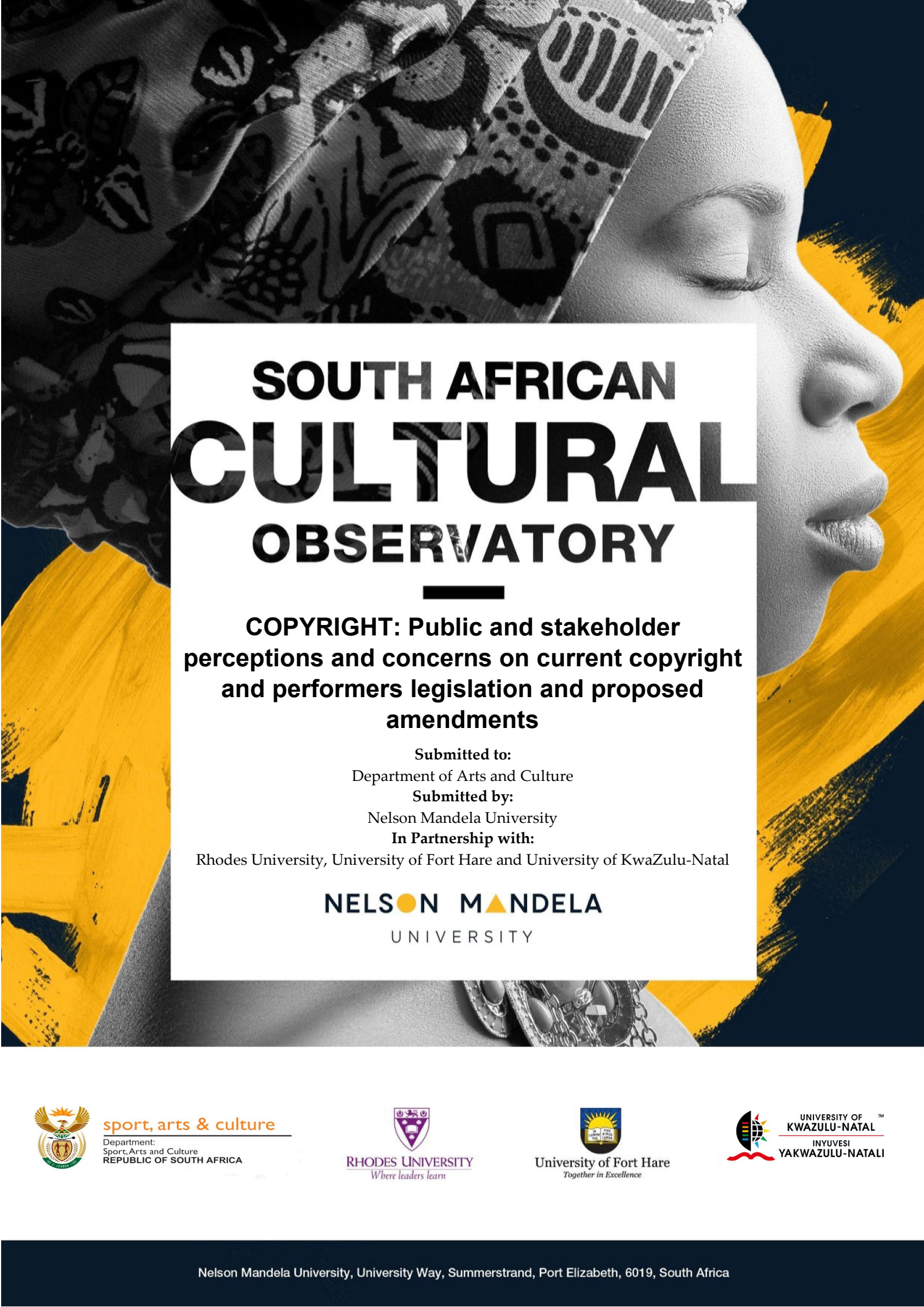




SOUTH AFRICAN CULTURAL OBSERVATORY

**COPYRIGHT: Public and stakeholder
perceptions and concerns on current copyright
and performers legislation and proposed
amendments**

Submitted to:

Department of Arts and Culture

Submitted by:

Nelson Mandela University

In Partnership with:

Rhodes University, University of Fort Hare and University of KwaZulu-Natal

NELSON MANDELA
UNIVERSITY



sport, arts & culture

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South African Cultural Observatory

Report

COPYRIGHT: Public and stakeholder perceptions and concerns on current copyright and performers legislation and proposed amendments

March 2021

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Executive Summary

Copyright protection is the right of the copyright owner to prevent others from making copies of their work. It trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximise the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.¹

Effective copyright protection therefore encourages or enhances creators to create and publishers to publish. This would be done through providing them with effective incentives to continue creating and publishing. The content that they are providing should not be freely available or accessible so as to make it unprofitable for them and therefore depriving them of their property and to a certain extent, their dignity. However, restricting access too much would result in a monopoly and the prices for accessing the content being so high that most people would not be able to access the content that is created. This would restrict the general public's freedom of expression as well as their access to information and educational content.

With South Africa's history of racial imbalances, having effective copyright protection is even more crucial. This is even more so in the access to educational content where previously disadvantaged schools and learners still struggle to have access to educational textbooks and materials for affordability reasons.

Access to copyrighted materials is also important for the preservation of cultural and creative content since it would allow for the digitization

Key Findings

...

- Effective copyright protection balances the rights of creators vs providing access – it is argued by opponents of the Bill that the Bill as it reads now, does not strike this balance and is pro-user, to the expense of creators and copyrights holders.
- The Bill will have serious impact on CCIs.
- The possible economic impact of the Bill includes loss of income or revenue, lack of investments in CCIs and businesses closing down.
- Foreign investments would also be threatened by the passing of the Bill.
- The Bill casts the net far too wide and has far reaching consequences that goes beyond the objects it seeks to achieve.
- An economic impact assessment is recommended to review the impact to the CCIs.
- Certain provisions of the Bill need to be reviewed in order to bring them in line with the constitution and in order to achieve the objects of the Bill.

¹ Landes & Posner, 1989 Journal for Legal Studies, p326

of the content so that it is preserved and reproduced in technological formats that are used currently and therefore making sure that they are available for generations to come.

The Bill in its current form, it has been argued, does not balance the interests of creators with the needs of society, and is heavily biased towards the users. Opponents of the Bill argue that some of the provisions of the Bill will largely impact on the more than 5 000 small and medium-sized record labels, as well as thousands of South African musicians who will not be able to sue big tech companies that are likely to take advantage of the broad exceptions in the Bill and the revenue generated by the industry will likely shrink. This could stifle the culture of writing, reading, education and training, creativity and innovation as well as the socio-economic wellbeing of South Africans. It has also been argued in the PWC report² that publishers expect a 33% decrease in sales, which would equate to about R21 billion a year and a loss in tax revenue, resulting in imported publications increasing.

The United States' threat to review South Africa's eligibility in the General System of Preferences (GSP) as a result of concerns about the effect of the Bills on the country's intellectual property protection and enforcement would have dire effects for South Africa as a whole (not just the creative industries) and this could result in over R34 billion worth of South African exports to the United States being suspended or withdrawn³.

Effective copyright protection is therefore critical since it facilitates cultural and economic production, thereby driving entertainment revenue locally and exporting it internationally. This is crucial not only for the cultural and creative industries (CCIs), but for the economy of the entire country.

1. Goals and Methods

The main goals of the research are to:

1. Provide an overview of the current documented positions being taken by parties supporting and opposing the legislation (including but not limited to "fair use versus

² <https://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>

³ <https://www.biznews.com/briefs/2020/01/16/copyright-amendment-bill-r34bn-export-revenue>

fair dealing” as well as retrospective clauses) being held by stakeholders within and outside of the Cultural and Creative Industries)

2. Identify the key points of agreement and contention;
3. Identify the possible economic impact of the proposed implementation based on the points of agreement and/or contention;
4. Identify which positions are the most beneficial to the South African economy and the Cultural and Creative Sector;
5. Propose a consolidated DSAC policy position.

Research Methods

This report is prepared through a desktop doctrinal analysis making use of reports, submissions to Parliament, articles, cases, legislation as well as scholarly commentary.

2. Introduction and background

The Copyright Act was enacted in 1978 and has long been overdue for amendment.

In 2010, the Department of Trade and Industry (“DTI”) established a Copyright Review Commission, led by Judge Ian Farlam (a retired Judge) to address artists’ concerns that royalties were not being properly distributed to the rightful owners of copyright, by collecting societies. The Farlam Commission Report⁴ recommended that:

“[t]he Copyright Act and the Performers’ Protection Act be amended to govern effectively the digital exploitation of copyright works. The CRC believes that an overall impact study should be conducted and finalised to determine the appropriateness for the country to ratify and implement the World Intellectual Property Organisation (WIPO) International treaties⁵.”

In 2011, the DTI also commissioned a study through the World Intellectual Property Organisation (‘WIPO’) titled “*Economic Contribution of Copyright-Based Industries in South Africa*”. In this report, the concluding recommendations were, *inter alia*, that “*As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review*

⁴ Copyright Review Commission Report available at <http://publishsa.co.za/files/1532283873rsg-copyrightreviewcommissionreport2011.pdf>.

