



Select Committee on Trade and International Relations

National Council of Provinces
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22 February 2019

Dear Sir

**SUBMISSIONS ON THE CONSTITUTIONALITY OF THE COPYRIGHT
AMENDMENT BILL, 2017**

- 1 On 14 February 2019, the Select Committee on Trade and International Relations of the National Council of Provinces (“the Council”) published a call for submissions on the Copyright Amendment Bill, 2017 (“the Bill”). The Bill seeks to amend the Copyright Act 98 of 1978 (“the Act”).
- 2 On instruction from Adams & Adams attorneys, we make these submissions on behalf of the following industry stakeholders:
 - 2.1 Juta and Company (Pty) Ltd;
 - 2.2 Media24 Boeke (Pty) Ltd;
 - 2.3 Music Publishers Association of South Africa (MPA-SA);
 - 2.4 Pearson South Africa (Pty) Ltd;
 - 2.5 Schuter & Shooter (Pty) Ltd;

- 2.6 Sony Music Entertainment Africa (Pty) Ltd;
 - 2.7 Universal Music SA (Pty) Ltd; and
 - 2.8 Warner Music SA (Pty) Ltd
- (“the stakeholders”)
- 3 These submissions are supported by the following South African trade associations:
- 3.1 **Academic and Non-Fiction Authors’ Association of South Africa (ANFASA)** – a national organization, established in 2004, with members in all nine provinces, that has approximately 500 members, including many from the academic and educational sectors. ANFASA’s objectives include to raise the status of authors in society, to build a strong organization to support and uplift authors and create opportunities for them to generate sustainable income; and to contribute to South African culture, heritage and nation building with a focus on social and cultural development.
 - 3.2 **Animation South Africa (Animation SA / A.S.A)** – a non-profit organization founded in 2006 and mandated by industry to develop, promote and represent South African animation and visual effects. A.S.A represents the interests of all who produce content for screens using digital animation, visual effects and post production software. This includes television commercials and shows, films, series, games,

online content, explainer videos, art, educational material, architectural walk throughs and 3D printing professionals

- 3.3 **The Independent Black Filmmakers Collective (IBFC)** – a growing collaborative business network of likeminded black independent filmmakers, content creators; film/tv/commercial directors, producers, distributors, exhibitors; media and entertainment facilitators and service entrepreneurs.
- 3.4 **Music Publishers Association of South Africa (MPA-SA)** – an industry association representing music publishers in South Africa that exists to safeguard and promote the interests of music publishers and the writers signed to them, to represent these interests to government, the music industry, the media and to composers and the public.
- 3.5 **Publishers Association of South Africa (PASA)** – the largest publishing industry body in South Africa that represents book and journal publishers in SA in the field of non-fiction, fiction, education, academic and trade publishing. Membership comprises the majority of South African publishing houses, for profit and non-profit, university presses, small and medium sized companies and multinational publishing enterprises. For a listing of PASA's members, please see: <http://publishsa.co.za/members/category?all=all>
- 3.6 **Recording Industry of South Africa (RiSA)** – The Recording Industry of South Africa (RiSA) is a trade association that represents the collective interests of producers of music sound recordings, being

independent and major record labels in South Africa. For a listing of RiSA's members, please see: <http://www.risa.org.za/members>

- 4 In addition to these written submissions, the stakeholders would greatly appreciate an opportunity for their representatives to make oral submissions to the Committee, as detailed in the covering letter to these submissions.
- 5 The stakeholders are concerned that certain aspects of the Bill may be inconsistent with the Constitution, and subject to challenge if the Bill is enacted in its current form. The written submissions address these constitutional issues, which, it is submitted, must be remedied before the Council passes the Bill.
- 6 The submissions address the following issues:
 - 6.1 The Bill has been incorrectly tagged as a section 75 bill;
 - 6.2 Sections 6A(7), 7A(7) and 8A(5) constitute retrospective and arbitrary deprivation of property;
 - 6.3 Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) impermissibly delegate legislative authority to the Minister;
 - 6.4 There has been inadequate public consultation on section 12A – the new fair use exception;
 - 6.5 The new exceptions constitute arbitrary deprivation of property; and

- 6.6 The new exceptions violate the right to freedom of trade, occupation and profession.

THE BILL HAS BEEN INCORRECTLY TAGGED AS A SECTION 75 BILL

- 7 The Constitution provides for two different processes to be followed when enacting ordinary bills. The first procedure is section 75. It applies to bills “*not affecting the provinces*”. The second procedure is section 76. It applies to bills “*affecting the provinces*”.

- 8 A failure to use the correct procedure is fatal: it means that the resulting Act will be constitutionally invalid. As the Constitutional Court held in *Tongoane*, in declaring an Act invalid on this basis:

“I consider that enacting legislation that affects the provinces in accordance with the procedure prescribed in s 76 is a material part of the law-making process relating to legislation that substantially affects the provinces. Failure to comply with the requirements of s 76(3) renders the resulting legislation invalid.”¹

- 9 The present Bill was tagged as a section 75 bill and has thus far been dealt with according to the processes set out in section 75 of the Constitution.

- 10 The stakeholders submit that the Bill ought to have been enacted according to the process in section 76 of the Constitution, instead of section 75.

- 11 The procedure to be used in enacting a bill depends on the bill’s subject-matter:

¹ *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) (“*Tongoane*”) at para 109.

