.

Regardless of the term used for them, we prefer to regard IPRs as instruments of public policy which confer economic privileges on individuals or institutions solely for the

²⁸ At p 6 (footnotes omitted)

purposes of contributing to the greater public good. The privilege is therefore a means to an end, not an end in itself.”

38. The reference to TRIPS is a reference to the World Trade Organization’s Agreement on Trade-related Aspects of Intellectual Property Rights,²⁹ which imposes on member states the obligation to legislate minimum standards of intellectual property protection. But even TRIPS makes provision for countries to legislate exemptions.

38.1. In respect of copyright, for example, Article 13 provides:³⁰

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

38.2. A similarly-worded provision dealing with patents is to be found in Article 30:

“Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”

38.3. Moreover, a number of other provisions – which apply to all forms of intellectual property – expressly recognise member states’ rights to tailor their laws to advance domestic needs.³¹ Article 1.1, for example, states that *“[m]embers shall be free to determine the appropriate method of implementing the provisions of [TRIPS] within their own legal system and practice.”* And Article 7, which sets out the agreement’s objectives, provides:

“The protection and enforcement of intellectual property rights should

²⁹ The reference to ‘trade’ is a reference to international trade.

³⁰ Article 14.6 also makes provision for certain exceptions relating to rights in respect of the protection of performers, producers of phonograms (sound recordings) and broadcasting organizations.

³¹ See, in particular, Articles 1.1, 7, 8, and 40.

contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

39. At a high level, the fair use provisions of the Bill can be seen as serving an analogous purpose to public health safeguards and flexibilities in patent law that are designed to increase access to medicines.³² Although the Patents Act 57 of 1978 has yet to be amended to give meaningful effect to such safeguards and flexibilities, government policy in this regard is clear. As the Intellectual Property Policy of the Republic of South Africa Phase I 2018 explains:³³

“The South African government has a long history of engaging with issues at the intersection of IP and public health. Indeed, the 1999 case, PMA v the President of the Republic of South Africa – when a consortium of multinational pharmaceutical companies sought to block amendments to the Medicines Act in 1997 that would expand access to medicines – was a key factor leading to global dialogue around the potentially negative impact of IPRs on public health, culminating in the Doha Declaration on TRIPS and Public Health.

South Africa has been a key driver of the now global recognition that the duty owed by states to safeguard public health is not inconsistent with their concomitant responsibility to honour international treaty obligations. Tellingly, paragraph 4 of the Doha Declaration on TRIPS and Public Health states as follows:

‘We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all.’

Having said this, the South African government has to date not made full use of the flexibilities available within international trade rules through the pursuit of appropriate national policy and legislation. This is despite a constitutional imperative to increase access to medicines as a component of the state’s obligation to take reasonable measures toward the realization of the right to healthcare services. Indeed, this constitutional imperative is reflected in government policies such as the NDP and the National Drug Policy for South Africa.

³² Ruth L Okediji ‘The Limits of International Copyright Exceptions for Developing Countries’ at p 693.

³³ At para 7.1 (footnotes omitted)

...

In addition to these domestic obligations, the state's duty to progressively realise the right to health is captured in international instruments which South Africa has ratified such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), Convention on the Elimination of all Forms of Discrimination against Women and Girls (CEDAW), the Convention on the Rights of Persons with Disability (CRPD), and regional treaties such as the African Charter on Human and Peoples' Rights.

It is therefore fitting that the IP Policy should support these domestic and international instruments pertaining to the right to health."

40. Although the nature and effect of copyright protection is to some degree distinguishable from that of patent protection, the two forms of intellectual property share one essential commonality: the need to find an appropriate balance between competing rights claims. As the UK Commission on Intellectual Property Rights explained:³⁴

As with patents, the trade-off for society is between the incentive offered to creators of literary and artistic works and the restrictions this places on the free flow of protected works. But, unlike patents, copyright in principle protects the expression of ideas, and not the ideas as such, which may be used by others. And it only prevents the copying of that expression, not independent derivation. The central issue for developing countries concerns the cost of access to physical or digital embodiments of the protected works, and the approach taken to enforcement of copyright protection.

As with patents, there are normally exceptions in law where the rights of owners are moderated in the wider public interest, known in some countries as 'fair use' provisions (for example in the US), as 'fair dealing' in the UK tradition, and exceptions to the reproduction right in the European tradition. It is the issue concerning the cost of access, and the interpretation of "fair use", that is particularly critical for developing countries, made more so by the extension of copyright to electronic material, and to software."

41. Okediji helpfully explains that '[h]istorically, most national copyright laws ha(ve) long reflected a symbiosis between the grant of property rights in knowledge goods and the "public interest."³⁵ She posits that limitations and exceptions should be framed to serve the development needs of a country: 'international (limitations and exceptions) should

³⁴ At p 17 (footnote omitted)

³⁵ Id at p 701

be viewed as an important component of modern economic development and growth strategy.’ She argues further that ‘[i]n most developing countries—and certainly in the least - developed countries—schools, libraries, and museums, where they exist, are the most likely (and sometimes the only) gateways to knowledge acquisition. These institutions should be direct targets of international copyright (limitations and exceptions), but currently are not.’³⁶

42. Limitations and exceptions can also be viewed as serving to protect rights in the Bill of Rights such as the right of access to education, to dignity and equality and to freedom of expression. The latter includes artistic and scholastic enterprise and the need to create reasonable space for individuals to build on the work of those who came before them. At least in some measure, limitations and exceptions are required to reconcile copyright’s prohibitions on speech with fundamental rights of this sort. We deal with this in more detail in section E below.

C. THE PRESIDENT’S OBLIGATIONS IN TERMS OF SECTION 79

43. Although the Bill has completed its passage through Parliament, it is inchoate. A Bill only becomes an Act of Parliament when the President assents to and signs it.³⁷ When called upon to assent to and sign a Bill, the President’s duties are determined by section 79(1) of the Constitution. Section 79(1) provides that: ‘*The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations*

³⁶ *Id*

³⁷ Section 81 of the Constitution: ‘*A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.*’

about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.’

44. It is clear from the language of section 79(1) that the President’s powers at this juncture are constrained. Indeed, the President is constitutionally obliged to assent to and sign the Bill unless he has reservations about its constitutionality. In that event, he must refer it back to the National Assembly for reconsideration in terms of sections 79(2) and (3) of the Constitution. If, after reconsideration by Parliament, the Bill fully accommodates the President’s reservations, the President must assent to and sign the Bill. If his reservations are still not fully accommodated, he must either assent to and sign it or refer it to the Constitutional Court for a decision on its constitutionality in terms of section 79(4)(b) of the Constitution.³⁸ The Court will be precluded from considering any reservations unless they have first been referred to Parliament for reconsideration.³⁹
45. Though constrained, the President’s role is nevertheless an important one to ensure protection of the Constitution. The Constitutional Court has explained:

‘[The President’s] role in the law-making process reflects a careful effort to ensure that the law-making process is kept under check consistent with the principle of checks and balances. The scheme is founded on the trust that our system has for the role of the President, namely, the responsibility it vests in the President to ‘uphold, defend and respect the Constitution as the supreme law’, and thus to ensure that laws that he or she assents to and signs, conform to the Constitution.’⁴⁰

³⁸ The first time the President did this was *Ex Parte President of the RSA In re: Constitutionality of the Liquor Bill 2000(1)* BCLR 1 (CC). In that case, the President had referred the Bill back to Parliament, which reconsidered it and returned it to the President without any amendment. The Court made it clear that its role was to deal with the reservations, not to pronounce definitely on the constitutionality of the Bill or certify it as valid in all respects. Paragraphs 12 to 15.

³⁹ *In re: Constitutionality of the Mpumalanga Petitions Bill 2000* 2001(11) BCLR 1126 (CC) paras 9 and 10.

⁴⁰ *Doctors for Life International v Speaker of the National Assembly and others* 2006(6) SA 416 (CC) at para 53.

46. The Courts have decided various cases about section 79 and its provincial sphere equivalent. Furthermore, general principles of public law are applicable to the exercise of the President's power, more particularly the requirements of legality and rationality (both substantive and procedural).⁴¹ In light thereof, certain propositions that are instructive for purposes of delineating the President's obligations in respect of the Bill can be stated with relative confidence.
47. First, and perhaps most importantly, the President may only raise reservations about the constitutionality of the Bill. This has important consequences for what the President may not do.
- 47.1. The President may not decline to assent to the Bill because he may disagree with the policy choices underlying the Bill or prefer a different legislative solution to a social problem. He does not enjoy any general discretion to veto a Bill.
- 47.2. The President may not decline to assent to a Bill solely because he may be concerned that a Bill, or a provision of a Bill, will result in South Africa not complying with international obligations. He may only do so if the international law obligation is either a requirement of the Constitution,⁴² or – when properly

⁴¹*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC); *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC); and *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC)

⁴² See, for example, *Glenister v President of the Republic of South Africa and Others* 2011 (1) SA 347 (CC), in which Moseneke DCJ and Cameron J held (at para 197):

“We therefore find that to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the State must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable. It is not an extraneous obligation, derived from international law and imported as an alien element into our Constitution: it is sourced from our legislation and from

interpreted in light of that obligation – a constitutionally-entrenched right will be limited in an unreasonable and unjustifiable manner.⁴³

- 47.3. If the President were to decline to assent to a Bill for either of these two reasons, he would then do so not because an international law obligation may be breached, but because the Constitution may be breached. We point out that as a result of the constraint on the President’s power in this regard, we do not consider most of the “objections” that have been raised by certain stakeholders about whether the Bill breaches any requirements of international law.⁴⁴
48. Second, the President’s reservations about the constitutionality of a bill may be substantive or procedural in nature.⁴⁵ Procedurally, they can include reservations about whether Parliament has facilitated public involvement in the legislative process.⁴⁶ By parity of reasoning, they would also include a reservation about tagging.
49. Third, the reservation(s) need not be such as to vitiate the Bill as a whole but may relate to specific parts of it.⁴⁷ In turn, the reservations must be specifically identified for and responded to by Parliament. The President does not re-open the entire legislative process

our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.”

