

Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]

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Abstract

South Africa is in the process of reforming its copyright law, attempting to update and align it with constitutional rights and existing and prospective international treaty obligations. With the adoption of the Copyright Amendment Bill [B13B-2017] by both Houses of Parliament in March 2019, the apartheid-era *Copyright Act* of 1978 had almost successfully been amended, when the President of the Republic withheld his assent to the Bill referring it back to Parliament citing reservations about its constitutionality. Following calls for public comment by the parliamentary Portfolio Committee on Trade and Industry on the President's reservations, a coalition of copyright and constitutional law experts, convinced of the constitutionality of the Bill, submitted two legal opinions to the Committee. The two opinions presented in this contribution underline the importance of copyright reform, as envisaged in the Bill, to bringing South African copyright law into the digital age and realising several constitutional rights including the rights to education, cultural participation, language, freedom of expression, and access to knowledge of everyone, without discrimination.

Keywords

Copyright Amendment Bill; intellectual property and human rights; constitutionality; President's referral back to Parliament; copyright reform.

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1 A Short Legislative History¹

1.1 Introduction

Over the past decade, South Africa has been involved in attempts to update its obsolete copyright laws and bring them out of the apartheid-era and in

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Sanya Samtani was the lead author of the "Short Legislative History". Malebakeng Forere was the lead author of the First Academic Opinion, Andrew Rens of the Second Academic Opinion. Many thanks go to Oraizia Adham, BCom LLB LLM (Wits), for her editorial assistance. The opinions have not been peer reviewed.

¹ This Short Legislative History chronicles the legislative process as on 12 May 2022.

line with the *Constitution of the Republic of South Africa*, 1996. This has taken the shape of legislative amendments to the *Copyright Act* of 1978 and its attendant regulations. A coalition of copyright and constitutional law experts, referred to as the CAB (Copyright Amendment Bill) Academic Team, submitted two opinions to Parliament as part of the public participation process. Written collaboratively by the members of the CAB Academic Team, the Joint Academic Opinion (May 2021) and the Joint Academic Opinion on the Proposed Changes November and December 2021 (January 2022), appended to this contribution as parts 2 and 3, analyse Parliament's most recent attempt at legislative reform: the Copyright Amendment Bill [B13B-2017] (the CAB). Both opinions were submitted pursuant to calls for public consultation issued by the Parliamentary Portfolio Committee on Trade and Industry to, and commented on by, members of the CAB Academic Teams before the Committee. This contribution locates the CAB in its legal historical context and sets out where we are now, as of May 2022.

1.2 Trajectory of the CAB through Parliament until 2019

The process of legislative reform began in 2009,² with the Department of Trade, Industry and Competition (currently the DTIC, formerly the DTI) commissioning a series of studies.³ The DTI, in 2010, subsequently established the Copyright Review Commission (the CRC), headed by Justice Farlam, to assess various concerns surrounding collecting societies' unfair distribution of royalties to musicians and composers.⁴ Amongst other things, the CRC recommended that the DTI begin the process of amending the *Copyright Act* of 1978 "to improve access to education, regulate collecting societies effectively, and facilitate fair and speedy payment of royalties to rightful owners".⁵

Accordingly, in July 2015, draft amendments were published for public comment and an early version of the CAB was introduced to the National Assembly.⁶ The Bill was tagged by the Joint Tagging Mechanism as a

² It must be noted that in 1998, the Music Industry Task Team was established to review the destitute condition of artists. This led to limited amendments to the *Copyright Act* in 2002, regarding needletime. Here, we focus on the origins of the CAB that is currently under consideration.

³ Nicholson 2019 <https://infojustice.org/archives/41167>.

⁴ DTI 2011 https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf para 1.1.1.

⁵ Davies 2014 <http://www.thedtic.gov.za/the-dti-budget-vote-address-delivered-by-dr-rob-davies-minister-of-trade-and-industry-22-july-201>.