⁵ Ibid note 3 at p.4

the Copyright Act in order to introduce limitations in accordance with the Berne Convention three-step test (article 9(2)) and with the fair use provision and to clarify clauses as necessary.”

In 2013, the DTI published the “Draft National Policy on Intellectual Policy: A Policy Framework” for comment which included a recommendation for fair use in copyrighted material, which is one of the most controversial provisions in the Bill. The Policy, *inter alia*, recommended that:

“To enhance access to copyrighted materials and achieve developmental goals for education and knowledge transfer, South Africa must adopt pro-competitive measures under copyright protection. The legislation must provide the maintenance and adoption of broad exemptions for educational, research and library uses.”⁶

In 2017, the Bill was introduced to Parliament and was referred to the National Assembly’s Portfolio Committee on Trade and Industry, which called for written submissions and held public hearings on the Bill during August 2017.

On the 11th of September 2017, the Secretary to Parliament, acting in accordance with section 18(1) of the Traditional Leadership and Governance Framework Act, referred the Bill to the National House of Traditional Leaders, to make any comments it wishes to make.

After extensive consideration, consultations, and public submissions were received and considered, the 2017 version of the Bill was amended and the amended version was passed by the National Assembly on the 5th of December 2018 and submitted to the National Council of Provinces for concurrence.

The Bill was referred to the Select Committee for Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour at the National Council of Provinces, which called for further submissions on the Bill, and the Bill was adopted by the National Council of Provinces on the 28th of March 2019 and sent to the President for his assent.

⁶ Notice 918 of 2013

The President, on the 16th of June 2020, referred the Bill back to the National Assembly, noting his reservations on the constitutionality of certain provisions in the Bill.

Despite this, there is overwhelming consensus among all the stakeholders that the Copyright Act of 1978 needs to be reviewed and brought in line with the digital era.

3. Purpose of the Bill

The Bill seeks to:

- a) Modernise South African copyright law and update the 1978 Act, including bringing the legislation in line with the needs of the fast-evolving digital age. The explanatory memorandum to the Bill says that the Bill seeks to align copyright with the digital era and developments at a multilateral era.
- b) To bring South African law in line with international standards and to implement the content of international treaties relating to copyright;
- c) To allow for further limitations and exceptions regarding the reproduction of copyright works;
- d) To provide for the sharing of royalties in copyright works;
- e) To provide for the payment of royalties in respect of literary, musical, artistic, and audio-visual works;
- f) To provide for the resale royalty rights;
- g) To provide for access to copyright works by persons with disabilities.

It is clear from these objects or purposes that the Bill recognises that the current Act needs to be amended to promote the socio-economic development and poverty reduction, innovation, and knowledge in South Africa. This recognises that the current industry is plagued by power imbalances, vulnerability, and abuse of authors and content creators who end up not benefiting from their work. The Bill then seeks to protect and advance the interests of authors

and creators. It seeks to achieve this in a way that balances the interests of these authors and creators, while also recognising the right of access to education and the right to equality and the rights of persons with disabilities.

4. Submissions provided in objection to the Bill were as follows:

- a) The Bill has been incorrectly tagged as a section 75 bill;
- b) Sections 6A(7), 7A(7), and 8A(5) constitute retrospective and arbitrary deprivation of property;
- c) Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) impermissibly delegate legislative authority to the Minister;
- d) Inadequate public consultation on section 12A – the new fair use exception;
- e) The new exceptions constitute an arbitrary deprivation of property; and
- f) The new exceptions violate the right to freedom of trade, occupation, and profession;
- g) The new exceptions do not meet the three-step test or comply with South Africa's international obligations.

Taking these submissions into account, the President referred the Bill back to the National Assembly with the following comments or reasons for the referral:

- a) *I am of the view that the Bills have been incorrectly tagged and that they ought to have been classified and passed as section 76 Bills. This is primarily because their provisions have an impact on "Trade" and "Cultural matters" as contemplated in Schedule 4 of the Constitution.*
- b) *The retrospective application of the proposed new sections 6A, 7A, and 8A of the Copyright Bill to copyright assigned before the new sections come into operation may indeed be unconstitutional on the ground that it constitutes an arbitrary deprivation of property under section 25 of the Constitution.*
- c) *The new exceptions introduced by section 12A, 12B, 12C, 12D, and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they*

are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law.

4.1 Sections 6A (7), 7A (7) and 8A (5) and arbitrary deprivation of property

The new sections 6A, 7A, and 8A provide that:

- a) Authors of literary, musical, or visual artistic works have the right to receive a royalty on the exploitation of that work. The Bill further provides that this right endures notwithstanding any assignment of the copyright in the work or authorisation granted by the author (section 6A(2), section 7A(2) and section 8A(2)(b);
- b) Performers of an audio-visual work have the right to share in the royalties received by the copyright owner. The performer's share of the royalty is to be determined by a written agreement, and any assignment of the copyright in that work is subject to that agreement (section 8A(2)(a) and (b), which agreement is supposed to meet certain requirements as stipulated in the Bill.

The provisions introduce an inalienable right to a fair share in royalties received from the commercial exploitation of a work.

This right to share in the royalties applies to:

- a) Royalties received in the future;
- b) Copyright assigned before the commencement date of the Act (provided that the copyright is still being exploited for profit).

The President expressed concern regarding the provisions of sections 6A, 7A, and 8A and that they may constitute an arbitrary deprivation of property.

Section 25(1) of the Constitution provides that “*no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property*”. The test to determine if there has been an infringement of section 25(1) is:

- i) Whether the thing in question is property?
- ii) Whether there has been a deprivation?
- iii) Is the deprivation arbitrary

This test was established by the Constitutional Court in the South African Diamond Producers⁷ case.

Property

There is a debate among the stakeholders in support of⁸ or against the Bill regarding whether copyright (i.e. intellectual property) constitutes property. Arguments in favour of copyright constituting property argue that copyright is an intellectual property right and is protected by section 25(1) of the Constitution⁹. This is supported by the decision of the South Gauteng High Court in the case of *Moneyweb (Pty) Limited v Media 24 and Another* 2016 (4) SA 591 (GJ) wherein the court held that “copyright is an intellectual property right. It is protected by section 25(1) of the Constitution”¹⁰. However, the argument against copyright being regarded as intellectual property protected by section 25(1) of the Constitution is that this issue has not been decided by the Constitutional Court. In Constitutional Court cases dealing with intellectual property¹¹, the focus on the manner was on the provision of the Trade Marks Act and whether this provision was to be interpreted to be consistent with a constitutional guarantee of free expression and the issue was not regarding copyright¹². Be that as it may, to proceed with the inquiry on whether the limitations and exceptions constitute an arbitrary deprivation of property, the stakeholders, proceed on the assumption that copyright is property protected under section 25(1) of the Constitution.

⁷ *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 231 (CC) (*South African Diamond Producers*) at para 34

⁸ Amongst the main supporters of the Bill is a non-profit organisation called ReCreate. ReCreate is a coalition of writers, filmmakers, photographers, education and content producers, software and video game developers, technology entrepreneurs, artists, poets, producers of accessible format materials and other South African creators.

⁹ https://libguides.wits.ac.za/ld.php?content_id=56780275

¹⁰ Para 108

¹¹ Certification of the Constitution of South Africa, 1996 (4) SA 744 (CC) and Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another 2006 (1) SA 144 (CC)

¹² https://libguides.wits.ac.za/ld.php?content_id=50611390

Deprivation

The pivotal question that arises in respect of section 25(1) is, whether any alleged deprivation is arbitrary.

Deprivation entails an interference with a property that is “substantial”. This means that the extent of the intrusion must be so extensive as to have a legally significant impact on the rights of the affected party¹³. The stakeholders in opposition of the Bill argue that the interference with copyright introduced in sections 6A, 7A, and 8A is substantial since, previously, copyright owners had the right to claim all of the fruits of the exploitation of the relevant work for themselves, but going forwards, they will be required to share with the author or performer and they will now be entitled to a lesser share of the fruits of their property than previously.

Arbitrary

Deprivation of property is “arbitrary” as meant by section 25 when the depriving law does not provide “sufficient reason” for the particular deprivation in question or is procedurally unfair and this was explained by the court in the FNB¹⁴ case as follows:

- a) *It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question;*
- b) *A complexity of relationships has to be considered;*
- c) *In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected;*
- d) *In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property;*
- e) *Generally speaking, where the property in question is ownership of land or corporeal moveable, a more compelling purpose will have to be established in order for the*

¹³ *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) at 59; *South African Diamond Producers* at para 48

¹⁴ *First National Bank of South Africa Limited trading as Wesbank v Commissioner, South African Revenue Service and another; National Bank of South Africa Limited trading as Wesbank v Minister of Finance* 2002(4) SA 768 (CC) at para 100

depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive.