⁴³ Section 39(1)(b) of the Constitution requires courts, when interpreting the Bill of Rights, to consider international law. Moreover, section 233 states that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

⁴⁴ This is the subject of the Myburgh submissions that have been supplied by Adams and Adams to the President. We point out that we have considered whether the Three Step Test set out in the Berne Convention and Trips is breached and have concluded that it is not. Moreover that appears to be the dominant view amongst scholars.

⁴⁵ *Doctors for Life International v Speaker of the National Assembly and others* 2006(6) SA 416 (CC) at para 45

⁴⁶ *Doctors for Life International v Speaker of the National Assembly and others* 2006(6) SA 416 (CC) at para 55

⁴⁷ *Ex Parte President of the RSA In re: Constitutionality of the Liquor Bill* 2000(1) BCLR 1 (CC) at paragraphs 17 and 18

merely by raising one or two substantive reservations. The process is reopened only to deal with the specific reservations.

50. Fourth, by raising a ‘reservation’ the President raises more than a mere concern. It is a formal act whereby the President marks his genuinely held and well-grounded view that a Bill or a provision of a Bill is probably unconstitutional. Put differently, the view would need to be that it is reasonable to expect that a Court would find the Bill or a provision of the Bill to be invalid. In the nature of things, it would probably suffice if this view was formed on the strength of reputable and cogently reasoned legal opinion or advice.
51. Importantly, the fact that a third party may have expressed concerns about the constitutional validity of a Bill might provide some cause for caution and investigation, but on its own it is certainly not enough to ground a reservation as contemplated by section 79. Indeed, third party concerns should be treated with some caution, as the President should not exercise his powers in a manner that in effect serves partisan interests or agendas. Furthermore, the existence of some uncertainty about constitutional validity is not, in our view, a proper basis for the President to decline to assent to a Bill. There will often be room for reasonable debate about such matters.
52. Fifth, the President has a duty to act within a reasonable time.⁴⁸ What is reasonable will always depend on the circumstances of a case. Factors that are relevant would include the nature of the legislation, the circumstances in which it is enacted, whether it seeks to

⁴⁸ Section 237 of the Constitution states: “*All constitutional obligations must be performed diligently and without delay.*” In *Khumalo v MEC for Education, KZN 2014 (5) SA 579 (CC)* at para 46 (footnote omitted), the Constitutional Court explained:

“*Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.*”

deal with matters that require urgent legislative redress, whether it seeks to protect constitutional rights and so on.

53. For completeness, we point out that once the Bill becomes an Act of Parliament, it is open to constitutional challenge in the ordinary course even before it comes into force.⁴⁹

It is also open to members of the National Assembly to approach the Constitutional Court in respect of its constitutionality.⁵⁰

D. THE BILL ADVANCES RIGHTS AND THE CONSTITUTION⁵¹

54. When the President considers whether he entertains any constitutional reservations about a bill, he will need to consider whether it ‘respects, protects, promotes and fulfills the

⁴⁹ *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development and others* 2004 (6) SA 505 (CC) at paragraph 90 to 92. In terms of section 38(1) it comes into force on a date to be fixed by the President by proclamation in the Gazette. This is apart from sections 5 (inserting section 6A(7)), 7 (inserting section 7A(7)) and 9 (inserting section 8A(5)). While these also come into operation on a date fixed by presidential proclamation in the Gazette, this must be preceded by the commencement of the relevant regulations. It should be appreciated that this power is distinct from the power in terms of section 79 of the Constitution. It is an exercise of public power that is close to the legislative process and that is not administrative action. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) While the President is vested with the power to determine when it would be appropriate to do so, similarly to section 79, the President may not use this power to veto or otherwise block the legislation. *Ex Parte Minister of Safety and Security and others: In re S v Walters and another* 2002(4) SA 613 (CC) at para 73. The nature of the power to bring legislation into force and the circumstances in which a Court will interfere with its exercise is dealt with by the Constitutional Court in the *Pharmaceuticals* case, supra. It includes considerations about time needed to prepare subordinate legislation necessary to give effect to the law.

⁵⁰ Section 80 of the Constitution provides that members of the National Assembly may approach the Constitutional Court for an order declaring that all or part of an act is unconstitutional when supported by at least a third of the members of the National Assembly and within 30 days of the date on which the President assented to and signed the Act.

⁵¹ In this section and more specifically where we deal with the right of access to education, we have drawn heavily from the underlying research and work done by Sanya Samtani, a PHD candidate at the University of Oxford (Bonavero Institute for Human Rights). See Sanya Samtani, ‘The Right of Access to Educational Materials’, DPhil Thesis, Faculty of Law, University of Oxford (forthcoming, copy on file). Samtani is writing on copyright and the right of access to educational materials and has provided us access to her work on file. To our knowledge it is the most comprehensive analysis of the subject in South African law. We are grateful for her assistance. We have drawn from her work not only where we quote her directly but in forming our opinion and identifying relevant authority.

rights in the Bill of Rights’ as this is the state’s duty in section 7(2) of the Constitution. Importantly, even if the Bill does limit a right, (a matter we deal with below) a Court, when considering constitutionality, will have to balance any right that may be limited with other rights that are advanced by the Bill.

55. In our view, there are multiple rights that are respected, protected, promoted and fulfilled by provisions of the Bill. This includes the right of access to education, the right to freedom of expression (including to receive and impart information and to cultural and artistic expression) and the rights to dignity and equality (including freedom from discrimination especially for persons with disability).

The broad objectives of the Bill are consistent with constitutional values

56. First, we are of the view that the broad purposes of the Bill (set out above) are consistent with constitutional values enshrined in the preamble and section 1 of the Constitution.

- 56.1. The preamble to the Constitution recognizes the injustices of the past and records that the people of South Africa adopted the Constitution, amongst other things, to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens and free the potential of each person. Rights entrenched in provisions such as section 29 of the Constitution are central to realizing this vision.

56.2. Section 1 of the Constitution affirms that the South African state is founded on values of human dignity, the achievement of equality and the advancement of rights and freedoms, non-racialism and non-sexism, and supremacy of the Constitution and the rule of law. Such values are clearly advanced when the state takes legislative measures designed to remove barriers that unreasonably restrict access to copyrighted materials and thereby undermine developmental objectives.

Copyright unreasonably limits rights unless the law contains adequate exceptions and limitations

57. Second, in our view, copyright protection without adequate limitations and exceptions should itself be regarded as limiting rights protected in the Bill of Rights.⁵² This includes at least each of the rights that are, in our opinion, advanced by the Bill: access to education, dignity, equality, and freedom of expression. In the result, any legislative measure that confers copyright protection on a knowledge good must make provision for appropriate limitations and exceptions so as to be reasonable and justifiable in an open and democratic society, and thus meet the test set out in section 36 of the Constitution.

⁵² This is dealt with in context of the right to education by Samtani. The barriers can operate because access is either at the mercy of the market, or via a set of limitations and exceptions that are inadequate. Samtani at page 16, Chapter 5: Access To Educational Materials In South Africa. *Laugh it Off* established that exclusive rights in trademarks operate to limit the right to freedom of expression. But because the constitutional validity of the anti-dilution prohibition under section 34(1)(c) of the Trade Marks Act 194 of 1993 had not been challenged, the Constitutional Court had to “assume without deciding that the limitation is reasonable and justifiable in an open and democratic society to which our Constitution is committed.” This meant that the Court was impelled “to a construction of s 34(1)(c) most compatible with the right to free expression.” The non-discrimination proscription is breached where people with disabilities are not able to access knowledge goods others have access to without breaching copyright, or where exceptions are limited to persons with particular disabilities, thereby excluding others with other disabilities. We are informed by Prof Andrew Rens that although the issue has not been dealt with in South African courts, it has been widely acknowledged at an international level. In the time available we have not been able to conduct independent foreign law research on point.

Put differently, in our view, the inclusion of fair use provisions that protect these rights are necessary in order for the Bill, when enacted, to survive constitutionality scrutiny.

The Bill respects, protects, promotes and fulfills multiple rights in the Bill of Rights

58. In our opinion the Bill respects, promotes, fulfils and protects multiple rights protected in the Bill of Rights. This is in part through the fair use provisions. We focus on the rights to dignity and equality, freedom of speech and the right of access to education.

Dignity and equality

59. First, the Bill advances the closely related rights to dignity and equality. While the right to dignity protects the intrinsic worth of all human beings, the right to equality precludes unfair differentiations that ultimately have the capacity to have a negative impact on dignity or human worth. The Bill advances the right to dignity protected in section 10 of the Constitution, and the right to equality protected in section 9 of the Constitution, not least the rights of persons with disabilities.⁵³

60. The need for copyright law to advance the rights of persons with disabilities lies at the heart of the Marrakesh Treaty,⁵⁴ which requires contracting parties to make provision in their laws for exceptions that permit the reproduction, distribution and making available of published works in accessible formats, and to permit the exchange of such works.

⁵³ In this regard, the UN Convention on the Rights of Persons with Disabilities ratified by South Africa in 2007 is relevant. Samtani explains that the Convention ‘obliges states party to realize the right of persons with disabilities to ‘inclusive education without discrimination.’ Samtani pat page 13, Chapter 5: Access To Educational Materials In South Africa.

