REPUBLIC OF SOUTH AFRICA

COPYRIGHT AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 40121 of 5 July 2016)
(The English text is the official text of the Bill.)

(MINISTER OF TRADE AND INDUSTRY)

[B 13—2017]

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GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for the reproduction of copyright work; to provide for the protection of copyright in artistic work; to provide for the accreditation and registration of Collecting Societies; to provide for the procedure for settlement of royalties disputes; to allow fair use of copyright work; to provide for access to copyright works by persons with disabilities; to provide for the protection of authorship of orphan works by the State; to provide for the establishment of the Intellectual Property Tribunal; to provide for the appointment of members of the Intellectual Property Tribunal; to provide for the powers and functions of the Intellectual Property Tribunal; to provide for prohibited conduct in respect of technological protection measures; to provide for prohibited conduct in respect of copyright management information; to provide for management of digital rights; to provide for certain new offences; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 98 of 1978, as amended by section 1 of Act 56 of 1980, section 1 of Act 66 of 1983, section 1 of Act 52 of 1984, section 1 of Act 13 of 1988, section 1 of Act 125 of 1992, section 50 of Act 38 of 1997, section 1 of Act 9 of 2002, section 224 of Act 71 of 2008 and section 3 of Act 28 of 2013

1. Section 1 of the Copyright Act, 1978 (hereinafter referred to as ''the principal Act''), is hereby amended—

(a) by the insertion before the definition of ''adaptation'' of the following definition:

'' **'accessible format copy'** means a copy of a work in an alternative manner or form which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without disability;'';

(b) by the insertion after the definition of ''artistic work'' of the following definition:

'' **'audiovisual fixation'** has the meaning ascribed to it in section 1 of the Performers' Protection Act, 1967 (Act No. 11 of 1967);'';

(c) by the insertion after the definition of ''collecting society'' of the following definition:

'' **'commercial'** means to obtain direct economic advantage or financial gain in connection with the business or trade of the user of the work in question;'';

(d) by the insertion after the definition of ''community protocol'' of the following definition:

'' **'Companies Act'** means the Companies Act, 2008 (Act No. 71 of 2008);'';

(e) by the insertion after the definition of ''copyright'' of the following definition:

'' **'copyright management information'** means information, including meta-data, attached to or embodied in a copy of a work that—

(a) identifies the work and its author or copyright author; or

(b) identifies or indicates some or all of the terms and conditions for using the work or indicates that the use of the work is subject to terms and conditions;'';

(f) by the insertion after the definition of ''National Trust'' of the following definition:

'' **'orphan work'** means a work in which copyright still subsists but none of the rights holders in that work is identified or, even if one or more of them are identified, none is located;'';

(g) by the insertion after the definition of ''performance'' of the following definitions:

'' **'performer'** has the meaning ascribed to it in section 1 of the Performers' Protection Act, 1967 (Act No. 11 of 1967);

'person with a disability' includes a person who has a perceived or actual physical, intellectual, neurological or sensory impairment which, as a result of communication, physical or information barriers, requires an accessible format copy in order to access and use a work;'';

(h) by the insertion after the definition of ''sound recording'' of the following definitions:

'' **'technologically protected work'** means a work that is protected by a technological protection measure;

'technological protection measure'—

(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is designed to prevent or restrict infringement of work; and

(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that it controls any access to a work for non-infringing purposes;

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

(i) by the insertion after the definition of ''traditional work'' of the following definition:

'' **'Tribunal'** means the Intellectual Property Tribunal established by section 29;''.

Insertion of section 2A in Act 98 of 1978

2. The following section is hereby inserted in the principal Act after section 2:

''**Scope of copyright protection**

2A. (1) Copyright protection extends to expressions and not to—

(a) ideas, procedures, methods of operation or mathematical concepts; or

(b) in the case of computer programs, to interface specifications.

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

(3) The copyright protection of tables and compilations shall—

(a) not extend to their contents; and

(b) be without prejudice to any rights subsisting in their contents.

(4) Notwithstanding the provisions of section 2, no protection shall—

(a) extend to an expression—

(i) inextricably merged with an idea such that the idea can be expressed intelligibly only in one or a limited number of ways; or

(ii) when the particular expression is directed by law or regulation such that only one form of expression will meet regulatory requirements, for example on a safety label;

(b) subsist in—

(i) official texts of a legislative, administrative or legal nature or in official translations of those texts;

(ii) speeches of a political nature, in speeches delivered in the course of legal proceedings or in news of the day that are mere items of press information: Provided that the maker of the speeches referred to in this subparagraph shall have the exclusive right of making a collection of the speeches in question.''.

Amendment of section 5 of Act 98 of 1978, as amended by section 5 of Act 52 of 1984 and section 5 of Act 125 of 1992

3. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

''(2) *(a)* Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by or under the direction or control of the state or **[such]** an international **[organizations as may be prescribed]** or local organisations.

(b) Copyright conferred in terms of paragraph *(a)* shall be owned by the state or organisation in question.''.

Amendment of section 6 of Act 98 of 1978, as amended by section 3 of Act 56 of 1980 and section 6 of Act 125 of 1992

4. Section 6 of the principal Act is hereby amended—

(a) by the insertion after paragraph *(e)* of the following paragraph:

''*(e*A*)* communicating the work to the public, by wire or wireless means, including by means of internet access and the making of the work available to the public in such a way that any member of the public may access the work from a place and at a time chosen by that person, whether interactively or non-interactively;'';

(b) by the substitution for paragraph *(g)* of the following paragraph:

''*(g)* doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs *(a)* to **[*(e)*]** *(e*A*)* inclusive**[.]**''; and

(c) by the addition of the following proviso:

'': Provided that, notwithstanding the transfer of copyright in a literary or musical work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have the right to claim an equal portion of the royalty payable for the use of such copyright work.''.

Amendment of section 7 of Act 98 of 1978, as amended by section 4 of Act 56 of 1980 and section 7 of Act 125 of 1992

5. Section 7 of the principal Act is hereby amended—

(a) by the insertion after paragraph *(d)* of the following paragraph:

''*(d*A*)* communicating the work to the public, by wire or wireless means, including by means of internet access and the making of the work available to the public in such a way that any member of the public may access the work from a place and at a time chosen by that person, whether interactively or non-interactively;'';

(b) by the substitution for paragraph *(f)* of the following paragraph:

"*(f)* doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs *(a)* to **[*(d)*]** *(d*A*)* inclusive**[.]**"; and

(c) by the addition of the following proviso:

": Provided that, notwithstanding the transfer of copyright in an artistic work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have the right to claim an equal portion of the royalty payable for use of the copyright work.".

Substitution of section 8 of Act 98 of 1978, as amended by section 5 of Act 56 of 1980, section 6 of Act 52 of 1984, section 1 of Act 61 of 1989 and section 8 of Act 125 of 1992

6. The following section is hereby substituted for section 8 of the principal Act:

"**Nature of copyright in cinematograph films and audiovisual fixations**

8. (1) Copyright in a cinematograph film or an audiovisual fixation vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

(a) Reproducing the film or fixation in any manner or form, including making a still photograph therefrom;

(b) causing the film or fixation, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;

(c) broadcasting the film or fixation;

(d) causing the film or fixation to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film or fixation, and is operated by the original broadcaster;

*(d*A*)* communicating the film or fixation to the public, by wire or wireless means, including by means of internet access and the making of the film or fixation available to the public in such a way that any member of the public may access the film or fixation from a place and at a time chosen by that person, whether interactively or non-interactively;

(e) making an adaptation of the film or fixation;

(f) doing, in relation to an adaptation of the film or fixation, any of the acts specified in relation to the film or fixation in paragraphs *(a)* to **[*(d)*]** *(d*A*)* inclusive;

(g) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the film or fixation

: Provided that, notwithstanding the transfer of copyright in a cinematograph film or an audiovisual fixation by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such film or fixation shall have the right to claim an equal portion of the royalty payable for use of the copyright film or fixation.".

Amendment of section 9 of Act 98 of 1978, as substituted by section 2 of Act 9 of 2002

7. Section 9 of the principal Act is hereby amended by the substitution for paragraph *(e)* of the following paragraph:

"*(e)* communicating the sound recording to the public, by wire or wireless means, including by means of internet access and the making of the sound recording available to the public in such a way that any member of the public may access the sound recording from a place and at a time chosen by that person, whether interactively or non-interactively.".

Substitution of section 9A of Act 98 of 1978, as inserted by section 3 of Act 9 of 2002

8. The following section is hereby substituted for section 9A of the principal Act:

"**Royalties**

9A. (1) *(a)* In the absence of an agreement to the contrary or unless otherwise authorised by law, no person may, without payment of a royalty to the owner of the relevant copyright—

(i) broadcast**[,]** a sound recording as contemplated in section 9*(c)*;

(ii) cause the transmission of a sound recording as contemplated in section 9*(d)*; or **[play]**

(iii) communicate a sound recording to the public as contemplated in **[section 9*(c)*, *(d)* or *(e)* without payment of a royalty to the owner of the relevant copyright]** section 9*(e)*.

*(a*A*)* Any person who intends to perform an act contemplated in section 9*(c)*, *(d)*, or *(e)* must, at any time before performing that act, submit a prescribed notice in the prescribed manner to the copyright user, performer, owner, producer, author, collecting society or indigenous community, community trust or National Trust, as the case may be, of his or her intention to perform that act, and must, in that notice—

(i) indicate, where practicable, the date of the proposed performance and the proposed terms and conditions of the payment of a royalty; and

(ii) request the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust to sign the proposal attached to the notice in question.