⁶ DTI 2015 <https://www.gov.za/speeches/dti-hosts-conference-copyright-law-changes-2015-08-20-20-aug-2015-0000>. See, for the text of the amendments, GN 646 in GG 39028 of 27 July 2015.

section 75 Bill. These amendments went through a process of public participation in the form of further comments, consultations, and multiple stake-holder workshops.⁷ In May 2017, the CAB was reintroduced in the National Assembly as a substantially revised Bill. Further public comments were sought, leading to the Bill being revised once again in 2017 after three days of public hearings and stake-holder engagement; and multiple times in 2018, until it was passed by the National Assembly in December 2018.⁸

Ordinary parliamentary procedure under section 75 of the Constitution entailed that once passed by the National Assembly, the CAB was presented before the National Council of Provinces (the NCOP). In March 2019, the NCOP also passed the CAB and the Bill was sent to the President in order for it to become law.⁹

1.3 Trade pressure, President referral and return to Parliament

The President received the CAB on 28 March 2019. According to the Constitution, he was bound to either sign the CAB to make it law, or refer it back to the National Assembly in the event of reservations about its constitutionality.¹⁰ Approximately 15 months later, in May 2020, Blind SA, a national organisation that advocates for the rights of people living with visual and print disabilities, filed a lawsuit against the President for "unreasonably delaying" the CAB from coming into force on the basis that this led to a persisting violation of their rights of access to information in accessible formats.¹¹ This was exacerbated during the Covid-19 pandemic which began to affect South Africa in March 2020.

In the lead-up to the lawsuit, it had been reported that the President was pressured by the industry lobby and consequently international trade partners – in particular, the European Commission and the United States of America – not to sign the CAB.¹² In October 2019, the Office of the United States Trade Representative called for a review of South Africa's status

⁷ See generally, Wits 2022 https://libguides.wits.ac.za/Copyright_and_Related_Issues/SA_Copyright_Amendment_Bill_2015.

⁸ See PMG 2022 <https://pmg.org.za/bill/705/>.

⁹ *Constitution of the Republic of South Africa*, 1996 (the Constitution) s 79. Coupled with the Copyright Amendment Bill is the Performers Protection Amendment Bill [B24-2016] (PPAB), that seeks to amend the Performers' Protection Act in order to update the law to respond to technological changes amongst other issues. We do not discuss the PPAB in our Joint Opinion.

¹⁰ Pursuant to s 79(1) of the Constitution.

¹¹ Blind SA 2020 <https://blindsa.org.za/2020/06/08/blind-sa-serves-papers-on-the-president-and-others-at-the-constitutional-court-in-respect-of-the-copyright-amendment-bil>.

¹² Kayali 2020 <https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101>.

within the Generalised System of Preferences programme (US preferential tariff system for developing countries) on the basis that the CAB did not enable "effective" and "adequate" protection of copyright holders.¹³ The European Commission, on the other hand, was more covert with "missives from the EU's delegation to South Africa asking the government to delay the reform".¹⁴

The Blind SA lawsuit was never set down for hearing as, in the interim, the President decided on the CAB in June 2020. The President did not assent to the CAB – rather, he referred it back to Parliament citing constitutional reservations.¹⁵ Parliament is constitutionally bound to consider these concerns, but is free to make its own determination as to the CAB's constitutionality. Importantly, a referral does not require a fresh review of the entire Bill – only those aspects that the President listed in his letter. There were six reservations outlined in the President's referral letter: that the Bill was incorrectly tagged under section 75; that the royalty provisions may constitute "retrospective and arbitrary" regulation of constitutional property (assuming without demonstrating the applicability of section 25) and relatedly that the Minister's power to promulgate regulations was impermissible; that there was inadequate public participation on "fair use"; that copyright exceptions in respect of libraries and education may run the risk of arbitrary deprivation of constitutional property; and that in general these provisions are potentially incompatible with South Africa's international copyright obligations. The first Joint Opinion, appended as part 2, analyses these reservations and responds to each in turn. In short, the Opinion concludes that the CAB is constitutionally defensible, and in fact

¹³ USTR 2019 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement>. After the hearing in 2020, South Africa's status remained unchanged and it was not placed on the Special 301 Watch List. The Special 301 Report is an annual review of the intellectual property laws of States that have trade relations with the United States of America. The Watch List and Priority Watch List comprise of those States that, in the view of the Office of the US Trade Representative, have inadequate or ineffective intellectual property laws that may unfairly disadvantage US copyright holders among other concerns. The consequences of this include the initiation of dispute settlement proceedings at the World Trade Organisation, the retraction of unilaterally granted trade benefits, and the imposition of unilateral sanctions among others.