- 11.1 Where a Bill deals with the areas of competence falling within schedules 4² or 5³ of the Constitution, it must be dealt with in terms of section 76 of the Constitution.
- 11.2 By contrast, where a Bill deals with an area of competence not falling within either schedule 4 or schedule 5 of the Constitution (that is, anything not mentioned in either schedule),⁴ it must be dealt with in terms of section 75 of the Constitution.
- 12 In *Tongoane*, the Constitutional Court held that the test for determining whether an ordinary bill should be classified as a section 76 bill is whether the bill's provisions "*substantially affect the interests of the provinces*".⁵ Therefore, to be classified as a section 76 bill, it is not necessary that the Bill deal solely with an area listed in schedule 4. It is sufficient if its provisions substantially affect a matter listed in schedule 4.
- 13 Schedule 4 lists a number of areas of concurrent national and provincial legislative competence. The stakeholders that the Bill substantially affects two matters listed in schedule 4: "*trade*" and "*cultural matters*".

² By way of example, the first four listed are "*Administration of indigenous forests; Agriculture; Airports other than international and national airports; Animal control and diseases...*"

³ By way of example, the first four listed are "*Abattoirs; Ambulance service; Archives other than national archives; Libraries other than national libraries...*"

⁴ The list of examples is necessarily endless, but obvious examples include foreign affairs, defence and the justice system.

⁵ *Tongoane* at para 72.

Trade

14 First, a number of provisions of the Bill undoubtedly have a substantial effect on trade.

15 The concept of “*trade*” has, at its heart, the notion of buying and selling;⁶ a commercial transaction where something is exchanged for something else. In the world of copyright, “*trade*” occurs through authorising acts in respect of works in which copyright exists (i.e. issuing licences) and assigning copyright in a work to another person, in exchange for consideration.

16 On this understanding, the Bill clearly regulates how copyright may be “*traded*”:

16.1 The new sections 6A, 7A and 8A⁷ provide for a right to receive royalties for the author of a literary, musical or visual artistic work, and a performer of an audio-visual work. This right to receive royalties cannot be waived, and any assignment or authorisation is subject to it. This clearly affects how an author is able to deal with his copyright.

16.2 Sections 39(cG) and (cl)⁸ provide that the Minister may make regulations prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of the Act; and prescribing royalty rates or tariffs for various forms of use.

⁶ See *Battiss and another v Elcentre Group Holdings Ltd and Others* 1993 (4) SA 69 (W) at 73.

⁷ Introduced by clauses 5, 7 and 9 of the Bill, respectively.

⁸ Clause 33 of the Bill.

- 16.3 Section 22(3)⁹ sets formalities for the assignment and exclusive licensing of copyright. It also provides that the assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.
- 17 In addition, certain provisions of the Bill have a significant impact for the trade in art works in particular:
- 17.1 Sections 7B-F¹⁰ provide for resale royalty rights for visual artistic works. This means that the artist is entitled to be paid a royalty on each commercial resale of his work. This will have a substantial impact on the trade in art works.
- 17.2 Section 22A¹¹ provides that a licence must be obtained to do an act subject to copyright in respect of an orphan work. This applies also to visual artistic works. The effect is that traders in second-hand goods, in particular art-works, who re-sell visual artistic works where the copyright owner is not identified or cannot be traced, will be required to pay royalties when they re-sell the art work. This too will have a substantial impact on the trade in art works.
- 18 Therefore, the manner in which authors and copyright owners are able to deal with – or “*trade*” in – their copyright is regulated by the Act. The Bill’s provisions

⁹ Clause 22 of the Bill.

¹⁰ Clause 7 of the Bill.

¹¹ Clause 24 of the Bill.

therefore have a substantial effect on trade – a matter listed in Schedule 4 of the Constitution.

Cultural matters

19 Second, the Bill's provisions also have a substantial effect on cultural matters.

20 In terms of the Bill, indigenous works will become eligible for the payment of royalties. An “*indigenous work*” is defined as a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community.¹² The Bill provides for the registration of collecting societies to administer rights on behalf of copyright owners or authors.¹³

21 The Bill's authors themselves have recognised that the Bill deals with the “*customs of traditional communities*”,¹⁴ and as a result found it necessary to refer the Bill to the National House of Traditional Leaders¹⁵. This referral was made pursuant to section 18(1) of the Traditional Leadership and Governance Framework Act 41 of 2003, which provides that “*any parliamentary Bill pertaining to customary law or customs of traditional communities must, before*

¹² In terms of section 1 of the Act, after amendment by the Copyright Amendment Act 66 of 1983 (with effect from a date to be proclaimed).

¹³ See sections 22B and 22C, clause 25 of the Bill.

¹⁴ Explanatory Memorandum to the Bill, para 6.10.

¹⁵ Explanatory Memorandum to the Bill, para 6.9. The referral was done on 11 September 2017. See “Copyright Amendment Bill (B13-2017): Bill History” at <https://pmg.org.za/bill/705/>.

it is passed...be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.”

22 Once it is accepted that the Bill deals with the customs of traditional communities such that it must be referred to the House of Traditional Leaders, it must follow that the Bill also affects “*cultural matters*” within the meaning of schedule 4 of the Constitution.

