

Director General, Department of Trade and Industry

For Attention: Meshendri Padayachy

Private Bag X84

Pretoria

0001

Cape Town, 16 September 2015

Written comments on the Copyright Amendment Bill 2015

Dear Ms. Padayachy:

Please find attached the comments prepared by UCT's IP Unit (faculty of law) on the proposed Copyright Amendment Bill 2015. We thank you for the opportunity to share our views on the Bill.

Kind regards,



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COPYRIGHT AMENDMENT BILL 2015

Government Gazette 39028, 27 July 2015

COMMENTS

16 September 2015

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Introduction

The comments in this document have been prepared based on our own subject-matter expertise, numerous stakeholder consultations¹ and an in-depth collaborative analysis carried out by a group of leading international and domestic experts and scholars working in the field of copyright law.²

Our approach is to engage with the Copyright Amendment Bill (hereinafter “Copyright Bill” or “the Bill”) in a sympathetic and constructive yet critical manner. Our comments are geared towards facilitating a balanced, modern, sound, coherent and practically relevant copyright regime that complies with relevant international instruments and, even more importantly, sufficiently incentivises and maximises creativity in South Africa through protection and sufficient access for the benefit of society at large. It is the maximisation of creativity that is the ultimate aim of our copyright law.

It is important to recognise that the previous assumption that if some protection is good for creativity, more is even better, is not only obsolete but potentially harmful, especially in the developing country context. In the same vein, it is now clear that global one-size-fits-all approaches to issues concerning copyright law are often ill-suited and that, instead, we need context appropriate and tailored approaches to copyright law that are responsive to local conditions. All this, together with the unprecedented opportunities for commercial and non-commercial creativity brought about by digital technologies, requires a creativity-friendly re-calibration of our copyright law as much of digitally-enabled creativity is now, at least partially, based on copying. Currently, there is a significant gap between our outdated copyright laws in the books and the way creativity actually happens “on the streets”. This is especially true as far as non-commercial creativity is concerned. This is worrisome if one considers that probably more than 99% of copyrighted works created today are created by individuals who create without any commercial purpose. Balancing features such as copyright exceptions and limitations play a key role in this context. Moreover, one needs to be mindful of the growing perception of creatives in South Africa that the current copyright system unjustly favours middlemen and multinationals.

¹ Incl. our self-organised *Internet Rights, Cultural Development and Balancing Features in South African Copyright Reform* conference, held on 11 August in Pretoria and funded by the Ford Foundation and Google, as well as the DTI’s one-day stakeholder conference in Johannesburg on 27 August

² The result of the international collaboration is available here <http://bit.ly/1NujKGB>

This submission is structured as an outline document – it comments on provisions in the Bill that are of particular importance and concern to us. We do not attempt an exhaustive review of the Copyright Bill but rather aim to highlight selected areas of concern. We hope this will benefit the broader discussion into the contours of the Copyright Bill as a whole. We also add some of our own recommendations as well as model language if appropriate. In addition, we are available to attend any consultations to elaborate on these issues in the finalisation of the Copyright Bill.

We wish to commend the DTI - once again - on a transparent and open stakeholder consultation process and its desire to tackle the difficult task of amending our Copyright Act.

General Comments

We wish to state upfront that the list of objectives preceding the Bill clearly shows that the lawmaker is aware of many of the topical issues in the area of copyright law. This, in our view, is a good basis to work from. We even suggest the lawmaker considers emphasising the most important objectives in a preamble as this will, among other things, provide some interpretive guidance for courts when applying existing and new provisions by putting forward a set of values, principles and objectives that could aid interpretation of the Act.³ Having said this, there is certainly room for improving the current Bill. Regrettably, some instances of clumsy drafting have enabled detractors of the Bill to dismiss the many positive and progressive aspects contained in it.

One general concern is that the Copyright Bill addresses some (important) issues which in our opinion do not fall within the scope of copyright legislation and should rather be dealt with in other

³ Including preambles in South African legislation is still somewhat unusual but should be considered in light of the aforementioned benefits. It is also noteworthy that the recently published *Protection, Promotion, Development and Management of Indigenous Knowledge Bill* also contained a preamble (see: http://www.gov.za/sites/www.gov.za/files/38574_gen243.pdf). Purposes that a preamble might wish to reflect include:

To achieve an appropriate balance between the rights of authors and those of users and the public as a means to promote, protect and fulfil the Constitution and its bill of rights, to promote creativity, innovation and the cultural arts, to expand opportunity to access and use information to promote the full development of all South Africans, to overcome vestiges of discrimination that have disadvantaged the majority from full participation in and enjoyment of the benefits of cultural industries, to contribute to criticism and public discourse, to promote education, research and public archiving, to expand access for underserved populations, to enable and take advantage of new technologies, to safeguard personal uses of works, and to ensure proper performance of public administration.

pieces of legislation. A point in case is the issue of promotion of broadcasting of local content which may better be left to broadcasting legislation. Similarly, we suggest that performers' rights are removed from the Bill and addressed in the existing Performers' Protection Act to avoid confusion and inconsistencies.

It appears that in some instances not enough emphasis was put on aligning the proposed changes with the existing internal structure of the Copyright Act. For instance, it is unclear why the new provisions on Collecting Societies are "sandwiched" between the provisions dealing with the nature of copyright in sound recordings (s9) (and the related royalties provision (s9A)) and the provision addressing the nature of copyright in broadcasts (s10). Similarly - and subject to our general comment above regarding the provision of performers protection in the Copyright Act - the provisions of ss20A et seq. fail to adequately integrate the different issues. More specifically, the scope of performer rights protection needs to be addressed in the nature of rights part (ss7-11B) of the Act, moral rights in s20, transfer in the transfer section (s22), and, overall, such protection needs to be made subject to all exceptions, especially fair dealing/fair use. In addition, the wording of s23(4) and 23(5) ("guilty of an offence"), read together with s23(6), suggests that these activities are supposed to qualify as *criminal* copyright infringement. Whether these acts should attract criminal liability is in itself very questionable (see our comments in the next section). However, if these acts indeed constitute criminal copyright infringement, then they should have been added to s27 ("Criminal offences"). Section 23 deals with *civil* law copyright infringement. It may be helpful, at this point, to renumber all provisions in the Copyright Act. Having said this, we welcome what appears to a change in structure in the part dealing with copyright exceptions and limitations. The current system of listing most exceptions in a clause dealing with literary and musical works only and then selectively referring back to this clause in subsequent provisions is confusing and should indeed be adjusted for the sake of clarity and to avoid undesirable results.

The reasons for introducing the new category "craft works" are unclear, especially since the existing definition of "artistic works" appears to already covers most of the works now considered craft works. Unless there is a compelling reason to add the new category of "craft works" we suggest to remove this category from the Bill. More generally, lawmakers should generally be mindful that adding additional layers of copyright protection to hitherto unprotected subject matter also creates societal costs through further reducing a crucial and freely available knowledge resource – the public

domain. As a vital engine for innovation, entrepreneurship and development in every country, the public domain is deserving of special protection.

It is unclear if and to what extent the Copyright Regulations of 1978, referred to in s13 of the current Copyright Act, remain applicable.

Subject to the comments contained in the next section, we welcome the proposed introduction of the more flexible fair use doctrine into South Africa's copyright legislation. However, in order to function in the intended manner, the entire system of copyright exceptions and limitations needs to be adjusted as proposed below.

Specific Comments

Definitions, s1

“Commercial” [not yet included in the Act/Bill]: Throughout the Copyright Act, the terms “commercial” or “non-commercial” are being used; a definition of “commercial” should therefore be added to s1 of the Copyright Act. The following definition of “commercial” is appropriate for the modern era in which user generated content created with no intent for financial gain of the user has become common⁴.

Model language:

‘Commercial’ means to obtain a direct economic advantage or financial gain in connection with the user’s business or trade.

“Craft works”: The reasons for introducing the new category “craft works” are unclear, especially since the existing definition of “artistic works” appears to already covers most of the works now considered craft works.

Delete

“Orphan works”: Minor changes to definition are suggested to eliminate ambiguity and to align the wording with wording used elsewhere.⁵

⁴ This definition is similar to that of Singapore Copyright Act (Chapter 63), Division 5, S.136 (6B) (“a person does an act for the purpose of obtaining a commercial advantage if the act is done to obtain a direct advantage, benefit or financial gain for a business or trade carried on by him.”).