- f) *Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
- g) *Depending on such interplay between variable means and ends the nature of the property in question and extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others, this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.”*

Opponent's submissions regarding arbitrariness	Proponent submissions regarding arbitrariness
a) The retrospective provisions cast the net far too wide, even assuming that the purpose is legitimate	a) Incorrect to provide that the provisions are retrospective, they impact on past transactions by imposing new terms and obligations on the parties.
b) The provisions permit deprivation of property regardless of the terms of the original assignment agreement. E.g. negotiated effectively and obtained fair payment	b) The Bill makes provision for parties to renegotiate the terms of unfair contracts, and where agreement can't be reached, to approach the Copyright Tribunal for an appropriate order. Where existing contracts are fair, they will presumably be untouched.
c) The legislative purpose could be achieved by less restrictive means – e.g. legislation could provide for an investigation and remedies in respect of those unfairly treated, as opposed to a blanket, retrospective provision, regardless of whether a fair assignment was paid	c) The courts have accepted that a range of legislative options may be reasonable in the circumstances and legislatures are not required to choose what a court or a third party views as the best option.
d) Second or subsequent assignees of the copyright will be unfairly prejudiced since they	d) The provisions limit vested rights, however, such limitation is justified under the

were not parties to the initial assignment agreement but acquired the copyright in good faith.	provisions of section 36(1) ¹⁵ of the Constitution and therefore constitutionally valid.
e) The Bill does not set a time limit for the operation of these retrospective provisions and could reach very far in the past, without a clear factual basis for doing so	e) Any proven deprivation would be non-arbitrary, and constitutionally valid.

Table 1: Arguments regarding arbitrariness - sections 6A, 7A and 8A

Proponents of the Bill further argue that the entitlement to royalty, as introduced by sections 6A, 7A and 8A is not open-ended, it is an entitlement to a “fair share of the royalty” – a reasonable royalty and is therefore intended to encourage fairness.

4.2 Sections 6A (7) (b), 7A (7) (b) and 8A (5) (b) and impermissible delegation of legislative authority

The President referred the Bill back to Parliament with, *inter alia*, the following note:

“Sections 6A (7) (b), 7A (7) (b) and 8A (5) (b) confer substantial discretionary powers on the Minister and this may well constitute an impermissible delegation of legislative authority, and as such would be constitutionally invalid if the Bill is assented to in its current form.

Current 6A(7)(b) permits the Minister to make key decisions regarding the deprivation of property (copyright) from those to whom it was assigned in the past. This also has the effect that there is no participation process to which litigation is generally subjected. In this regard, I have reservations that the Bill fails to provide for the oversight role by the NCOP. The contention is that the decision-making process in the Bill is in fact within the domain of the National Assembly and is, therefore, an impermissible delegation.”

The provisions of s6A (7) (b), 7A (7) (b), and 8A (5) (b) all provide that, the Minister must –

¹⁵ The provisions of section 36(1) state that rights may be limited by a law of general application that is ‘reasonable and justifiable in an open and democratic society based on dignity, freedom and equality’.

“i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);

ii) Conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and

iii) Table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.”

The key questions to consider are:

- a) Whether the sections delegate authority to the Minister to make regulations “within the framework of” the Bill – in which case it is constitutionally permissible; or
- b) Purports to assign plenary legislative power to the Minister – in which case it is not.

The Bill sets the following framework:

- a) In terms of section 6A(2), the author of a literary or musical work is entitled to royalties, notwithstanding assignment or authorisation;
- b) In terms of section 6A (3), the author’s share of the royalty must be set out in a written agreement. Any assignment is subject to that agreement. Where the agreement cannot be reached, the Tribunal may be approached;
- c) Section 6A (7) (a) provides that the provisions of section 6A apply where copyright in the relevant work was assigned before the commencement date of the Act (subject to certain provisos).

Opponents submissions	Proponents submissions
a) The Minister is, in essence, empowered to develop rules regarding how the rights and obligations in section 6A are to apply in respect of works assigned before the Amendment Act came into force. This is not a matter of working out the details of how existing statutory provisions are to be	a) The right to share royalties is expressly guaranteed in the Bill; the Minister plays no role in determining who should succeed in obtaining their share. The Minister’s role is limited to developing regulations setting out the process to give effect to the application of each

implemented but it purports to permit the Minister to determine the rights and obligations of persons who concluded assignment agreements in the past.	section, conducting an impact assessment, tabling regulations before the National Assembly, and lastly, making the regulations should they be approved by the National Assembly.
b) the decisions are taken by the Minister, and simply ratified by the National Assembly, the extensive participation process to which legislation is subjected does not occur, and there is no oversight by the NCOP	b) The delegation of power to make regulations about the process to give effect to each section is properly regarded as conferring the power to make subordinate legislation within the framework of the empowering legislation and to give effect to it and this does not amount to a delegation of plenary legislative power ¹⁶ .

Table 2: Arguments regarding impermissible delegation of legislative authority

4.3 Exceptions and limitations – arbitrary deprivation of property, freedom of occupation and profession, international treaty implications, and the three-step test

The President's note:

The new exceptions introduced by section 12A, 12B, 12C, 12D, and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law.

The new exceptions are:

- a) Section 12A introduces fair use provisions;
- b) Section 12B sets out specific exclusions that will apply to all works;
- c) Section 12C allows temporary reproduction and adaptation;
- d) Section 12D allows reproduction for educational and academic activities;
- e) 19B introduces general exceptions regarding the protection of computer programs;

¹⁶ https://libguides.wits.ac.za/ld.php?content_id=50611390

- f) 19C introduces general exceptions regarding the protection of copyright work for libraries, archives, museums, and galleries;
- g) 19D introduces general exceptions regarding the protection of copyright work for persons with disability

Copyright exceptions provide a defense to a claim for an infringement to the effect that, if an exception applies, then a person may perform what would otherwise be a restricted act, without obtaining permission from, or paying remuneration to, the copyright owner.

4.3.1 Fair Use – section 12A

Fair use is one major limitation of a copyright holder's exclusive right to a published work. Fair use recognises that certain reproductions of copyrighted works do not require permission from copyright holders or infringement of legal rights.

Fair use is referred to in clause 12A of the Copyright Amendment Bill. Clause 12 of the Copyright Act refers to "fair dealing" as opposed to "fair use". Fair dealing, as provided for in the current Copyright Act provides for few cases for protected works to be used and only for those listed purposes, any use other than for listed purposes, would constitute copyright infringement.

The existing section 12 permits *fair dealing* with copyrighted material in *musical and literary works* for certain purposes, more specifically:

- a) For research or private study by, or the personal or private use of, the person using the work;
- b) For criticism or review of that work or of another work; or
- c) To report current event:
 - i) In a newspaper, magazine or similar periodical or
 - ii) Through broadcasting or in a cinematograph film.¹⁷

¹⁷ Section 12(1) further provide that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work

Section 12A of the Bill proposes the introduction of new exceptions that are general in nature, rather than work-specific. The Bill goes further than the current Section 12 and provides for uses for purposes of the following, to be fair uses that do not infringe on copyright:

- (i) Research, private study, or personal use, including use of a lawful copy of the work at a different time or within a different device;
- (ii) criticism or review of that work or of another work;
- (iii) Reporting current events;
- (iv) Scholarship, teaching, and education;
- (v) Comment, illustration, parody, satire, caricature, cartoon, tribute, homage, or pastiche;
- (vi) Preservation of access to the collections of libraries, archives, and museums; and
- (vii) Ensuring proper performance of public administration

“Fair use”, as it is being proposed on the Bill, has expanded on the list of use exceptions and includes purposes such as scholarship, teaching and education, illustration, comment, satire, parody, caricature, cartoon, tribute, homage, or pastiche, and preservation of and access to the collections of libraries, archives, and museums. This makes “fair use” much more open and it does not have a closed list as per the current “fair dealing”. The change in the wording in section 12A(1)(a) has also shifted the nature of the exception from being one more akin to the existing “fair dealing” exception in section 12 of the Act to one that is closer to the “fair use” exception in US Law.

The key difference between “fair dealing” and “fair use” is that “fair dealing” is only permissible in respect of the specific purposes; other types of dealings are not permissible no matter how “fair” they may be¹⁸. “Fair use” on the other hand, provides only guidelines as to what amounts to “fair use”. The purpose of the use is one of the factors that are taken into account, not a separate qualifying enquiry. More factors are considered as part of the assessment as to whether the use is fair. These factors are set out in section 12A (b) of the Bill.