¹⁴ Kayali 2020 <https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101>. See also, list of documents acquired by former Minister for European Parliament, Julia Reda, in response to Freedom of Information requests (EU date unknown https://www.asktheeu.org/en/request/7916/response/26626/attach/12/Gestdem%202020%202472%20REDA%20List%20of%20documents.pdf?cookie_passthrough=1). See also, list of copyright holders in Europe asking for further intervention (EU 2020 https://www.asktheeu.org/en/request/7916/response/26627/attach/10/Doc%2033%20Ares%202020%202496211%20Meeting%20Report%20Minutes%20TRADE%201444%20Redacted.pdf?cookie_passthrough=1).

¹⁵ Pursuant to s 79 of the Constitution.

some provisions of the CAB that were referred to Parliament by the President are constitutionally *required* on the basis that they fulfilled the rights to education, equality, dignity, freedom of expression and information, and access to and participation in cultural life. In respect of the final reservation on international law, the Joint Opinion highlights that South Africa is a constitutional democracy, and the Constitution remains the supreme law – even when South Africa seeks to legislate in advance of undertaking future international treaty obligations. The Joint Opinion offered its analysis and proposed minor amendments to further clarify the above issues. It must be emphasised that these minor amendments were for the purposes of clarity, and not in response to any perceived constitutional defects.

1.4 Parliament's consideration of the referral letter, public consultations and further litigation: where we are now

The Parliamentary Portfolio Committee on Trade and Industry began considering the six concerns raised by the President in August 2020. After debating these issues for approximately a year, in June 2021, the Portfolio Committee agreed with the President's reservations on tagging, and recommended that the Joint Tagging Mechanism re-tag the CAB as a section 76 Bill. The Joint Tagging Mechanism did so.¹⁶ This action means that once the National Assembly's Parliamentary Portfolio Committee on Trade and Industry finalises its recommendations on the other five reservations, the Bill will be required to go through the process in the NCOP.¹⁷

In July 2021, in order to consider the President's reservations on educational and library exceptions, fair use, and international law, Parliament published a call for public consultation in the form of written and oral submissions. Parliament received over 90 written submissions and public hearings took place between 11 and 12 August 2021.¹⁸ Subsequently, after considering these submissions in November 2021, the Portfolio Committee published a call for comments on further amendments to the Copyright Amendment Bill on 3 December 2021.¹⁹ The Portfolio Committee took a decision to publish only part of the amendments that were being effected, despite the fact that the unpublished amendments materially

¹⁶ See PMG 2022 <https://pmg.org.za/bill/705/>.

¹⁷ Saxby 2021 <https://www.dailymaverick.co.za/opinionista/2021-08-15-south-africans-deserve-to-know-why-the-copyright-amendment-bill-has-languished-in-bureaucratic-limbo-for-four-years/>.

¹⁸ Portfolio Committee on Trade and Industry 2021 <https://www.youtube.com/watch?v=76wB4BIP2Ss>; Portfolio Committee on Trade and Industry 2021 <https://www.youtube.com/watch?v=pXcdwUwyrTM&t=29766s>.

¹⁹ PMG 2022 <https://pmg.org.za/call-for-comment/1114/>.

affected the published amendments. After stakeholders conveyed this to the Committee, the Committee published a second document, which contained both sets of amendments. The CAB Academic Team made submissions on these further amendments in the form of a second Joint Opinion to meet the deadline of 28 January 2022. The second Joint Opinion is appended as part 3 to this contribution as well. At the time of writing, the Portfolio Committee is still considering these submissions and has not yet finalised its report.

In parallel with the above, people with disabilities have remained deprived of access to educational and cultural materials as the current *Copyright Act* of 1978 does not have an accessible format shifting provision. The President's referral letter was received by Parliament in June 2020. Approximately two years later, the Bill remains in Parliament. Given that it has been retagged and required to undergo additional legislative processes at the NCOP, further delay is likely in passing the CAB. On this basis, Blind SA represented by SECTION27 initiated fresh litigation against the Department of Trade and Industry and four others, in the Pretoria High Court, arguing that the current *Copyright Act* unfairly discriminates against people living with visual and print disabilities due to the lack of an accessible format shifting provision.²⁰ People living with disabilities could not meaningfully access works because copyright prevented them from converting the work into Braille, Daisy and other accessible formats unless they had express permission from the copyright holder. Doing so was subject to civil and criminal penalties under the current *Copyright Act*.²¹ This is not a burden that people living without disabilities bear. The matter was unopposed – and the respondent government departments all agreed to abide by the order of the court. On 21 September 2021, the Pretoria High Court accordingly held that the current *Copyright Act* was unconstitutional on this basis.²² The first Joint Academic Opinion appended to this contribution as part 2 had also identified this unconstitutionality – and went on to flag several other rights that are severely limited by the operation of the apartheid-era *Copyright Act* of 1978.