⁵⁴ The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

Those entitled to benefit have disabilities that interfere with the effective reading of printed material. These include persons who are blind or visually impaired, or have a physical disability that prevents them from holding and manipulating a book.⁵⁵

61. At present, the 1978 Act does not contain any protection for this group. In contrast, the Bill introduces special protections in section 19D by conferring a right to make accessible format copies,⁵⁶ for the benefit of persons with disabilities, under certain conditions (including that the activity be undertaken on a not for profit basis). The Bill defines a persons with a disability to mean ‘a person who has a physical, intellectual, neurological, or sensory impairment and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person without a disability.’

62. While the Marrakesh Treaty is limited to printed materials, there is no good reason why the principled basis underpinning the agreement – access to copyrighted materials for persons with disabilities – should not apply with effect effect to other forms of protected works. On the contrary, the right to equality and freedom from unfair discrimination (in section 9(3) of the Constitution) precludes Parliament from adopting an approach that only includes protections for persons with visual disabilities, with section 9(2) expressly authorising the state to take *“legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”*.⁵⁷

⁵⁵ See World Intellectual Property Organization, Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, available at https://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html

⁵⁶ Defined as ‘a copy of a work in an alternative manner or form, which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without a disability.’

⁵⁷ Importantly, the study of Caroline Neube and Blake Reid ‘Revising Scoping Study on Access to Copyright Protected Works by Persons With Disabilities’ published by WIPO’s Standing Committee on Copyright and Related Rights shows that a significant number of countries who are members of the Marrakesh Treaty have deemed it necessary and appropriate to legislate exceptions for people with disabilities that go beyond the

The right to freedom of expression

63. Second, the Bill advances the right to freedom of expression protected in section 16 of the Constitution. It does so in various ways, including by providing an exception to permit the use of works for reporting current events, scholarship, teaching and education, comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche,⁵⁸ and preservation of and access to the collections of libraries, archives and museums.⁵⁹
64. The right to freedom of expression is also closely linked to education. As Samtani argues, it includes the freedom to receive information, and learners' freedom to participate in the exchange of ideas by receiving and engaging with educational materials. In making provision for a number of fair uses, as described above, the Bill enables the ability of learners and artists to do so by enhancing access to works that would, otherwise, have been inaccessible to most people for educational purposes and through library, archival and museum collections.⁶⁰

The right of access to education

provisions contemplated by the Treaty. See p 18. The study is available on the WIPO website. Caroline Ncube is based at the University of Cape Town. Prof Reid is based at the University of Colorado Law Schools' Samuelson-Glushko Technology Law and Policy Clinic.

⁵⁸ Although in the context of trade mark law, the Constitutional Court held – in *Laugh it Off* – that such exceptions from intellectual property protection are constitutionally mandated. See above n 52

⁵⁹ Section 12A(a)

⁶⁰ Samtani, pages 37-38 Chapter 5: Access To Educational Materials In South Africa.

65. Third, the fair use provisions advance the right of access to education protected in section 29 of the Constitution.⁶¹ For example, fair use of a work for “*scholarship, teaching and education*” purposes does not infringe copyright in that work;⁶² neither does fair use of a work for the “*preservation of and access to the collections of libraries, archives and museums*”.⁶³

66. The right of access to basic education is immediately realizable under the Constitution. It is not, like other socio-economic rights, subject to the qualification that it be progressively realised through reasonable legislative and other measures.⁶⁴ Given the particular challenges that South Africa faces in realizing the right of access to education, we focus on this right and how the Bill assists to realise it.

67. Rens explains the factual backdrop to the right:⁶⁵

“Approximately 15.9 million people are enrolled in formal education in South Africa. The majority (88%) are in primary or secondary school, while only 2.7% are in vocational training institutions (vocational colleges) and 4.7% in tertiary institutions. A major obstacle is lack of educational resources. In 2013 more children at public schools reported lack of books than any other problem in their education. The South African government, through setting curricula, largely determines what is in textbooks,

⁶¹ This right will be interpreted by the Courts in light of international law. The relevant international law treaties are set out helpfully by Samtani, *supra* as follows:

- International Covenant on Economic, Social and Cultural Rights ratified in 2015 which recognizes the right to education;
- the UNESCO Convention Against Discrimination in Education ratified in 2000 (Samtani explains that States party to this convention undertake to promote equality of opportunity in education and prohibit discrimination);
- UN Convention on the rights of the Child ratified in 1995 (education must be made available free to all progressively and on the basis of equal opportunity);
- UN Convention on the Rights of Persons with Disabilities ratified in 2007. Samtani explains that the Convention ‘obliges states party to realize the right of persons with disabilities to ‘inclusive education without discrimination.’

⁶² Section 12A(a)(iv)

⁶³ Section 12A(a)(vi)

⁶⁴ The right to further education is subject to progressive realization.

⁶⁵ Rens A ‘The right to education and the internet: Case study on the role of the internet in provision and accessibility of educational resources in South Africa *Association for Progressive Communications (APC) May 2016*

workbooks and the like. The state is also the main customer for the textbooks produced according to its specifications. While a few textbooks are sold to private schools which follow the national curriculum, they have no market power. Instead school textbooks are produced for purchase by the state. Failure to deliver educational resources when it occurs, is thus primarily due to the procurement processes of the state.”

68. We are instructed that in practice, the way that the market for textbooks works is that the state specifies the content of textbooks, and pays for their production, while permitting publishers to retain copyright. Absent adequate exceptions and limitations, teachers and learners who wish to make copies of portions of such textbooks,⁶⁶ or translations into other South African languages, are prohibited by copyright from doing so. Furthermore, Rens has explained further how promoting digital access to educational materials will greatly enhance the ability of the state to realise the right of access to education in a meaningful way for learners who are currently deprived of access to textbooks. However, doing so requires changes to state procurement systems.
69. The need for the fair use provisions must therefore be considered in light of this factual background, which we assume to be correct. It must also be viewed in light of the fact that the Supreme Court of Appeal (**‘the SCA’**) has held that the right to basic education in South Africa includes the right to set textbooks.⁶⁷
70. To our knowledge, Samtani’s important work best explains how a fair use exception for education is mandated, if not, required by the Constitution. She, as does Rens, highlights that education is considered an “empowerment right” which *“means that it provides the basis for the development of further capabilities and enjoyment of other constitutional*

⁶⁶ Paid for by the state

⁶⁷ *Minister of Basic Education v Basic Education for All* (2016 (4) SA 63 (SCA))

rights.”⁶⁸ She explains further that the right to access to education materials has already been held to be an integral part of the right to basic education under section 29 of the Constitution by South African courts (including the SCA),⁶⁹ and argues persuasively that it must also be included in the right to further education.⁷⁰

71. She correctly forefronts – with reference to Constitutional Court authority – that the denial of access to adequate education for most people in South Africa must be understood in light of our history.⁷¹ As part of its duties in respect of the right to education, the state is thus under a positive obligation to facilitate access to text-books, as well as a negative obligation not to pass obstructing legislation. Private players, often the gatekeepers in the context of learning materials, have a negative obligation not to impair or diminish the right of access to education,⁷² which includes access to text-books.
72. Samtani argues, we believe correctly, that where people can afford access to a socio-economic right, the positive duty on the state entails unlocking a system to facilitate access to text books, including in the private sector. But where people are poor, their particular vulnerable status requires special attention.⁷³ A fair use exception for educational purposes, that enables broad access to educational materials where needed,

⁶⁸ See too: Rens A ‘The right to education and the internet: Case study on the role of the internet in provision and accessibility of educational resources in South Africa *Association for Progressive Communications (APC) May 2016*

⁶⁹ *Section 27 v Minister of Education* 2013 (2) SA 40 (GNP), 2013 (2) SA 40 (GNP) para 25; *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198 *Basic Education For All v Minister of Basic Education* [2014] ZAGPPHC 251, 2014 (4) SA 274 (GP) 82.

⁷⁰ Her analysis includes a consideration of case law to date and international law.

⁷¹ Citing *MEC for Education: KwaZulu-Natal v Pillay* [2007] ZACC 21, 2008(1) SA 474 (CC) at 121-124 and *Governing Body of the Juma Masjid Primary School and others v Essay NO* [2001] ZACC 13, 2011 (8) BCLR 761 (CC) 42

⁷² See *Juma Masjid*, above n 71 at para 60

⁷³ See Samtani at page 32, Chapter 5 Chapter 5: Access To Educational Materials In South Africa. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 para 36.

would both unlock the system for those who can afford to buy text books, and give special attention to the particularly vulnerable.

E. CONSTITUTIONAL CONCERNS WITH THE BILL?

73. In this section, we consider whether certain concerns raised relating to the Bill are such that the President should have constitutional reservations as contemplated by section 79 of the Constitution. We commence by considering two procedural concerns relating to public participation during the legislative process, and the tagging of the Bill as a section 75 bill. We then consider other objections that, in short, concern section 1 of the Constitution and its protection of the rule of law, the right to property protected in section 25, and the right to freedom of trade, occupation and profession protected in section 22.

Was the Bill correctly tagged as a section 75 Bill?

74. The first procedural objection we consider is whether the Bill was correctly tagged as a section 75 bill (an ordinary bill not affecting the provinces), or whether it ought to have been tagged a section 76 bill (an ordinary bill affecting the provinces).⁷⁴ The objection we consider is leveled on the ground that the Bill is said substantially to affect trade and customary law / cultural matters, both of which are functional areas listed in schedule 4 of the Constitution.⁷⁵ If the objections are sound, this would mean that the Bill should have been processed as a section 76 bill, and is invalid for this reason.⁷⁶ Although the

⁷⁴ A structure in parliament known as the Joint Tagging Mechanism classifies a bill for procedural purposes when introduced in parliament, which is known colloquially as ‘tagging’.