⁵ The proposed definition of orphan works is adapted from Article 2 of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, 2012 O.J. (L 299) 5, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0028&from=EN>

Model language:

‘orphan works’ means works in which copyright still subsists but none of the rights holders in that work is identified or, even if one or more of them is identified, none is located, despite a diligent search for the rights holders having been carried out.

“Parallel importation of goods”: The current definition conflates issues of copyright and trademark protection and is unnecessary if the “parallel importation” is dealt with and defined in the context of ss12 et seq. as proposed below.

Delete

“Person with a disability”: Section 19D(5) of the Bill also defines ‘person with a disability’. The definition in s19D(5) is more closely aligned with Art 17(5) EIFL Model Law and consistent with definitions found elsewhere in South African law, including the Employment Equity Act 55 of 1998.⁶ We recommend that the 19(D) definition replace that of “person with a disability” in the definition section of the Bill. The latter definition is unduly limited to “a perceptual or reading disability” and is focused on books or reading material, rather than all works. The latter definition would not, for example, enable modifications to audio-visual works to assist the deaf or hard of hearing.⁷

Model language:

‘person with a disability’ means a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability.

“Reproduction”: We argue that while it might be desirable to simplify the current definition of “reproduction”, the suggested replacement is inadequate and needs to be revised.

⁶ The Employment Equity Act 55 of 1998 reads:

“people with disabilities means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”

⁷ See Denise Nicholson, Are the Deaf Getting Fair Deal

https://www.westerncape.gov.za/text/2012/4/7_jf2012-copyright.pdf. For disability access clauses that apply regardless of the type of disability, see, e.g., Luxembourg, Law of 18 April 2004, Art. 10.11; Serbia, Law on Copyright and Related Rights, Art. 54.

“Technological protection measure”: The last part of the definition (“that is protected by a technological protection measure”) makes the definition circular. The following alternative explicitly carves out of the definition common technologies used for non-infringing purposes.⁸

Model language:

‘technological protection measure’ -

(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of a work;

(b) does not include a process, treatment, mechanism, device, or system to the extent that it controls any access to a work for noninfringing purposes. For example, a “technological protection measure” does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in South Africa of a noninfringing copy of a work.

“Technological protection measure circumvention device”: The word “unlawful” should be added to the definition to ensure that this definition is sufficiently aligned with the permission to allow circumvention in exercise of copyright exceptions and limitations.

Model language:

‘Technological protection measure circumvention device’ means a device primarily designed, produced or adapted for purposes of enabling or facilitating the unlawful circumvention of a technological protection measure;

⁸ Based on: New Zealand, Copyright (New Technologies) Amendment Act 2008, Art. 226. Definitions (“TPM or technological protection measure— (a) means any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the infringement of copyright in a TPM work; but (b) for the avoidance of doubt, does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for noninfringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a noninfringing copy of a work)”)

Works eligible for copyright, s2

The Bill does not propose any changes to s2. However, we wish to bring the following to the lawmakers attention:

1. Protection for “broadcasts” and “programme-carrying signals” belongs, if anywhere, in broadcasting legislation, rather than in copyright. No modern copyright law recognises these as categories of copyrightable subject matter, though some national laws do provide limited protection under other rubrics.
2. The dated interpretation by South African courts of the “originality” requirement in s2 as referring to skill and effort instead of creative activity has the in our view the undesirable effect of affording copyright protection to works that are in most other countries considered non-original.⁹ There is strong reason to believe that this approach to the law of copyrightability is anticompetitive in effect, and could serve to stifle innovation in South Africa. And copyright protection for databases (such as test results) may have a chilling effect on access to needed generic drugs.
3. It may be useful to prescribe a list of non-copyrightable information objects that incorporates and expands upon the list currently located in s12(8) of the Copyright Act to facilitate public access to essential buildings of knowledge. The list provided in the model provision below is based, in parts in Article 2 of the WIPO Copyright Treaty and Art 5 of the EIFL Model law.
4. In some cases, a particular idea can only be expressed intelligibly in one or a very limited number of ways and in such cases even the expression of an idea should remain unprotectable or protection should be limited to verbatim copying only. The UK, the US and many Commonwealth countries already have corresponding provisions in their laws. Similarly, it is also desirable to exclude from protection information required by regulation. Such exclusion would cover disclosures in areas such as generic medicine package insert and

⁹ The clear international trend in copyright law is to move away from providing copyright protection for productions that do not reflect creative activity but merely represent the outcome of skill and effort. In some jurisdictions (like the United States) such non-original productions (which often take the form of databases and other compilations) are denied protection outright. In others, like the EU countries (including the UK), they receive lesser, non-copyright protection for a period of time. But nowhere does a modern copyright law embrace non-original productions as copyrightable. This, however, appears to be the tendency of recent jurisprudence in South Africa, as in *Board of Healthcare Funders v Discovery Health Medical Scheme* (Gauteng High Court 2010), relying in part on superseded UK precedents.

pesticide labels. If those statements were protected by copyright, the potential resulting risks to public health and safety would be considerable.¹⁰

Model language:

2A. Scope of copyright protection

(1) Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such, nor, in the case of computer programs, to interface specifications

(2)(a) Tables and compilations which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright.

(b) The copyright protection of tables and compilations shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

(3) Notwithstanding the provisions of Section 2, no protection shall extend to expression inextricably merged with the idea such that the idea can be expressed intelligibly only in one or a limited number of ways, or when a particular expression is directed by law or regulation such that only one form of expression will meet regulatory requirements, such as on a safety label.

(4) Notwithstanding the provisions of Section 2, no protection shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information, provided that the author of the speeches referred to in this subsection shall have the exclusive right of making a collection thereof.

Copyright by virtue of nationality, domicile or residence and duration of copyright, s3

The provision of perpetual term for some copyrights runs counter to principles of international and domestic copyright that prescribed “limited” terms for copyrights. This recognises the important public interest in the existence of a “public domain” of preexisting works that are, by virtue of their age, open and available to use by all. If the intent here is to adopt a system of domaine public payant (DPP), or “paying public domain” such as exist in Algeria, Kenya, Rwanda, Senegal, Republic of the

¹⁰ There is at least one case in South Africa where this issue was engaged, with a holding of the court that a generic medicine could not copy information on a label required to be there by government regulation. *Beecham Group plc and SmithKline Beecham Pharmaceuticals (Pty) Ltd v Biotech Laboratories (Pty) Ltd* 2002.

Congo, Côte d'Ivoire and Paraguay, further study may be in order to determine how the public interest will be served in such cases. The Bangui Agreement of the OAPI and its Annex on literary and artistic property provides for such a regime for the exploitation of expressions of folklore and works or productions that have fallen into the public domain (Section 59, (as amended in 1999) Annex VII, Title I). But many theoretical and practical problems arise in the implementation of such legislation, and there are no known instances in which it has provided governments with a significant source of revenue.¹¹

Delete s3(1)(c)

Copyright in relation to the state and certain international organizations, s5

Section 5(2) now stipulates that all eligible works *funded by* the the state or international organisations shall be owned by the state or such international organisation. This provision therefore denies recipients of research grants to keep ownership of rights in their work and to decide if and where they publish their results. This effect is compounded by proposed s22 which prohibits the re-assigning state copyright to the individual researcher or research institution. We are not aware of any modern copyright law that deals in this way with funded works as a category. Indeed, the typical default is that copyright, which is an author's right, vests in the individual who received the funding (or other commission), while (by one or another mechanism), the funder is assured whatever use rights it may require in the resulting work. It is also unclear what constitute a "funded" work (Does this include professors' salaries? How are partially funded works treated? How are collaborations between funded authors and non-funded authors treated?). This provision also appears to be in conflict with the IPR from Publicly Financed Research and Development Act.

Model language for s5(2):

Section 5(2): Unless altered by terms contract, copyright for state funded works shall vest in the author of the funded work and the state or international organization funder shall enjoy a royalty-free paid-in-full non-exclusive licence to the full practice and use of the full rights in the work for any purpose. In absence of contractual provisions to the contrary, data and works funded by the

¹¹ See Carlos Mouchet, Problems of the "Domaine Publique Payante," 8 Colum.-VLA Art & L. 137 (1983-1984).

state or international organization shall be released or licenced under a public or open licence to maximise public access to such works.