23 Because the provisions of the Bill fall, in substantial measure, within matters listed in schedule 4, the stakeholders submit that the Bill ought to have been enacted following the section 76 process. Therefore, if the Bill is ultimately enacted following the current section 75 process, the resulting Act would be invalid.

SECTIONS 6A(7), 7A(7) AND 8A(5) CONSTITUTE RETROSPECTIVE AND ARBITRARY DEPRIVATION OF PROPERTY

24 The new sections 6A, 7A and 8A provide that authors of literary, musical or visual artistic works have the right to receive a royalty on the exploitation of that work; and a performer of an audio-visual work has the right to share in royalties received by the copyright owner. In the case of literary, musical and visual artistic works, this right endures notwithstanding any assignment of the copyright in the work or authorisation granted by the author.¹⁶ In the case of audio-visual works, the performer’s share of the royalty is to be determined by

¹⁶ Section 6A(2); section 7A(2); section 8A(2)(b).

a written agreement, and any assignment of the copyright in that work is subject to that agreement.¹⁷

25 Subsections 6A(7), 7A(7) and 8A(5) give these royalty provisions retrospective effect:

25.1 Though the right to share in royalties only applies to royalties received in the future, subsections 6A(7), 7A(7) and 8A(5) provide that the right to share in royalties applies not only to future assignments, but also where copyright in the relevant work was assigned before the commencement date of the Act.

25.2 Therefore, if copyright in a literary work was assigned in 2010, for instance, its author will, from the commencement date of the Amendment Act, have a right to share in the royalties received in respect of that work, notwithstanding the assignment.

26 The stakeholders submit that subsections 6A(7), 7A(7) and 8A(5) (“the retrospective provisions”) are constitutionally invalid.

27 First, the fact that these provisions have retrospective effect raises significant rule of law concerns.¹⁸ Inherent in the rule of law is the principle that law must be certain, clear and stable, and give those bound by it sufficient warning so as to enable them to conduct themselves in accordance with it.¹⁹ By altering

¹⁷ Section 8A(2)(a) and (b).

¹⁸ The rule of law is a foundational constitutional principle, protected in section 1(c) of the Constitution.

¹⁹ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) (“*Affordable Medicines*”) at para 108.

- the legal effects of transactions concluded in the past, the retrospective provisions violate this principle. The provisions seek to undo the legal effects of agreements concluded in the past – removing vested rights from parties who, at the time of contracting, had no way of knowing that their contractual rights would later be undone. The stakeholders submit that these provisions are constitutionally invalid on this basis alone.
- 28 Second, in addition to the rule of law concerns, the stakeholders the provisions are constitutionally invalid because they constitute an arbitrary deprivation of property.
- 29 Section 25(1) of the Constitution provides that “*no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*” In order for there to be an infringement of section 25(1): (i) the thing in question must be property; (ii) there must be a deprivation; and (iii) the deprivation must be arbitrary.²⁰
- 30 Intellectual property has been recognised by the Constitutional Court as constitutionally protectable property.²¹ As an intellectual property right, copyright will similarly fall within the protection of section 25(1).²²

²⁰ *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC) (*South African Diamond Producers*) at para 34.

²¹ *Laugh It Off Promotions CC v SAB International (Finance) Bv t/a Sabmark International (Freedom Of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

²² *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* 2016 (4) SA 591 (GJ) at para 108.

31 “*Deprivation*” entails an interference with a property right 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 party.²³

31.1 The stakeholders submit that the interference with copyright occasioned by sections 6A(7), 7A(7) and 8A(5) is substantial.

31.2 Whereas, previously, copyright owners had the right to claim all of the fruits of the exploitation of the relevant work for themselves, these provisions mean that, going forward, they will be required to share these amounts with the author or performer. Copyright owners will be entitled to a lesser share of the fruits of their property than previously.

31.3 The relevant provisions thus undoubtedly involve a deprivation of property.

32 Further, the deprivation is arbitrary. A 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.²⁴

33 Sufficient reason is to be established 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.

²³ *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) at para 59; *South African Diamond Producers* at para 48.

²⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100.

- (c) *In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*
- (d) *In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*
- (e) *Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.*
- (f) *Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
- (g) *Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.*
- (h) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."*

34 The stakeholders submit that the deprivation of property brought about by sections 6A(7), 7A(7) and 8A(5) is arbitrary, for the following reasons:

34.1 It appears that the aim of these retrospective provisions is to assist authors who were previously victims of bad deals, and who assigned their copyright at too low a fee, by giving them a right to royalty payments going forward.

- 34.2 Even assuming that this purpose is legitimate, the stakeholders submit that the retrospective provisions cast the net far too wide.
- 34.3 The provisions permit the deprivation of property regardless of the terms of the original assignment agreement. In many cases, performers and authors will have negotiated effectively, and obtained a fair payment. In these cases, there is no reason to require a perpetual royalty payment. This simply cannot fulfil the stated legislative purpose.
- 34.4 The legislative purpose here could be achieved in a much less restrictive manner. For instance, the legislation could provide for an investigation to be done, on application by a particular performer or author who feels himself to have been the victim of an unfair contract, into the circumstances into which that contract was concluded. The legislation could then provide for a process to afford remedies to those who have actually been unfairly treated – as opposed to a blanket, retrospective provision for royalty payments, regardless of whether a fair assignment fee was paid.
- 34.5 In many cases, the current copyright owner, whose property stands to be deprived by these provisions, is the second or subsequent assignee of the copyright. He is not the person who concluded the initial assignment agreement with the author or performer; he simply acquired it later on, from a prior assignee. Here, it is entirely arbitrary to deprive such a person of their property. This owner has no link to the contract feared to have been unreasonable. He has acquired the

copyright in good faith; yet stands to lose a substantial portion of it as a result of the retrospective provisions.