⁷⁵ See submissions from Adams and Adams’ clients, paragraphs 14 to 23

⁷⁶ *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC). The Constitutional Court held in *Tongoane* that it is important to follow the process set out in section 76 when enacting

matter is not beyond debate, the objections do not provide a basis for concluding that the Bill was correctly tagged.

75. It is important to bear in mind that under our Constitution, Parliament is vested with plenary legislative powers. It can legislate “*with regard to any matter including a matter within a functional area listed in Schedule 4 but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5*”.⁷⁷ Moreover, certain matters reside within the *exclusive* competence of Parliament such as foreign affairs and the justice system. However, even where a matter falls within the exclusive competence of Parliament, its provisions may *have implications for provinces’* competences.
76. The passage of a bill through Parliament follows one of three possible processes, set out in sections 74 to section 76 of the Constitution. Different procedures are set out in the Constitution depending on whether a bill is a constitutional amendment (a section 74 bill), an ordinary bill that does not affect the provinces (a section 75 bill), or an ordinary bill that affects the provinces (a section 76 bill).⁷⁸ Beyond procedural integrity, there are other constitutional principles at stake, not least the value of co-operative government, which is one of the pillars upon which our democratic dispensation rests.⁷⁹

legislation that substantially affects the provinces and the failure to do so “*renders the resulting legislation invalid.*” Importantly, the degree of provincial control over a section 76 bill is more extensive than where a section 75 bill has been tabled. Also different is the manner in which the provinces exercise their vote in the National Council of Provinces, more particularly whether the NCOP votes by individual delegate (section 75) or by mandate from the provincial legislature (section 76). Moreover, in that case, the Constitutional Court rejected an argument that the validity of the legislation could be saved in circumstances where the NCOP had unanimously approved the impugned legislation albeit adopted via a section 75 procedure. One of the reasons for this is because the voting procedure in the NCOP is different when a section 76 Bill is in process in that provinces each vote with a single vote on a mandate procured from the provincial legislature. On this authority and reasoning, it does not matter that in the present case the NCOP adopted the Bill without amendment. If the Bill ought to have been tagged as a section 76 Bill, the Bill is invalid.

⁷⁷ *Premier: Limpopo Province v Speaker of the Limpopo Provincial Government and others* 2011(11) BCLR 1181(CC).

⁷⁸ For completeness we point out that money bills, dealt with in section 77 of the Constitution must be passed in terms of the procedure in section 75.

⁷⁹ *Tongoane* at para 67-68 and *Liquor Bill* at para 74. Chapter 3 of the Constitution.

77. A bill must be passed under the section 75 procedure if it is a bill “*other than a Bill to which the procedure set out in section 74 or 76 applies.*” In respect of the Bill, the concern is whether section 76 applies. Bills that must be tagged as section 76 bills are bills referred to in sections 76(3), (4) and (5) of the Constitution. Relevant for present purposes, section 76(3) includes bills falling within the functional areas listed in schedule 4 of the Constitution, these being functional areas of concurrent provincial and national legislative competence.
78. It is, however, important to note that the test for tagging is different to, and more expansive than, the test for determining whether a law falls within the legislative competence of a sphere of government.⁸⁰ That said, the test for tagging depends – to some extent – on whether a bill falls within the exclusive legislative competence of national government, or a functional area of concurrent national and provincial legislative competence. As the Constitutional Court explained in *Tongoane*:⁸¹

“To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in s 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in s 76(3)(a) – (f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in s 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a s 76 Bill is determined in two ways. First, by the explicit list of legislative matters in s 76(3)(a) – (f); and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.”

⁸⁰ *Tongoane and Liquor Bill, supra.*

⁸¹ *Tongoane* at para 72

79. In our view, copyright – like other forms of intellectual property – is a subject matter that ordinarily falls within the exclusive national legislative competence. In light of the following four considerations, we are of the view that a court would probably find that legislating for copyright recognition regimes is an exclusive national competence.

79.1. First, the Bill deals centrally with regulating the incidents and nature of a class of rights, being copyright or rights to knowledge goods. Copyright is a species of intellectual property, albeit a distinct and unique one.⁸² There is no express reference in either Schedule 4 or 5 to intellectual property, and the subject matter does not naturally fall within any of the items that are expressly referred to.

79.2. Second, in nature, copyright exists incorporeally, and is not place-bound in its exercise. Given these features, national regulation is not only necessary, but it is difficult to conceive practically how national regulation could coexist with provincial legislation that sets up any independent rights recognition scheme.

79.3. Third, a consideration of foreign law provides support for the case that copyright is ordinarily treated as an exclusive national (or federal) competence. Although every country's Constitution needs to be understood and interpreted in light of its own distinct provisions, it appears to be common place for countries with federal / state systems to treat copyright, at least in the main, as a federal or national competence. In this regard, we have considered the United States,

⁸² We emphasise at this juncture that recognizing that copyright is a species of intellectual property does not mean that it is constitutionally protected property as contemplated by section 25 of the Constitution.

Canada, Germany, Nigeria, Australia and India. For present purposes, we do not detail our research and findings.

79.4. Fourth, we are of the view that the assumption of international obligations in respect of intellectual property rights results in any copyright recognition regime to be nationally rather than provincially regulated. In this regard, the copyright regime is both inward-looking and outward-looking in that it regulates the treatment of copyright internally in South Africa, but also internationally. The latter concerns both the treatment of rights originating in South Africa, when the knowledge good is exported, as well as rights originating externally. Under international law, South Africa is required to accord “national treatment” to foreign persons in respect of copyright in terms of obligations arising out of membership of the World Trade Organization.⁸³

80. *Tongoane* makes it clear, however, “that legislative competence is not determinative of when the Constitution requires the more burdensome processes prescribed by s 76 to be followed.”⁸⁴ That said, the test for tagging is not whether any of the Bill’s provisions substantially affect a matter listed in schedule 4, but rather whether the Bill’s provisions – read as a whole – substantially affect functional areas listed in Schedule 4.⁸⁵

⁸³ Article 3(1) of the General Agreement on Tariffs and Trade, incorporated into the World Trade Organisation framework by the Uruguay Round Agreements on 1 January 1995 provides: *Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits*

⁸⁴ *Tongoane* at para 61

⁸⁵ *Tongoane* at para 59

81. The facts in *Tongoane* are particularly instructive. In that case, Parliament had processed the Communal Land Rights Act 11 of 2004 (**‘CLARA’**) as a section 75 bill, because – in its view – the main purpose of the legislation was land tenure, an exclusive national competence. It was submitted that “[a]ny provision of CLARA that deals with indigenous law or traditional leadership, matters listed in Schedule 4, is incidental to land tenure”, and is accordingly, “irrelevant for the purposes of tagging CLARA”.⁸⁶

82. But applying the test for tagging, the Constitutional Court held that “the provisions of CLARA in substantial measure affect ‘indigenous law and customary law’ and ‘traditional leadership’, functional areas listed in Schedule 4.”⁸⁷ It explained why:⁸⁸

“CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces both the institutions that regulated these matters and their corresponding rules. CLARA also gives traditional councils new wide-ranging powers and functions. They include control over the occupation, use and administration of communal land.”

83. The specific concern raised by some stakeholders in respect of the tagging question is that specific provisions of the Bill may substantially affect trade, as well as customs of traditional communities (and in turn cultural matters), which are functional areas of legislative competence referred to in Schedule 4 of the Constitution.

83.1. In respect of trade, the contention is that the Bill substantially affects trade as it sets out a regime that will regulate commercial transactions relating to copyright.⁸⁹ These include the terms on which copyright shall be transacted, the

⁸⁶ *Tongoane* at para 50

⁸⁷ *Tongoane* at para 97

⁸⁸ *Tongoane* at para 96

⁸⁹ See submissions paragraphs 14 to 18.

Minister's authority to make regulations prescribing terms of such transactions and licensing of copyright, artists' resale rights,⁹⁰ and licensing for acts in respect of orphan works.⁹¹

83.2. In respect of customs of traditional communities, the contention is based on the Memorandum that accompanied the Bill where it states that the Bill has an effect on customs as it provides for royalties to be paid for indigenous works,⁹² and for the registration of collecting societies to administer rights on behalf of copyright owners or authors. Further, it is contended that the reference of the Bill by Parliament to the National House of Traditional Leaders, in accordance with section 18(1) of the Framework Act, necessarily means that the Bill affects custom (and in turn cultural matters).⁹³

84. Having regard to prior case law, the Courts have considered the following four matters relevant to a determination whether a bill substantially affects the provinces: (a) the purpose of the Bill;⁹⁴ (b) legislation designed to be implemented by the provincial governments may be indicative of such effect;⁹⁵ (c) the existence of provincial policy on

⁹⁰ Section 7B of the Bill

⁹¹ An orphan work is defined in section 1 as a work in which copyright subsists and the owner of a right in that work cannot be identified or is identified but cannot be located. The licensing provisions are in section 22A of the Bill.

⁹² When IPLAA comes into force, 'indigenous works' will (in terms of section 1 of the 1978 Act) mean 'a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community'

⁹³ See Adams and Adams' clients' submissions, paragraphs 19 to 23.