Delete s5 (3), (4), and (5)

Resale royalty right, s7A

The argument for such a right is easy to grasp: visual artists, at least traditionally, have relied on sales of physical embodiments of their works to generate income. However, any resale of that embodiment is free of an obligation to pay the artist absent a contractual obligation. This has, in some famous (but perhaps also limited) cases, led to resales at prices far in excess of that made by the artist, and a consequent perception that artists are not properly sharing in the bounty that stems from their creativity. There are, however, arguments against such a right. A high resale price might be the result of a dealer's considerable efforts to increase the popularity of the artist. Another argument, made by artists themselves, is that the right only helps those who are already successful. A 2010 report on artists' resale royalties, commissioned by the European Art Market Coalition, found that in continental Europe, 74 percent of all the royalties collected went to artists' heirs, 20 percent went to the collecting agencies and only six percent went to living artists. Helping older artists may be the intended goal, but critics claim the practice has largely benefited the heirs of already successful artists like Pablo Picasso and Henri Matisse. The resale royalty right thus may after all not help up and coming artists who may in fact be harmed by the right since dealers may shy away from their work out of a concern that they will be stuck with paying and administering a resale royalty. Additionally, dealers point out that many sales are at losses and that artists do not chip in to help with losses, and only want to benefit when the price goes up. Moreover, given the strong trend toward visual artists making money off of digital sales, a right based on 19th century business models and production methods may be obsolete.

There are also important questions of scope and administration that should be addressed before a decision is made to introduce such a right. These include which works will be included? What about limited editions? Which artists, deceased ones, only living, only South African or all authors? Should there be a minimum sales price? How long after the original purchase does a resale trigger the right? At any time, or only after a minimum period? Do private sales count, or just those by auction houses? Will there be collecting societies? What will be transparency requirements for sellers and

collecting societies; in other words, what right will artists have to examine the books and how will this right be enforced? Will sales of South African works abroad trigger the obligation, or only sales in South Africa? If sales within South Africa, how will royalties for non-South Africans be handled? These are only a few of the important questions that must be studied.¹²

If, upon further study, South Africa were to determine that it did want to pursue such a right, it might be wise to consider a model that involves less bureaucratic oversight than the current Bill. Thus, for example the version of droit de suite now in place in the state of California, in the U.S., is largely self-administering: When the sale of a work meets the conditions outlined above, a seller must pay the artist 5% of the resale price. If the artist is deceased, the payment goes to the artist's estate or heirs. It is the seller's obligation to locate the artist within 90 days of the sale. If the artist or heirs cannot be located, the seller is to make payment to the California Arts Council, who will hold the collected payments for up to 7 years for the artist. In the event that the Council is unable to locate a particular artist or the artist fails to claim the collected royalties in that time period, the funds collected are distributed to the city of Sacramento's Art in Public Places program.

If Artists' Resale Royalty provisions are retained in the final version of the Copyright Amendment Act, the provisions relating to "computer-generated" works probably should be reconsidered. Granting resale rights for all "computer-generated" images, including on the internet, could lead to unforeseen consequences for the functioning of the internet and digital media in South Africa. We therefore suggest to delete s7C(2)(a).

Royalties, s9A

This section should exclude any requirement to pay royalties where limitations and exceptions provide for permission-free uses. The language should also track that in sections 9(c), (d) and (e) to which it refers, rather than introducing new terms (e.g. "to play").

¹² See Clare McAndrew and Lorna Dallas-Conte, Implementing Droit de Suite (artists' resale right) in England, available at <http://www.artscouncil.org.uk/media/uploads/documents/publications/325.pdf> (study of the law in the UK and in six other countries).

Model language for s9A(1)(a):

Section 9A(1) (a) In the absence of an agreement to the contrary, unless otherwise authorized by law, no person may broadcast, transmit, or communicate to the public, a sound recording as contemplated in section 9 (c), (d) or (e), and not otherwise authorized, without payment of a royalty to the owner of the relevant copyright.

Copyright exceptions and limitations / users rights, s12 - 19E

Copyright exceptions and limitations are the single most important tool for fairly balancing rights holder interests and legitimate interest of users of copyrighted material. Importantly, copyright exceptions and limitations are a crucial national policy tool to reach developmental targets and goals. For it is by way of exceptions and limitations that equitable access to educational and other knowledge material can be facilitated as copyright protection would otherwise bar considerable amounts of such material from being reproduced and disseminated freely. Yet, while the scope of copyright protection - internationally and domestically - has significantly expanded in the last decades, copyright exceptions and limitations have not kept up and they now appear out of sync with how creativity works in the digital age.

Digital technologies challenge some of the foundations upon which copyright protection systems were originally built. For instance, copyright was originally never intended to be applied towards end-users. Instead, it was introduced as a right to be exercised by and against professionals. It is therefore very likely that at least some of the rights granted to copyright holders in current copyright laws would not have been phrased and awarded the same way if lawmakers had foreseen that users might not be able to make use of widely accepted copyright exceptions and limitations, such as fair use, fair dealing, and certain private uses. A thorough examination of the changes brought about by digital technologies also highlights that the clear traditional distinction between creators of creative materials on the one hand and users of such material on the other is to some extent becoming obsolete. This is because digital technologies have turned a great number of formerly passive users into active producers and publishers of digital media. This observation leads to an interesting conclusion: Often the real copyright conflicts are nowadays not between creators and users but between users (including potential creators) on the one hand and rights holders other than creators, for example (multinational) publishers, on the other. New technologies often jeopardise the pre-digital business models of these rights holders. As a result, once-powerful intermediaries are increasingly fighting for their *raison d'être*. However, instead of adjusting their old business models,

it increasingly appears that many of the main beneficiaries of the old system have chosen to fight the new circumstances. In spite of claims to the contrary, these fights are, therefore, chiefly fought in self-interest and not in representation of, and for the benefit of, the actual creators of the works. Our current copyright regimes have led to a concentration of rights in much of the world's more recent knowledge material in the hands of a few profit-orientated, multinational corporations, and most of these corporations are reluctant to allow a remuneration-free use of their material, regardless of the intended use. Culture, however, is created by individuals who, by building on previous findings and materials of others, create new material. While new technologies facilitate the creation of creative material at a much faster rate than ever before, the restrictive stance of corporate and other rights holders on any free use of their material inevitably hampers the dissemination and use of copyright protected works.

It is against this backdrop that our system of copyright exceptions and limitations is in urgent need for reform and we commend the lawmaker on addressing this issue in the Bill. We do, however, believe that more work is needed to create a coherent, modern and relevant system of copyright exceptions and we hope that our model language provided below can help creating such a system.

By way of clarification and for the avoidance of confusion some general remarks are required. In general there are three main approaches to copyright exceptions and limitations in national copyright laws around the globe: First, some countries, especially civil law countries in continental Europe, follow a specific provisions approach and incorporate rather long lists of specifically phrased copyright exceptions and limitations into their copyright laws. Secondly, some countries, most notably the U.S., have chosen to introduce into their copyright laws broad, open-ended so-called fair use provisions. These provisions are usually accompanied by only a few more specific copyright exceptions and limitations. Thirdly, there are countries, especially those in the common law tradition, that have opted for a compromise. While their copyright laws contain specific copyright exceptions and limitations, they also employ broader so-called fair dealing provisions. According to these fair dealing provisions, the unauthorised use of protected works is permitted if the use can be considered fair in light of the underlying purpose. Such underlying purposes are research, (private) study, criticism and review, news reporting, teaching, use by disabled persons and use by archives as well as libraries. The concepts of fair use in the U.S. and fair dealing in other countries (incl. South Africa under its current Copyright Act) must not be confused. Both concepts share the same fundamental idea of permitting uses which are considered fair. However, the concept of fair use is,

in general, much broader than the concept of fair dealing because it is not confined to specific purposes such as research, study, criticism and review or news reporting. Furthermore, some of the uses permitted under the concept of fair dealing only pertain to certain kinds of protected works. Therefore, fair use and fair dealing are analogous rather than synonymous. In a way, the concepts may even be described as converse: Under the fair dealing concept permitted uses are regulated by law and the courts are required to develop certain general principles from those kinds of uses. By contrast, under the fair use doctrine the principles for permitted uses are specified, and it is left to the courts to determine certain kinds of uses. The Bill in its current form appears to ignore some of these conceptual differences between fair use and fair dealing.