*(a*B*)* If the person referred to in paragraph *(a*A*)* has failed to submit the required notice to the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust before performing an act contemplated in section 9*(c)*, *(d)*, or *(e)*, that person must forthwith—

(i) notify the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust of such act;

(ii) pay the generally applicable licence fees as per the proposal or as published by the collecting society in respect of that person's category of use; and

(iii) pay retrospective fees calculated from the date of first use, but not in respect of use prior to the coming into operation of the Copyright Amendment Act, 2017.

*(a*C*)* The copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust must as soon as is reasonably practicable upon receipt of such notice respond to such proposal.

*(a*D*)* If the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust rejects such proposal, or if the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust proposes different terms and conditions to such proposal and the proposal is rejected after negotiations, any party may in the prescribed manner refer the matter to the Tribunal.

*(a*E*)* The Tribunal must adjudicate the matter as soon as is reasonably practicable and, if possible, before the performance which is the subject of the application make an order it deems fit, including, but not limited to, an order that a provisional payment of a royalty must be made into a trust account of an attorney nominated by the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust pending the finalisation of the terms and royalty payable: Provided that such amount shall be paid over to the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust as such amount represents the difference, if any, between the amount determined as the appropriate royalty and the amount already paid, and any balance must be repaid.

(b) The amount of any royalty contemplated in paragraph *(a)* shall be determined by an agreement between the user of the sound recording, the performer and the owner of the copyright, or between their **[representative]** collecting societies.

(c) In the absence of an agreement contemplated in paragraph *(b)*, the user, performer or owner may refer the matter to the **[Copyright]** Tribunal **[referred to in section 29(1)]** or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(2) *(a)* The user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust of the copyright who receives payment of a royalty in terms of this section shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967): Provided that the royalty payable for the use of a sound recording shall be divided equally between the copyright user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust on the one hand and the performer on the other hand or between the recording company, user, performer, owner, producer, author, collecting society, indigenous community, community trust or National Trust.

(b) The performer's share of the royalty shall represent fair and equitable remuneration determined by an agreement between the performer and the owner of copyright, or between their **[representative]** collecting societies.

(c) In the absence of an agreement contemplated in paragraph *(b)*, the performer or owner may refer the matter to the **[Copyright]** Tribunal **[referred to in section 29 (1)]**, or they may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(d) Any payment made by the user of the sound recording in terms of this subsection shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his or her use of a corresponding fixation in terms of section 5 of the Performers' Protection Act, 1967 (Act No.11 of 1967).

(3) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.''.

Insertion of sections 9B to 9F in Act 98 of 1978

9. The following sections are hereby inserted in the principal Act after section 9A:

''**Resale of royalty right**

9B. (1) The author of an artistic work shall enjoy an inalienable right to receive royalties on the commercial resale of his or her work subsequent to the first transfer by the user of that work (in this Chapter referred to as the ''resale royalty right'').

(2) *(a)* Royalties in respect of artistic works shall be payable at the rate prescribed by the Minister after consultation with the Minister responsible for arts and culture.

(b) The Minister must, before prescribing the rate referred to in paragraph *(a)*, publish the rate proposed once in the *Gazette* and call for written comments by any interested party to be provided within 30 days after such publication.

(3) The user, performer, owner, producer or author of an artistic work shall be entitled to receive a resale royalty if—

(a) at the time when the resale is concluded—

(i) the author is a South African citizen or is resident in the Republic; and

(ii) the term of validity of the resale royalty right has not expired;

(b) in the case of a deceased author, the deceased was at the time of death a South African citizen or was resident in the Republic;

(c) the resale or any part of the transaction takes place in the Republic or in any country contemplated in Article 1 of the Berne Convention for the Protection of Literary and Artistic Works; and

(d) the resale of the work is recognisable after the commencement of section 9 of the Copyright Amendment Act, 2017.

(4) A resale royalty right applies whether or not the author—

(a) is or was the first user, performer, owner, producer or author of any copyright in the work; or

(b) has entered into an agreement with any person to assign, waive or charge a resale royalty right in contravention of this Act.

Proof of user, performer, owner, producer or author

9C. (1) Where a mark or name purporting to identify a person as the author of an artistic work appears on such work, the person whose name appears, is, in the absence of evidence to the contrary, presumed to be the user, performer, owner, producer or author of such work.

(2) If it is found that an artistic work is a work of more than one user, performer, owner, producer or author, the presumption in subsection (1) applies to each artist linked with such artistic work.

(3) If it is found that an artistic work includes indigenous knowledge of a community, such community is entitled to an equitable share in the resale royalty payable.

Duration of resale royalty right

9D. (1) The resale royalty right of a user, performer, owner, producer or author of an artistic work expires at the end of the period of 50 years calculated from the end of the calendar year in which the author concerned died.

(2) In the case of—

(a) an artistic work created by an unknown author, the resale royalty right of the work expires at the end of the period of 50 years calculated from the end of the calendar year in which the work was first made available to the public, including by exhibition in public;

(b) an artistic work by more than one author, the resale royalty right continues—

(i) if the identity of all the authors are known, until the end of the period of 50 years calculated from the end of the calendar year in which the last of the authors dies; or

(ii) if the identity of one or more, but not all, of the authors are known, until the end of the period of 50 years calculated from the date on which the last author whose identity is known dies.

(3) After the expiry of the resale royalty right of an artistic work created by an unknown author contemplated in subsection (2)*(a)*, the resale right in that work revives if the identity of the author becomes known.

Assignment or waiver

9E. (1) Assignment or waiver of a resale royalty right is unlawful.

(2) Any term of an agreement which purports to assign or waive a resale royalty right is unenforceable.

Transmission of resale royalty right

9F. (1) A resale royalty right may be transmitted on the death of the holder of the right in the following manner:

(a) The right passes to a person by testamentary disposition made by the holder; or

(b) if there is no such direction by testamentary disposition by the holder, by operation of law.

(2) In the case of a bequest of an artistic work by an author who did not transfer authorship of that work in his or her lifetime, the bequest must be read as including the resale royalty right.

(3) If a resale royalty right that passes to a person in accordance with subsection (1)*(a)* may be exercised by two or more persons, the resale royalty right may be exercised by each of them independently of the other: Provided that if the resale royalty right is indivisible, the successors in title of such right may not render the right commercially valueless.

(4) If resale royalties are recovered by a collecting society and an indigenous community after the death of a holder of a resale royalty right, those resale royalties must be treated as part of the estate of the deceased holder.''.

Amendment of section 12 of Act 98 of 1978, as amended by section 11 of Act 125 of 1992 and section 54 of Act 38 of 1997

10. Section 12 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

''(1) *(a)* 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:

(i) Research, private study or personal use, including the use of a lawfully possessed 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 or pastiche;

(vi) preservation of and access to the collections of libraries, archives and museums;

(vii) expanding access for underserved populations; and

(viii) ensuring proper performance of public administration.

(b) In determining whether an act done in relation to a work constitutes fair dealing or 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)* and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.''.

Insertion of sections 12A and 12B in Act 98 of 1978

11. The following sections are hereby inserted in the principal Act after section 12:

''**General exceptions from copyright protection**

12A. (1) Copyright in a work shall not be infringed by any of the following acts:

(a) Any quotation, including a quotation from articles in a newspaper or periodical, that is in the form of a summary of that work: Provided that the quotation shall be compatible with fair use in that the extent thereof shall not exceed the extent reasonably justified by the purpose: Provided further that, 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) teaching or any illustration in a publication, broadcast, sound or visual record: Provided that such use shall be compatible with fair practice in that the extent thereof shall not exceed the extent justified by the purpose: Provided further that, 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 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 author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;

(e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—

(i) the reproduction by the press, 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; and

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

(f) 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 advice purposes only; or

(iii) such work is translated and communicated to the public for non-commercial public information 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 of judicial proceedings;

(i) the reasonable use of such work for the purposes of cartoon, parody, satire, pastiche, tribute or homage; and

(j) the making of a copy of such work by an individual of—

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

(ii) a personal copy of the work made by the individual for the individual's personal use and made for ends which are not commercial.

(2) For the purposes of subsection (1)*(j)*, 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 area accessed by means of the internet or similar means which is accessible only by the individual and the person responsible for the storage area.

(3) The provisions of subsection (1) shall also 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 a cinematograph film or audiovisual fixation, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film or fixation.

Parallel importation

12B. (1) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other transfer of ownership of a transferred original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such transferred original or copy.".

Insertion of sections 13A and 13B in Act 98 of 1978

12. The following sections are hereby inserted in the principal Act after section 13:

"Temporary reproduction and adaptation

13A. (1) Any person may make transient or incidental copies of a work, including reformatting an integral and essential part of a technical process, if 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.

Reproduction for educational and academic activities

13B. (1) Any person may make copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose.

(2) *(a)* Educational establishments may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments and library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.

(b) Establishments referred to in paragraph *(a)* shall not include all or substantially all of a book or journal issue, unless a licence to do so is not available from the author or collecting society, or representative if it is an indigenous community, on reasonable terms and conditions.

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

(4) *(a)* The author of a scientific or other contribution, which is the result of a research activity publicly-funded by at least 50 per cent and which has appeared in a collection, has the right, even after granting the publisher or editor an exclusive right of use, to make the contribution available to the public under a public licence or by means of an open access institutional

repository in the final accepted manuscript version peer-reviewed post print.

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

(c) When the work is made available to the public, the place of the first publication must be properly acknowledged.