34.6 Finally, the Bill does not set a time-limit for the operation of these retrospective provisions. As a result, it appears that even assignments made decades ago will be subject to the royalty payment requirements. To reach into the past to this extent, without a clear factual basis for doing so, is arbitrary.

35 Therefore, the stakeholders submit that sections 6A(7), 7A(7) and 8A(5) permit arbitrary deprivation of property, would be invalid if enacted and ought to be deleted from the Bill.

SECTIONS 6A(7)(b), 7A(7)(b) AND 8A(5)(b) IMPERMISSIBLY DELEGATE LEGISLATIVE POWER TO THE MINISTER

36 Section 6A(7)(b) confers substantial powers on the Minister to determine how assignments that pre-date the Amendment Act are to be dealt with. It provides:

“(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.” (emphasis added)*

- 37 Sections 7A(7)(b) and 8A(5)(b) are largely similar to section 6A(7)(b), and so they are not repeated here. The submissions that follow apply equally to these sections.
- 38 The stakeholders submit that the delegation of power to the Minister contained in these subsections constitutes an impermissible delegation of legislative authority.
- 39 In *Executive Council, Western Cape Legislature*,²⁵ the Constitutional Court held that detailed provisions are often required for the purposes of implementing laws, and Parliament is permitted to delegate subordinate regulatory authority to other bodies for this purpose.²⁶ However, the Court held that there is a difference between delegating authority to make subordinate legislation within the framework of a statute, and assigning plenary legislative power to another body.²⁷ The assignment of plenary legislative power to another body is not permissible.
- 40 The principles first articulated in *Executive Council* have now been applied by the Constitutional Court in a series of decisions in different contexts.²⁸
- 41 The key question that emerges from these decisions is that it is necessary to consider whether section 8D(3) –

²⁵ *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (“*Executive Council, Western Cape Legislature*”).

²⁶ *Executive Council, Western Cape Legislature* at para 51.

²⁷ *Executive Council, Western Cape Legislature* at para 51.

²⁸ See, for example, most recently: *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC).

- 41.1 delegates authority to the Minister to make regulations “*within the framework of*” the Bill – in which case it is constitutionally permissible; or
 - 41.2 purports to assign plenary legislative power to the Minister – in which case it is not.
- 42 The Bill sets the following framework:
- 42.1 In terms of section 6A(2), the author of a literary or musical work is entitled to royalties, notwithstanding assignment or authorisation.
 - 42.2 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 agreement cannot be reached, the Tribunal may be approached.²⁹
 - 42.3 Section 6A(7)(a) provides simply that the other provisions of section 6A apply where copyright in the relevant work was assigned before the commencement date of the Act (subject to certain provisos).
 - 42.4 This is obviously not a straightforward exercise. The other provisions of 6A, which 6A(7) makes applicable to past assignments, require agreement to be reached between the parties on the royalties payable, and that other prescribed matters be dealt with in that agreement. It is not possible to reach into the past and place similar provisions into assignment agreements that have already been concluded. Therefore,

²⁹ Section 6A(4).

the provisions of section 6A cannot simply be made applicable to past assignments by a provision saying they are.

43 In recognition of this problem, section 6A(7)(b) provides that the Minister must *“develop draft regulations setting out the process to give effect to the application of this section to a work [that was assigned before the Amendment Act came into effect].”*

44 The stakeholders submit that section 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.

44.1 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.

44.2 This is not a question of working out the details of how existing statutory provisions are to be implemented: rather, it purports to permit the Minister to determine the rights and obligations of persons who concluded assignment agreements in the past.

44.3 For instance, the Minister may decide that a time-limit should be set, and only assignments concluded within the last 10 years should fall under section 6A(7).

45 Indeed, the provision itself seems to recognise that the decision-making delegated to the Minister falls within the domain of the National Assembly.

- 45.1 It seeks to claw back a role for the National Assembly, providing that the regulations must be approved by the National Assembly before they are to take effect.
- 45.2 But this does not save the provision. The fact remains that the relevant decisions are taken by the Minister, and simply ratified by the National Assembly. The extensive participation processes to which legislation is subjected do not occur; and there is no oversight by the NCOP at all. In *Executive Council, Western Cape Legislature*, for instance, the impugned provision empowered the President to amend the Act by proclamation, but required him to act with the approval of the select committees on constitutional affairs of the National Assembly and the Senate. The provision was held to confer plenary legislative power on the President, notwithstanding the involvement of these parliamentary structures.
- 46 Therefore, the stakeholders submit that sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) constitute an impermissible delegation of legislative authority on the Minister and as such would be constitutionally invalid if enacted.