⁹⁴ *Ibid* at para 77

⁹⁵ *South African Municipal Worker's Union v Minister of Co-Operative Governance and Traditional Affairs* (3558/2013) [2016] ZAGPPHC 733 (23 February 2016) at para 153. See also Christina Murray and Richard Simeon, in the article "Tagging" Bills in Parliament section 75 or section 76" published in 2006 Volume 123 Issue 2 SALJ at page 232.

the subject of the bill in question may suggest it affects the provinces in substantial measure;⁹⁶ and (d) the extent of intrusion on provincial jurisdiction is relevant.⁹⁷

85. In our view, the concerns raised do not lead to the conclusion that the Bill was incorrectly tagged. As we have already indicated, the provisions of the Bill centrally concern matters that reside in the exclusive legislative competence of the national Parliament. And as we explain below, the provisions in respect of which concerns are raised – considered collectively – do not substantially affect any matter that resides within a provincial competence. In so doing, we are mindful of the need to be cautious of “*blind adherence to a strictly verbal interpretation*” that “*would result in a large number of statutes being declared invalid*”.⁹⁸

86. In respect of trade, the argument is, centrally, that ‘trade’ has been defined by the Courts as ‘buying and selling’, and as material provisions of the Bill concern the terms on which copyright may be assigned and royalties shared, this necessarily affects trade. In our view this argument oversimplifies the issue.

86.1. First, the case relied on to give meaning to the term ‘trade’ in Schedule 4 – *Battis v Elcentre Group Holdings Ltd*⁹⁹ – predates the enactment of even the interim Constitution, and simply was not about the meaning of the term in context of Schedule 4 of the Constitution. To the extent that the Constitutional Court

⁹⁶ *Ibid*

⁹⁷ *Ibid*.

⁹⁸ The quotations are from an Indian case, referred to and quoted in *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* 2001 (1) SA 500 at footnote 53. See also *South African Municipal Worker's Union v Minister of Co-Operative Governance and Traditional Affairs* (3558/2013) [2016] ZAGPPHC 733 (23 February 2016) para 29.

⁹⁹ 1993 (4) SA 69 (W) at 731

sought to give meaning to the term ‘trade’ in the *Liquor Bill* case, we this was to draw a distinction between the liquor trade, a functional area of concurrent legislative competence, and liquor licences, a functional area of exclusive provincial legislative competence; it was not to provide a definitive definition of the term.

86.2. Second, Mahomed J, who authored the *Battis* judgment, expressly recognised that the meaning of trade is context dependent (even where it may involve buying and selling), and that the term may embrace transactions that do not constitute buying and selling.¹⁰⁰ Thus, even giving the term its natural meaning, ‘buying and selling’ may thus be both too narrow and too broad.

86.3. Third, whatever its ambit, trade in schedule 4 does not – in our view – include the *incidents, nature and extent* of copyright protection, or transactions in respect of copyright. The transactions that are said to constitute trade (and that are governed by the Bill) essentially confer an inalienable right to a fair share in royalties, and create a dispute resolution mechanism to determine what this is where parties fail to reach agreement.

86.4. The only way in which copyright may be traded (in the sense of being bought and sold) is by way of assignment. Outside of the context of assignments, a commercial transaction in respect of a copyrighted work would ordinarily involve the right to do with the work that which would otherwise be prohibited. While there are some provisions in the Bill dealing with the assignment of

¹⁰⁰ See p 73A-C

property, the concerns raised by stakeholders primarily consider those provisions of the Bill that deal with the *incidents, nature and extent* of copyright protection.

87. The argument on trade is sought to be advanced further by contending that trade in art is affected because the Bill confers on artists resale royalty rights (sections 7B-F), and licensing requirements in respect of orphan works (section 22A). In our view, these provisions are similarly concerned with the incidents, nature and extent of copyright protection, and while they may indirectly impact on trade, especially the art trade, they do not substantially affect it. The resale right confers a royalty right, and the orphan works provision effectively creates a national regulatory mechanism to make copyright real – and not illusory – for orphan works.

88. The argument presented about cultural matters is very narrowly framed, and hinges on the inclusion of indigenous works being amongst those to which the Bill shall apply. Indigenous works will in future be regulated by the 1978 Act as a result of IPLAA and when IPLAA is brought into force, they will be affected by some of the amendments. However, the mere presence of an effect on the ‘interests, concerns and capacities’ of the provinces does not lead to the bill being classified as a section 76 bill. It is only where the impact is substantial that this should happen. In our view, where there are impacts, they are not substantial. We have considered the following:

88.1. First, the substantial impact on custom and customary law by copyright law reform (and in turn this aspect of all matters) arose when IPLAA was enacted as IPLAA created a statutory basis for copyright protection of these works. This

would have had a dramatic impact on customary law, which is subject to legislation in terms of section 211(3) of the Constitution. Thus, while IPLAA was ultimately correctly tagged as a section 76 bill, it does not follow that the Bill ought also to have been.¹⁰¹

88.2. Second, no substantial argument has been developed why the Bill substantially affects custom, customary law (and in turn this aspect of cultural matters) and the impact has not been demonstrated. The high water mark of the argument expressly made appears to be that collecting societies who may in future become involved in assisting traditional communities to collect royalties are now subject to greater regulation in the public interest. But this does not affect any custom. It affects how collecting societies are regulated. And importantly, the Bill does not cause the potential involvement in collecting societies – that was caused by IPLAA.

88.3. Third, indigenous works are largely regulated by the new Chapter 2A – comprised of sections 28A to 28N – that will be inserted into the 1978 Act by IPLAA. This is a self-standing chapter that contemplates the regulation of indigenous works in largely distinct ways. It is only subject to the remainder of the 1978 Act (and in turn the amendments contemplated by the Bill) in limited ways. For example, and notably, section 28G expressly regulates exceptions to copyright conferred on these works, such as fair use for educational purposes.

¹⁰¹ When detailing the legislative history above, we pointed out that Adams and Adams have sought to place reliance on an opinion by Advocates Marcus SC and Yacoob. The opinion concluded that the correct way to tag IPLAA was as a section 76 Bill. Accordingly, the opinion is of no application to the Bill.

88.4. Fourth, the impact of the Bill on indigenous works is either minimal or indirect, for example by strengthening the regulation of collecting societies in the public interest and by extending copyright protection to acts common in the digital age.¹⁰² The introduction of the new sections 6A, 7A, and 8A do not appear to apply to indigenous works and the process for determining a right to royalties will rather be governed by section 28.

88.5. Fifth, there is no need for any provincial implementation of this aspect of the Bill nor any identified or known impact on provincial policy.

89. Further, we do not think that the fact that Parliament referred the Bill to the National House of Traditional Leaders in terms of section 18(1) of the Framework Act is, on its own, relevant. Indeed, it appears to us to have been a cautious but probably unnecessary referral. In terms of section 18(1) of the Framework Act, any law that ‘pertains to customary law or customs of traditional communities’ must be referred for input. In light of the considerations above, it is difficult to see what customs of traditional communities are in fact affected by the Bill.

90. Without suggesting that we have considered every possible argument or each provision of the Bill, we have considered whether there are any other Schedule 4 competences that are obviously substantially affected by the new royalty provisions or the fair use provisions of the Bill. More particularly, we have considered whether the competence of education¹⁰³ is affected. We have also considered any impact on cultural matters in its

¹⁰² By way of amendments to sections 6 to 9 made applicable to indigenous works by Section 28H.

¹⁰³ Education other than tertiary education is a Schedule 4 competence.

broad sense of the arts and human intellectual achievement, in other words not limited to traditional cultural matters.

91. It is indisputable that the fair use provisions of the Bill are intended to, and will have important consequences for, access to education and the promotion of cultural expression. In respect of the latter, it is designed to unlock creative efforts in all cultural spheres. But it does not follow that it will substantially affect these competencies in the sense contemplated by *Tongoane*. In our view it does not because these provisions, while indisputably intended to benefit broader educational and cultural objectives, serve to delineate the incidence, nature and extent of copyright protection, and do not extend beyond what we regard to be exclusive national legislative terrain. Put differently, they simply create a rights recognition regime.

Public participation

92. The second procedural objection relates to the constitutional obligation on Parliament to facilitate public involvement in the legislation process. In terms of section 59(1)(a) of the Constitution, the National Assembly must “*facilitate public involvement in the legislative and other process of the Assembly and its committees*”. The same obligation is imposed on the NCOP in terms of section 72(1)(a).
93. The Constitutional Court has held that the consequence of a failure to comply with these duties is that legislation is invalid.¹⁰⁴ In *Doctors for Life*, the Court considered the nature

¹⁰⁴ *Doctors for Life International v Speaker of the National Assembly and others* 2006(6) SA 416 (CC) at paragraph 209; *Matatiele Municipality and others v President of the TSA and others (No 2)* 2007(6) SA 477 (CC)

and scope of the duties of the NCOP, and the extent to which these duties are justiciable. The Court held that the “*duty to facilitate public involvement in the legislative process is an aspect of the right to political participation.*”¹⁰⁵ It entails taking part in the conduct of public affairs and is a form of participatory democracy.¹⁰⁶ It is a right that is recognized in international law, and which is bolstered by the right to freedom of expression protected in section 16 of the Constitution (which includes a freedom to seek, receive and impart information), and the political rights protected in section 19 of the Constitution.

94. The Constitutional Court held that ‘*Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfill their duty to facilitate public involvement.*’¹⁰⁷ However, in an appropriate case, the courts will determine whether there has been “*the degree of public involvement that is required by the Constitution*”.¹⁰⁸ In each case, the NCOP must act reasonably in carrying out its duty to facilitate public involvement: there must be a reasonable opportunities to know about the issues and to have an adequate say. What is reasonable will depend on the circumstances of each case.¹⁰⁹ As the Court held: “*Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case.*” Context is all important.¹¹⁰

South African Veterinary Association v Speaker of the National Assembly and others 2019(3) SA 62 (CC) at para 19 and para 23.