¹⁸ Davies et al (eds) Copinger and Skone on Copyright 17ed 2016 (Sweet & Maxwell: London) vol 1 (Copinger) at 716; para 9.28 (referring to a similar fair dealing provision in UK law)

Arbitrary deprivation of property

Opponents	Proponents
a) Section 12A has the effect of substantially reducing the degree of protection a copyright owner has over his property (copyright) and the degree to which the owner can benefit from the fruits of that property by: • Introducing four new purposes for which works may be used without constitution infringement. Copyright owners were previously entitled to remuneration for use for education or governmental purposes; now, they are not • Changes list of purposes from a closed one to an open, illustrative one	a) The four-factor test seeks to yield a balance between the copyright holder and the user and the test seeks to avoid undue commercial prejudice (some factors only apply when use is for non-commercial purposes)
b) The effect of s12A is that copyright owners are afforded less protection than they previously had, which means that their rights to benefit from those works is limited.	b) The four-factor test seeks to avoid undue commercial prejudice (some factors only apply when use is for non-commercial purposes).
c) Deprivation is arbitrary • The extent of deprivation casts the net far too wide and is disproportionate to the end sought to be achieved; • The extent of deprivation is considerable – the open list makes the circumstances under which the works may be used to be unknown and unknowable	c) Deprivation not arbitrary • The provisions seek to strike a balance between the rights of copyright holders and providing access. • The list not intended to be open-ended but would be limited in line with the <i>eisdum generis</i> maxim of statutory limitation which literally means ‘of the same kind’ and is a contextual device employed to restrict the meaning of

	general words by reference to specific words in their immediate vicinity
d) The extent of the deprivation is not justified by the purpose of enhancing access to copyright material and the purpose could be achieved by a less restrictive means	d) The courts have accepted that a range of legislative options may be reasonable in the circumstances and legislatures are not required to choose what a court or a third party views as the best option.
e) No assessment as to economic effects of increasing the scope of copyright exceptions so drastically or necessary was undertaken by Parliament	e) Extensive policy-making process preceded the tabling of the Bill, extensive public participation engagements conducted before and after the tabling of the Bill, and two impact assessments were conducted (in 2014 and 2015)
f) Section 12A constitutes an arbitrary deprivation of property and would be constitutionally invalid if enacted	f) Section 12A does not constitute an arbitrary deprivation of property.

Table 3: Arguments regarding fair use

The four factor test (s12A(b))

12A (b) provides that – *in order to determine whether an act done in relation to the work constitutes fair use, all the relevant factors shall be taken into account, including but not limited to:*

- i) *The nature of the work in question;*
- ii) *The amount and substantiality of the part of the work affected by the act in relation to the whole of the work;*
- iii) *The purpose and character of use, including whether –*
 - a) *Such use serves a purpose different from that of the work affected; and*
 - b) *It is of a commercial nature or non-profit research, library or educational purposes, and*
- iv) *The substitution effect of the act upon the potential market for the work in question.*

The Columbia University in the United States of America created the below checklist¹⁹ to assist users in making a judgment on whether the use is “fair use” when using copyrighted materials.

a. Purpose and character of the use

Using a work for educational and teaching purposes strengthens the argument in favour of fair use.

In favour of fair Use	Against fair use
Teaching/research/scholarship	Commercial activity
Non-profit educational institution	Profiting from use
Criticism/commentary	Entertainment
News reporting	Bad faith behaviour
Transformative/productive use (changes the work for a new utility)	Denying credit to the original author
Parody	
Restricted access (use is limited)	

Table 4: Purpose and character of use - fair use

As can be seen on the table above, uses for commercial activity to derive a profit, for entertainment purposes, bad faith behaviour, and the denying of credit to the original author, would not be considered fair uses.

b. Nature of the work

Using highly creative work – even in small portions, often is not fair use. However, using work of a factual nature can be considered fair use.

In favour of Fair Use	Against fair use
Published work	Using unpublished work
Factual or nonfiction based (e.g. a memoir/autobiography)	Highly creative work (e.g. art, music, novels, films, plays, etc.)

Table 5: Nature of the work - fair use

¹⁹ <https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf>

c. Amount

Amount used refers to not only the quantity of the work but also the specific content used. Using a small portion that is central to the heart of the work is not fair use.

In favour of fair use	Against fair use
Small quantity	A large portion or whole work used
Portion used is not central or significant to the entire work	Portion used is central to or “heart of the work”
The amount is appropriate for favoured educational objectives	

Table 6: Amount - fair use

d. Effect

Uses that alter or impair the actual or potential value of the work significantly weaken the argument in favour of fair use. The use should not substitute for purchasing the original work.

In favour of fair use	Against fair use
The user owns a lawfully purchased or acquired copy of the original work	The use could replace the sale of the copyrighted work
One or few copies made	Numerous copies made
No significant effect on the market or potential market for copyrighted work	Significantly impairs the market or potential market for copyrighted work or derivative
No similar product marketed by the copyright holder	
Lack of licensing mechanism	A reasonably available licensing mechanism for use of the copyrighted material
	Repeated or long-term use
	Unrestricted access (web or in another forum)

Table 7: Effect - Fair use

4.3.2 Section 12D: the educational and academic activities exception

Copyright owners, under the existing Act, were entitled to remuneration where their works were used for education and academic activities. The main points of contention regarding clause 12D is that the proposed provisions provide, *inter alia*, for:

- a) The making of copies for educational and academic activities provided that the copying does not exceed the extent justified by purpose;
- b) Incorporating such copies in printed and electronic course packs in course of instruction or virtual learning hosted on a secure network with restricted access;
- c) Prohibits copying of the whole or substantially the whole of the book or journal issue or recording, unless a licence is not available on reasonable terms and conditions.
- d) Reproduction of the whole textbook allowed where:
 - The book is out of print
 - The owner cannot be found
 - Copies are not for sale in SA or cannot be obtained at a price reasonably related to that normally charged in the Republic.
- e) Right to make copies not extended for commercial purposes

a) Arbitrary deprivation of property

Opponents submissions	Proponents submissions
a) The extent of deprivation casts the net too wide and disproportionate to the end sought to be achieved	a) The Bill seeks to strike a balance between the rights of copyright holders and users.
b) The extent of the deprivation is extreme – permits wholesale copying of an entire textbook, in a wide range of circumstances – including where the user considers the owner's licence terms “unreasonable”. It is unclear what “unreasonable” licence term is – opens the door for unscrupulous users to ignore copyright entirely	b) There is no entitlement to copy books wholesale under the Bill Academic authors, generally, write in course and scope of employment
c) The extent of deprivation not justified – could be achieved by less restrictive means	c) The courts have accepted that a range of legislative options may be reasonable in the circumstances and legislatures are not required to

	choose was a court or a third party views as the best option.
d) No assessment of economic effects	d) Extensive policy-making process preceded the tabling of the Bill, extensive public participation engagements conducted before and after the tabling of the Bill, and two impact assessments were conducted (in 2014 and 2015)
e) Education is, in many instances, a commercial enterprise. Permits institutions to reduce business costs by removing the obligation to pay licence fees.	e) The Bill enhances access to works that would, otherwise, have been inaccessible to most people for educational purposes. An exception that enables access to educational materials where needed, would both unlock the system for those who can afford to buy textbooks, and give special attention to the particularly vulnerable
f) Arbitrary deprivation of property and would be unconstitutional if enacted.	f) The provisions do not constitute an arbitrary deprivation of property

Table 8: Arguments regarding arbitrary deprivation of property - section 12D

4.3.3 Further exceptions and arbitrary deprivation of property

- a) Section 19C: the library, archive, museum, or gallery exceptions allow a library, archive, museum, or gallery to:
 - i) Section 19C (3) provides “temporary access” to a copyrighted work to a user in another library. The meaning of “access” is not clear.
 - ii) Section 19C(4) permit a user to view or listen to the whole work, for educational purposes on its premises, in a classroom, or over a computer network;
 - iii) Section 19C(5)(b), allows for placing works reproduced for preservation on publicly accessible websites;
 - iv) Section 19C (9) allows for the making of a copy for its collection.

- b) Section 12B(1)(a)(i) provides that copyright shall not be infringed by a quotation but this provision is not work-specific as the current Act which restricts it to literary or musical works;
- c) Section 12B(1)(c) permits reproduction by broadcasters and this provision is also not work-specific as the current Act which only applies to literary or musical works but now extends it to cinematographic films, thereby depriving the authors of those films of their property.
- d) Section 12B(1)(e)(i) permits reproduction in the press, or a broadcast or other communication to the public of an article in the press, whenever the reproduction, broadcasting, or communication has not been expressly reserved;
- e) Section 12B(1)(f) permits a translation of a work

Opponents argue that all these provisions permit arbitrary deprivation of property, and would therefore be constitutionally invalid if enacted. This is denied by those in support of the Bill.

4.3.4 The new exceptions and right to freedom of trade, occupation, and profession

The President, when the Bill was submitted to him for assent, returned it with the following comment regarding clause 12.

“Sections 12 and 19 include exceptions and limitations that seek to align the Bill with the Marrakesh Treaty. However, Sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e) (i), 12B(1)(f), 12D, 19C (3), 19C(4), 19(c)(5)(b) and 19(9) may constitute arbitrary deprivation of property. Section 12A and 12D may further run the risk of violating the right to freedom of trade, occupation, and profession.”

Section 22 of the Constitution provides that “[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation, or profession may be regulated by law.” Section 22 comprises two elements:

- a) The right to choose a trade, occupation, or profession freely; and

- b) The proviso that the practice of a trade, occupation, or profession may be regulated by law.

The two elements are subject to different levels of judicial scrutiny.

- a) Limitation on the choice of trade, occupation, or profession must be tested by way of the test developed under section 36(1) of the constitution;
- b) The regulation of the practice of a trade, occupation, or profession must be tested by a rationality test which is a weaker test than the test for arbitrariness.