This said, we do support the DTI's decision to introduce a more flexible fair use-based system of copyright exceptions and limitations. If done properly and in a way responsive to South Africa's particular needs such a system appears best suited to create a balanced and modern copyright regime that benefits creators and users alike while sufficiently addressing rapid technological change. We are aware, however, that the much-needed flexibility offered by fair use comes at a price. The vagueness of open-ended fair use provisions can result in a legal uncertainty, even though the four factors contained in our fair use provision already provide some useful guidance, especially when relevant international case law is also considered. But in some cases it is inevitable that South African courts will have to be involved in deciding cases concerning fair use. Against this backdrop, it is possible that some users may shy away from time-consuming and costly litigation and may not be willing to test the limits of fair use. Inflexible specific provisions appear, however, to be an equally poor alternative. It became obvious in recent years that, in times of rapid technological developments, specific exceptions and limitations are often inappropriate. For example, even in developed countries numerous now-popular activities such as time-shifting, space-shifting and reverse-engineering were, if at all, only addressed with considerable delay because legislative amendment procedures could not keep up with the pace of development. As a result, everyday activities such as the copying of music from legitimately purchased CDs onto a portable MP3 player remain, in principle, illegal in many countries (including South Africa). Our suggestions below aim to combine advantages of both approaches while, at the same time, minimising the described disadvantages. More specifically, we propose to retain or adjust numerous specific exceptions and limitations in the interest of legal certainty. Yet, we suggest to complement these provisions with a more flexible fair use provision in section 12. It should also be noted here that some commentators have argued that a possible conflict exists between the broad wording of fair use provisions and the

first step of the so-called three-step test contained in international instruments, which requires that exceptions and limitations must be confined to certain special cases. We believe that newer research sufficiently refutes such claims¹³ and we would also like to point out that several countries, including the U.S., have had similar fair use provisions for years and have not been taken to, for instance, the WTO Dispute Resolution body. To address this concern, we do, however, suggest to adopt, wherever possible, clarifying, non-binding fair use guidelines.

Our suggestions below overhaul and modernise South Africa's current system of copyright exceptions and limitations in its entirety under consideration of the Bill's direction and intent, and:

- introduce in s12 a general, flexible and open fair use provision that incorporates the purposes previously covered by South Africa's fair dealing provision in s12(1). Importantly, such provision can be used to justify new uses or technologies over time that may not be envisioned in the Act at the time of its passing.¹⁴ A four factor analysis is applied to determine whether or not a certain use is fair (see s12(2)) to limit the scope of fair use and protect rights holder interests. s12 applies to all works;
- re-locate the exceptions and limitations contained in s12(2)-(7), (13), (14)¹⁵ as well as some provisions from the Bill's s12A to a re-drafted s12A that now contains specific exceptions and limitations in addition to the general fair use provision in s12. To some extent, the uses protected under s12A are arguably already covered by the revised s12 and the lawmaker may thus consider deleting some of them from s12A. However, in the interest of legal clarity it may be advisable to accept the overlap and keep s12A as proposed below. Section 12A applies to all works. By and large, we have retained the current language from the provisions moved elsewhere; however, the following changes were made:
 - Section 12A(1)(a): The quotation right currently in 12(3) is a broad and useful exception, arguably required by the Berne Convention. It is a traditional part of South African copyright law, and its omission or dilution here would disturb settled

¹³ See, for instance, For an extended discussion of the *compatibility of open exceptions with the international "Three-step test"* (e.g. Berne, TRIPS), see *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*

<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=auilr>

¹⁴ For responses to frequent arguments against such flexible limitations and exceptions see: *Responding to Frequently Asked Questions About Flexible Use Provisions*, <http://infojustice.org/wp-content/uploads/2012/12/Appendix-III.pdf> and *The Fair Use Doctrine in the United States — A Response to the Kernochan Report*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298833.

¹⁵ S12(8) was integrated into the newly proposed s2A, and we recommend deletion of s12(15) as the exception contained in that provision appears to overlap with and duplicate the educational exceptions proposed in s13B(2)

expectations. In the modern information and communications environment, where so much information (online and elsewhere) may be difficult to trace back to its source, attribution cannot be a hard and fast requirement but rather be required whenever reasonably practical. The proposed provision allows for the continued vitality of the quotation right, while promoting respect for the interests of creators.

- Section 12A(1)(b): We propose expanding the fair dealing exception for “illustration” beyond the limited confines of teaching. An exception of this kind is essential if the public discourse is to be carried on in South Africa without unreasonable interference from copyright law. Whether in the context of political discussion, or cultural commentary, or educational programming, the ability to illustrate an argument with appropriate examples is close to the heart of free expression.¹⁶
- Section 12A(1)(e): The existing provision in 12(7) -- restricted to print and “broadcast” -- is out of date in the age of blogs and web hosting. In the proposed modernised version, it has been separated out and made into a separate subsection on communication to the public for informatory purposes, as suggested in the EIFL Model Law, Art. 13. The expansion of the exception for informatory uses is appropriate to the present situation in South Africa, where the ability of the media to cover public events and public debates comprehensively is so critical to the democratic political process.
- Section 12A(1)(f) is adapted from s12(8) of the Bill. For clarity, here and elsewhere, the term “personal” is used instead of “private.” “Private” may suggest a non-governmental entity (“private company”), rather than a personal use. Read together with our proposed definition of “commercial” in s1, this exception is intended to make clear that an individual end-user using an online translation service, e.g., to translate an English webpage into Xhosa, is defined as a personal use even though the platform is commercial (e.g., makes money through ads). The revision clarifies that the purposes stand alone, e.g., that giving “professional advice” does not have to be performed by an educational institution.
- Section 12A(1)(j) is based, in part, on EIFL Model Law Art. 14. It is important to recognise that these activities may occur in commercial as well as non-commercial

¹⁶ Switzerland’s law provides an example, providing an exception for the use of copyrighted material “if the quotation serves as an explanation, a reference or illustration.” Federal Law on Copyright and Related Rights Act (copyright, LDA) of 9 October 1992 (as of 1992) – Ch. 5: Limitations on Copyright - Art. 25.

settings. Parodies are often commercial in nature, but are still subject to free expression rights.¹⁷ Likewise, any effort to specify the media through which these uses will occur is likely to be underinclusive. The inclusion of tribute and homage is for the avoidance of doubt, to make clear that artistic references to pre-existing works in new ones will not always convey a negative assessment. The “few lines ... few parts” restriction in the Bill has been deleted because it runs counter to the practice of effective parody and satire. There are many examples where the entire work had to be used in order to effectively engage in criticism, commentary, or education. At minimum, the entire work may need to be copied as an intermediate technical step.

- Section 12A(1)(k) is based on the Bill’s s12A(4) private use right. But the Bill’s language is not sufficiently tailored to include common modern uses such as cloud storage and time and format shifting. The substitute provision at right follows the recent UK legislation creating spaces for the making personal copies, including format shifting. In our view, it is the most comprehensive modern private use right.¹⁸
- remove the Bill’s s12A(3), (6), (7) and (8) for the following reasons:
 - The Bill’s s12A(3) is not framed as an exception but rather as a prohibition. However, such prohibition is not necessary given the existing Copyright Act’s protections, which already apply to digital material. As written, it appears to grant less room for fair use of anything on the Internet than for offline material. If the intent is to actually provide more access to digital material in the classroom, the provision could be re-worded and combined with what we propose as a new 12A(1)(b) below.
 - The intent of s12A(6) of the Bill is unclear. Given the proposed restructuring of 12 and 12A, this limitation now seems unnecessary. Whether the work is for commercial or non-commercial purposes will be considered in the fourth factor of the new fair use test under s12.
 - Section 12A(8) appears redundant with the law enforcement exception to the TPMs provision below.
- move the provision contained in s12A(7) of the Bill to a newly created s12B for better clarity. The wording of that section has also been amended. Even if copyright is not a barrier to