INADEQUATE PUBLIC CONSULTATION ON THE FAIR USE EXCEPTION IN SECTION 12A

- 47 In terms of section 59(1) of the Constitution, the National Assembly is obliged to facilitate public involvement in its legislative and other processes and those of its committees. The Constitutional Court has held that the obligation to facilitate public participation is a material part of the law-making process, and

the failure to comply with this requirement renders the resulting legislation invalid.³⁰

48 Following the public hearings in August 2017, substantial amendments were effected to various sections of the Bill. The relevant provisions, as amended, were not put out for public comment before the final version of the Bill was published.

49 One such provision was the new section 12A(1)(a). The stakeholders submit that, because there was a material change to the wording of section 12A(1)(a), further consultation was necessary, and failure to consult on the wording change renders the provision constitutionally invalid.

50 The version of section 12A(1)(a) put out for public comment read as follows:

“In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work...”

51 The final version of section 12A(1)(a), reads as follows:

“In addition to uses specifically authorized, fair use in respect of a work, for purposes such as the following, does not infringe copyright in that work:...”

52 The effect of this amendment is that, whilst the original text provided for a closed list of purposes for which a work could be used and be considered “*fair use*”, the final version provides for an open list. The purposes enumerated in

³⁰ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 209; *South African Veterinary Association v Speaker of the National Assembly and Others* [2018] ZACC 49 at para 23.

section 12A(a)(i)-(vii) are no longer the only purposes for which a work may be used under the provision – they are now only illustrative of the sorts of purposes that may be taken to constitute “*fair use*”.

53 This is a material change:

53.1 The change in wording in section 12A(1)(a) in effect shifts 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 type of “*fair use*” exception used in US law.

53.2 The Explanatory Memorandum to the Bill, both as introduced in May 2017 and after its revision by the National Assembly, states:

“Scope is left for the reproduction of copyright material for limited uses or purposes without obtaining permission and without paying a fee or a royalty. Furthermore, this provision stipulates the factors that need to be considered in determining whether the copyright work is used fairly.”

(Our emphasis.)

53.3 Under the Act’s existing “*fair dealing*” exception in section 12, the test whether use infringes copyright is whether the use is for a specific exempted purpose, and if so, whether the use is fair.³¹ Fair dealing is permissible only in respect of specific purposes; other types of dealing are not permitted no matter how “*fair*” they might be.³²

53.4 The key difference between this and a “*fair use*” provision (such as that in US copyright law) is that a “*fair use*” exception provides only

³¹ Dean *Handbook of South African Copyright Law* 2015 (Juta & Company: Cape Town) at 1-95 para 9.2.2.

³² Davies et al (eds) *Copinger and Skone James on Copyright* 17ed 2016 (Sweet & Maxwell: London) vol 1 (“*Copinger*”) at p716; para 9.28 (referring to a similar fair dealing provision in UK law).

guidelines as to what amounts to “*fair use*”:³³ the purpose of the use is not a separate qualifying enquiry, but rather forms part of the assessment of whether the use is fair.

- 53.5 The wording on which comment was sought was in the nature of a “*fair dealing*” provision, in that the test on that wording would have been whether the use is for a specific, listed purpose, and if so, whether the use is fair. By contrast, the new wording, post public participation, is clearly in the nature of a “*fair use*” provision, as the new wording only provides an illustrative list, by way of guidance as to what sorts of purposes a work may be used for. These are therefore no longer the “*limited uses or purposes*” contemplated by the Explanatory Memorandum.
- 54 The stakeholders therefore submit that the public did not have sufficient warning that a change of this nature was being contemplated, in order to comment properly in favour of, or against it. As a result, there was inadequate consultation on this issue, and section 12A(1)(a) would be constitutionally invalid if enacted.

THE NEW EXCEPTIONS CONSTITUTE ARBITRARY DEPRIVATION OF PROPERTY

- 55 Copyright exceptions provide a defence to a claim of infringement. If an exception applies, then a person may perform what would otherwise be a

³³ *Copinger* at p716; para 9.28.

restricted act in respect of a work, without obtaining permission from, or paying remuneration to, the copyright owner.

56 Currently, the Act provides for work-specific exceptions based on “*fair dealing*”.³⁴

57 The Bill proposes the introduction of new exceptions that are general in nature, rather than work-specific. The new section 12A introduces an exception based on “*fair use*”, and section 12B sets out specific exceptions that will apply to all works. Section 12C allows temporary reproduction and adaptation; while section 12D allows reproduction for educational and academic activities. Additional new exceptions are introduced by the new sections 19B,³⁵ 19C³⁶ and 19D.³⁷

58 The stakeholders submit that various of these new exceptions constitute an arbitrary deprivation of property within the meaning of section 25(1) of the Constitution.

Law on arbitrary deprivation

59 As explained above in relation to sections 6A(7), 7A(7) and 8A(5), in order for there to be an infringement of section 25(1) of the Constitution: (i) the thing in

³⁴ Sections 12 to 19B of the Act.

³⁵ General exceptions regarding protection of computer programs; clause 19 of the Bill.

³⁶ General exceptions regarding protection of copyright work for libraries, archives, museums and galleries; clause 20 of the Bill.