The High Court litigation was successful. The Pretoria High Court read section 19D of the CAB into the current *Copyright Act* as an interim remedy to ensure that unfair discrimination does not continue. The matter is now at

²⁰ Blind SA 2021 <https://blindsa.org.za/2021/09/08/court-case-to-endthebookfamine/>. See also Daniels 2021 <https://www.dailymaverick.co.za/article/2021-04-07-civil-society-challenge-constitutionality-of-outdated-copyright-act-in-court/>.

²¹ *Copyright Act* 98 of 1978 ss 24-27.

²² Blind SA and SECTION27 2021 <https://section27.org.za/2021/09/high-court-declares-copyright-act-unconstitutional/>. See also Samtani and Harding 2021 <https://ohrh.law.ox.ac.uk/long-awaited-realisation-of-the-right-of-access-to-materials-under-copyright-of-persons-with-visual-and-print-disabilities-in-south-africa/>.

the Constitutional Court for confirmation in accordance with the usual procedure, with the hearing having taken place on 12 May 2022.²³ The matter has been reserved for judgment. As laid out above, the CAB remains at the National Assembly and after the completion of that process it would still need to go through the NCOP. It is difficult to estimate how long it will take for these processes to be completed. As we write, the Covid-19 pandemic continues to exacerbate existing inequalities – emphasising the urgency of copyright reform to, *inter alia*, increase research capacity in South African universities. Although South Africa is internationally at the forefront of the waiver of stringent international intellectual property obligations for access to health technologies and essential research to end the pandemic,²⁴ this appears not to be reflected in its domestic parliamentary processes given the lack of urgency in passing the Copyright Amendment Bill and the President's action in writing his referral letter. The first and second Joint Academic Opinions appended to this contribution as parts 2 and 3 therefore constitute an important knowledge resource setting out how the CAB can be passed expediently, and reminding law-makers that *all* statutes are subject to South Africa's Constitution, in particular to the Bill of Rights and must be interpreted accordingly.

In what follows, we set out both sets of parliamentary submissions in turn. The first Joint Opinion responds directly to the President's reservations set out in his referral letter. The second Joint Opinion comments on proposed amendments published by the Committee to address some of these reservations. Both opinions were submitted before the Committee and are publicly available.

2 The first Joint Opinion

The first Joint Opinion addresses the President's reservations about the Bill's constitutionality, as well as his expressed concerns about the Bill's domestic application of international law. It analyses each of, and only, the specific clauses in the CAB that are mentioned in the President's letter. In a nutshell, it argues that the CAB passes constitutional muster and does not require amendment. But should the Committee choose to make changes in its legislative discretion, it offers proposed text. This opinion responds to the call for public comments made in mid-2021. We include the opinion below with the names of the academics involved in its drafting.

²³ Blind SA and SECTION27 2021 <https://section27.org.za/2021/11/blind-sa-and-section27-joint-media-statement-blind-sa-files-court-papers-with-constitutional-court/>.

²⁴ WTO 2020 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>.

Joint Academic Opinion

Re: Copyright Amendment Bill [B13B of 2017]

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10 May 2021

We offer the enclosed Joint Opinion on the President's referral of the Copyright Amendment Bill back to Parliament. We address the President's reservations about the Bill's constitutionality, as well his expressed concerns about the Bill's domestic application of international law. We analyse each of, and only, the specific clauses in the CAB that are mentioned in the President's letter. The question we ask and answer, is whether Parliament should take action to bolster the constitutionality of any of the provisions identified in the President's letter.