(d) Third parties, such as librarians, may carry out these activities on behalf of the author.

(e) Any agreement to the detriment of the author shall be void, except as provided for in this section.

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

(6) The permission under subsection (1) shall not extend to reproductions for commercial purposes but the permission shall include 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 text book are not for sale in the country or cannot be obtained at a price reasonably related to that normally charged in the country for comparable works.''.

Amendment of section 16 of Act 98 of 1978, as substituted by section 14 of Act 125 of 1992

13. Section 16 of the principal Act is hereby amended by the deletion of subsection (1).

Repeal of section 17 of Act 98 of 1978

14. Section 17 of the principal Act is hereby repealed.

Repeal of section 18 of Act 98 of 1978

15. Section 18 of the principal Act is hereby repealed.

Repeal of section 19A of Act 98 of 1978

16. Section 19A of the principal Act is hereby repealed.

Substitution of section 19B of Act 98 of 1978, as inserted by section 18 of Act 125 of 1992

17. The following section is hereby substituted for section 19B of the principal Act:

''**General exceptions regarding protection of computer programs**

19B. (1) A person having a right to use a copy of a computer program may, without the authorisation of the rights holder, 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, running, transmitting or storing the program which he or she is entitled to perform.

(2) The authorisation of the rights holder 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 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 expression to the program contemplated in subsection (1); or

(d) used for any other act which infringes copyright.

(4) For the purposes of this section, " 'interoperability' means the ability to exchange information and to use the information which has been exchanged.".

Insertion of sections 19C and 19D in Act 98 of 1978

18. The following sections are hereby inserted in the principal Act after section 19B:

"**General exceptions regarding protection of copyright work for libraries, archives, museums and galleries**

19C. (1) A library, archive, museum or gallery may, without the authorisation of the copyright owner, use a copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13) if the work is not used for commercial purposes.

(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another institution.

(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library.

(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole film or audiovisual fixation, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such film or fixation or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from rights owners, but may not permit a user to make a copy or recording of the work for commercial purposes.

(5) A library, archive, museum or gallery may make—

(a) a copy of any work in its collection for the purposes of back-up and preservation; and

(b) copies of publicly accessible websites for the purposes of preservation.

(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another institution.

(7) A library, archive, museum or gallery may, without the consent of the author, engage in format-shifting or conversion of works from ageing or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.

(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act, 1997 (Act No. 54 of 1997).

(9) A library, archive, museum or gallery may make a copy of a copyright work when the permission of the author or other owner of copyright, collecting society or representative of the indigenous community concerned cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.

(10) Notwithstanding any other section, a library, archive, museum or gallery may buy, import or otherwise acquire any copyright work that is legally available in any country.

(11) A library, archive, museum or gallery may reproduce in any format any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the author or other rights holder, and make such work available for preservation, research or any other legal use.

(12) *(a)* A library, archive, museum or gallery may make a copy of any copyright work and make it available for institutional or public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.

(b) A library, archive, museum or gallery contemplated in paragraph *(a)* may also, for the purposes of that paragraph—

(i) take and show a photograph of such work or show video footage of such work;

(ii) create other images such as paintings of buildings; or

(iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place.

(13) *(a)* Subject to paragraph *(b)*, a library may supply to any other library with a copy of a copyright work in its collection, whether by post, fax or secure electronic transmission.

(b) The receiving library must delete any electronic file received from the other library immediately after supplying the patron who has requested it with an electronic or paper copy of the work.

(14) An institutional officer or employee acting within the scope of his or her duties, shall be protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—

(a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or

(b) the copyright work, or material protected by related rights, is in the public domain or licensed to the public under a public or open licence.

(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in sections 12 and 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.

General exceptions regarding protection of copyright work for persons with disability

19D. (1) Any person may, without the authorisation of the author, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

(a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;

(b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and

(c) the activity under this subsection must be undertaken on a non-profit basis.

(2) *(a)* A person with a disability to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the author of the copyright work, reproduce the work for personal use.

(b) The provisions of paragraph *(a)* are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.

(3) A person with a disability or an organisation that serves persons with disabilities may, without the authorisation of the author, export to or import from another country any copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person or organisation.

(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.''.

Amendment of section 20 of Act 98 of 1978, as substituted by section 19 of Act 125 of 1992

19. Section 20 of the principal Act is hereby amended—

(a) by the substitution for subsections (1) and (2) of the following subsections, respectively:

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

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

(b) by the addition of the following subsections:

''(3) A right contemplated in subsection (1) lapses on the date of the death of the author of the work, if any, and in the case of works created by more than one author the right lapses on the date of the death of the author who dies last.

(4) A right contemplated in subsection (1) is non-transferable and, where applicable, limitations and exceptions provided for in this Act, including those specified in sections 12 and 12A, shall apply to this section with the changes required by the context.''.

Amendment of section 21 of Act 98 of 1978, as substituted by section 9 of Act 56 of 1980

20. Section 21 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(c)* of the following paragraph:

''*(c)* Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or audiovisual fixation or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, **[such person shall, subject to the provisions of paragraph *(b)*, be the owner of any copyright subsisting therein by virtue of section 3 or 4]** the ownership of any copyright subsisting in the work shall be governed by contract: Provided that in the absence of valid contract, ownership shall vest in the person commissioning the work and the author of the work shall have a licence to exercise any right which by virtue of this Act would, apart from the licence, be exercisable exclusively by such author.''.

Amendment of section 22 of Act 98 of 1978

21. Section 22 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law: Provided that copyright owned by, vested in or under the custody of the state may not be assigned.";

(b) by the substitution for subsections (3) and (4) of the following subsections, respectively:

"(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the **[licenser]** licensor or, in the case of an exclusive **[principal act]** sub-licence, the exclusive **[sub-licenser, as the case may be]** sub-licensor, as stipulated in Schedule 2: Provided that assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment.

(4) A non-exclusive licence to do an act which is subject to copyright may be **[written or oral]** verbal or in writing, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted **[by contract]** in writing or its electronic equivalent shall not be revoked, either by the person who granted the licence or his or her successor in title, except as the contract may provide, **[or by a further contract]** by a further contract or by operation of law."; and

(c) by the substitution for subsection (8) of the following subsection:

"(8) Unless otherwise prohibited from doing so, a licensee may grant a sub-licence for the doing of any act that falls within the terms of the licence, including any implied term, without the consent of the original licensor.".

Insertion of section 22A in Act 98 of 1978

22. The following section is hereby inserted in the principal Act after section 22:

"**Assignment and licences in respect of orphan works**

22A. (1) A person who wishes to obtain a licence to do an act which is subject to copyright in respect of an orphan work must make an application to the Commission in the prescribed manner.

(2) Before making an application in terms of subsection (1), the applicant must publish his or her intention to make such application by notice in the *Gazette* and in English and any other official language in two daily newspapers having general circulation throughout the national territory of the Republic.

(3) An application in terms of subsection (1) must be made in such form as may be prescribed and must be accompanied by copies of the published advertisement contemplated in subsection (2) and such fee as may be prescribed.

(4) When the Commission receives an application in terms of subsection (1), the Commission may, after holding such inquiry as may be prescribed, grant to the applicant a licence to perform any act which is subject to copyright, subject to subsections (5) and (6) and the payment of a royalty.

(5) A licence issued in terms of subsection (4) is non-exclusive and is subject to such terms and conditions as the Commission may determine.

(6) The Commission may not issue the licence in terms of subsection (4) unless the Commission is satisfied that the applicant has undertaken the following steps in locating the copyright author:

(a) Conducted a search of the database of the register of copyright maintained by the Commission that is available to the public through either the internet or any other means relevant to identifying and locating registered copyright authors;

(b) conducted a search of reasonably available sources of copyright authorship and authorship information and where appropriate, licensor information;

(c) conducted a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert assistance;

(d) conducted a search using any other database available to the public, including any database that is available to the public through the internet; and

(e) undertaken actions that are reasonable and appropriate in terms of the facts relevant to the search, including—

(i) actions based on facts known at the start of the search and facts uncovered during the search;

(ii) actions directed by the Commission; and

(iii) the review of any records not available to the public through the internet that are known to be useful in identifying and locating the copyright author.

(7) Where a licence is granted in terms of subsection (4), the Commission may direct the applicant to deposit the amount of the royalty determined in a particular account so as to enable the author of the copyright or, as the case may be, his or her heirs, executors or legal representatives to claim such royalty at any time.

(8) The copyright author may, not later than five years after the expiration of a licence issued in terms of this section, collect the royalties fixed in the licence or in default of payment by initiating a legal suit to recover such royalties.

(9) Any person who can adduce evidence for the purposes of proving that he or she is the author of an orphan work, may have the copyrighted work returned to him or her with a claim in law to recover any fees that accrued to the copyright work after such return.''.

Insertion of Chapter 1A in Act 98 of 1978

23. The following Chapter is hereby inserted in the principal Act after Chapter 1:

''**CHAPTER 1A**

COLLECTING SOCIETIES

Registration

22B. (1) Any person who intends to act as a representative collecting society by—

(a) administering rights on behalf of any copyright owners or authors or on behalf of an organisation representing copyright authors, has the right to receive payment of a royalty in terms of this Act; or

(b) administering rights on behalf of performers or owners, on behalf of a performers' or owners' organisation, has the right to receive payment of a royalty in terms of section 5(1)*(b)* of the Performers' Protection Act, 1967 (Act No. 11 of 1967),

and must be registered and accredited by the Commission.

(2) Any person contemplated in subsection (1)*(b)* may, in the prescribed manner, lodge a written application with the Commission for registration.