¹⁰⁵ At paragraph 89

¹⁰⁶ See esp para 115 and 116

¹⁰⁷ At paragraph 124.

¹⁰⁸ Id.

¹⁰⁹ At paragraph 125. The Court upheld the statements to this effect made by Sachs J in his minority judgment in the *New Clicks* matter at para 630

¹¹⁰ At paragraph 127. The Court’s summary of its findings is instructive as regards the general approach to follow. See paragraphs 145 and 146.

95. The principal objection raised in respect of the Bill is that after public hearings were held in the National Assembly in August 2017, substantial changes were made to the Bill, in respect of which public comment was not sought before the Bill was passed.¹¹¹ The objectors refer specifically to section 12A(1)(a) – the new fair use provision – to demonstrate the substantial nature of the changes that were made.
96. The Bill as introduced (B13-2017) contemplated the use, in the new proposed section 12, of a fair *use* exception, thus removing the language of fair *dealing*. It then incorporated a closed list of permissible uses after the introductory words: “*for the following purposes*”. Such language denotes a closed list.
97. As adopted, the Bill makes provision for an open list: the introductory words were changed to say: “*purposes such as the following*”. The objectors say that this alteration effects a change from a “fair dealing” to a “fair use” exemption, which is a significant change with far-reaching effects. In this regard, the objectors also point out that the Explanatory Memorandum to the Bill referred to “*reproduction of copyrighted material for limited uses or purposes*”. The fair use exemption embodied in the open list is, they submit, not limited, and so the Bill deviates significantly from the stated objective.
98. In *SA Veterinary Association*,¹¹² the Constitutional Court held that where a committee makes a material amendment to a Bill, this triggers a duty on the committee, as far as possible, to invite further public comment. Importantly, however, this finding was made in the context of an amendment that made a Bill applicable to a sector not originally

¹¹¹ See Adams and Adams clients’ submissions at paragraphs 47 to 54

¹¹² *Supra* at paragraphs 24 to 27, 31 to 32 and 46.

contemplated by the Bill at all – veterinarians. Its materiality was thus self-evident and dramatic.

99. In our view, even if one takes a wide view of the *SA Veterinary Association* precedent, the change identified by the objectors to the proposed section 12 during the committee process was not a material deviation that triggered a duty on Parliament to consult further. We say so for at least three reasons.

99.1. First, the shift from fair dealing to fair use was always a live issue for consultation, given that the Bill – as introduced – contemplated the use of the language of fair use, whereas the 1978 Act uses the language of fair dealing. Indeed, this can properly be regarded as a key policy pillar of the Bill as introduced. This appears from various sources including prior policy statements, the Committee’s deliberations,¹¹³ the nature of the submissions made, and the DTI’s presentation of policy issues underlying the Copyright Amendment Bill.

99.2. Second, in our view the change was not intended to introduce a wholly open-ended list of permissible purposes. For this reason alone, it is not a material departure. In this regard, a court would not interpret the list as being open-ended in line with the *eisdum generis* maxim of statutory interpretation. It literally means ‘of the same kind’ and it is “a contextual device that can be employed to restrict the meaning of general words by reference to specific words in their

¹¹³ The issue of fair use v fair dealing is described as a policy issue arising from submissions in the Portfolio Committee’s report.

immediate vicinity”.¹¹⁴ The Three-Step Test contemplated by the Berne Treaty and TRIPS would, furthermore, provide an additional reason to interpret the clause ‘such as’ narrowly to the extent that that is what the test requires.¹¹⁵

99.3. Third, and in any event, a reasonable participant in the legislative process would in our view have understood that the scope of any permissible exceptions under the fair use rubric was very much a matter that warranted comment on the Bill as introduced. This would have included whether the list should be a closed list or an open list.

99.4. That this is so manifests from a consideration of the PMG reports themselves, and the fact that the Portfolio Committee in fact expressly canvassed the issue of the use of the language ‘such as’ with stakeholders on 1 August 2017.¹¹⁶ On 3 August 2017, there was further engagement on fair use. It is thus not surprising that the PMG minutes – to which we have had access – show that the issue of fair use was, from the outset, identified as a key issue for the committee’s specific deliberations following the hearings in 2017.

¹¹⁴ ‘The *eiusdem generis* rule is... contextual interpretation which is encapsulated in the maxim *noscitur a sociis*. According to this maxim, particular words are coloured by their association with other words.’ (Devenish Interpretation of Statutes (1992) at 74.) “Where words which have a limited or particular meaning are followed by a phrase of general application, the meaning of the said phrase is restricted to the generic meaning of the preceding words (Du Plessis The Interpretation of Statutes (1986) at 154.) ‘To invoke the application of the *eiusdem generis* rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply.’ (Craies Statute Law 7th ed at 181.) Devenish Statutory Interpretation p 70.

¹¹⁵ The Three-Step Test is an international standard used to determine whether exceptions and limitations of copyright, and more particularly the holder’s exclusive right of reproduction, are acceptable. Though framed in different language, it forms part of both the Berne Convention and TRIPS.

¹¹⁶ The relevant portion of the summary of the public hearings reads: ‘The Committee asked for the stakeholders’ views on the incorporation of the doctrine of ‘fair use’, the use of the phrase ‘such as’ for exceptions, ... The committee commented that the task of legislators was to develop relevant legislation in a fast changing environment which could be used for at least five to eight years before it was reviewed. The stakeholders therefore needed to confirm whether the language of the proposed Bill was too limited to accommodate the technical advances concerning the publication of copyright works.’

100. We are mindful that the objectors raise the above issue as an example of material deviations. But none others are identified. It can and should be noted, however, that according to the Portfolio Committee's report, the Committee did consult further on new issues that it assessed warranted further consultation. Indeed, as set out above, it reopened comment four times when new issues arose. At least on the face of it, the Committee thus appears to us to have been very alive to the contours of the duty to consult, and the need to consult further when it introduced material amendments.
101. A Court would consider whether Parliament complied with its public participation duties in light of a specific objection about the process. It would not conduct an ex post facto and abstract assessment of whether the process that was followed was generally compliant. Nevertheless, it can be noted that at least on the face of it, the process was extensive both in and prior to Parliament.
102. It is also material to note that the objectors who are raising the complaint were as a matter of fact specifically heard, and their objections specifically considered by the NCOP. While they were heard as a collective in the NCOP, some of the entities had previously elected to participate individually during the National Assembly process. The fact that Parliament disagreed with them does not mean that there was any procedural defect in the process.
103. We are thus of the view that the public participation argument raised is devoid of any merit.

Fair use and the property clause

104. In this section, we consider specifically whether the new or widened exceptions and limitations introduced in the Bill are an arbitrary deprivation of property within the meaning of section 25(1) of the Constitution. We have considered the question in light of the inclusion of the new or widened purposes in section 12A(a)(iv) to (vi), being scholarship, teaching and education; comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche, and preservation of and access to the collections of libraries, archives and museums. We have also considered the introduction of the words ‘such as’ in section 12A(a), which is said to convert the fair dealings clause to an open ended fair use clause.

105. Section 25 provides: “*No law may permit arbitrary deprivation of property.*” In order to constitute an arbitrary deprivation of property, the thing concerned must be constitutionally-protected property, there must be a deprivation, and the deprivation must be arbitrary.

106. We have noted that various participants in the legislative process have adopted the view that the Constitutional Court has decided that copyright, as intellectual property, is constitutionally-protected property in terms of section 25 of the Constitution.¹¹⁷ But that is not so. On a careful analysis of the relevant case law, we take the view that the Constitutional Court has not decided the question. Instead, its focus was on the manner

¹¹⁷ The argument is typically advanced on the basis that this question has been decided by the Constitutional Court either in *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) at para 75 or in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) at para 17.[]

in which a provision of the Trade Marks Act was to be interpreted so as to be consistent with the constitutional guarantee of free expression.

107. Furthermore, it is a contested and difficult issue.¹¹⁸ Because of the view we take on the question of arbitrariness, we simply assume for purposes of this part of the opinion – without considering the question – that copyright is constitutionally-protected property.

108. The Constitutional Court has given meaning to the concept of ‘deprivation’. It did so first in the *FNB* case.¹¹⁹ Put simply, it means a substantial interference with a property right, one that has a legally significant impact on the rights of the affected party.¹²⁰ The question whether the new and expanded clauses constitute deprivations of property is not simple to answer. Again, because of the view we take on the question of arbitrariness, we simply assume for purposes of the opinion – without considering the question – that there is a deprivation.

109. The pivotal question that arises in respect of section 25(1) is, we believe, whether any alleged deprivation is *arbitrary*. If the answer to this is No, as we believe it is, then the same reasoning will apply in respect of certain other arguments advanced that we consider below.¹²¹ Put differently, if the limitations and exceptions pass muster under the test for arbitrary deprivation in terms of section 25(1), they will pass muster for these

¹¹⁸ Samtani, p43, Chapter 5: Access To Educational Materials In South Africa demonstrates how the Constitutional Court considers each case on its own facts and argues that copyright should not be recognized as constitutionally protected property.

¹¹⁹ *First National Bank of South Africa Limited trading as Wesbank v Commissioner, South African Revenue Service and another; National Bank of South Africa Limited trading as Wesbank v Minister of Finance* 2002(4) SA 768 (CC) at paragraph 100.

¹²⁰ *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) at para 59; *South African Diamond Producers* at para 48.