4.3.5 Section 12A: fair use exceptions and the right to freedom of trade, occupation, and profession

Opponents submissions	Proponents submissions
a) The provisions limit the choice of trade and the test under section 36(1) of the Constitution applies, which is the arbitrariness test. b) Section 12A has a negative impact on the choice of trade, occupation, or profession and makes the occupations that rely on the exploitation of copyright works uncertain and potentially unprofitable. c) Limits the choice to enter into these provisions d) Although the provision does not prohibit persons from becoming authors, composers, or producers, it does so in effect, by making these occupations so undesirable, difficult, or unprofitable that the choice to enter into them is limited.	a) The opportunities provided by the Bill will likely generate new trade, occupational, and professional opportunities. b) The fair use provisions are designed to promote creative efforts c) There is also some scope for new industry, e.g. for dealings in orphan works, and non-profit ventures specifically to facilitate the production of accessible format materials for people with disabilities. d) There is a clear intention in the Bill to secure more financial benefits for the originators of works covered by copyright. e) The net effect of the Bill, in part, would be a shifting of some profits from the intermediate levels of the production chain to the originators of the works at the primary level and prevent exploitative practices. f) The limitation of the right to choose a trade, occupation, or profession will be regarded

	by a court to be reasonable and justifiable, therefore satisfying the test contained in section 36(1) of the Constitution. g) The court, when conducting the limitations analysis, will have regard to and balance competing rights. The Bill advances the rights to education, equality, dignity and seeks to find an appropriate balance between the rights that may conflict with the Bill.
h) If the provisions are found not to limit trade but regulate the practice of occupations, it nevertheless violates section 22 of the Constitution because it has no rational basis. No research conducted to determine the economic impact of section 12A and no suggestion that it is rationally connected to a legitimate government purpose	b) As stated above, various impact assessments were conducted during 2014 and 2015 and formed part of the considerations before the Bill was passed.

Table 9: Arguments regarding section 12A fair use and freedom of trade, occupation and profession

4.3.6 Section 12D: the educational and academic activities exception

Opponents submissions	Proponents submissions
a) Violates copyright owners' section 2 rights b) Limitation severe for authors of academic texts, or texts routinely used for academic purposes. c) Section 12D has a negative impact on the <u>choice</u> of trade, occupation, or profession and makes the occupations that rely on the profitability of exploitation of copyright works in academic context so unprofitable, that it limits the choice to enter into these occupations at all.	a) The claims about academic authors do not bear scrutiny and appear to be based on the assumption that works currently paid for, will be copied wholesale without compensation, and to the author's financial detriment. b) No entitlement to copy books wholesale under the Bill c) Academic authors write in the course and scope of their employment and the motivation to publish are predominantly reputational rather than directly financial.

d) Section 12D limits the rights protected by section 22 of the Constitution, without adequate justification, as required under section 36 of the Constitution.	d) The authors would benefit from the Bill in that the more access they have to other works, the more work is ultimately generated and cited. e) Restricting access has a limiting effect on creativity and productivity f) There is a clear intention on the Bill to secure more financial benefits for the originators of the works covered by copyright.
e) If the provisions are not considered to limit choice but regulate the practice of occupations, it nevertheless violates section 22, because it has no rational basis. f) No research conducted to determine the economic impact	h) The Bill seeks to enhance access to knowledge and ideas and promote access to educational materials i) Various impact assessments were undertaken during 2014 and 2015 and were considered in the passing of the Bill.
j) Section 12D runs contrary to the purpose of enhancing access to educational texts because it disincentivizes authors from writing and publishers from publishing. It is, therefore, irrational.	j) There is a clear intention on the Bill to secure more financial benefits for the originators of the works covered by copyright.
k) Therefore, provisions violate freedom of trade, occupation, and profession and ought to be deleted.	k) The limitation is reasonable and justifiable, thereby satisfying the test contained in section 36(1) of the Constitution.

Table 10: section 12A educational and academic activities exception

4.4 Exceptions and Limitations and compliance with International Treaties

The President's comments or notes on the Bill included, *inter alia*:

"The Bill seeks to align national legislation with international treaties which have been reviewed and are in the process of being acceded to by South Africa, including the World Intellectual Property Organization ("WIPO") digital treaties, namely, the WIPO Copyright Treaty, the WIPO Performance, and Phonograms Treaty, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are blind, visually impaired or otherwise print disabled.....I have reservations about whether the Bills comply with the above Treaties

and am therefore referring the Bills back to Parliament in order that it may consider the Bills against South Africa's International Law obligations.

The new exceptions introduced in sections 12A, 12C, 12D and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under International law”

WIPO Copyright Treaty was adopted in Geneva on the 20th of December 1996. This treaty has been signed by South Africa, although we have not yet acceded to it. It is a special agreement under the Berne Convention dealing with the protection of works and the rights of authors of such published works. It grants the authors the right to authorise, distribute, rent, and communication to the public of their work.

WIPO Performance and Phonograms Treaty has also been signed by South Africa, but we have not acceded to it. It was adopted on the 20th of December 1996 and deals with the rights of performers and producers of phonograms by granting them economic rights in their performances. The concern with this treaty is the economic implications of the Bill as it related to the economic rights of performers.

Marrakesh Treaty was adopted on the 28th of June 2013 and seeks to facilitate access to published works by visually impaired persons and persons with print disabilities. It is the first treaty to deal with copyright exceptions and seeks to harmonise the interests of copyright holders and users with visually impaired and print disabilities by allowing them to be provided accessible versions of published books. It also requires contracting parties to include limitations and exceptions to allow for the reproduction, distribution, and formats of published works for visually impaired persons.

Proponents of the Bill confirm that while the Marrakesh Treaty is limited to printed materials, there is no good reason why the principled basis underpinning the agreement – i.e. access to copyrighted materials for persons with disabilities – should not apply with effect to other forms of protected works. On the contrary, the right to equality and freedom from unfair discrimination (section 9(3) of the Constitution) precludes Parliament from adopting an approach that only

includes protection for persons with visual disabilities, with section 9(2) expressly authorising the state to take “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”.²⁰

4.4.1 Three-step test

The three-step test was first included in the 1967 revision of the Berne Convention and provides that “*it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in:*

- a) *Certain special cases;*
- b) *Provided that such reproduction does not conflict with a normal exploitation of the work; and*
- c) *The reproduction does not unreasonably prejudice the legitimate interests of the author.”*

Band²¹ argues that there is a significant overlap between the four factors outlined in subsection 12A (b) and the three-step test. I agree. The “purpose and character of the use” in factor (iii) matches the first step, whether the use is a “special case”. The “amount and substantiality” of the use in factor (ii) and whether “such use serves a different purpose from that of the work in factor (ii) (aa) corresponds to the second step, “conflict with a normal exploitation of the work”. And “substitution effect of the act upon the market for the work” in the fourth factor matches the third step, whether the use “unreasonably prejudice the legitimate interests of the author”.

Copyright Amendment Bill	Three-step
Factor (iii) - Purpose and character of the work	Special case – first step
Factor (ii) – Amount and substantiality of the use Factor (ii)(aa) – Whether the use serves a different purpose from that work affected	Second step – conflict with the normal exploitation of the work
Factor (iv) – substitution effect of the act upon the market for the work	Third step – whether the use “unreasonably prejudices the legitimate interests of the author

Table 11: Comparison between CAB and Three step test

²⁰ https://libguides.wits.ac.za/ld.php?content_id=50611390

²¹ Band Jonathan, “Analysis of Woods and Myburgh Comments on Copyright Amendment Act” (2020), Joint PIJIP/TLS Research paper. 55. <http://digitalcommons.wcl.american.edu/research/55>

The three-step test should be interpreted in a manner that respects the legitimate interests of third parties, including –

- a) Interests deriving from human rights and fundamental freedoms;
- b) Interests in competition, notably on secondary markets; and
- c) Other public interests, notably in scientific progress and cultural, social, or economic development²².

Band, in arguing that the Bill is not in conflict with the three-step test argues that the three-step test is so vague that it provides national legislatures with no meaningful guidance concerning the permissible exceptions and it is far more useful to refer to the body of existing exceptions adopted around the world. He claims that it is clear that the DTI carefully considered the exceptions in the US, the EU and other jurisdictions with modern copyright laws and there is nothing in Bill's hybrid model that does not have precedent in another jurisdiction that is considered to afford a high level of copyright protection²³. A hybrid of flexible fair use provisions and specific exceptions has been adopted in leading IP producers such as the United States, Canada, Singapore, Korea, and Israel. Every country that has adopted a flexible fair use provision also has enacted a list of specific exceptions. The legislatures in all these jurisdictions have identified certain uses that always can be made while providing courts with the flexibility to allow other uses if warranted under the circumstances and none of these countries' hybrid structures has been challenged before the WTO²⁴.

5. Possible economic impacts of the Copyright Amendment Bill on creative and cultural industries and UNESCO domains

It can be seen from all the submissions above that the possible impact of the Copyright Amendment Bill are quite diverse depending on the domains affected.

²² <http://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf>.