³⁷ General exceptions regarding protection of copyright work for persons with disability; clause 20 of the Bill.

question must be property; (ii) there must be a deprivation; and (iii) the deprivation must be arbitrary.³⁸

59.1 Intellectual property has been recognised by the Constitutional Court as constitutionally protectable property.³⁹ As an intellectual property right, copyright will similarly fall within the protection of section 25(1).⁴⁰

59.2 “*Deprivation*” entails an interference with a property right 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 party.⁴¹

59.3 A 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.⁴²

Section 12A: the fair use exception

60 The new section 12A⁴³ introduces a general “*fair use*” exception. It provides:

“(a) *In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:*

³⁸ *South African Diamond Producers Organisation v Minister of Minerals and Energy and Others* 2017 (6) SA 331 (CC) (*South African Diamond Producers*) at para 34.

³⁹ *Laugh It Off Promotions CC v SAB International (Finance) Bv t/a Sabmark International (Freedom Of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

⁴⁰ *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* 2016 (4) SA 591 (GJ) at para 108.

⁴¹ *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) at para 59; *South African Diamond Producers* at para 48.

⁴² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100.

⁴³ Clause 13 of the Bill.

- (i) *Research, private study or personal use, including the use of a lawful copy of the work at a different time or with 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 and access to the collections of libraries, archives and museums; and*
 - (vii) *ensuring proper performance of public administration.*
- (b) *In determining whether an act done in relation to a work constitutes fair use, all 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 the use, including whether—*
 - (aa) *such use serves a purpose different from that of the work affected; and*
 - (bb) *it is of a commercial nature or for non-profit research, library or educational purposes; and*
 - (iv) *the substitution effect of the act upon the potential market for the work in question.*
- (c) *For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.”*
- (emphasis added)*

61 The effect of section 12A is to substantially reduce the degree of protection a copyright owner has over his property (copyright) and the degree to which the owner is able to benefit from the fruits of that property. It does this in two key respects.

61.1 First, it introduces four new purposes for which works may be used without constituting infringement: those listed at section 12A(a)(iv) to (vii). Previously, copyright owners were entitled to remuneration if their

works were used for education or governmental purposes: now, they are not.

- 61.2 Second, it changes the list of purposes for which work may legitimately be used from a closed one (as is the case in section 12 of the current Act) to an open, illustrative one. Previously, a work could only be used, without permission, for a closed list of purposes. Now, copyright owners will not be entitled to remuneration whenever their work is used for a purpose similar to those actually listed in section 12A(a).
- 62 The effect of section 12A is that copyright owners are afforded less protection for their works than they previously had. This, in turn, means that their rights to benefit from those works is limited. This substantially limits the owner's entitlement to exploit that work and constitutes a deprivation of property.
- 63 Furthermore, the deprivation of property occasioned by section 12A is arbitrary.
- 63.1 It appears that the purpose of expanding the exceptions is to promote access to copyright material.⁴⁴ However, the extent of the deprivation caused by section 12A casts the net far too wide, and is entirely disproportionate to the end sought to be achieved.
- 63.2 The extent of the deprivation caused by section 12A is considerable. Because section 12A provides for an open list, the circumstances in

⁴⁴ Para 2.3 of the Memorandum on the Objects of the Copyright Amendment Bill ("the Explanatory Memorandum").

which a work may now be used, without the requirement to obtain the copyright owner's permission, or to pay remuneration, are both unknown and unknowable. It will require a lengthy period of incremental judicial interpretation before it is possible to predict, with any certainty, the purposes for which a work may be used under the exception.

- 63.3 The extent of this deprivation is not justified by the purpose of enhancing access to copyright material. For one thing, this purpose could be achieved by far less restrictive means. For another, Parliament has conducted absolutely no assessment as to the economic effects of increasing the scope of copyright exceptions so drastically. Nor has any assessment been conducted to determine whether this step – which dramatically weakens copyright in South Africa – is actually necessary to achieve the desired increase in access.
- 63.4 In the absence of compelling economic research – let alone any research at all – as to the economic impact of section 12A, the deprivation of property it gives rise to is entirely arbitrary.
- 64 Therefore, the stakeholders submit that section 12A constitutes an arbitrary deprivation of property, and would be constitutionally invalid if enacted.

Section 12D: the educational and academic activities exception

65 As explained above, copyright owners were, under the existing Act, entitled to remuneration whenever their works were used for educational and academic activities.

66 The new section 12D⁴⁵ changes this position. It provides:

- (1) *Subject to subsection (3), a person may make copies of works 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 purpose.*
- (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 environments or library environments hosted on a secure network and accessible only by the persons giving and receiving 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 authorized 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.*

⁴⁵ Clause 13 of the Bill.

(7)

- (a) *The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the 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)."*
(emphasis added)

67 As with the fair use exception contained in section 12A, the effect of the educational use exception in section 12D is that copyright owners are afforded far less protection for their works than they previously had. This, in turn, means that their rights to benefit from those works is limited. This substantially limits the owner's entitlement to exploit that work and constitutes a deprivation of property.

68 Again, this deprivation is arbitrary:

68.1 It appears that the purpose of section 12D is to promote access to copyright material for educational purposes. However, the extent of the

deprivation caused by section 12D casts the net far too wide, and is entirely disproportionate to the end sought to be achieved.