¹²¹ These grounds include an alleged breach of section 1 of the Constitution and section 22 of the Constitution

other purposes too. This is because the test for arbitrariness in section 25(1) is relatively broad.

110. How is a court to determine whether a deprivation of property is arbitrary? In short, the test is whether there is a sufficient purpose for the deprivation. As the Constitutional Court explained in *FNB*:¹²²

- “(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question;*
- (b) A complexity of relationships has to be considered;*
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected;*
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property;*
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.*
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
- (g) Depending on such interplay between variable means and ends the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.”*

111. In our view, and on the information to hand, the limitations and exceptions would pass scrutiny under this test. We have considered a range of issues.

¹²² At para 100. Although the judgment specifically states that it is not concerned with incorporeal property, we consider this test because if it is met, then it is likely that any different test for incorporeal property would probably also be met.

- 111.1. First, the new purposes contemplated by the limitations and exceptions are, without question, legitimate, indeed crucial public purposes. These relate most centrally to equality, facilitating access to knowledge for persons with disabilities, access to education, freedom of expression and access to information and ideas. In a country with the wealth disparity and development needs of South Africa, it is crucial that the legislature adopts measures to achieve these purposes. South Africans are calling out for development and demanding greater access to knowledge. Importantly, the objects of the Bill are centrally to advance the values and rights in the Bill of Rights.
- 111.2. As regards the right of access to education in particular, the lack of access to educational materials is a dire problem in South Africa. For the most part, people who will be able to benefit from the new and expanded exceptions are likely to be those who are currently not receiving access at all, and who will never be able to pay for it, not those who do and can.¹²³
- 111.3. Second, the “property” is incorporeal in nature. It is not fixed in place or quantity and is not depleted through use. On the contrary, it can be enhanced through greater use.
- 111.4. Third, the Bill carefully seeks to balance the nature and extent of a creator’s copyright protection (which in some respects is enhanced under the Bill) with exceptions and limitations in the public interest. In our view, it does so carefully, and in a justifiable way, having regard to the following:

¹²³ See Samtani, *supra*

111.4.1. There is no unbridled or open ‘licence’ to copy or use without permission. On the contrary, the limitations and exceptions are framed fundamentally by the principle of *fair* use, which in turn is determined by the application of the four-factor test in section 12A(b). Fairness is a flexible but well-worn and well-understood concept in multiple contexts in South African law.

111.4.2. Moreover, the four-factor test introduces important principles that yield a proportionate relation between the copyright holder and the user. They include the nature of the work in question, the amount and substantiality of the part of the work affected in relation to the whole of the work, the purpose and character of the use (including if it is of a commercial nature or for non-profit purposes), and the substitution effect of the act upon the potential market for the work in question.

111.4.3. Proportionality is expressly infused in some of the more specific exceptions. For example, quotations do not infringe copyright provided, amongst other things, their extent does not exceed what is reasonably justified by the purpose.¹²⁴ Similar constraints apply to other specific exceptions. Importantly, it constrains the making of copies for educational and academic activities.¹²⁵ It is not permissible to make copies of a whole textbook unless it is out of print, the owner

¹²⁴ See section 12B(1)(a)(i)

¹²⁵ See section 12D(1)

cannot be found, or it is not possible to purchase the book in South Africa or at a reasonable price.

111.4.4. Avoiding undue commercial prejudice is built into the test for fairness via the four-factor test. Moreover, some exceptions apply only when use is for a non-commercial purpose, such as translating a work.¹²⁶ Avoiding commercial prejudice is also built into the section dealing with copying for educational purposes, in that the right to make copies does not extend to reproductions for commercial purposes. ‘Commercial’ is defined to mean ‘the obtaining of economic advantage or financial gain in connection with a business or trade.’¹²⁷

111.4.5. The use of the words ‘such as’ to introduce the new and expanded purposes in section 12A does not open the door widely, without constraint, to new purposes; the language itself does not introduce any element of real uncertainty. On the contrary, the terms will be interpreted restrictively, in line with the *eiusdem generis* maxim and the Three-Step Test.

111.4.6. In countries where there are fair dealings clauses, such as Canada, courts may, at times, interpret the purposes very broadly and flexibly to accommodate new developments. The same result is thus achieved through different legislative means. The inclusion of the term ‘such as’

¹²⁶ See section 12B(f)

¹²⁷ Section 1

arguably precludes artificial reasoning to accommodate analogous purposes necessary to achieve the legitimate purposes of the Bill.¹²⁸

112. Some of those opposed to the Bill have suggested that to the extent that any of the exceptions constitute deprivations of property, such deprivations are arbitrary because they do not make use of less – or the least – restrictive means to achieve the same result. Although Courts will consider less restrictive means when considering whether deprivations of property are proportionate,¹²⁹ this suggestion is out of kilter with our law because Courts recognise that a range of legislative options may be reasonable in the circumstances and legislatures are not required to choose what a Court or a third party, views as the best option and it is only one consideration in an enquiry. Indeed the Constitutional Court has stated that when considering this issue a Court ‘should take care to avoid a result that annihilates the range of choices available to the Legislature. In particular, it should take care not to dictate to the legislature unless it is satisfied that the mechanism chosen by the Legislature is incompatible with the Constitution.’¹³⁰ Whatever other means might be available to the legislature, this is not a case where the legislature has sought to ‘use a sledgehammer to crack a nut’.¹³¹ Rather the Bill in our view reflects a careful balancing of rights.

¹²⁸ In both the Canadian and UK jurisdictions, although the words “fair dealing” are used, the effect given to the provisions is similar to that of “fair use”. In *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para 60, the Supreme Court of Canada found that six non-exhaustive factors were determinative of the fairness of an intended use: purpose, character, amount, alternatives, nature, and effect. This decision was upheld, subsequently in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326, 2012 SCC 36. See too *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345, 2012 SCC 37. See also, Section 30 1ZA of the UK’s Copyright, Designs and Patents Act 1988.

¹²⁹ *Reflect-All 1025 CC and others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and another* 2009(6) SA 391 (CC) at para 49 but cf *National Credit Regulator v Opperman* 2013(2) SA 1 (CC) at para 71.

¹³⁰ See *S v Manamela and another (DG of Justice Intervening)* 2000(3) SA 1 (CC) at paras 94 and 95 per O’Regan J and Cameron AJ endorsed by the majority at paras 33 and 34.

¹³¹ *Id* at para 34

113. We have noted that when considering the issue of rationality, an argument has been advanced that there has not been any assessment of the economic impact of the new exceptions, and that the need for the measures has not been ascertained. On the information that has been made available to us, we are of the view that this objection is neither adequately explained nor, on the face of it, factually grounded.

114.1 First, it neglects to mention the extensive policy making process that preceded the tabling of the Bill including on these issues.¹³²

114.2 Second, it neglects to mention the extensive public participation engagements on these issues both prior to and following the tabling of the Bill.

114.3 Third, it neglects to mention two impact assessment procedures that, to our knowledge, were conducted.

114. The first impact assessment took place in 2014. As mentioned above, after the draft IP policy was published for public comment in September 2013, a Regulatory Impact Assessment was undertaken by the DTI in 2014 under the then extant procedures. This assessment was conducted by an independent third party, Genesis Analytics, a economics consultancy firm, who produced the report titled “Assessment of the Regulatory

¹³² We have already described the lengthy policy-development process. In addition to that, we are advised that the DTI commissioned a report by WIPO in 2011, which recommends fair use. See WIPO, “The Economic Contribution of Copyright-Based Industries in South Africa”, available at https://www.thedti.gov.za/industrial_development/docs/Economic_Contribution.pdf. Moreover, together with 12 other countries, the Minister of Arts and Culture committed to fair and balanced copyright laws in the Cape Town Declaration 2015. In this regard, see <https://www.ifla.org/files/assets/wlic/2015/documents/cape-town-declaration-of-ministers.pdf>

Proposals on the Intellectual Property Policy Framework for South Africa”, dated 31 July 2014. The specific impacts were assessed at least at a high level.

115. The second impact assessment took place after the introduction in July 2015 of the Socio-Economic Impact Assessment System. Further to this, a Socio-Economic Impact Assessment Report was undertaken and certified by the Department of Monitoring and Evaluation on 29 May 2017. The Phase 2 report was presented to the Portfolio Committee on 30 May 2017.

Fair use and section 22 of the Constitution

116. Section 22 of the Constitution protects the right to freedom of trade, occupation or profession. Section 22 encompasses two elements, namely the right of citizens to choose a trade, occupation or profession, and that the practice of a trade, occupation or profession may be regulated by law. For purposes of this opinion, we assume that all South Africans currently engaged in the industries affected by the Bill are protected by the first element of the right.¹³³

117. The two elements are subject to different levels of judicial scrutiny.¹³⁴ Where there is a limitation on the *choice* of trade, occupation or profession, it must be tested by way of the test developed under section 36 of the Constitution. Where the regulation of the

¹³³ Courts will protect the rights of citizens whether as individuals or through corporate structures. There are multiple ways in which citizens are affected, from the act of creation, through intermediaries to public distribution. We assume each will be regarded as a ‘trade, occupation or profession’.

¹³⁴ See *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* 2017 (6) SA 331 (CC) at para 65 and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 93.

practice of a trade, occupation or profession is scrutinised, then the test is a rationality test. The Constitutional Court has confirmed that the rationality test in context of section 22 is weaker than the test for arbitrariness in section 25 of the Constitution.¹³⁵ In view of our conclusions regarding section 25 of the Constitution, we do not reconsider the arguments in context of the second element.¹³⁶ Suffice to state that the test would in our view be met.