(3) The Commission may, for purposes of issuing a registration certificate, consult with any person and may grant such registration and issue a registration certificate on such terms and conditions as may be determined by the Commission.

(4) The Commission shall not register and issue a registration certificate to any applicant unless the Commission is satisfied that—

(a) having scrutinised the application and supporting documents, the applicant is able to ensure adequate, efficient and effective administration relating to collection of royalties; and

(b) the applicant may satisfactorily comply with any condition for accreditation and the relevant provisions of the Companies Act, 2008 (Act No. 71 of 2008), the Broad-Based Black Economic Empowerment Act, 2013 (Act No. 46 of 2013), and any other applicable legislation.

(5) A registration certificate issued in terms of this section is valid for a period not exceeding five years and, unless it is suspended or cancelled, may, in the prescribed manner, be renewed on such terms and conditions as may be determined by the Commission.

(6) The Commission shall only register one collecting society for each right or related right granted under copyright.

(7) Where there is no collecting society for a right or related right granted under copyright, the user, performer, owner, producer or author may enter into such contractual arrangements as may be prescribed.

Administration of rights by collecting society

22C. (1) Subject to such terms and conditions as may be prescribed—

(a) a collecting society or Community Trust may accept from a user, performer, owner, producer, author, community trust or another collecting society of rights exclusive authorisation to administer any right in any work by the issuing of licences or the collecting of licence fees, or both; and

(b) a user, performer, owner, producer, author, community trust or other collecting society of rights may withdraw such authorisation without prejudice to the right of the collecting society or Community Trust concerned.

(2) A collecting society may—

(a) enter into an agreement with any foreign society or organisation administering rights corresponding to rights that the collecting society administer under this Act; and

(b) entrust to such foreign society or organisation the administration in the foreign country in question of rights administered by the said collecting society in the Republic: Provided that no such collecting society, foreign society or organisation shall permit any discrimination in respect of the terms of a licence or the distribution of royalties collected.

(3) Subject to such conditions as may be prescribed, a collecting society may—

(a) issue a licence in respect of any rights under this Act;

(b) collect royalties in pursuance of such a licence;

(c) distribute such collected royalties among users, performers, owners, producers, authors, community trusts or collecting societies of rights after deducting a prescribed amount from the collected royalties for its own expenses;

(d) perform any other prescribed function; and

(e) negotiate royalty rates with publishers.

Control of collecting society or Community Trust by users, performers, owners, producers or authors of rights

22D. (1) A collecting society or Community Trust is subject to the control of the users, performers, owners, producers or authors of rights under this Act whose rights that collecting society or Community Trust administers, and the collecting society or Community Trust shall, in such manner as may be prescribed—

(a) obtain the approval of those users, performers, owners, producers or authors of rights for its procedures of collection and distribution of royalties;

(b) obtain the approval of those authors for the utilisation of any amounts collected as royalties for any purpose other than the distribution of the royalties to the user, performer, owner, producer or author of rights; and

(c) provide to those users, performers, owners, producers or authors regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of those authors.

(2) Royalties distributed among the authors of rights shall, as far as may be possible, be distributed in proportion to the actual use of their works.

Submission of returns and reports

22E. (1) A collecting society or Community Trust shall submit to the Commission at the prescribed time such returns and reports as may be prescribed.

(2) The Commission may call for a report and specific records from a collecting society for the purposes of satisfying the Commission that—

(a) the affairs of the collecting society are conducted in a manner consistent with the registration conditions of that collecting society; or

(b) the royalties collected by the collecting society in respect of rights administered by that collecting society are being utilised or distributed in accordance with the provisions of this Act.

Suspension and cancellation of registration of collecting society

22F. (1) The Commission may issue a compliance notice or apply to the Tribunal for an order to institute an inquiry into the affairs of a collecting society, if the Commission is satisfied that the collecting society is being managed in a manner that contravenes the registration conditions of that collecting society or is managed in a manner detrimental to the interests of the authors of rights concerned.

(2) The Commission may, if it is of the opinion that it will be in the interest of the authors of rights concerned, apply to the Tribunal for an order suspending the registration of such collecting society pending an inquiry for such period as may be specified in the order.

(3) The Commission may, after such inquiry and if it is of the opinion that it will be in the interest of the authors of rights concerned, apply to the Tribunal for an order of cancellation of the registration of the collecting society in question.

(4) The Commission shall be responsible for the administration and discharge of the functions of the collecting society during the period of suspension or cancellation of the registration of the collecting society in question following the order of the Tribunal: Provided that the Tribunal may, on application by the Commission, appoint any suitable person to assist the Commission in the administration and discharging of the functions of that collecting society.''.

Amendment of section 23 of Act 98 of 1978, as amended by section 20 of Act 125 of 1992

24. Section 23 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

''(1) Copyright shall be infringed by any person**[**,**]**—

(a) not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise;

(b) who tampers with any information kept by any other person in order to administer copyright in terms of this Act;

(c) who omits to pay the performer, owner, producer or author of copyright work a royalty fee as and when the copyright work is used;

(d) who omits to pay the author of artistic work a royalty fee as prescribed by this Act as and when the artistic work is sold;

(e) who misuses copyright and technological protection measures in order to constitute a defence to any claim of copyright liability or any independent cause of action that may be pursued either as a

counterclaim in an action for infringement or instituted independently.''; and

(b) by the deletion in subsection (2) of paragraph *(b)*.

Amendment of section 27 of Act 98 of 1978, as amended by section 11 of Act 52 of 1984, section 3 of Act 61 of 1989 and section 24 of Act 125 of 1992

25. Section 27 of the principal Act is hereby amended by the addition of the following subsection:

''(7) Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the owner of the copyright—

(a) make, import, sell, distribute, let for hire, offer or expose for sale or hire or advertise for sale or hire, a technological protection measure circumvention device if—

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

(ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or

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

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

(c) circumvent such technological protection measure when he or she is not authorised to do so,

shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.''.

Amendment of section 28 of Act 98 of 1978, as substituted by section 12 of Act 52 of 1984 and amended by section 25 of Act 125 of 1992

26. Section 28 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

''(2) This section shall apply to any copy of the work in question made outside the **[Republic which if it had been made in the Republic would be an infringing copy of the work]** Republic, if the making of such copy constituted an infringement of copyright in the country in which the work was made.''; and

(b) by the substitution for subsection (5) of the following subsection:

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

Insertion of sections 28O to 28S in Act 98 of 1978

27. The following section is hereby inserted in the principal Act after section 28N:

''**Prohibited conduct in respect of technological protection measures**

28O. (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a technological protection measure circumvention device if such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technologically protected work.

(2) No person may provide a service to any other person if—

(a) such other person intends to use the service to circumvent an effective technological protection measure; or

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

(3) No person may publish information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting another person to unlawfully circumvent a technological protection measure in the Republic.

(4) No person may, during the subsistence of copyright in a work and without a licence of the author of the copyright in such work, circumvent an effective technological protection measure applied by the author of the copyright to such work.

(5) A technological protection measure shall be deemed to be effective if the use of the work is controlled by the author, exclusive licensee or person assigned copyright in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

Exceptions in respect of technological protection measure

28P. (1) For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform any of the following:

(a) An act permitted in terms of any exception provided for in this Act; or

(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph *(a)*.

(2) A person or user of a technologically protected work who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—

(a) apply to the copyright author for assistance to enable such person or user to circumvent such technological protection measure in order to perform such permitted act; or

(b) if the copyright author has refused such person's or user's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person or user to circumvent such technological protection measure in order to perform such permitted act.

(3) The person or user engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)*(b)* shall maintain a complete record of the particulars of the—

(a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and

(b) purpose for which the services of such other person has been engaged.

Enforcement by Commission

28Q. The Commission must enforce this Act by—

(a) performing all the relevant functions contemplated in section 187 of the Companies Act in respect of this Act;

(b) referring matters to and appearing before the Tribunal; and
(c) dealing with any other matter referred to it by any person, Tribunal or any other regulatory authority.

Prohibited conduct in respect of copyright management information

28R. No person may—
(a) in respect of any copy of a work, remove or modify any copyright management information; and
(b) in the course of business make, import, sell, let for hire, offer or expose for sale, advertise for sale or hire a copy of a work if any copyright management information has been removed or modified without the authority of the copyright author.

Exceptions in respect of copyright management information

28S. The prohibition in section 28R does not apply if a person—
(a) is authorised by the user, performer, owner, producer or author to remove or modify the copyright management information;
(b) does not know and has no reason to believe that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work; or
(c) does not know or has no reason to believe that the copyright management information has been removed or modified without the authority of the copyright user, performer, owner, producer or author.''.

Substitution of heading of Chapter 3 of Act 98 of 1978

28. The following heading is hereby substituted for the heading of Chapter 3 of the principal Act:

''**[COPYRIGHT TRIBUNAL] REGULATORY AND ENFORCEMENT AGENCIES**''.

Substitution of section 29 of Act 98 of 1978, as amended by section 26 of Act 125 of 1992

29. The following section is hereby substituted for section 29 of the principal Act:

''**Establishment of Tribunal**

29. (1) There is hereby established a juristic person to be known as the Intellectual Property Tribunal, which—
(a) has jurisdiction throughout the Republic;
(b) is independent and subject only to the Constitution and the law; and
(c) must perform its functions impartially and without fear or favour.

(2) Each organ of state must assist the Tribunal to maintain its independence and impartiality, and to perform its functions effectively.