To prepare this Opinion, we reviewed the *Copyright Act*, the President's letter, the 2019 Copyright Amendment Bill [B13B of 2017] (CAB), and the analysis of the Panel of Experts appointed to Parliament to review the Bill.²⁵

²⁵ In particular, we reviewed in detail the comments by Ms Michelle Woods of WIPO, Geneva, Switzerland ("Woods") (contained in Myburgh 2019

We conclude that the CAB could be interpreted and implemented in a constitutional manner, including with regulatory clarifications. But we recommend that Parliament aid the process of constitutionally implementing the proposed law through the following specific technical changes to the Bill, language for which is included in the Appendix:

- revise sections 7A and 8A to require only a "fair" royalty in each;
- require that quotations under section 12B(1)(a) be "consistent with fair practice", as in the current Act;
- remove the exception in section 12B(1)(e)(i) for uses of works not subject to reservations of rights;
- revise the translation right in section 12B(1)(f) to include the full range of purposes for which a lawful translation may be made;
- add a clarification to section 19D that it authorises cross-border trade by "authorised entities" as defined by the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*.

I Unconstitutionality of the Current *Copyright Act of 1978*

It is our opinion that the current apartheid-era *Copyright Act of 1978* violates the Bill of Rights in several respects. Specifically, the 1978 Act:

- unfairly discriminates against persons living with visual and print disabilities as it does not permit the creation of accessible formats of works under copyright without permission from the rights holder, in violation of the right to equality, section 9;
- does not permit uses of works to the degree required for freedom of expression, in violation of the right to receive and impart information, section 16;
- inhibits access to educational materials in the modern world, including through the digital environment, in violation of the equal right to basic and further education for all, including in languages of the students' choice, section 29;

https://legalbrief.co.za/media/filestore/2019/03/Letter_AF_Myburgh_to_Minister_R_Davies_Mr_E_Makue_14Mar2019.pdf) and the opinion of counsel for the International Publishers Association, André Myburgh, of Lenz Caemmerer, Basel, Switzerland, (Myburgh 2018 http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf) ("Myburgh").

- does not allow for materials to be translated into underserved languages, in violation of rights to use languages of one's choice and participate in cultural life, sections 30 and 31;
- does not protect the rights of authors, performers, and other creators to fair remuneration and fair contract terms, as needed to promote the right to dignity and the principle of decent work, section 10.

The CAB promotes the Constitution and the Bill of Rights by amending the deficient *Copyright Act* with provisions modelled on examples that exist in other open and democratic societies. Until the CAB is adopted, the *Copyright Act 1978* will continue to violate the Bill of Rights, and therefore responding to the President's reservations and finalising the Copyright Amendment Bill is urgent. The urgency of amending the *Copyright Act* is all the more urgent with the advent of the Covid-19 pandemic, which has cut off access to physical schools, libraries and other institutions. These public services, in many cases, are not enabled to share materials for remote access and learning needed to promote the enjoyment of the rights in the Bill of Rights.

II Tagging

We conclude that re-tagging the Bill is not constitutionally required, and would indeed be constitutionally suspect.

The Copyright Amendment Bill was passed by Parliament following the procedure set out in section 75 of the Constitution. The section 75 process is for "Ordinary Bills not affecting provinces". It is the process used for other copyright and intellectual property amendments. The President states that he has reservations that the section 76 process should have been followed because copyright amendments affect areas like trade and culture, which are subject to joint national and provincial authority.

The President's reservations are, in our opinion, unfounded. The applicable portion of section 76 of the Constitution describes a process requiring a greater provincial role in legislation only if it "falls within a functional area listed in Schedule 4". The regulation of copyright, and all intellectual property law, does not fall within a functional area listed in schedule 4. At most, the impact on provincial competencies, such as culture and trade, are mere "knock on effects", rather than the "direct regulation" required to trigger the section 76 process.²⁶ Re-tagging and following section 76 would be contrary to the Constitution and would render the CAB open to subsequent constitutional challenge.

²⁶ *Democratic Alliance v President of South Africa* 2014 4 SA 402 (WCC) paras 94-95.

III Royalty rights in existing contracts

We conclude that the royalty rights provisions of the Bill should be amended to require only "fair" remuneration for current dispositions of copyrights.

The President states his reservation that the royalty requirements in the Bill may constitute "retrospective and arbitrary" regulation of property protected by the Constitution.