- 68.2 The extent of the deprivation caused by section 12D is extreme. Not only does it provide for extracts of copyright works to be reproduced verbatim in course materials, but it also permits the wholesale copying of an entire textbook, in a wide variety of circumstances – including that the user considers the copyright owner’s licence terms to be “*unreasonable*”. What constitutes an “*unreasonable*” licence term, justifying what would otherwise be serious infringement of copyright, is not specified in section 12D – opening the door for unscrupulous users to ignore copyright entirely.
- 68.3 The extent of this deprivation is not justified by the purpose of enhancing access to copyright material. This purpose could be achieved by far less restrictive means. In addition, Parliament has conducted absolutely no assessment as to the economic effects of, in effect, removing copyright in academic works entirely. In the absence such research, the deprivation of property section 12D gives rise to is arbitrary.
- 68.4 In addition, section 12D fails entirely to recognise that education is, in many instances, a commercial enterprise. South Africa has a large number of private educational institutions, which exist to make a profit. Section 12D effectively permits these institutions to reduce their business costs, by removing the obligation to pay licence fees, and

thereby enhance their profits at the expense of copyright owners. This does nothing to further the purpose of enhancing access to education.

69 Therefore, the stakeholders submit that section 12D constitutes an arbitrary deprivation of property, and would be constitutionally invalid if enacted.

Other exceptions that constitute arbitrary deprivation of property

70 As explained above, the Bill introduces a number of new exceptions, that reduce the degree of protection copyright owners have in respect of their copyright, and the extent to which they are able to benefit from their copyright.

71 We have dealt with two key exceptions above: sections 12A and 12D. Both of these provisions constitute an arbitrary deprivation of property of copyright owners. However, they are not the only new exceptions that do so.

72 Below, we list other exceptions that similarly, the stakeholders submit, constitute arbitrary deprivation of property, for reasons substantially similar to those set out above in relation to sections 12A and 12D: they interfere substantially with copyright owners' legal rights in respect of their property, and are arbitrary in that they do so without sufficient reason. We reiterate that Parliament has conducted absolutely no assessment as to the economic effects of these new exceptions. In the absence of such research, the deprivation of property these exceptions give rise to can only be arbitrary.

73 In addition to sections 12A and 12D, the stakeholders submit that the following exceptions also deprive copyright owners of their copyright arbitrarily:

73.1 Section 19C: the library, archive, museum or gallery exception. In particular:

73.1.1 Section 19C(3), which provides for a library, archive, museum or gallery to provide “*temporary access*” to a copyright work to a user in another library. This is complicated by the fact that the meaning of “access” is not clear.

73.1.2 Section 19C(4), which provides that a library, archive, museum or gallery may permit a user to view or listen to a whole work, for educational purposes, on its premises, in a classroom or over a computer network.

73.1.3 Section 19C(5)(b), which permits a library, archive, museum or gallery to place works reproduced for preservation on publicly accessible websites.

73.1.4 Section 19C(9), which permits a library, archive, museum or gallery to make a copy of a work for its own collection.

73.2 Section 12B(1)(a)(i), which provides that copyright shall not be infringed by any quotation. The problem in this provision lies in the fact that it is not work-specific: the quotation exception that currently exists in section 12(3) of the Act applies only to literary or musical works. Section 12B(1)(a) applies also to visual artistic works, which cannot, by their very nature, be “*quoted*” without reproducing them in their entirety.

73.3 Section 12B(1)(c), which permits reproduction by broadcasters. The problem in this provision lies in the fact that it is not work-specific: the broadcasting exception that currently exists in section 12(5) of the Act applies only to literary or musical works. Section 12B(1)(c) now extends the application of this exception to cinematographic films, thereby depriving the authors of those films of property.

73.4 Section 12B(1)(e)(i), which permits any reproduction in the press, or in 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.

73.5 Section 12B(1)(f), which permits any translation of a work.

74 The stakeholders submit that all of the provisions listed above permit arbitrary deprivation of property, and would therefore be constitutionally invalid if enacted.

THE NEW EXCEPTIONS VIOLATE THE RIGHT TO FREEDOM OF TRADE, OCCUPATION OR PROFESSION

75 The stakeholders submit that certain of the new exceptions, in addition to arbitrarily depriving copyright owners of property, also unjustifiably limit the rights of copyright owners to freedom of trade, occupation or profession.⁴⁶

⁴⁶ Section 22 of the Constitution.

The law on freedom of trade, occupation or profession

76 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 –

76.1 the right to choose a trade, occupation or profession freely, and

76.2 the proviso that the practice of a trade, occupation or profession may be regulated by law.⁴⁷

77 Different levels of scrutiny attach to each of these two elements:⁴⁸

77.1 If a legislative provision has a negative impact on choice of trade, occupation or profession, it must be tested in terms of the criterion of reasonableness in the limitations clause – section 36(1) of the Constitution.

77.2 If the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of Rights.

⁴⁷ *South African Diamond Producers* at para 65.

⁴⁸ *South African Diamond Producers* at para 65.

Section 12A: the fair use exception

78 The stakeholders submit that section 12A of the Bill has a negative impact on choice of trade, occupation or profession. It makes occupations that rely for their profitability on the exploitation of copyright works (such as writing books or music or producing sound recordings or films) so uncertain, and potentially so unprofitable, that it effectively limits the choice to enter into these occupations at all.