(3) In carrying out its functions, the Tribunal may—
(a) have regard to international developments in the intellectual property arena; and
(b) consult any person, organisation or institution with regard to any matter within its jurisdiction.

(4) The Tribunal consists of a chairperson, deputy chairperson and not less than nine members appointed by the Minister, on a full-time or part-time basis.''.

Insertion of sections 29A to 29S in Act 98 of 1978

30. The following sections are hereby inserted in the principal Act after section 29:

"**Functions of Tribunal**

29A. (1) The Tribunal must carry out the functions entrusted to it in terms of this Act or any other legislation.

(2) The Tribunal may—

(a) adjudicate any application or referral made to it in terms of this Act, the Companies Act or any other relevant legislation, and may make any appropriate order in respect of an application or referral;

(b) only hear matters referred to it by the Commission, a dispute resolution institution or any regulatory authority, if the dispute relates to intellectual property rights;

(c) review any decision of the Commission, dispute resolution institution or any regulatory authority if it relates to intellectual property rights;

(d) adjudicate any application or referral made to it by any person, institution or regulatory authority where the dispute can only be directly referred to the Tribunal in terms of this Act and such dispute relates to intellectual property rights; and

(e) settle disputes relating to payment of royalties or terms of agreements entered into as required by this Act or agreements entered into in order to regulate any other matter in relation to intellectual property rights.

Appointment of members of Tribunal

29B. (1) The Minister must appoint as members of the Tribunal persons who have adequate and appropriate qualifications and experience in economics, law, commerce or public affairs.

(2) The Minister must designate a member of the Tribunal as chairperson and another member as deputy chairperson of the Tribunal.

(3) The deputy chairperson shall perform the functions of the chairperson whenever—

(a) the office of chairperson is vacant; or

(b) the chairperson is for any other reason temporarily unable to perform those functions.

(4) The Minister, in consultation with the Minister of Finance, must determine the remuneration, allowances, benefits and other terms and conditions of employment of members of the Tribunal.

Qualifications for appointment

29C. (1) To be eligible for appointment as a member of the Tribunal and to continue to hold that office, a person must, in addition to satisfying any other specific requirements set out in this Act—

(a) not be subject to any disqualification set out in subsection (2); and

(b) have submitted to the Minister a written declaration stating that he or she is not disqualified in terms of subsection (2).

(2) A person may not be appointed or continue to be a member of the Tribunal, if that person—

(a) is an office-bearer of any political party, political movement or political organisation;

(b) has or through a related person acquires a personal financial interest that may conflict or interfere with the proper performance of the duties of a member of the Tribunal;

(c) is disqualified in terms of section 69 of the Companies Act from serving as a director of a company;

(d) is subject to an order of court holding that person to be mentally unfit or disordered;

(e) has been found in any civil or criminal proceedings by a court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonourably, in breach of a fiduciary duty or of any other offence for

which such person has been sentenced to direct imprisonment without the option of a fine;

(f) has been removed from a position of trust; or

(g) has at any time found to be in contravention of this Act.

Terms of office of members of Tribunal

29D. (1) Each member of the Tribunal, including the chairperson and deputy chairperson, serves for a term of five years which may be renewed only once for a further period of five years.

(2) The chairperson may, on one month written notice addressed to the Minister—

(a) resign from the Tribunal; or

(b) resign as chairperson, but remain as a member of the Tribunal.

(3) A member of the Tribunal other than the chairperson may resign by giving at least one month written notice to the Minister.

(4) In the event of the expiry of the term of office of a member of the Tribunal, the member has a matter pending for adjudication before the Tribunal, the member may continue to act as a member in respect of that matter only.

Removal or suspension of members of Tribunal

29E. The Minister may, at any time, remove or suspend a member of the Tribunal from office if such a member—

(a) becomes subject to any of the disqualifications referred to in section 29C(2);

(b) repeatedly fails to perform the duties of the Tribunal;

(c) due to a physical or mental illness or disability becomes incapable of performing the functions of the Tribunal;

(d) is found guilty of a serious misconduct; or

(e) engages in any activity that may undermine the integrity of the Tribunal.

Conflict and disclosure of interest

29F. (1) A member of the Tribunal may not represent any person before the Tribunal.

(2) If, during a hearing in which a member of the Tribunal is participating, it appears to the member that the matter concerns a financial or other interest of the member contemplated in section 29C(2)*(b)*, the member must—

(a) immediately and fully disclose the fact and nature of such interest to the chairperson, deputy chairperson and the presiding member at that hearing, as the case may be; and

(b) withdraw from any further involvement in that hearing.

(3) A member must not—

(a) make private use of or profit from confidential information obtained as a result of performing his or her official duties as a member of the Tribunal; or

(b) divulge any information referred to in paragraph *(a)* to a third party, except as required and as part of the official functions as a member of the Tribunal.

Proceedings of Tribunal

29G. (1) The chairperson is responsible for managing the case files of the Tribunal, and must, taking into account the complexity of a matter, assign the matter to—

(a) a member of the Tribunal; or

(b) a panel composed of any three members of the Tribunal.

(2) When assigning a matter to a panel in terms of subsection (1)*(b)*, the chairperson must—

(a) ensure that at least one member of the panel is a person with suitable legal qualifications and experience; and

(b) designate a member of the panel to preside over the proceedings of the Tribunal.

(3) If a member of the panel is unable to complete the proceedings in a matter assigned to that panel due to resignation, illness, death, removal, suspension or withdrawal from a hearing in terms of this Act, the chairperson may—

(a) direct that the hearing of that matter proceed before the remaining members of the panel, subject to the requirements of subsection (2)*(a)*; or

(b) terminate the proceedings before that panel and constitute a new panel which may include any member of the original panel and direct the new panel to conduct the hearing afresh.

(4) The decision of a Tribunal on a matter referred to it must be in writing and must include reasons for that decision.

(5) A decision of a single member of the Tribunal hearing a matter in terms of subsection (1)*(a)*, or of a majority of the members of a panel in any other case, is the decision of the Tribunal.

(6) A decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court and is binding subject to review or appeal to a High Court.

Hearings before Tribunal

29H. (1) The Tribunal must conduct its hearings in public—

(a) in an inquisitorial manner;

(b) as expeditiously as possible;

(c) as informally as possible; and

(d) in accordance with the principles of natural justice.

(2) Notwithstanding the provisions of subsection (1), a Tribunal member presiding at a hearing may exclude members of the public, specific persons or categories of persons from attending the hearing if—

(a) evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;

(b) the proper conduct of the hearing requires it; or

(c) for any other reason that would be justifiable during proceedings in a High Court.

Right to participate in hearing

29I. The following persons may participate in a hearing before the Tribunal, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

(a) The Commission;

(b) the applicant, complainant and respondent; and

(c) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member of the Tribunal, such interest is adequately represented by any other person participating at the hearing.

Powers of member presiding at hearing

29J. The member of the Tribunal presiding at a hearing may—

(a) direct or summon any person to appear before the Tribunal at any specified time and place;

(b) question any person under oath or affirmation;

(c) summon or order any person to—

(i) produce any book, document or item necessary for the purposes of the hearing; or

(ii) perform any other act in relation to this Act; and

(d) give direction prohibiting or restricting the publication of any evidence adduced during a Tribunal hearing.

Rules of procedure

29K. Subject to the rules of procedure of the Tribunal, a member of the Tribunal presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case and the requirements of the applicable provision of this Act.

Appeals and reviews

29L. (1) A participant in a hearing before a single member of the Tribunal may appeal against the decision of that member to a full panel of the Tribunal.

(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may—

(a) apply to the High Court to review the decision of the Tribunal; or

(b) appeal to the High Court against the decision of the Tribunal.

Interim relief

29M. (1) Any person may apply at any time, whether or not a hearing has commenced, to the Tribunal for an interim order in respect of the matter before the Tribunal.

(2) The Tribunal may grant such an order if—

(a) there is *prima facie* evidence that the allegations may be true;

(b) an interim order is reasonably necessary to—

(i) prevent serious, irreparable damage to that person; or

(ii) prevent the purposes of this Act from being frustrated;

(c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(d) the balance of convenience favours the granting of the order.

(3) An interim order in terms of this section must not extend beyond the earlier of—

(a) the date of the conclusion of a hearing into the matter before the Tribunal; or

(b) six months after the date of the issue of the interim order extension of that order in terms of subsection (4).

(4) If an interim order has been granted and a hearing into that matter has not been concluded within six months after the date of that order, the Tribunal may, on good cause shown, extend the interim order for a further period not exceeding six months.

Orders of Tribunal

29N. In addition to the powers in terms of this Act and the Companies Act, the Tribunal may make any appropriate order in relation to a matter brought before it, including—

(a) declaring particular conduct to constitute an infringement of this Act and as such prohibited;

(b) interdicting conduct which constitutes an infringement of this Act;

(c) imposing an administrative fine in terms of section 175 of the Companies Act, with or without the addition of any other order in terms of this Act;

(d) confirming a consent agreement in terms of section 173 of the Companies Act as an order of the Tribunal;

(e) condoning any non-compliance of its rules and procedures on good cause shown;

(f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;

(g) suspending or cancelling the registrant's registration or accreditation subject to any such terms and conditions the Tribunal deems fit; or

(h) any other appropriate order required to give effect to a right contemplated in this Act or any other relevant legislation.

Witnesses

29O. (1) Every person giving evidence at a hearing of the Tribunal must answer any relevant question.

(2) The law regarding a witness's privilege in a criminal case in a court of law applies to a person giving evidence at a hearing of the Tribunal.