The alleged retrospectivity of the royalty provisions is not in itself a ground to find the provisions unconstitutional. Many laws, including all minimum wage laws, are "retrospective" in the limited sense of applying to future work under existing contractual or other arrangements. This is the same effect of the CAB's royalty provisions. The CAB applies its royalty requirements "where copyright in that work was assigned before the commencement date" of the Act, but only if the work "is still exploited for profit", and only for uses "after the commencement date" of the Act.²⁷ The CAB does not require that royalties be paid for past uses of works.

We accept that the royalty provisions must avoid arbitrariness to comply with the Constitution, despite the unclarity in South African constitutional law as to whether rights conveyed in copyright agreements are constitutionally protected property.²⁸ The provisions do not lack an adequate purpose. There was ample evidence before Parliament of unfairness in current and past contracts between South African creators and distributors of their work.²⁹ Other copyright laws have responded to similar problems by

²⁷ CAB s 6A(7).

²⁸ The question of whether copyright is covered by the right not to be arbitrarily deprived of property under s 25 has not been definitively settled in South African law. See *Laugh It Off Promotions CC v South African Breweries International (Finance) BV* 2006 1 SA 144 (CC) (deciding that free expression rights apply to use of parody in trademarks without deciding whether trademarks are property protected by s 25); *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* 2020 1 SA 327 (CC) (characterising patents as a statutory system creating an "artificial monopoly" rather than property for the purposes of s 25); *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 75 (holding that there was no defect in the final Constitution on the basis that it did not contain an explicit right to intellectual property in the Bill of Rights). We do not need to opine here, however, on whether the regulation of contract implicates the right not to be deprived arbitrarily of property because all legislation must avoid arbitrariness. See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC).

²⁹ See DTI 2011 https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf (surveying the plight of South African creators and recommending that unfair contracts be regulated, that excessive costs and unfair practices of collective management organisations be controlled, that copyrights revert to the creator after 25 years, and that the Copyright Tribunal be streamlined).

requiring adequate remuneration of authors and performers, including recently in the European Union.³⁰

Any perceived constitutional problem may arise from the failure of sections 7A and 8A to explicitly limit the required royalty in existing agreements to "fair" remuneration.³¹ Without clarifying regulations or interpretation, the law as written could be seen to require the renegotiation of otherwise fair copyright licenses and transfer agreements.³² This could arguably be considered an arbitrary regulation, as there would be no legitimate reason to alter existing arrangements that are already fair. We therefore advise that the Bill revise sections 7A and 8A to clarify that existing arrangements are required to be modified only when their terms are not fair.

IV Exceptions to rights

We conclude that the limitations and exceptions to rights – considered individually and together – are reasonable, justifiable and indeed necessary, and reflect those contained in many open and democratic societies around the world. Nothing in international or comparative copyright law suggests that the number or collective effect of the exceptions is impermissible, excessive or extraordinary.³³ We do, however, propose technical

³⁰ Similar provisions were recently included in the European Union's *Directive (EU) 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market* (2019). Specifically:

- Article 18 of the DSM Directive gives authors and performers a right to "appropriate and proportionate remuneration".
- Article 19 requires reporting of uses to enable remuneration determination - requiring that "authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due".
- Article 20 applies to existing contracts through what some refer to as a "bestseller" clause. The Articles provides a "contract adjustment mechanism" in which authors and performers are "entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights ... when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances".

³¹ Proposed s 6A would require that authors of literary and artistic works be entitled to "a fair share" of royalties for uses of their work. Ss 7A and 8A change the standard, proposing that authors of "visual artistic works" and performers in audiovisual works "share in the royalty received for" uses of their protected rights. The provisions apply to prospective uses of works created before the Act goes into effect.

³² It could require the revision, for example, of an arrangement that provided a fully adequate payment to an author or performer through a lump sum payment, rather than through "a royalty".

³³ There are many countries that have more exceptions than South Africa would under the Bill. See e.g. Australia's *Copyright Act of 1968* ss 103, 135A-ZT (providing four

amendments that would dispel any doubts about the constitutionality of some of the provisions questioned by the President.

A 12A, Fair use

We conclude that there was adequate public participation in drafting the fair use clause in section 12A, and that the fair use right is fully in compliance with the Constitution.