¹⁷ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

¹⁸ See the Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014, available at <http://www.legislation.gov.uk/ukdsi/2014/978011116036/regulation/3>.

parallel import, trademark could still be used to prevent import of copyright goods - there are South African cases in which this has happened. Sec. 12(8) of the EIFL Model Law deals with this issue. The best and simplest modern parallel importation clause lies in the recent amendment of its law by Chile.¹⁹

- slightly revise the important new ‘transient copy’ exception in s13A of the Bill.²⁰
- broaden the scope of and slightly amends s13B of the Bill to include the full range of activities, both teaching and scholarship, that typically occur in and around academic institutions.
 - Two requirements contained in s13B of the Bill - i.e., that the use must be for “fair use” and that the user “has received permission and instructions” - have been removed. The “fair use” requirement appears unnecessary since the provision already includes the most important qualification -- not exceeding the extent of the purpose. The permission requirement is confusing as exceptions concern permission-*free* uses.
 - Section 13B(2) was re-drafted with the aim of enabling teaching without significantly affecting legitimate market interests of publishers. And the proposed balance is, in our view, appropriate in light of South Africa’s paramount interest in delivering high quality education at reasonable cost to the greatest possible number of its citizens.
 - Section 13A(3), slightly amended, is now s13B(3A). It takes account of an important new phenomenon: the open “institutional repositories” of faculty and student work that are being established by institutions of higher education. Institutional repositories represent an excellent opportunity for the important work of South African students and scholars to become better known in the general community of learning.
 - The new s13A(3B) deals with a related topic -- the making available of publicly funded research by way of public or open licences (such as Creative Commons licences) and repositories (i.e., those that not only permit the public to read their

¹⁹ See Chile Law No. 17.336 on Intellectual Property http://www.wipo.int/wipolex/en/text.jsp?file_id=270205 Article 18 (“the first sale or other transfer of ownership in Chile or abroad shall exhaust the right of distribution nationally and internationally in respect of the transferred original or copy”).

²⁰ For recent modern examples of transient copy exceptions, see New Zealand Copyright Act 1994 (amended 2011) Section 43A; Switzerland, Federal Law on Copyright and Related Rights (2008), Ch. 5, Art 24; Poland Act 2/4/94 Art 75(1); Denmark Copyright Act of 2010; Australia Copyright Act of 1968 (Amended 2012), Sections 43A and 43B.

contents but also allow for its general use for various purposes, including republication). The suggested provisions are adapted from Art. 38 (4) of German Copyright Act, as last amended by Article 8 of the Act of 1 October 2013.²¹ The Netherlands and Argentina have similar provisions. In our view, a provision of this kind is essential if the state-funded research of South African scholars is to have appropriate influence, both nationally and internationally.

- amend and re-locate the exception contained in s13C of the Bill. The apparent ban on providing an electronic copy of the work to the patron (requiring “printing a paper copy of an electronic copy of a work”) falls short of conventional ILL practice in other countries where a digital copy is commonly sent by the requesting library to the patron. Because this provision relates to libraries, it is relocated in the proposed version to s19C(14).
- transform s15 into a clause addressing incidental copying and with relation to works in public spaces. The amendments are necessary because:
 - The incidental use exception in s15(1) of the current Copyright Act is unduly restricted. It fails, for example, to permit the incidental capture of audiovisual works (a television or radio in the background), photographs, or performances (e.g. a street band) of the kind commonly captured in cinematographic film. The exception also leaves out key works that commonly incidentally capture background material, such as photographs, paintings, etc.
 - The ‘right of panorama’ (also referred to as ‘freedom of panorama’ right) in 15(3) is also unduly limited. It should be expanded to include photographs and other images (such as paintings). The 2001 EU Directive on Copyright (Art. 3), for example, broadly applies to any “work” included in “any material” -- permitting “incidental inclusion of a work or other subject-matter in other material. The proposed language is adapted from Art. 59 of the German Copyright Act.
 - It is no longer necessary to refer back to s12 (and s12A) as, according our proposed model language, both sections now apply to all works and not only to literary and musical works as was previously the case.
- delete ss16(1), 17, 18, 19A. It is no longer necessary to refer back to s12 (and s12A) as, according our proposed model language, both sections now apply to all works and not only to literary and musical works as was previously the case.

²¹ Federal Law Gazette Part I, p. 3714, available at http://www.gesetze-im-internet.de/englisch_urhg/ .

- amend the wording of s19B. The existing computer program exceptions need to be expanded to permit reverse engineering for purposes of interoperability, as in the EU Software Directive. The proposed language draws from that Directive (please note: if the proposed personal copying exception in 12A is accepted, 19B(1) would not be required).
- recommend that s19C of the Bill is (tentatively) replaced with adjusted language from Art. 12 of the EIFL Model Law. We suggest that before this section is finalised further stakeholder consultation takes place to fully understand the challenges, requirements and needs of these institutions that serve a crucial public function. Particular emphasis should be on assessing the impact of digital technologies. A few points are worth mentioning here:
 - It is important to point out that these specific exceptions do not exclude the application of fair dealing in library settings, since it may be necessary as a basis for making a variety of uses that are not specifically mentioned here (e.g. making digitized records publicly available).
 - Because many cultural institutions now engage with materials using a full range of technologies, including digital ones, an effective set of exceptions for cultural institutions must recognise that a range of rights reserved to copyright owners may be implicated. For the avoidance of doubt, this provision is made co-extensive with the itemisation of copyright owners rights in s8(c). This is the intent of the use of the inclusive term “use” in 19C(1).
 - With respect to format shifting, discussed in s19C(8), the goal should be to make it possible for a library that holds a collection in an out-of-date format (e.g. VHS, Microfiche, etc.) to shift the format of the entire collection easily. Because format shifting is a form of preservation, it is implicated in other subsections of 19C as well. The proposed new language is included for the avoidance of doubt.
 - The second sentence in s19C(13) also is included for the avoidance of doubt. The inclusion of a revised “panorama right,” as suggested in relation to s15 would obviate the need for this provision.
- make no changes to s19D since inclusion in its current form represents a remarkable accomplishment through which South Africa assumes an international leadership role in the harmonisation of copyright and disability rights.
- delete s19E of the Bill if craft work protection is, as suggested, removed from the Bill.
- change the headings for ss12, 13, 15, 16, 19 and 19B.

Model language for copyright exceptions and limitations in SA (ss12 et seq.):

Section 12 Fair use

- 1) *In addition to uses expressly permitted in this Act, a fair use with respect to a work [or performance] for purposes such as the following does not infringe copyright in that work:*
 - a) *research, personal study or the personal use of the person using the work;*
 - b) *criticism or review of that work or of another work;*
 - c) *reporting current events*
 - d) *research, scholarship, teaching, and education;*
 - e) *comment, illustration, parody, satire, caricature or pastiche,*
 - f) *personal use, including to use a lawfully possessed work at a different time or with a different device;*
 - g) *preservation of and access to the collections of libraries, archives, and museums;*
 - h) *expanding access for underserved populations;*
 - i) *ensuring proper performance of public administration.*
- 2) *In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including—*
 - a) *the nature of the work in question;*
 - b) *the amount and substantiality of that part of the work affected by the act in relation to the whole of the work;*
 - c) *the purpose and character of the use, including whether such use serves a purpose different from that of the work affected, and whether it is of a commercial nature, or is for non-profit research, library and/or educational purposes; and*
 - d) *the effect of the act upon the potential market for the work affected;*

Provided that, to the extent reasonably practicable and appropriate, the source shall be mentioned, as well as the name of the author if it appears on the work.

Section 12A General exceptions from copyright protection

(1)The copyright in a work shall not be infringed by any of the following:

(a) Any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, in that the extent thereof shall not exceed the extent reasonably justified by the purpose

and that, to the extent practicable, the source shall be mentioned, as well as the name of the author if it appears on the work.

(b) To the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record, or for teaching: Provided that such use shall be compatible with fair practice in that the extent thereof shall not exceed the extent justified by the purpose and that, to the extent practicable, the source shall be mentioned, as well as the name of the author if it appears on the work.

(c) By the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work. Any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work.

(d) Reproducing in the press or by broadcasting a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for an informatory purpose. The author of a lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof.