(3) The Tribunal may order a person to answer any question or to produce any article or document, even if it is self-incriminating to do so.

Costs

29P. (1) Subject to subsection (2), each party participating in a hearing of the Tribunal shall bear its own costs.

(2) If the Tribunal—

(a) has not made a finding against a respondent, the member of the Tribunal presiding at the hearing may award costs to the respondent and against a complainant who referred the complaint to the Tribunal; or

(b) has made a finding against a respondent, a member of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint to the Tribunal.

Appointment of staff of Tribunal

29Q. The Chairperson or any delegated member of the Tribunal may—

(a) appoint staff and enter into an agreement with or hire independent contractors to assist the Tribunal in carrying out its functions; and

(b) in consultation with the Minister and the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of members of staff of the Tribunal or those contracted or hired to assist the Tribunal.

Finances

29R. (1) The Tribunal is financed from—

(a) money appropriated by Parliament;

(b) any fees or fines payable in terms of this Act or any relevant legislation;

(c) income derived from investment and deposit of surplus money in terms of subsection (2); or

(d) other money accruing from any source.

(2) The Tribunal may invest or deposit money that is not immediately required for contingencies or to meet current expenditures—

(a) on a call or short-term fixed deposit with any registered bank or financial institution in the Republic; or

(b) in an investment account with the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).

Reviews and reports to Minister

29S. (1) The Minister may, at any time, conduct an audit review of the performance by the Tribunal of its functions.

(2) In addition to any other reporting requirement set out in this Act or any other legislation, the Tribunal must report to the Minister annually on its performance and activities as required by the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) As soon as practicable after receiving a report of a review contemplated in subsection (1), or after receiving a report contemplated in subsection (2), the Minister must transmit and table a copy of the report in Parliament.''.

Repeal of sections 30, 31, 32, 33 and 36 of Act 98 of 1978

31. Sections 30, 31, 32, 33 and 36 of the principal Act are hereby repealed.

Amendment of section 39 of Act 98 of 1978, as amended by section 4 of Act 9 of 2002 and section 5 of Act 28 of 2013

32. Section 39 of the principal Act is hereby amended—

(a) by the deletion of the word ''and'' at the end of paragraph *(c*D*)*;

(b) by the insertion of the following paragraphs after paragraph *(c*E*)*:

''*(c*F*)* prescribing rules regulating the processes and proceedings of the Tribunal;

*(c*G*)* prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;

*(c*H*)* prescribing permitted acts for circumvention of technological protection measures contemplated in section 28B after due consideration of the following factors:

(i) The availability for use of works protected by copyright;

(ii) the availability for use of works for non-profit archival and educational purposes;

(iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or

(iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;

*(c*I*)* prescribing royalty rates or tariffs for various forms of use;

*(c*J*)* prescribing the percentage and period within which distribution of royalties must be made by Collecting Societies;

*(c*K*)* prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a Collecting Society; and

*(c*L*)* in consultation with the Minister responsible for communication, prescribing the local music content for television and radio broadcasting;''; and

(c) by the addition of the following subsection, the existing section becoming subsection (1):

''(2) Before making any regulations in terms of subsection (1), the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.''.

Insertion of section 39B in Act 98 of 1978

33. The following section is hereby inserted in the principal Act after section 39A:

''Unenforceable contractual term

39B. (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.

(2) This section does not prohibit or otherwise interfere with public and open licences to do any act which is subject to copyright or moral rights, settlement agreements, terms of service licences and the voluntary dedication of a work to the public domain.''.

Insertion of Schedule 2 in Act 98 of 1978

34. The following Schedule is hereby added to the principal Act, the existing Schedule becoming Schedule 1:

"**Schedule 2**

(Section 22(3))

Part A

Translation Licences

Application of provisions in Part A

1. The provisions in this Part apply to copyright works which have been published in printed or analogous forms of reproduction.

Application for licence to translate copyrighted work

2. (1) Any person may apply to the Commission for a licence to make a translation of the work in order in printed or analogous forms of reproduction, into any language that is an official language within the Republic, or a foreign language that is regularly used in the Republic, for use by readers located in the Republic.

(2) Any person may apply to the Commission for a licence to translate copyrighted work in order to make the work into a usable or analogous form of reproduction.

(3) No licence shall be granted until the expiration of the following applicable periods:

(a) A period of one week from the date of the first publication of the original copyrighted work, where the application is for a licence for translation into specified languages;

(b) a period of three months from the date of the first publication of the original copyrighted work, where the application is for a licence for translation into specified languages in general use or any other language in general use; and

(c) a period of one year from the date of the first publication of the of the original copyrighted work, where the application is for a licence for translation into any language that is not stipulated in this Act or languages that are not generally used in the Republic covered in subitem (1).

Granting of licence

3. (1) Before granting a licence the Tribunal shall determine that—

(a) no translation of the work into the language in question of the copyrighted work has been established in printed or analogous form of reproduction by or with the authorisation of the user, performer, owner, producer or author of the right of translation or any previous editions in that language are out of print;

(b) the applicant for the licence has established that he or she has requested and has been denied authorisation from the author of the right of translation after due diligence on his or her part was unable to find such user, performer, owner, producer or author;

(c) at the same time as addressing the request referred to in paragraphs *(a)* and *(b)* with the user, performer, owner, producer or author, the applicant for the licence has informed any organisation designated for the purpose of his or her request in which the publisher of the work to be translated is believed to have his or her principal place of business;

(d) if the applicant could not find the user, performer, owner, producer or author of the copyrighted work requiring translation by registered mail or electronic mail (with proof of service), a copy of his or her application to the publisher whose name appears on the work and a copy to any principal place of business referred to in paragraph *(c)*;

(e) no licence shall be granted unless the user, performer, owner, producer or author of the copyrighted work requiring translation is known or located and has been given an opportunity to be heard;

(f) no licence shall be granted until the expiration of—

(i) a further period of two days, where one week referred to in item 2(3)*(a)* applies;

(ii) a further period of two weeks, where three months referred to in item 2(3)*(b)* applies; or

(iii) a further period of three months, where one year referred to in item 2(3)*(c)* applies;

(g) such further period shall be computed from the date on which the applicant complies with the requirements mentioned in paragraphs *(a)* to *(e)* or where the identity or the address of the user, performer, owner, producer or author of the copyright work requiring translation is unknown from the date on which the applicant also complies with the requirement mentioned in paragraphs *(a)* to *(e)*; and

(h) if, during either of the said further periods, a translation into the language in question of the copyright work has been published in printed or analogous form of reproduction by or with the authorisation of the user, performer, owner, producer or author of the translation right, no licence shall be granted.

(2) For works composed mainly of illustrations, a licence shall be granted only if the conditions stipulated in paragraphs *(a)* to *(e)* are also fulfilled.

(3) No licence shall be granted when the user, performer, owner, producer or author has withdrawn all copies of the work from circulation.

Scope and conditions of licence

4. (1) Any licence granted under this Part shall—

(a) be for the purpose of teaching only;

(b) be for training, scholarship or research;

(c) be to allow publication in a printed or analogous form of reproduction consistently with the conditions set out in item 3, if—

(i) the Tribunal certifies that facilities do not exist for such printing or reproduction or that existing facilities are incapable for economic or practical reasons of ensuring such reproduction, the preparation may be made outside the country and if—

(aa) all copies reproduced are sent to the licensee in one or more bulk shipments for distribution exclusively in the Republic and the contract between the licensee and the establishment doing the work of reproduction so requires;

(bb) the said contract provides that the establishment engaged for doing the work of reproduction guarantees that the work of reproduction is lawful in the country where it is done; and

(cc) the licensee does not entrust the work of reproduction to an establishment specially created for the purpose of having copies reproduced of works for a licence granted under this Part;

(ii) the publication does not extend to the export of copies made under the licence, except as provided in subparagraph (i);

(iii) the licence is non-exclusive; and

(iv) the licence is transferable.

(2) Copies of a translation published under a licence may be sent abroad by the Government or other public entity if—

(a) the translation is into a language other than the language used in the Republic that will be of use;

(b) the recipients of the copies are individuals who are South African nationals or are organisational groupings that are nationals in the Republic;

(c) the recipients will use the copies only for the purposes of teaching, scholarship or research;

(d) both the sending of the copies abroad and their subsequent distribution to the recipients are without any commercial purposes; and

(e) the government of the foreign country to which the copies are sent, has agreed to the receipt or distribution, or both, of the copies in that country.

(3) The licence shall provide for just compensation in favour of the user, performer, owner, producer or author of the right of translation that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the Republic and authors of translation rights in the country of the author of the right of translation.

(4) If the licensee is unable to transmit the compensation to the user, performer, owner, producer or author of the right of translation due to conversion of currency, he or she shall report the fact to the Tribunal who shall make all efforts, by the use of international machinery, to ensure that such transmittal is in internationally convertible currency or its equivalent.

(5) As a condition of maintaining the validity of the licence, the translation must be correct for such use and all published copies must include the following:

(a) The original title and name of the user, performer, owner, producer or author of the work;

(b) a notice in the language of the translation stating that the copy is available for distribution only in the Republic; and

(c) if the work which is translated was published with a copyright notice, a reprint of that notice.

(6) The licence shall terminate if—

(a) a translation of the work is in the same language of the copyrighted work with substantially the same content as the original publication under the licence; and

(b) a translation of the work is published in printed or analogous form of reproduction in the country by or with the authorisation of the user, performer, owner, producer or author at a price reasonably related to the price normally charged in the country for comparable works.

(7) Any copies of the work already made before the licence terminates may continue to be distributed until stocks are exhausted.