79 In *South African Diamond Producers*, the Constitutional Court recognised that it is not only laws that regulate entry into a particular trade, occupation or profession that limit the “choice” element of section 22. Laws may equally limit choice if they have the effect of making a trade so unprofitable that the “choice” to enter that profession is rendered illusory. The Court held:

“Clearly, then, a law prohibiting certain persons from entering into a specific trade, or providing that certain persons may no longer continue to practise that trade, would limit the choice element of s 22; in these cases there is a legal barrier to choice. This would be the case where, for instance, a licence is necessary to conduct a particular trade, and that licence is withdrawn. However, one may also conceive of legislative provisions that, while not explicitly ruling out a group of persons from choosing a particular trade, does so in effect, by making the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited.”⁴⁹ (emphasis added)

80 Section 12A is one such provision: through it 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 in fact limited. The way in which section 12A does this is to

⁴⁹ *South African Diamond Producers* at para 68.

significantly reduce the protection copyright owners have in respect of their works – thus significant reducing the copyright owner's ability to make a living from exploiting those works.

81 Section 12A does not simply regulate the manner in which copyright owners may pursue their occupations – instead, it renders the trade or occupation of becoming a person who deals in copyright (an author, a composer, a producer) so economically uncertain, that it in effect renders the element of choice illusory.

82 Section 12A therefore limits the rights protected by section 22 of the Constitution. In the stakeholders' submission, it does so without adequate justification, as required under section 36 of the Constitution.

83 In any event, even if section 12A is considered not to limit choice, but simply to regulate the practice of copyright owners' occupations, it nevertheless violates section 22, because it has no rational basis.⁵⁰ No research whatsoever has been conducted to determine the economic impact of section 12A. In these circumstances, there can be no suggestion that section 12A is rationally connected to a legitimate government purpose.

84 Therefore, the stakeholders submit that section 12A violates the right to freedom of trade, occupation and profession, would be constitutionally invalid if enacted, and ought to be deleted from the Bill.

⁵⁰ *South African Diamond Producers* at para 65.

Section 12D: the educational and academic activities exception

- 85 Similarly, section 12D also violates copyright owners' section 22 rights.
- 86 Here, the limitation is particularly severe for authors of academic texts, or texts routinely used for academic purposes.
- 87 As with section 12A, section 12D of the Bill has a negative impact on choice of trade, occupation or profession. It makes occupations that rely for their profitability on the exploitation of copyright works in an academic context (such as authors of academic texts) so unprofitable, that it effectively limits the choice to enter into these occupations at all. The only avenue an author of academic works has to monetise his copyright is through licensing the use of his works, for academic use. Section 12D significantly curtails the extent to which such an occupation will be profitable, going forward.
- 88 Section 12D therefore limits the rights protected by section 22 of the Constitution. In the stakeholders' submission, it does so without adequate justification, as required under section 36 of the Constitution.
- 89 In any event, even if section 12D is considered not to limit choice, but simply to regulate the practice of copyright owners' occupations, it nevertheless violates section 22, because it has no rational basis.⁵¹ No research whatsoever has been conducted to determine the economic impact of section

⁵¹ *South African Diamond Producers* at para 65.

12D. In these circumstances, there can be no suggestion that section 12D is rationally connected to a legitimate government purpose.

90 Indeed, section 12D runs contrary to the purpose of enhancing access to educational texts, because it disincentivises authors from writing them, and publishers from publishing them. It is, as a result, entirely irrational.

91 Therefore, the stakeholders submit that section 12D violates the right to freedom of trade, occupation and profession, would be constitutionally invalid if enacted, and ought to be deleted from the Bill.

CONCLUSION

92 The stakeholders' key submissions are as follows:

92.1 The Bill has been incorrectly tagged as a section 75 bill. In fact, its provisions substantially affect two areas listed in Schedule 4 to the Constitution: cultural matters, and trade. As a result, the process in section 76 of the Constitution ought to have been followed. If the Bill is ultimately enacted following the section 75 process, it is liable to be set aside as constitutionally invalid on this basis alone.

92.2 Sections 6A(7), 7A(7) and 8A(5) constitute retrospective and arbitrary deprivation of property. These provisions mean that, going forward, copyright owners will be entitled to a lesser share of the fruits of their property than previously. The retrospective provisions deprive copyright owners of property without sufficient reason, and therefore

permit arbitrary deprivation of copyright. Sections 6A(7), 7A(7) and 8A(5), if enacted, would be constitutionally invalid.

92.3 Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) impermissibly delegate legislative authority to the Minister. If enacted, they would be constitutionally invalid.

92.4 There has been inadequate public consultation on section 12A – the new fair use exception. Public participation is a prerequisite for legislation to be constitutionally valid. Section 12A therefore stands to be set aside on this basis, if enacted.

92.5 A number of the new exceptions constitute arbitrary deprivation of property. These are, in particular:

92.5.1 Section 12A.

92.5.2 Section 12D.

92.5.3 Section 19C. In particular, sections 19C(3), 19C(4), 19C(5)(b) and 19C(9).

92.5.4 Section 12B(1)(a)(i).

92.5.5 Section 12B(1)(c).

92.5.6 Section 12B(1)(e)(i).

92.5.7 Section 12B(1)(f).

92.6 Sections 12A and 12F violate the right to freedom of trade, occupation and profession. Not only do they limit copyright owners' choice of

occupation without justification, but they also constitute irrational regulation of copyright owners' occupations.

Art.4(1)(b)

Art.4(1)(b)

Chambers, Sandton
22 February 2019