(e) Subject to the obligation to indicate the source and the name of the author as far as practicable:

(i) the reproduction by the press, broadcasting, transmission or other communication to the public of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;

(ii) for the purpose of reporting current events, the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of such events, to the extent justified by the purpose;

(iii) the reproduction in a newspaper or periodical, the broadcasting or communication to the public of a political speech, a lecture, address, sermon or other work of a similar nature delivered in public, or a speech delivered during legal proceedings, to the extent justified by the purpose of providing current information.

(f) Translation of such work by a person or a public body giving or receiving instruction provided that-

(a) such translation is not done for commercial purposes;

(b) such translation may be used for personal, educational, teaching, judicial proceedings, research and professional advice purposes only; or

(c) such work is translated from or into any language and communicated to the public for non-commercial public information purposes.

(g) Use of a work in a bona fide demonstration of electronic equipment to a client by a dealer in such equipment.

(h) Use of a work for the purposes of judicial proceedings or preparing a report of judicial proceedings.

(j) The reasonable use of a copyrighted work for purposes of cartoon, parody, satire, pastiche, tribute or homage.

(k) The making of a copy of a work by an individual of—

(i) the individual's own copy of the work, or

(ii) a personal copy of the work made by the individual,

for the individual's personal use and made for ends which are not commercial. Permitted personal uses include: making a back-up copy, time or format-shifting, or for the purposes of storage, including in an electronic storage area accessed by means of the internet or similar means which is accessible only by the individual (and the person responsible for the storage area).

(2) The provisions of subsection (1) shall apply also with reference to the making or use of an adaptation of a work and include the right to use the work either in its original language or in a different language.

(3) An authorization to use a literary work as a basis for the making of a cinematograph film or as a contribution of a literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film.

Section 12B Parallel Importation

Notwithstanding any provisions of this Act, the Trademark Act 194 of 1993 and the Counterfeit Goods Act 37 of 1997, the first sale or other transfer of ownership in South Africa or abroad shall exhaust the rights of distribution and importation nationally and internationally in respect of the transferred original or copy.

*Section 13 Special exceptions in respect of reproduction of works
[unchanged from the current Act]*

Section 13A Temporary reproduction and adaptation

Anyone is permitted to make transient or incidental copies of a work, including reformatting, when an integral and essential part of a technical process, provided that the purpose of such copies or adaptations is (i) to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work, or (ii) to adapt the work to allow use on different technological devices, such as mobile devices, provided there is no independent economic significance to these acts.

Section 13B Use for educational and academic activities

(1) For the purpose of educational and academic activities copies may be made of works, recordings of works, broadcast in radio and television provided the copying does not exceed the extent justified by the purpose.

(2) Educational establishments may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in the course of instruction or in virtual learning environments, managed learning environments, virtual research environments and library environments hosted on a secure network and accessible only by the persons giving and receiving instructions at or from the the educational establishment making such copies, provided that such environments shall not include all or substantially all of a book or journal issue, unless a licence to do so is not available from the publisher or its representative on reasonable terms and conditions.

(3A) Persons receiving instruction may incorporate portions of works in printed or electronic form in assignments and portfolios, theses and in dissertations for personal use and library deposit, including institutional repositories.

(3B) The author of a scientific or other contribution which is the result of a research activity publicly-funded by at least fifty (50) percent and which has appeared in a collection, has the right, even after granting the publisher or editor an exclusive right of use, to make the contribution available to the public under a public or open licence and/or by means of an open access institutional repository in the final accepted manuscript version (peer-reviewed postprint), except that, in the case of a

contribution published in a collection that is issued periodically at least once per year, agreements may provide for a delay in the exercise of this author's right for up to 12 months from the date of first periodical publication. When the work is made available, the place of the first publication shall be properly acknowledged. Third parties, such as librarians, may carry out these activities on behalf of the author. Any deviating agreement to the detriment of the author shall be ineffective, except as provided herein.

(4) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies made under subsection (1) to (3B).

(5) The permission under subsection (1) shall not extend to reproductions for commercial purposes and shall include the reproduction of whole textbooks where the textbook is either out of print, the owner of the right cannot be found, authorised copies of the same edition of the textbook are not for sale in the country or cannot be obtained at a price reasonably related to that normally charged in the country for comparable works.

Section 14 Special exceptions in respect of records of musical works

[unchanged from the current Act]

Section 15 Special exceptions for incidental copying, three-dimensional reproductions and with relation to works in public spaces

(1) The copyright in a work shall not be infringed by its inclusion in another work if such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work.

(2) The copyright in a work of architecture or in the relevant drawings shall not be infringed by the reconstruction of that work on the same site in the same style as the original.

(3) It shall be permissible to reproduce, distribute and make available to the public works located permanently in public roads and ways or public open spaces. In the case of buildings, this authorisation shall only extend to the façades thereof.

(3A) The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as authorized reproductions), shall not be infringed if any person without the consent of the owner makes or makes available to the public three-dimensional

reproductions or adaptations of the authorized reproductions, provided the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process.

Section 16 Special exceptions regarding protection of cinematograph films

Where sounds embodied in a sound-track associated with a cinematograph film are also embodied in a record other than such a sound-track or in a record derived directly or indirectly from such a sound-track, the copyright in the film shall not be infringed by the use of that record.

Section 17 General exceptions regarding protection of sound recordings

[delete; ss12, 12A apply to all works]

Section 18 General exceptions regarding protection of broadcasts

[delete; ss12, 12A apply to all works]

Section 19 Special exceptions from protection of programme-carrying signals

[unchanged from the current Act]

Section 19A General exceptions regarding protection of published editions

[delete; ss12, 12A apply to all works]

Section 19B Special exceptions regarding protection of computer programmes

(1) A person having a right to use a copy of a computer program shall be entitled, without the permission of the rights holder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

(2) The permission of the rights holder shall not be required where reproduction of the code and translation of its form are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met -

(a) those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and

(c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.

(3) The provisions of paragraph (2) shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

(4) For purposes of this section, interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.

Section 19C Libraries, archives, museums and galleries

(1) Libraries, archives, museums and galleries may, without permission from the copyright owner, use a work to the extent appropriate to their activities in accordance with subsections (2) – (13), provided this is not done for commercial purposes.

(2) Such institutions may lend copyright works incorporated in tangible media to a user, or to another institution.

(3) Such institutions may provide temporary access to copyright works in digital or other intangible media, to which it has lawful access, to a user, or to another library.

(4) Such institutions may for educational or research purposes, permit a user or users to view a whole film, or listen to a full DVD, CD or other sound recording or musical work, on its premises, or in an

institutional classroom or lecture theatre, or by means of a secure computer network, without permission from rights owners, but may not permit users to make copies or recordings of the works.

(5) Such institutions may make copies of works in their collection for the purpose of back-up and preservation. Such institutions may also make copies of publicly accessible websites for the purposes of preservation.

(6) If a work or a copy of such work, in such an institution's collection, is incomplete, such an institution may make or procure a copy of the missing parts from another institution.

(7) Such institutions may, without the consent of rights owners, engage in format-shifting or conversion of works from ageing and/or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.

(8) This Law does not prevent the making of copies in accordance with the provisions of the Act on legal deposit of published works.

(9) Such institutions may make copies of works when the permission of the author or other owner of copyright cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.

(10) Notwithstanding any other section, such institutions shall be permitted to buy, import, or otherwise acquire copyright works that are legally available in any country.

(11) Such institutions may reproduce and make available, as appropriate, in any format for preservation, research or other legal use, any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the author or other rightsholder.

(12) Such institutions are permitted to make copies of works, and make them available, for institutional or public exhibitions of a non-profit nature, for the purposes of commemorating historical or cultural events, or for educational and/or research purposes. They may also, where necessary for these purposes, show or take photographs and/or video footage, and/or create other images, such as paintings of buildings or photograph artworks on public buildings, such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place, for the above mentioned purposes.

(13) Libraries may supply to each other copies of works in their collections, whether by post, fax or secure electronic transmission, provided that any electronic file received is deleted immediately by the receiving institution after supplying a patron who has requested it with an electronic or paper copy of a work.