²³ Band, *supra*, at page 7

²⁴ Band, *supra*, at page 4

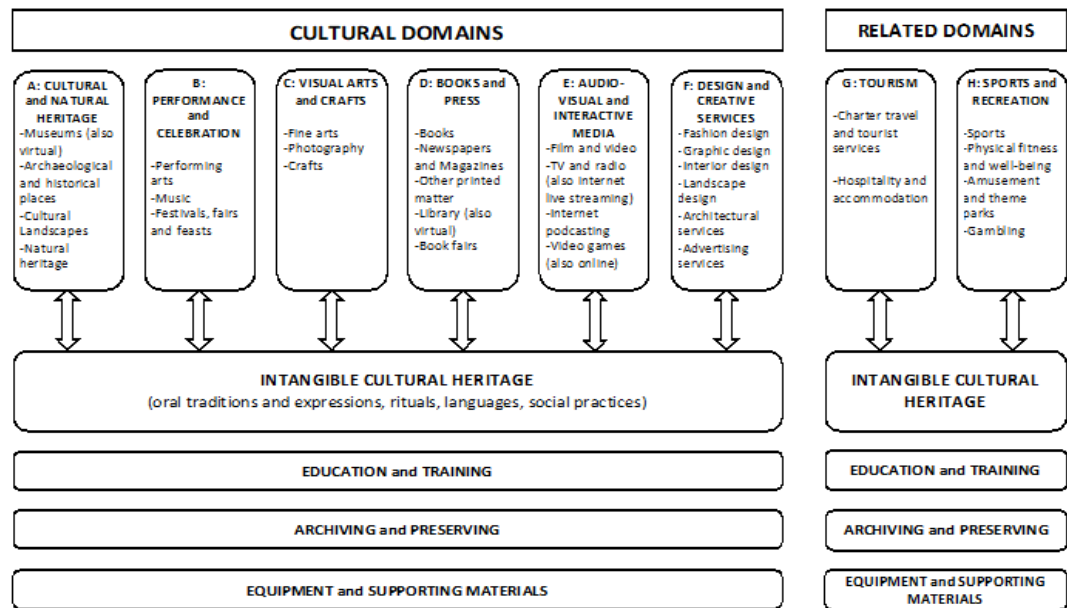


Figure 1: UNESCO domains

There are various ways of defining the cultural and creative industries, this includes the definition used by the UNESCO Framework for Cultural Statistics (UNESCO 2009 FCS) which groups the sector into six main domains. These domains include:

- Cultural and natural heritage. This includes museums, archaeological and historical places, cultural landscapes and natural heritage;
- Performance and celebration, i.e. performing arts, festivals, fairs and feasts;
- Visual arts and crafts, i.e. fine arts, photography and crafts;
- Books and press, i.e. books, newspapers and magazines, other printed matter, library, book fairs;
- Audio-visual and interactive media, i.e. film and video, TV and radio, internet podcasting, video games;
- Design and creative industries, i.e. fashion design, graphic design, interior design, landscape design, architectural services, advertising servicing.

This report will look at the impact of the Bill on each of these domains.

Submissions for cultural and natural heritage domain

The Library and Information Association of South Africa (LIASA) submitted that libraries and archives were key players as they collected and preserved the cultural heritage and enabled creators of works to use and re-use their collections for new creations.

Libraries have large collections of old VHS and Beta videotapes, maps, archival materials, special collections, old newspapers that are disintegrating and becoming inaccessible because the technologies are obsolete. The Bill will make it possible for the collections to be digitised and preserved for generations to come. The fair use provisions for libraries, archives and museums in section 19C allows for the preservation of cultural heritage, as well as providing print and e-resources for users.

Submissions for audio-visual and interactive media domain

The International Federation of Film Producers Association (FIAPF) made submissions to Parliament that the film production industry was a high risk and cost intensive industry, since most of the cost had to be paid upfront without any guarantee of market success. They stated that the industry acted as an essential cultural development tool and needed to be nurtured in an enabling environment. They made submissions that in order to achieve economic growth, copyright licensing, remuneration models and access to copyright works had to be considered.

The South African Guild of Actors (SAGA) made submissions that the current Copyright Act was flawed to the extent that it threatened the livelihood of actors and the industry as a whole. Actors' work continued to be exploited without any financial benefit due to the continued use of outdated models of exploitation and exclusion in the industry. They argued that the Bill would introduce a statutory mechanism for performers to negotiate and secure their economic rights in the continued exploitation of the works. The performers would have the right to authorise the fixation and communication to the public of their live performances.

The contrary argument was provided by the South African Screen Federation (SASFED) who submitted that the Bill, as presently drafted, may weaken the incentives for the audio-visual industry to create and distribute content since Section 21B of the Bill and section 22 of the

Act, limited the duration of protection to 25 years, and this would make content creators prefer other countries without these limitations.

The National Association of Broadcasters submitted that they support the general aims of the Bill, but had concerns with its practical implementation and the manner in which the power of the Minister of Trade and Industry could regulate content. They also stated their concerns about the practicality of the provisions regarding royalties and clause 9A which sought to introduce the need for prior consent from the copyright owner each time a work was broadcast. They submit that this would result in broadcasters being deterred from using artists' works, leading to the unintended consequence of less exposure and fewer royalties.

Submissions for books and press domain

The PWC report was commissioned in order to look at the economic impact of the fair use provisions introduced in the Bill. In the report, PWC reported that the Bill would lead to job losses as a result of the exceptions and fair use provisions regarding access for educational purposes. It is argued that academic publishing will become less financially viable, forcing publishers to close. In terms of the PWC report²⁵, it was estimated that about 1 250 jobs would likely be lost due to the implementation of the Bill and the publishers expect a 33% decrease in sales, which could equate to about R21 billion a year and a loss of tax revenue²⁶.

South Africa's body of knowledge will be reduced rather than increased. Writers will stop writing, and publishers will stop publishing and less South African publishing will be available resulting in imported foreign material filling the gap. South African students will then learn generic ideas from other countries, and will result in recolonization of the South African education system.

The Bill will also have far reaching effects for all other domains in that:

- a) Big tech companies will be able to access and republish creative work without having to pay fair royalties or usage fees, and then be able to monetise this content by licensing it and selling it, without providing remuneration to the original creators;

²⁵ <https://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>

²⁶ <https://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf>

- b) It has been projected that South Africa could lose up to R34 billion in export revenue if it loses its eligibility for the Generalised System of Preferences (GSP) programme under the US Trade Act²⁷. Our credibility for the GSP has been called into question by the United States as a result of the possible passing of the Copyright Amendment Bill. The GSP designation allows South Africa preferential duty-free access to the US markets for selected export products. Inadequate protection of intellectual property rights would therefore discourage foreign investment.

The economic impacts of the Bill are quite concerning for the CCIs. It is clear, as stated by the opponents of the Bill that there has not been meaningful economic impact assessments conducted. The studies as to the economic impact were indeed conducted during 2014 and 2015, however, the Bill was only prepared and sent to Parliament in 2017. No economic impact has been conducted since the Bill was prepared, submitted for comments and passed by Parliament and this is crucial in order for the DTI to review the impacts and consequences that would follow from the Bill coming into law. It is suggested that this would be a good time for these studies to be commissioned in order to ensure that all the factors are taken into account before the Bill is assented into law, and the economic impact is felt by all the affected stakeholders.

Since the Bill has been returned to Parliament by the President, Parliament is only restricted to reviewing the comments or reasons for the referral by the President and cannot take into account any other factors. However, the economic impact of the Bill falls into the crux of the deprivation of property argument as well as the freedom of trade, occupation and profession argument. If the economic impact studies conclude that there would not be any economic loss, then the argument that the Bill results in deprivation of property and restricts freedom of trade, occupation and profession would lose its merits. However, if the studies conclude that there is serious economic effects or impacts that would flow from the Bill, then the Department of Sports, Arts and Culture would be best suited to consider the position or stance that they will take moving forward.

6. The way forward

²⁷ <https://www.biznews.com/briefs/2020/01/16/copyright-amendment-bill-r34bn-export-revenue>

Now that the Bill has been referred back to Parliament by the President, the process going forward will be regulated by Section 79 of the Constitution.

Section 79 provides that –

- 3.3.5.1 *The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.*
- 3.3.5.2 *The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.*
- 3.3.5.3 *The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if –*
 - 3.3.5.3.1 *The President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or*
 - 3.3.5.3.2 *Section 74(1), (2) or (3) (b) or 76 was applicable in the passing of the Bill.*
- 3.3.5.4 *If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either –*
 - 3.3.5.4.1 *Assent to and sign the Bill; or*
 - 3.3.5.4.2 *Refer it to the Constitutional Court for a decision on its constitutionality.*
- 3.3.5.5 *If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.*

4.1 Possible actions

- 4.1.1 Section 6A (7), 7A (7) and 8A (5) and retrospective application

It is submitted that there are still a lot of grey areas regarding these provisions which would need to be satisfied for these provisions to pass constitutional muster. These include the concern that:

- i) The provisions would affect unconnected third parties, who were not a party to the original assignment agreement,
- j) The provisions do not distinguish between agreements with unfair provisions or those that were concluded and there was reasonable and fair compensation paid. Although it may be assumed that the provisions would not affect fair contracts, this needs to be specified in the provisions to avoid lengthy litigation processes to assist with the interpretation of the provisions;
- k) The uncertainty regarding the application of the provisions and how they will affect current copyright owners, and the time limit on how far back the provisions would apply, also create rule of law issues because the provisions are uncertain and individuals cannot conform their conduct to its dictate.