Licence for broadcasting organisation

5. (1) A licence under this Part may also be granted to a domestic broadcasting organisation if the following conditions are met:

(a) The translation is made from a copy made and acquired in accordance with the laws of the country;

(b) the translation is for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialised technical or scientific research to experts in a particular profession only;

(c) the translation is used exclusively for the purpose specified in paragraph *(b)* through broadcasts that are lawfully made and that are intended for recipients in the Republic, including broadcasts made through the medium of sound or visual recording that have been made lawfully and for the sole purposes of such broadcasts;

(d) sound or visual recordings of the translation may not be used by broadcasting organisations other than those having their headquarters in the country; and

(e) all uses made of the translation are without commercial purpose.

(2) A licence may also be granted to a domestic broadcasting organisation under all of the conditions provided in subitem (1) to translate any text incorporated in an audiovisual fixation that was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Part B

Reproduction Licences

Application of provisions in Part B

1. The provisions in this Part apply to works which have been published in printed or analogous forms of reproduction.

Application for licence

2. (1) Any person may apply to the Intellectual Property Tribunal for a licence to reproduce and publish a particular edition of the work in printed or analogous forms of reproduction (hereinafter referred to as ''the licence'').

(2) No licence shall be granted until the expiration of the following applicable periods, commencing from the date of first publication of the particular edition of the work:

(a) Three years for works of technology and the natural and physical sciences including mathematics;

(b) seven years for works of fiction, poetry, drama and music, and for art books; and

(c) five years for all other works.

Grant of licence

3. (1) Before the granting of a licence, the Tribunal shall determine that—

(a) no distribution by, or without authorisation of, the user, performer, owner, producer or author of the right of reproduction of copies in printed or analogous forms of reproduction of that particular edition has taken place in the country to the general public or in connection with systematic activities at a price reasonably related to that normally charged in the country or that, under the same conditions, such copies have not been on sale in the country for a continuous period of at least six months;

(b) the applicant for the licence has established that he or she either has requested, and has been denied, authorisation from the user, performer, owner, producer or author of the right of reproduction or that, after due diligence on his or her part, he or she was unable to find such user, performer, owner, producer or author;

(c) at the same time as addressing the request referred to in paragraph *(b)* to the user, performer, owner, producer or author, the applicant for the licence has informed any national or international organisation designed for the purpose of his or her application in which the publisher of the work to be reproduced is believed to have his or her principal place of business; and

(d) if the applicant for the licence could not find the user, performer, owner, producer or author of the right of reproduction, the applicant has sent, by registered mail or electronic mail (with proof), a copy of his or her application to the publisher whose name appears on the work and a copy of his or her application to any principal place of business referred to in paragraph *(c)*.

(2) No licence shall be granted unless the user, performer, owner, producer or author of the right of reproduction is known, located or has been given an opportunity to be heard.

(3) Where the three-year period referred to in item 2(2)*(a)* applies, no licence shall be granted until the expiration of six months calculated from the date on which the applicant complies with the requirements mentioned in subitem (2)*(a)* and *(b)* or, where the identity or the address of the user, performer, owner, producer or author of the right of reproduction is unknown, from the date on which the applicant also complies with the requirements mentioned in this Part.

(4) Where the seven-year or five-year periods referred to in paragraphs *(b)* and *(c)* of item 2(2) apply and where the identity or the address of the user, performer, owner, producer or author of the right of reproduction is unknown, no licence shall be granted until the expiration of six months calculated from the date on which the copies referred to have been mailed.

(5) If, during the period of six or three months referred to in subitem (3) or (4), a distribution or placing on sale has taken place, no licence shall be granted.

(6) No licence shall be granted if the user, performer, owner, producer or author has withdrawn from circulation all copies of the edition which is the subject of the application.

(7) Where the edition which is the subject of an application for a licence under this Part is a translation, the licence shall only be granted if the translation is in a language required by, or with the authorisation of, the user, performer, owner, producer or author of the right of translation.

Scope and condition of licence

4. (1) Any licence under this Part shall—

(a) be for use in connection with systematic instructional activities only;

(b) allow publication only in a printed or analogous form of reproduction at a price reasonably related to or lower than that normally charged in the country for comparable work;

(c) allow publication within the country only and shall not extend to the export of copies made under the licence;

(d) if the Tribunal certifies that facilities do not exist in the country and the contract between the licensee and the establishment doing the work of reproduction so requires, allow reproduction outside the country as long as—

(i) all copies reproduced are sent to the licensee in one or more bulk shipments for distribution exclusively in the country and the contract between the licensee and the establishment doing the work of reproduction so requires;

(ii) the said contract provides that the establishment engaged for doing the work of reproduction guarantees that the work of reproduction is lawful in the country where it is done;

(iii) the licensee does not entrust the work of reproduction to an establishment created for the purpose of having copies reproduced of works for which a licence has been granted under this Part;

(iv) the licence is non-exclusive; and

(v) the licence is transferable.

(2) The licence shall provide for just compensation in favour of the user, performer, owner, producer or author of the right of reproduction that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the country and users, performers, owners, producers or authors of reproduction rights in the Republic.

(3) If the licensee is unable, by reason of currency regulations, to transmit the compensation to the user, performer, owner, producer or author of the right of reproduction, he or she shall report the fact to the Tribunal who shall make all efforts, by the use of international machinery, to ensure such transmittal in internationally convertible currency or its equivalent.

(4) As a condition of maintaining the validity of the licence, the reproduction of that particular edition must be accurate and all published copies must include the following:

(a) The title and name of the user, performer, owner, producer or author of the work;

(b) a notice in the language of the publication stating that the copy is available for distribution only in the Republic; and

(c) if the edition which is reproduced bears a copyright notice, a reprint of that notice.

(5) The licence shall terminate if—

(a) copies of an edition of the work in printed or analogous form of reproduction are distributed in the Republic, by or with the authorisation of the user, performer, owner, producer or author of the right of reproduction and in connection with systematic instructional activities, at a price reasonably related to that normally charged in the Republic; and

(b) such edition is in the same language and is substantially the same in content as the edition which was published under the licence.

(6) Any copies of an edition of the work already made before the licence terminates may continue to be distributed until stocks are exhausted.

Licence for audiovisual fixations

5. Under the conditions provided in this Part, a licence may also be granted—

(a) to reproduce in audio-visual form a lawfully made audio-visual fixation, including any protected work incorporated in it if that fixation was prepared and published for the sole purpose of being used in connection with systematic instructional activities; and

(b) to translate any text incorporated in that fixation into a language generally used in the Republic.''.

Short title and commencement

35. This Act is called the Copyright Amendment Act, 2017, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COPYRIGHT AMENDMENT BILL

1. BACKGROUND

1.1 The Copyright Amendment Bill (''the Bill'') seeks to align copyright with the digital era and developments at a multilateral level. The existing Copyright Act, 1978 (Act No. 98 of 1978) (''the Act''), is outdated and has not been effective in a number of areas. The creative industry is impacted upon; educators are hampered in carrying out their duties; researchers are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. For this reason, a need exists for Intellectual Property (''IP'') legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with disabilities; and to ensure that artists do not die as paupers due to ineffective protection. The latter is supported by the experience of the power imbalance, vulnerabilities and abuse taking place in the music industry which Government was called to address.

1.2 The Bill is consistent with the Draft National Policy as commented on and the recommendations of the Copyright Review Commission (''the CRC'') chaired by retired judge Ian Farlam, and is linked to the National Development Plan (''NDP''), in that it seeks to ensure consistency and coherence in aligning the approach of various Government Departments to IP matters. The proposed provisions in the Bill are strategically aligned with the treaties that South Africa reviewed, amongst others, the World Intellectual Property Organisation (''WIPO'') digital treaties namely the WIPO Copyright Treaty (''WCT''); the WIPO Performance and Phonograms Treaty (''WPPT''); the Beijing Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The alignment is for purposes of ensuring effective governance, social protection, employment creation and reduction of inequalities.

1.3 The amendment of the Act means that South Africa will be able to accede to international treaties and conventions which require domestic legislation to be consistent with international imperatives.

2. OVERVIEW OF BILL

2.1 The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. It is also envisaged that the proposed legislation will reward and incentivise authors of knowledge and art. Various sectors within the South African Copyright regime are dissatisfied. Ranking highest are local performers and composers, who have not benefitted due to the lack of access to the Copyright system. (CRC report 2011). Thus, the Bill aims to make copyright consistent with the digital era, developments at a multilateral level, international standards and introduce improved exceptions and limitations into Copyright law. The Bill also aims to enhance access to and use of copyright works, to promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creative industry.

2.2 The objectives of the Bill are—

- to develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa;

- to address the licensing of Copyright works or material in relation to commissioned work to facilitate commercial exploitation by any person so licensed.

2.3 The Bill introduces provisions which deal with matters pertaining to Collective Management. Collecting Societies will only be allowed to collect for their registered members, and all Collecting Societies have to be registered with the Companies and Intellectual Property Commission (''CIPC''). Collecting Societies will only be allowed to collect for one set of Copyright Rights (Performance, Mechanical and Needle time).

2.4 The Bill deals with the protection of works and rights of authors in the digital environment.

2.5 The Bill provides for the availability of accessible formats of a work to accommodate persons with disabilities. This provision extends beyond matters pertaining to the blind but to other disabilities such as learning disabilities, dyslexia etc.

2.6 The Bill introduces an Artist Resale Royalty. This resale right means that an artist could be entitled to a royalty even when their work is resold.