118. A different argument is however raised in respect of the first element, being that the fair use provision in section 12A has a negative impact on the *choice* of trade, occupation or profession. Although there are no formal impediments imposed by the Bill, the argument is that there is an *effective* impediment because any activity that relies on the commercial exploitation of copyright will be made uncertain, and therefore illusory, and potentially unprofitable.

119. Reliance is placed on *Diamond Producers*,¹³⁷ where the Constitutional Court held that legislation limits the choice of trade, occupation or profession if it “*in effect, [makes] the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter it is in fact limited.*” The argument proceeds that there is no adequate justification that meets section 36 limitations test. Moreover, it is argued that there is no adequate reason for the limitation in view of the absence of research on the economic impact of the provisions, (a matter we have already dealt with above.)

¹³⁵ *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) at para 55.

¹³⁶ *Ibid* at para 58.

¹³⁷ *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* 2017 (6) SA 331 (CC) at para 68

120. A similar argument is raised in respect of section 12D of the Bill. The impact is said to be particularly severe for authors of academic texts. It is argued that the business of providing academic literature shall become highly unprofitable, and this is neither rational nor justified under section 36 of the Constitution. A further objection is raised: the provision provides a disincentive for authors to write, and for publishers to publish, which means that it would have the opposite effect to the intended goal of improving access to the works.
121. On the information to hand, we are unable to agree with the conclusion that the Bill would have this effect, and thereby limit the section 22 right.
122. The first difficulty is that the arguments are based on the partial and wholly unsubstantiated view of those opposed to the Bill – that these disastrous effects will ensue. However, the Constitutional Court, in *Diamond Producers*, set a high bar for establishing the negative impact that the legislation must cause in order to be considered an infringement of section 22. There is no evidence of any such an effect.
123. Even if those opposed to the Bill, and some in some industries, may be able to establish that the profitability of their businesses will decrease, it is a different matter altogether to establish support for the further claim that the effect will be of such a degree so as to make their businesses so undesirable, difficult or unprofitable that the choice to enter that line of business will effectively be taken away.
124. Such a claim would moreover be difficult to establish in light of the fact that the opportunities provided by the Bill will likely generate new trade, occupational and

professional opportunities. The fair use provisions are designed to promote creative efforts, and there is no reason why they should not do so. There is also some scope for new industry, for example, for dealings in orphan works, and non-profit ventures specifically to facilitate production of accessible format materials for people with disabilities.

125. The claims about academic authors do not bear scrutiny, either as a matter of logic or fact. They appear to be based on an assumption that works currently paid for, to the benefit of academic authors, will be copied wholesale without compensation, and to authors' financial detriment.

126. First, there is no entitlement to copy books wholesale under the Bill. Furthermore, we are instructed that academic authors do not currently benefit financially, either from copying materials, or substantially from writing. Academic authors are, we are informed, in general employed by an educational institution or research institute, and write in the course and scope of their employment. For many, it is a requirement of tenure to publish. The motivations for academic authors to publish are predominantly reputational rather than directly financial. There are also benefits that result from the Bill to academic authors in that the more access they have to other works, the more work is ultimately generated and cited. Restricting access thus has a limiting effect of creativity and productivity.

127. Second, there is a clear intention in the Bill to secure more financial benefits for the originators of works covered by copyright, in other words, to give them a greater slice of the pie. This intention is achieved by the same provisions that are said to make the

copyright-based businesses unprofitable, presumably for those who currently receive the greater slice of the pie. Ready examples are the right to a fair royalty and the artists' resale rights.

128. The net effect of the bill as a whole would, in part, be a shifting of some profits from the intermediate levels of the production chain to the originators of the works at the primary level. The Bill thus entails a conscious attempt to realign the sharing of profits to prevent exploitative practices. While this will entail a sharing of profits, the clear intention is that the sharing be '*fair*'. There is no reason why it should not be.

129. In any event, we are of the view that if there is a limitation of right to choose a trade, occupation or profession, it will be regarded by a court to be reasonable and justifiable, satisfying the test contained in section 36(1) of the Constitution.¹³⁸ Only a cursory account has been taken of the limitations analysis under section 36 of the Constitution by those objecting to the Bill. In light of the considerations we refer to when dealing with section 25, we are of the view that the fair use provisions are probably readily justified under this test.

130. It is important, moreover, to keep in mind that when conducting the limitations analysis, courts will have regard to and balance competing rights. We have explained above what rights are advanced by the provisions of the Bill. The limitations analysis, therefore, is

¹³⁸ Section 36 provides that the rights in the Bill of Rights 'may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.

one that seeks to find an appropriate balance between rights that may conflict with the Bill.

131. A proper balancing of rights does not seek to achieve a “winner-take-all” result, but rather one that recognises each right, and places no more limits than are reasonable with regard to the factors enumerated in section 36.¹³⁹ This has been the consistent approach of the Constitutional Court, which has emphasised that it “*must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list*”¹⁴⁰ The approach of the Court “*is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.*”¹⁴¹

The rule of law, retrospectivity and impermissible delegation

132. The final issue we consider is whether there are rule of law or separation of powers concerns with the provisions of the Bill regulating new royalty rights. We consider two related concerns.

133. The first is a concern about retrospectivity. The effect of sections 6A, 7A and 8A of the Bill is that authors of literary, musical or visual works shall have an inalienable right to a fair royalty on the exploitation of their work. In our view it is not correct to describe the provisions as operating retrospectively.

¹³⁹ *Khumalo and Others v Holomisa* 2002 (5) SA 401 at para 43.

¹⁴⁰ *S v Manamela and Another (Director-General of Justice intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32. *S v Makwanyane and another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104

¹⁴¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 23

134. Rather, they operate prospectively in respect of two categories of works: those in respect of which the right to royalties has already been assigned; and those in respect of which the right to royalties has yet to be assigned. Insofar as this second category of works is concerned, there can be no question whatsoever of retrospectivity.
135. Insofar as the first category of works is concerned, we accept that the provisions have an impact on past transactions in that they impose new terms and obligations on the parties to any contract dealing with the assignment of royalties. In and of itself, this cannot raise any rule of law concerns. It is comparable to the introduction of a national minimum wage in certain sectors, which has a direct impact on the contractual relationships between employers and employees in such sectors.
136. While we accept that the provisions may limit vested rights, we are of the view that were there to be any limitation of a constitutionally-entrenched right, such as the right to dignity,¹⁴² any such limitation could be justified in accordance with the provisions of section 36(1) of the Constitution. Were a court to find that such vested rights constitute property as contemplated by section 25 of the Constitution, we submit that any proven deprivation would be non-arbitrary, and accordingly, constitutionally valid.
137. The second concern is whether Parliament has impermissibly delegated plenary legislative power to the Minister, and breached the rule of law by creating an uncertain

¹⁴² Cf *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 57

regime. In our view, there is no impermissible delegation of power, and no uncertainty that breaches the rule of law.

138. The concern has been expressed in respect of sections 6A(7)(b), 7A(7)(b), and 8A(5)(b), each of which empowers the Minister to make draft regulations dealing with procedural aspects. At issue in each of the three sections is the right of the author of a copyrighted work to share in royalties in respect of literary or musical works, visual artistic works, and audiovisual works.
139. The right to share in royalties, in defined circumstances, is expressly guaranteed in the Bill; the Minister plays no role in determining who should succeed in obtaining their share. Instead, the Minister's role is limited to four things: first, developing draft regulations setting out the process to give effect to the application of each section to eligible works; second, conducting an impact assessment of the proposed process; and third, tabling the draft regulations and impact assessment in the National Assembly; and fourth, making the regulations should the National Assembly provide its approval.
140. The delegation of power to make regulations about the process to give effect to each section is properly regarded as conferring the power to make subordinate legislation within the framework of the empowering legislation and to give effect to it. This does not amount to a delegation of plenary legislative power.¹⁴³

¹⁴³ See in this regard *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 esp at paragraph 51.

141. While an added benefit, the tabling of draft regulations and the impact assessment is not necessary. The Bill could simply have made ordinary provision for the Minister to make regulations setting out the procedures in terms of which eligible authors may seek to obtain their share of the royalties.
142. The need for the provisions dealing with royalties is well illustrated by the sad tale of Solomon Linda, who wrote the song “Mbube” in the 1920s, which was adapted by an American artist into “The Lion Sleeps” in the early 1950s, and proceeded to earn many millions of dollars over decades for various artists who recorded the song, and their recording companies. All profited, except for Solomon Linda.
143. The Bill would enable the originator of a work, such as Solomon Linda, to earn a fair share from exploitation of the work, from the date of commencement of the Act. They would not be able to claw back profits that have already been earned at the time of the commencement of the Act, so as retrospectively to defeat commercial gains already realized; only prospective uses of the works will attract a fair benefit for their originator.
144. The entitlement to a royalty, as introduced by sections 6A, 7A and 8A, is not open-ended; it is an entitlement to a “fair share of the royalty” – a reasonable royalty. Because the facts of each case will have to be adjudicated on its own merits, the Bill cannot be expected to provide any detail in this regard.
145. Instead, it effectively makes provision for parties to renegotiate the terms of unfair contracts, and where agreement can't be reached, to approach the Copyright Tribunal – a designated judge of the Gauteng Division of the High Court – for an appropriate order. Where existing contracts are fair, they will presumably be untouched.

CONCLUSION

146. In light of the above, we are of the view that the objections considered do not constitute any impediment to the President signing and assenting to the Bill. Subject to any other valid constitutional reservation, the President is, rather, under a constitutional duty to sign and assent to the Bill within a reasonable time.

147. We advise accordingly.

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13 October 2019