It is recommended that these provisions be amended to only provide for the prospective application. Alternatively, the provisions can be amended to address the concerns listed above. Failing these amendments, the provisions can be removed instead.

4.1.2 Impermissible delegation of plenary power to the Minister

The tabling of regulations before the National Assembly is not delegating plenary power but is part of the oversight function of the National Assembly and the delegation to the Minister falls within the limits of implied legislative delegation that is allowed by the Constitution.

Since these provisions also relate to or are connected to the above reservation regarding clauses 6A (7), 7A (7), and 8A (5), should these provisions be amended, this issue would not need to be resolved.

4.1.3 Copyright exceptions and deprivation of property

Copyright has always been subject to exceptions and/or limitations. It is not an absolute right. If too much protection is provided to copyright holders, this would create a monopoly and perpetuate a lack of access to information, which would have a serious social and economic cost. Copyright without exceptions limits the rights to education, dignity, equality, trade, and freedom of expression.

The purpose of the exceptions is to align copyright with the digital era and advance constitutional values and human rights. The exceptions are also not open-ended and are subject to the four-factor test contained in section 12A(b) so I do not believe that they result in arbitrary deprivation of property.

4.1.3 Copyright exceptions and right to freedom of trade, occupation, or profession

The provisions would not limit or bar anyone to choose a trade, occupation, or profession but merely seeks to address exploitative practices and would pass the test set out in section 36 of the Constitution. It is believed that the provisions would even generate new trade, occupational and professional opportunities due to the enhancement of creativity as well as the digitisation of information.

4.1.4 Copyright exceptions and the three-step test

It is not a ground for a referral to argue non-compliance with international treaties, especially since the treaties referred to be not currently enforceable in South Africa as they have not been ratified, nor domesticated.

Be that as it may, the four-factor test complies with the three-step test. Upon careful review, it is clear that the provisions of the Bill were founded upon, and were heavily influenced by the three-step test, as well as other countries that have applied the same four-factor test successfully in their statutes for decades.

7. Conclusion / concluding remarks

Having reviewed all the submissions from the various stakeholders, it is clear that there is a long way until there is a consensus amongst the various stakeholders, regarding the contentious provisions in the Bill (It is unclear if there will ever be a consensus!)

What is clear, though, is that the Bill seeks to, as its core function, address the issue of poverty and exploitation of artists and creators plaguing the South African entertainment industry, and to try and create a balance between property rights, providing for fair contracts to be entered into and avoid exploitation and abuse of creators of content. The task that the Bill seeks to achieve is not an easy one, i.e.:

- a) Ensuring that the artists and creators get a fair slice of the pie and promoting the artists' right to dignity;
- b) That the current copyright owners do not feel threatened with having to now share the piece of the pie and accepting that they will now get a lesser slice than they had before and do not feel that they are deprived of their property and their right to trade, occupation and profession;
- c) Providing access for educational purposes and thereby enhancing the right to basic education as enshrined in the constitution;
- d) Providing access to people with disabilities and therefore enhancing the right to equality and legislation that does not discriminate against people with disabilities;
- e) Making our laws compatible with the digital era and enhancing access to knowledge and ideas.

It is submitted that some of the provisions in the Bill, although seeking to serve a legitimate purpose, cast the net far too wide and exceed what would be considered reasonable. These provisions, it is submitted, would need to be reviewed by Parliament again. These are the provisions relating to or affecting the payment of royalties resulting from unfair contracts concluded before the commencement of the Bill. These provisions go far and beyond the purpose for which they intend to achieve and would not pass constitutional muster.

As for the exceptions providing for fair use, access for educational purposes, we submit that these provisions are reasonable and justifiable in a democratic society where there needs to be a balance between conflicting rights. There cannot be a “winner takes all” approach since the rights that are affected are important rights that need to be balanced effectively. Unfortunately, for the Bill to be passed, current copyright owners would need to be willing to share the piece of the pie and allow for fairness to prevail. This is necessary for there to be a reform in the industry.

Some of the possible impacts of the Bill as stated by the opponents, are, to our submission, based upon an incorrect reading and interpretation of the legislation. They represent the worst case scenario and there is no evidence that if the Bill is indeed passed as it is, the Bill will have those effects or impacts as illustrated by the opponents of the Bill. That being said, it is suggested that an economic impact assessment study be commissioned in order to carefully look at the economic impacts of the Bill on not only the CCIs but also to the South African economy. It would not help to have a legally sound and constitutional Bill that has dire effects on the South African economy and does not end up benefiting the people it is trying to protect.

LIST OF REFERENCES

1. Band Jonathan, "Analysis of Woods and Myburgh Comments on Copyright Amendment Act" (2020), Joint PIJIP/TLS Research paper.
<http://digitalcommons.wcl.american.edu/research/55>
2. *Certification of the Constitution of South Africa*, 1996 (4) SA 744 (CC) and *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC)
3. Copyright Review Commission Report available at
<http://publishsa.co.za/files/1532283873rsg-copyrightreviewcommissionreport2011.pdf>.
4. Davies et al (eds) *Copinger and Skone on Copyright* 17ed 2016 (Sweet & Maxwell: London) vol 1 (Copinger).
5. *First National Bank of South Africa Limited trading as Wesbank v Commissioner, South African Revenue Service and another; National Bank of South Africa Limited trading as Wesbank v Minister of Finance* 2002(4) SA 768 (CC)
6. <http://www.jipitec.eu/issues/jipitec-1-2-2010/2621/Declaration-Balanced-Interpretation-Of-The-Three-Step-Test.pdf>.
7. <https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf>
8. https://libguides.wits.ac.za/ld.php?content_id=50611390
9. https://libguides.wits.ac.za/ld.php?content_id=50611390
10. https://libguides.wits.ac.za/ld.php?content_id=56780275
11. <https://www.biznews.com/briefs/2020/01/16/copyright-amendment-bill-r34bn-export-revenue>
12. <https://www.biznews.com/briefs/2020/01/16/copyright-amendment-bill-r34bn-export-revenue>
13. <https://www.publishsa.co.za/file/1501662149slp/pwcreportonthecopyrightbill2017.pdf>
14. *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) at 59.
15. Landes & Posner, 1989 *Journal for Legal Studies*, p326
16. Notice 918 of 2013
17. *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 231 (CC) (*South African Diamond Producers*)
18. The Constitution of South Africa, 1996.

1. ANNEXURE A: EXTRACTS FROM THE COPYRIGHT AMENDMENT BILL

Share in royalties regarding literary or musical works

Section 6A

(1) For the purposes of this section 'royalty' means the gross profit made on the exploitation of a literary work or musical work by a copyright owner or a person who has been authorised by the author to do any of the acts contemplated in section 6.

(2) Notwithstanding –

- a) An assignment of copyright in a literary or musical work; or*
- b) The authorisation by the author of a literary or musical work of the right to do any of the acts contemplated in section 6,*

The author shall, subject to any agreement to the contrary, be entitled to receive a fair share of the royalty received for the execution of any of acts contemplated in section 6.

(3) (a) The author's share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or between the author and the person contemplated in subsection (2)(b), or between their respective collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a) or the order contemplated in subsection (4).

(4) Where the author and the copyright owner, or the person contemplated in subsection (2) (b), cannot agree on the author's share of the royalty, either party may refer the matter to the Tribunal for an order determining the author's share of the royalty.

(5) The agreement contemplated in subsection (3)(a) must include the following:

- a) The rights and obligations of the author and the copyright owner or the person authorised by the author to use the work as contemplated in subsection (2)(b);*
- b) The author's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;*

- c) *The method and period within which the amount must be paid to the author by the copyright owner, or the person authorised to use the work as contemplated in subsection (2)(b), to the author, and*
 - d) *A dispute resolution mechanism*
- (6) *This section does not apply to –*
- (a) *A copyright owner who is the author of the literary or musical work in question'*
 - (b) *A work created in the course of employment contemplated in section 21(1)(b) or (d); or*
 - (c) *A work where copyright is conferred by section 5 in the state, or a prescribed local or international organisation.*
- (7) (a) *This section applies to a literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017 if that literary or musical work –*
- (i) *Falls within the application of this Act; and*
 - (ii) *Is still exploited for profit;*
- (b) *The Minister must –*
- (i) *Develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);*
 - (ii) *Conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and*
 - (iii) *Table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.*
- (c) *The share in the royalty applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2017.*

Section 7A – Share in royalties regarding visual artistic work

(1) For the purposes of this section 'royalty' means the gross profit made on the exploitation of a visual artistic work by a copyright owner or a person who has been authorised by the author to do any of the acts contemplated in section 7.