(14) An institutional officer or employee acting within the scope of his or her duties, shall be protected from claims for damages, from criminal liability, and from copyright infringement, when the action is performed in good faith:

(a) In the belief, and where there are reasonable grounds for believing, that the work is being used as permitted within the scope of an exception in this Act, or in a way that is not restricted by copyright;
or

(b) in the belief, and where there are reasonable grounds for believing, that the work, or material protected by related rights, is in the public domain or licensed to the public/under a public or open licence librarians and archivists shall be exempt from liability for the actions of their users.

(15) Nothing in the section shall diminish any rights that libraries, archives, museums, and galleries otherwise enjoy pursuant to other provisions of this Act, including Sections 12 and 12A.

Provided that, in exercising rights provided in this section or elsewhere in the Act, institutions shall take reasonable steps to assure that any digital copies supplied by them are accompanied by information concerning the appropriate use of those copies.

Section 19D General exceptions regarding protection of copyright work for a person with disability

(1) It shall be permitted without the authorisation of the author or other owner of copyright to make an accessible format of a work for the benefit of a person with a disability, to supply that accessible format or copies of that accessible format to persons with a disability by any means including, by non-commercial lending or by electronic communication by wire or wireless means and undertake any intermediate steps to achieve these objectives, provided that the following conditions are met

(a) the person or organisation wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;

(b) the work is converted to an accessible format which may include, any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to a person with a disability; and

(c) the activity is undertaken on a non-profit basis

(2) A person with a disability to whom the work is communicated by wire or wireless means as a result of activity under subsection (1) shall be permitted without the authorisation of the owner of copyright to reproduce the work for personal use. This provision is without prejudice to any other limitations or exceptions that such person is able to enjoy.

(3) It shall be permitted without the authorisation of the author or other owner of copyright to export to or import from another country, copies of an accessible format of a work referred to in subsection (1), to or by a person with a disability or an organisation that serves persons with a disability, as long as such activity is undertaken on a non-profit basis by that person or organization.

(4) For the purposes of this section, accessible format means in such a format as may be required to address the needs created by the specific disability of a person with a disability in order to access and use a work to substantially the same degree as a person without a disability.²²

(5) For the purposes of this section, a person with a disability means a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability.²³

(6) This exception is subject to the obligations of indicating the source and the name of the author on the copy as far as practicable.

Section 19E General exceptions regarding protection of copyrighted craft works

[delete if craft work protection is, as suggested, removed from the Bill]

Moral rights, s20

Moral rights are an important aspect of any modern copyright law, and recognition of certain moral rights is mandated by Art. 6bis of the Berne Convention. However, it is widely recognised that the reputational security that moral rights provide to individual creators is in potential tension with the public interest in promoting new innovation and creativity. The model language provided below improves the language in the Copyright Amendment Bill to balance these interests, clarify the reference to ownership in s20(2), impose a needed limitation on duration (consistent with the Berne Convention) in s 20(3), underscore that moral rights are an authors' right and confirm the general applicability of general copyright exceptions and limitations to ensure that moral rights are not invoked to prevent uses that are considered beneficial for the public interest. The model language also provides authors with with the ability to effectively waive their moral rights in connection with projects in which they wish to participate (based closely on EIFL Model Law Art 7(3). Such waiver language is crucial for the functioning of some creative industries, e.g. filmmakers. It is important to note that s20(4) of the Bill in actual fact defines economic rights, not moral rights, even though the

²² This subsection can be deleted if the same definition is contained in s1.

²³ This subsection can be deleted if the same definition is contained in s1.

obligations mentioned here may be rooted in moral considerations. These rights, if retained, should therefore be dealt with outside of s20. Moreover, the economic rights in question are not copyrights but so-called “neighboring rights.” For this reason, these provisions appear better suited to being incorporated into SA's Performers’ Protection Act. This said, we are not convinced that such a provision is practical.

Model language for s20:

(1) Notwithstanding the transfer of the copyright in a work, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorizes the use of his work in a sound recording or cinematograph film or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are necessary on technical grounds or for the purpose of commercial exploitation of the work.

(2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2, except that purposes of the provisions of the said Chapter the author shall be deemed to have the right to complain of any infringement, rather than the owner of the copyright in question.

(3) The duration of moral rights in a given work subsist only for the life of its individual author, if any; in the case of works created by more than one author, moral rights endure for the life of the longest lived among them.

(4) Moral rights are non-transferable.

(5) Where applicable, limitations and exceptions provided in this Act, including specifically those specified in Sections 12 and 12A, shall apply mutatis mandatis to moral rights.

(6) The author may waive any of the moral rights mentioned in subsection (1), provided that such a waiver is in writing and clearly specifies the right or rights waived and the circumstances in which the waiver applies.

Provisions related to performers’ rights, ss20A-20E

As mentioned in our general comments, we suggest that performers’ rights are removed from the Bill and addressed in the existing Performers’ Protection Act to avoid confusion and inconsistencies. If these provisions are retained in the final version of the Copyright Amendment Act, they need to be

better integrated into the Copyright Act. More specifically, the scope of performer rights protection needs to be addressed in the nature of rights part (ss7-11B) of the Act, moral rights in s20, transfer in the transfer section (s22), and, overall, such protection needs to be made subject to all exceptions, especially fair dealing/fair use.

Digital rights management, s20F

This provision appears to be misplaced and overly burdensome. For example, informing each user “of the extent of fair use” is a very difficult task. The extent of fair use is a fact intensive inquiry that will defy the ability of each library. Furthermore, s20F(1)(c) appears an impossible requirement: There are no known forms in which a digital work “cannot be altered or modified.” Lastly, the requirement in s20F(1)(d) to verify the number of copies of a work used appears another nearly impossible task. We recommend to delete s20F and add the following model language after s19C(16) as suggested above.

Model language to be added to s19C(16) [as proposed above]:

Provided that, in exercising rights provided in this section or elsewhere in the Act, institutions shall take reasonable steps to assure that any digital copies supplied by them are accompanied by information concerning the appropriate use of those copies.

Ownership of copyright, s21

Research with South African filmmakers and other creatives has shown that the practical result of (the unchanged) s21(1)(c) is that photographs and other works in South Africa are often locked away in the archives of commissioning entities with the result that enjoyment by the public, as well as benefits to the authors, is curtailed.²⁴ As far as s21(3) is concerned, we recommend deleting the new language on orphan works and instead relying on specific exceptions for libraries and archives and the flexible fair fair use provision.

²⁴ http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=pjijp_facsch

Model language for s21(1)(c):

Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the ownership of any copyright subsisting in the work as between the commissioning person and the author or authors who execute the commission shall be governed by contract; provided that in the absence of an effective, signed agreement, ownership shall vest in the author or authors and the commissioning party shall enjoy an irrevocable non-exclusive licence to use all copyright rights as may subsist in the work.

Delete s21(3)

Assignment and licences in respect of copyright, s22

We are concerned that the proposed prohibition on the state assigning copyright may severely impede the states' ability to use its resources efficiently, economically and effectively as required by section 195 of South Africa's Constitution. It will also be a significant burden on the state to administer a growing portfolio of low-value copyrights. It is therefore proposed to delete the prohibition on the state assigning copyright in s22(1). In addition, care should be taken to legally accommodate the growing world-wide phenomenon of voluntary public or "open" (non-exclusive) licensing and public domain dedication, which allows rights holders to manage their copyright more flexibly or even relinquish all rights in their works. The use of such licences and public domain tools facilitates vital free access to cultural and knowledge material. For instance, as of 2015, more than 1 billion works are licensed under open Creative Commons licences, including all articles on Wikipedia. Another important example of licences promoting openness are FLOSS software licences. We recommend (a) to add language to s22 specifically addressing public and open licences and (b) consider amending s22(4) if the possibility of revocation currently provided for in s22(4) applies, in the lawmaker's opinion, to open and public licences. Allowing open and public licences to be revoked at any time is in sharp conflict with the principles of public and open licensing. Lastly, we propose to add digital signatures to s22(3). We are not entirely clear about the scope of s22(8) but we provide easier language below in case the lawmaker's intention is to merely state that sub-licensees are permitted to act without the consent of the original licensor.

Model language for s22(1):

Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law. [note: unchanged from the current Act]

Model language for s22(3):

No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing and signed, including in electronic form, by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub-licensor, as stipulated in the Schedule hereto or as the case may be: Provided that such assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment.