2.7 Scope is left for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty. Limited circumstances have been provided for in this regard. Furthermore, this provision stipulates the factors that need to be considered in determining whether the use of a copyright amounts to fair use.

2.8 The Bill proposes a new structure for the tribunal that will settle disputes in the area of all domains of IP. The current Tribunal process takes long to settle disputes and was found to be ineffective by the CRC in providing speedy redress to rights holders. There is clear justification to follow the route taken in respect of the Companies, Trade Marks and Competition Tribunals which are good examples in this regard. This will be a Tribunal to deal with all IP matters.

3. ANALYSIS OF BILL

3.1 Clause 1 of the Bill proposes the insertion into the Act of a range of new definitions necessitated by certain amendments embodied in the Bill.

3.2 Clause 2 proposes the insertion of section 2A in the Act, circumscribing the extent of copyright protection.

3.3 Clause 3 of the Bill proposes an amendment to section 5 of the Act by providing for State ownership of copyright funded by the State.

3.4 Clause 4 of the Bill proposes an amendment to section 6 of the Act by providing for communication to the public of a musical work, by wire or wireless means, including internet access and making available to the public a work in such a way that members of the public may access such work from a place and at a time individually chosen by them, whether interactively or non-interactively.

3.5 Clause 5 of the Bill proposes an amendment to section 7 by providing for communication to the public of an artistic work by wire or wireless means, including internet access.

3.6 Clause 6 of the Bill proposes an amendment to section 8 of the Act by providing for communication to the public of a cinematograph film or audiovisual fixation by wire or wireless means, including internet access.

3.7 Clause 7 of the Bill proposes an amendment to section 9 of the Act providing for communication to the public of a sound recording by wire or wireless means, including internet access. Furthermore, by providing for a person who intends to broadcast, cause transmission of or make any work available to the public, to give the author, collecting society or indigenous community a notice in the prescribed manner of his or her intention to perform such acts, indicating where practicable, the date of the proposed performance, proposed terms and conditions for the payment of royalties and requires the copyright author, collecting society or indigenous community to sign the proposal attached thereto.

3.8 Clause 8 of the Bill proposes the substitution of section 9A of the Act. It embodies a variety of additions and amendments pertaining to the payment of royalties in respect of intellectual property rights.

3.9 Clause 9 of the Bill proposes the insertion into the Act of sections 9B to 9F, providing for the resale, duration, assignment or waiver of royalty rights. It also provides for authors to enjoy the inalienable resale royalty right on the commercial resale of his or her work of art, subsequent to the first transfer by the author of such work of art.

3.10 Clause 10 of the Bill proposes an amendment to section 12, providing for fair dealings and uses of copyright work.

3.11 Clause 11 of the Bill proposes the insertion of section 12A in the Act, providing for the general exceptions from copyright protection and section 12B providing for the first sale or transfer of ownership of copyright to exhaust the rights of distribution and importation locally and internationally in respect of the transfer of the original or copy.

3.12 Clause 12 of the Bill proposes the insertion of sections 13A and 13B in the Act providing for the permission to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process.

3.13 Clause 13 of the Bill proposes an amendment to section 16 of the Act, providing for the deletion of subsection (1).

3.14 Clauses 14 and 15 proposes the repeal of sections 17 and 18 of the Act, respectively.

3.15 Clause 16 of the Bill proposes the repeal of section 19A of the Act.

3.16 Clause 17 of the Bill proposes an amendment to section 19B of the Act by providing that the person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rights holder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if he or she does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to do.

3.17 Clause 18 of the Bill proposes the insertion of sections 19C and 19D into the Act by providing general exceptions regarding protection of copyright work for archives, libraries, museums and galleries, also exceptions regarding protection of copyright work for persons with disability.

3.18 Clause 19 of the Bill proposes an amendment to section 20 of the Act, thereby providing for an author to have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author.

3.19 Clause 20 of the Bill proposes an amendment to section 21 of the Act by providing for the ownership of any copyright subsisting in the work between

the person commissioning the work and the author who executes the commission.

3.20 Clause 21 of the Bill proposes an amendment to section 22 of the Act by providing that copyright owned by, vesting in or under the custody of the State may not be assigned.

3.21 Clause 22 of the Bill proposes the insertion into the Act of a new section 22A, making provision for assignment and licences in respect of orphan works.

3.22 Clause 23 of the Bill proposes the insertion of a new Chapter 1A into the Act and provides for the registration and regulation of Collecting Societies.

3.23 Clause 24 of the Bill proposes an amendment to section 23 of the Act by providing for an offence if a person tampers with information managing copyright, omits to pay the author of the copyright work a royalty fee as and when the copyright work is used and omits to pay the author of artistic work royalty fees as and when the artistic work is sold as prescribed by the Act.

3.24 Clause 25 of the Bill proposes an amendment to section 27 of the Act by inserting a new subsection which provides for an offence if a person unlawfully circumvents technological protection measures applied by the author.

3.25 Clause 26 of the Bill proposes amendments to section 28 of the Act, which provides for the copying of a work to constitute an infringement of copyright, if such copying would have constituted infringement in the country in which the work was made.

3.26 Clause 27 of the Bill proposes the insertion of sections 28O, 28P, 28Q, 28R, 28S in the Bill providing for prohibited conduct in respect of technological protection measures; exceptions in respect of technological protection measures; and prohibited conduct in respect of copyright management information and exceptions.

3.27 Clause 28 of the Bill proposes an amendment to the heading in Chapter 3 of the Act [Copyright Tribunal] by replacing it with the heading ‘‘Regulatory and Enforcement Agencies’’.

3.28 Clauses 29 and 30 of the Bill propose the insertion of sections 29A to 29S into the Act, which provide for, amongst others, the establishment of the Intellectual Property Tribunal; its functions; appointment of its members; qualifications for such appointment; term of office; removal and suspensions; and procedural matters on the conduct of hearings of the Tribunal.

3.29 Clause 31 of the Bill proposes the repeal of sections 30, 31, 32, 33 and 36 of the Act.

3.30 Clause 32 of the Bill proposes an amendment to section 39 of the Act by providing for ministerial powers to prescribe regulations relating amongst others to the procedure for the conduct of Tribunal hearings and relating to Collecting Societies.

3.31 Clause 33 of the Bill proposes a new section 39B, and provides that a term in a contract that purports to prevent or restrict any act which by virtue of the Act would not infringe copyright or which purport to renounce a right or protection afforded by the Act will be unenforceable.

3.32 Clause 34 of the Bill proposes the insertion into the Act of a new Schedule 2, providing for ‘‘Translation Licences’’ and ‘‘Reproduction Licences’’.

3.33 Clause 35 of the Bill provides for the short title and commencement.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department of Trade and Industry consulted various stakeholders in different sectors within the South African Copyright regime such as Departments and their agencies, local performers, composers, academics, non-government organisations, copyright consultants and the general public, through meetings and a conference. The consultation took place pre- and post-Cabinet approval.

5. FINANCIAL IMPLICATIONS FOR STATE

Any financial requirement will accommodated within the existing budget.

7. PARLIAMENTARY PROCEDURE

Tagging

7.1 The Constitution of the Republic of South Africa, 1996 (''the Constitution'') distinguishes between four categories of Bills: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). A Bill must be correctly tagged otherwise it would be constitutionally invalid.

7.2. The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.

7.3 The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of **Tongoane and Others v Minister of Agriculture and Land Affairs and Others**[1]. The Constitutional Court in its judgment stated as follows:

> ''[58] What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill 'in substantial measure fall within a functional area listed in schedule 4'. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This 'involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about.'' (footnote omitted).
>
> [60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.''

7.4 In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that ''any Bill whose provisions in substantial measure'' fall within a specific Schedule must be classified in terms of that Schedule.

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[1] 2010 (8) BCLR 741 (CC)

7.5 The Act regulates copyright. In terms of section 2 of the Act, and subject to the provisions of the Act, the following works, if they are original, are eligible for copyright, namely literary works, musical works, artistic works, cinematograph films, sound recordings, broadcasts, program-carrying signals, published editions and computer programs.

7.6 The Bill, amongst others things, seeks to provide for certain exceptions in respect of infringement of copyright for educational purposes, e.g. the new section 13B [clause 12 of the Bill] which regulates the making of copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose. ''Education at all levels, excluding tertiary education'' is a functional area listed in Schedule 4 to the Constitution. The Bill also proposes general exceptions regarding protection of copyright work for archives, libraries, museums and galleries. ''Archives other than national archives'', ''Libraries other that national libraries'' and ''Museums other than national museums'' are functional areas listed in Schedule 5 to the Constitution. The question is whether or not the abovementioned provisions of the Bill in substantial measure fall within a functional are listed in Schedule 4 or 5. The purpose of the Bill is to regulate copyright and not to regulate any matter falling under the functional areas in question. The Constitutional Court, in paragraph 71, stated the following with regard to the test for tagging:

> ''[71] . . . the 'substantial measure' test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.'' (emphasis added).

The subject matter of the Bill is the regulation of copyright in the Republic and does not impact on matters that substantially affect the provinces.

7.7 Since none of the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4 or 5, the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

Referral of Bill to House of Traditional Leaders

7.8 According to section 18(1) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), ''*(a)*ny parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.''.

7.9 Indigenous works will in terms of the Act be eligible for the payment of royalties. An ''indigenous work'' means 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. The Bill provides for the registration of collecting societies to administer rights on behalf of copyright owners or authors. Since the Bill pertains to ''customs of traditional communities'' it would be necessary to refer the Bill to the House of Traditional Leaders.

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