(2) Notwithstanding –

- c) An assignment of copyright in a visual artistic work; or*
- d) The authorisation by the author of a visual artistic work of the right to do any of the acts contemplated in section 7,*

The author shall, subject to any agreement to the contrary, be entitled to receive a fair share of the royalty received for the execution of any of acts contemplated in section 7.

(3) (a) The author's share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or between the author and the person contemplated in subsection (2)(b), or between their respective collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a) or the order contemplated in subsection (4), as the case may be.

(4) Where the author and the copyright owner, or the person contemplated in subsection (2) (b), cannot agree on the author's share of the royalty, either party may refer the matter to the Tribunal for an order determining the author's share of the royalty.

(5) The agreement contemplated in subsection (3)(a) must include the following:

- a) The rights and obligations of the author and the copyright owner or the person authorised by the author to use the work as contemplated in subsection (2)(b);*
- b) The author's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;*
- c) The method and period within which the amount must be paid to the author by the copyright owner, or the person authorised to use the work as contemplated in subsection (2)(b), to the author, and*
- d) A dispute resolution mechanism*

(6) This section does not apply to –

- a) A copyright owner who is the author of the visual artistic work in question'*

- b) A work created in the course of employment contemplated in section 21(1)(b) or (d); or*
 - c) A work where copyright is conferred by section 5 in the state, or a prescribed local or international organisation.*
- (7) (a) This section applies to a visual artistic work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that literary or musical work –*
- (iii) Falls within the application of this Act; and*
 - (iv) Is still exploited for profit;*
- (8) The Minister must –*
- (i) Develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);*
 - (ii) Conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and*
 - (iii) Table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.*
- (c) The share in the royalty applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2017.*

8A – Share in royalties regarding audio visual works

- (1) A performer shall, subject to the Performers Protection Act. 1967 (Act No. 11 1967), have the right to share in the royalty received by the copyright owner for any of the acts contemplated in section 8.*
- (2) (a) The performer's share of the royalty contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the performer and the copyright owner or between their respective collecting societies.*
- (b) Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner,*

contemplated in paragraph (a), or the order contemplated in subsection (4), as the case may be

- (3) Where the performer and the copyright owner contemplated in subsection (2)(a) cannot agree on the performer's share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer's share of the royalty.*
- (4) The agreement contemplated in subsection (2)(a) must include the following –*
 - (a) The rights and obligations of the performer and the copyright owner;*
 - (b) The performer's share of the royalty agreed on, or ordered by the Tribunal, as the case may be;*
 - (c) The method and period within which the amount must be paid by the copyright owner to the performer; and*
 - (d) A dispute resolution mechanism*
- (5) (a) This section applies to an audio-visual work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that audio-visual work –*
 - (i) Falls within the application of this Act; and*
 - (ii) Is still exploited for profit;*
- (b) The Minister must –*
 - (i) Develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);*
 - (ii) Conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and*
 - (iii) Table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.*

- (c) *The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2017.*
- (6) *Any person who executes an act contemplated in section 8 for commercial purposes must –*
 - (a) *Register that act in the prescribed manner and form; and*
 - (b) *Submit a complete, true and accurate report to the performer, copyright owner, the indigenous community, or collecting society, as the case may be, in the prescribed manner for purposes that include the calculation of royalties due and payable by that person.*
- (7)
 - (a) *Any person who intentionally fails to register an act as contemplated in subsection (6) (b), or who intentionally fails to submit a report contemplated in subsection (6) (b), shall be guilty of an offence.*
 - (b) *A person convicted of an offence under paragraph (a) shall be liable to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten percent of its annual turnover.*
 - (c) *For the purposes of paragraph (a), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences were committed, and if that financial year has not been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which the Act applies.*
 - (d) *If the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the minimum sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.*

12B – specific exceptions from copyright protection applicable to all works

- (1) *Copyright in a work shall not be infringed by any of the following acts:*
 - a) *Any quotation: Provided that –*

- (i) *The extent thereof shall not exceed reasonably justified by the purpose;
and*
 - (ii) *To the extent that it is practicable, the source and the name of the author,
if it appears on or in the work, shall be mentioned in the quotation.*
- b) *Any illustration in a publication, broadcast, sound or visual record for the purpose
of teaching: Provide that such use shall not exceed the extent justified by the
purpose: Provided further that, to the extent that it is practicable, the source and
name of the author, if it appears on or in the work, shall be mentioned in the act
of teaching or in the illustration in question;*
- c) *The reproduction of such work by a broadcaster by means of its own facilities
where such reproduction or any copy of the reproduction is intended exclusively
for lawful broadcasts of the broadcaster and is destroyed before the expiration of
a period of six months immediately following the date of 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: Provided that 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) *The reproduction in the press or by broadcasting of a lecture, address or other
work of a similar nature which is delivered in public, if such reproduction or
broadcast is for information purposes: Provided that the source and name of the
author should be indicated and that the author of the lecture, address or other
work so reproduced should have the exclusive right of making a collection
thereof:*
- e) *Subject to the obligation to indicate the source and name of the author in so far
as it is practicable –*
 - i. *The reproduction by the press, or in a broadcast, transmission or other
communication to the public of an article published in a newspaper or
periodical 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. *The reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or*
 - iii. *The reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;*
 - f. *The translation of such work by a person giving or receiving instruction: Provided that –*
 - i. *such translation is not done for commercial purposes;*
 - ii. *Such translation is used for personal, educational, teaching, judicial proceedings, research, and professional advise purposes only: Provided that such use shall not exceed the extent justified by the purpose; or*
 - iii. *Such work is translated and communicated to the public for non-commercial purposes*
 - g. *The use of such work in a bona fide demonstration of electronic equipment to a client by a dealer in such equipment;*
 - h. *The use of such work is for the purposes of judicial proceedings or preparing a report for judicial proceedings; or*
 - i. *The making of a personal copy of such work by an individual for the individual's personal use and made for ends which are not commercial: Provided that such use shall not exceed the extent justified by the purpose.*
- (2) *For the purposes of subsection (1)(i), permitted personal uses include –*
- (a) *The making of a back-up copy;*
 - (b) *Time or format-shifting; or*
 - (c) *The making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility;*
- (3) *The provisions of subsection (1) shall apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.*

- (4) An authorisation to use a literary work as the basis for the making of an audio-visual work, or as a contribution to the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audio-visual work.*
- (5) The provisions of subsection (1) (d) and (e) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.*
- (6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act 37 of 1997), the first date of or other assignment of ownership of an assigned original copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and important locally and internationally in respect of such assigned original or copy.*

12C – Temporary reproduction and adaptation

12C – Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptation are an integral and essential part of a technical process and the purpose of those copies or adaptations is –

- (a) To enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or*
- (b) To adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent, economic significance to these acts.*

19B – General exceptions regarding protection of computer programs

- (1) A person having a right to use a copy of a computer program may, without the authorisation of the copyright owner, 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 that person does so while performing any of the acts of loading, displaying, executing, transmitting or storing the program, which he or she is entitled to perform.*
- (2) The authorisation of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:*

- (a) *The acts referred to in subsection (1) are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorised to do so;*
 - (b) *The information necessary to achieve the interoperability has not previously been readily available to the persons referred to in paragraph (a) and*
 - (c) *Those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.*
- (3) *The information obtained through the application of the provisions of subsection (2) may not be –*
- (a) *Used for goals other than those to achieve the interoperability of the independently created computer program;*
 - (b) *Given to others except when necessary for the interoperability of the independently created computer program;*
 - (c) *Used for the development, production or marketing of a computer program substantially similar in its exception to the program contemplated in subsection (1); or*
 - (d) *Used for any other act which infringes copyright.*
- (4) *For the purposes of this subsection, ‘interoperability’ means the ability to exchange information and to use the information which has been exchanged.*

“12D. (1) Subject to subsection (3), a person may make copies of work or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purposes.

(2) Educational institutions 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 a course of instruction or in virtual learning environments, managed learning environments, virtual research environment or library environments hosted on a secure network and accessible only by the persons giving and receiving the instruction at or from the educational establishment making such copies.

(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the

copyright owner, collecting society or an indigenous community on reasonable terms and conditions.

(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook –

a) Where the textbook is out of print;

b) Where the owner of the right cannot be found; or

c) Where authorised copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.

(5) The right to make copies shall not extend to reproductions for commercial purposes.

(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.

(7) (a) The author of a scientific or other contribution, which is the result of a research activity that received at least 50 percent of its funding from the state and which has appeared in a collection, has the right, despite the granting the publisher or editor an exclusive right of use, to make a final manuscript version available to the public under an open licence or by means of an open access institutional repository.

(b) in the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.

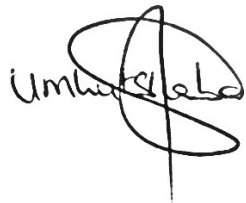
(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.

(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.

(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.

(8) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (6)

APPROVALS FOR THE SOUTH AFRICAN CULTURAL OBSERVATORY - COPYRIGHT: Public and stakeholder perceptions and concerns on current copyright and performers legislation and proposed amendments - 31 March 2021

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