Model language for s22(8):

Unless otherwise prohibited from doing so, a licensee may grant a sub-licence or sub-licences for the doing of acts that fall within the terms of the licence, including its implied term, without the consent of the original licensor.

Model language for s22(9):

Public and open licences shall be in writing.

Model language for s22(10):

Dedication of a work to the public domain shall be in writing and clearly identify the work. The effect of a dedication to the public domain shall be to terminate all copyright and moral rights in the work held by the person dedicating the work as if the term of copyright in the work had expired.

Orphan works, s22A

A fuller study of the question of how to deal with orphan works may be appropriate. Some priority issues, such as how to authorise libraries to use and copy orphan works, are addressed through tailored exceptions (as suggested above in s19C). Other urgent uses of orphan works could be enabled through enactment of the flexible fair use clause we suggest above. The requirements contained in the Copyright Bill for using orphan works appears to be cumbersome, and vesting all ownership rights in the government is, in our view, problematic in light of South Africa's obligations

under international instruments such as the Berne Convention and TRIPS. While other countries have introduced simpler language that may be considered for South Africa²⁵, it may in fact be sufficient to simply rely on fair use as proposed in this submission. And Regulations could be later defined (and more easily changed) to deal with specific uses as they arise.

Delete s22A

Infringement, s23

Sec 23 deals with *civil* offences. Therefore, the provisions in s23(4) are civil infractions rather than criminal offenses (which are addressed in s27 of the Act) and the wording “shall be guilty of an offence” must be avoided as such wording wrongly implies criminal liability. Criminal liability in the context of copyright law must be reserved to grave misdoings, e.g. infringement on a commercial scale. Consequently, s23(6) should also be deleted. As far as lamentable conduct of *rights holders* is concerned (see, for instance, in s23(4)(d) of the Bill) such conduct should in our view not be declared copyright infringement. Instead, we propose including a provision relating to the misuse of copyright, and indicating that, when proven, it represents either of both (1) a defense to a claim of infringement, and (2) an independent basis asserting a civil offense against the copyright owner. As mentioned earlier, measures aimed at promoting local content are better be left to broadcasting legislation, and thus s23(5) should be removed. Lastly, s23(2)(a) is contrary to the lawmaker’s intent to now permit parallel importation of works from abroad and should therefore be deleted.

Delete s23(2)(a)

Model language for s23(4):

Section 23(4) Copyright shall be infringed by any person who –

²⁵ For instance, the laws of Brunei Darussalam (order under section 83(3), 1999, Art. 61, and Jamaica (Copyright Act of 1993, Art. 71), stipulate for orphan works:

“Copyright in a literary, dramatic, musical or artistic work is not infringed by an act done at a time when, or under arrangements made at a time when — it was not possible by reasonable inquiry to ascertain the identity of the author; and it was reasonable to assume — that copyright had expired; or that the author had died fifty years or more before the beginning of the year in which the act was done or the arrangements were made.”

- (a) tampers with information managing copyright, as contemplated in subsection 20A(16) of the Act.
- (b) omits to pay the author or creator of the copyright work a royalty fee as and when the copyright work is used as contemplated in subsection 9(4) of the Act;
- (c) omits to pay the creator of craft work a royalty fee as and when the craft work is sold at a higher price or is re-sold to a second and third seller, as contemplated in section 9(5) of the Act;
- (d) contravenes the provisions in relation to orphan works as contemplated in this Act;
- (e) collects fees outside the membership of Collecting Society;
- (f) engages in a conduct that is prohibited in respect of technological protection measures stipulated in this Act;
- (g) contravenes the provision in relation to the prohibition of conduct in respect of copyright management information;
- (i) contravenes the provisions relating to the royalty rights of the creator in the case of resale of copyrighted work.

Replace s23(5) with:

(5) Misuse of copyright and technological protection measures constitute both defences to any claim of copyright liability, and independent causes of action that may be pursued either as counterclaims in an action for infringement or independently.

Delete s23(6)

***Penalties and proceedings in respect of dealings which infringe copyright,
s27(5A)***

Section 27(5A) as proposed in the Copyright Bill does not take into account that circumvention is lawful, if it has been authorised either by the copyright owner or by copyright law itself. We therefore recommend to amend the provision accordingly. Furthermore, a categorical ban on publication could be a specific threat to computer security researchers and journalists, raising issue under the Bill of Rights Act.

Model language for s27(5A):

(5A) (1) Any person who at the time when copyright subsists in a work that is protected by an effective technological protection measure applied by the owner of copyright -

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

(i) such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technological protected work;

(ii) such person intends to provide a service to another person to enable or assist such person to circumvent an effective technological protection measure without authorisation; or

(iii) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright in a technological protected work;

(b) publishes information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting another person to unlawfully circumvent a technological protection measure in the Republic;

(c) knowingly or having reasonable grounds to know, circumvents such a technological protection measure, when not authorised to do so, shall be guilty of an offence.

Offences by companies, s27A

Liability of office bearers is better be left to company legislation. At the very minimum we recommend to delete s27A(1) and (3) because of the, in our view, unreasonably harsh *criminal* liability standards in s27A(1) and because juristic persons cannot not be imprisoned.

Delete s27A(1)

Delete s27A(3)

Provision for restricting importation of copies, s28

Currently, s28 allows a South African rights holder to block otherwise lawful parallel importation. We propose to amend the provision in order to prevent the importation of copies that infringed copyright where and when they were made, but to permit so-called “grey market” copies to enter without restriction. This, in our view, would yield significant benefits for South African consumers, both with respect to copyrighted materials (books, films, etc.) but also with respect to goods (soap, cosmetics, etc.) that have copyrighted labels or packaging.

Replace s28(2) with

(2) This section shall apply to any copy of the work in question made outside the Republic, the making of which constituted an infringement of copyright in the country in which the article was made.

Replace s28(5) with

(5) This section shall mutatis mutandis apply with reference to an exclusive licensee who has the right to import into the Republic any work published elsewhere which would be an infringing copy of the work in the country in which it was made.

Prohibited conduct in respect of technological protection measures, s28O

The prohibition in s28O(3) goes too far in that it appears to prohibit the publication of general scientific information and fails to allow to the communication of information in fields such as security research, which can be used to defeat (as well as, perhaps, to enable) circumvention.

Delete s28O(3)

Exceptions in respect of technological protection measures, s28P

Section 28P(1) can be simplified and prohibitions on circumvention and the provisions of circumvention tools should apply only when there is infringing activity.

Model language for s28P(1)

(1) For the purposes of this Act and of Section 86 of the Electronic Communications and Transactions Act No. 25 of 2002, nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform-

(a) a permitted act that falls within the exceptions in this Act.

(b) The sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, in order to enable the performance of any act permitted by 1(a) of this section is not unlawful.

Qualifications for appointment, s29C

This requirement to not be the member of any “organisation,” even those not having conflicts of interest with the Tribunal's works (e.g. neighbourhood associations) seems excessive.

Delete s29C(2)(a)

Unenforceable contractual term, s39A

The first part of 39A is positive, ensuring that contractual terms cannot negate the user rights in the act -- thereby disrupting the policy balance at the heart of copyright. The second part of s39A, however, forbidding the renouncement of rights, needs to assure that it does not interfere with the effectiveness of public and open licences (Creative Commons, FLOSS, etc.). It is not likely the intent of the lawmaker to constrict open licences here but instead to protect less powerful rights holders when contracting with more powerful entities. Additional statutory language is therefore required to not inadvertently restrict voluntary open and public licensing which has become a crucial engine for innovation and creativity around the world.

Add s39(A)(2)

(2) This section does not prohibit or otherwise interfere with public and open licences to do any act which is subject to copyright or moral rights, nor with settlement agreements, terms of service licences, and the voluntary dedication of a works to the public domain.

Schedule A Translation Licences, 2. Application for licence

We suggest amending the wording of this clause to mitigate doubt about the languages covered by the provision and the audiences for such translations.

Model language

Any person may, apply to the Intellectual Property Tribunal for a licence to make a translation of the work, in printed or analogous forms of reproduction, into any language that is an official language within South Africa, or a foreign language that is regularly used in the Republic, for use by readers located in the Republic.

--- end of submission ---