The fair use clause was adequately considered in public submissions and testimony. Parliament and the Department of Trade and Industry considered in many public processes that South African copyright law currently has a general exception permitting for a "fair dealing" with a work. Semantically, the terms "use" and "dealing" are equivalent.³⁴ A key difference from present law is the inclusion of the words "such as" before the list of permitted purposes - making clear that the list is open to other purposes of use, as long as the use itself is fair to the copyright owner. Similar openness to purposes is present in about a dozen other countries.³⁵ The policy reason to include an opening term like "such as" to a list of permitted purposes is to ensure that fair uses of the future – that cannot be known today – are permitted without further legislative amendment.³⁶ This policy issue was thoroughly canvassed in the parliamentary record. Indeed, the term "such as" was present in the 2015 Bill, removed in a later draft, and then reinserted based on consideration of comments from the public. This legislative history shows that the issue was adequately considered and commented on by the public.

Another difference from present law is that the inclusion of express factors to be considered in determining whether a use is fair. These factors,

separate fair dealing exceptions and 38 provisions for other exceptions). See generally Seng 2017 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_5.pdf, surveying the common practice of countries around the world to enact multiple exceptions and limitations.

³⁴ Dean *Handbook of South African Copyright Law* 1-52 ("While it is true that the American Act refers to 'fair use' whereas the South African Act uses the term 'fair dealing' it is submitted that for the present purposes the two terms are synonymous").

³⁵ See Elkin-Koren and Netanel 2020 <https://digitalcommons.wcl.american.edu/research/50/> 3-6 (finding that "the fair use model has been adopted, with some variation, in a dozen countries").

³⁶ See Supreme Court of Appeal in *Golden China TV Game Centre v Nintendo Co Ltd* 1997 1 SA 405 (SCA) paras 13-14 (discussing the "intention" in the *Copyright Act* "to cover future technical innovations by using general words"; "This general scheme of the Act suggests to me that the definitions in the Act should be interpreted 'flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force [the Legislature] periodically to update the act").

although new to the statute, substantially reflect South African case law and commentary.³⁷

B 12B(1)(a), Quotation

We conclude that Parliament could make explicit the "fair practice" standard within the quotation right in section 12(B)(1)(a) to parallel the requirement in the current Act and in the *Berne Convention for the Protection of Literary and Artistic Works*.

The President lists the quotation right in section 12(B)(1)(a) of the CAB among those he alleges may violate the Constitution, but he does not explain his reservations. The *Berne Convention*, which South Africa is a member of, requires that it "shall be permissible to make quotations from a work . . . , provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose".³⁸ In the Parliamentary review process, it was suggested that the quotation right include the *Berne Convention's* standard that every quotation be "compatible with fair practice".³⁹

The *Berne Convention* does not require that the "compatible with fair practice" condition be stated directly in the exception,⁴⁰ and many copyright laws provide quotation rights that do not explicitly require compliance with "fair practice".⁴¹ Many of these laws, however, contain other qualitative

³⁷ See *Moneyweb (Pty) Limited v Media 24 Limited* 2016 4 SA 591 (GJ) para 113 (considering factors to determine whether a particular dealing is "fair" as including: the nature of the medium in which the work has been published; whether the original work has been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; the extent of acknowledgement given to the original work); Dean *Handbook of South African Copyright Law* 1-52 (opining that four factors in US fair use right, which also appear in the Australian fair dealing rights, "are commonsensical and reasonable and should be followed by the South African courts").

³⁸ *Berne Convention for the Protection of Literary and Artistic Works* (1886) Art 10.

³⁹ The *Copyright Act* 98 of 1978 s 12(3) states (emphasis added): "The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work."

⁴⁰ See Band 2020 <https://digitalcommons.wcl.american.edu/research/55/4> ("Contrary to Woods' suggestion, the *Berne Convention* does not require explicit inclusion of the concept 'compatible with fair practice' in national legislation. Rather, the phrase serves as a standard by which to evaluate whether the exceptions for quotations and illustrations in teaching are being applied fairly, or are being applied so broadly that they swallow the author's exclusive rights.").

⁴¹ See e.g. *Act (1960:729) on Copyright in Literary and Artistic Works* (as amended up to Act (2018:1099)) (Sweden) art 22 (as amended up to Act (2018:1099) (permitting quotation "in accordance with proper usage and to the extent necessary for the

terms that require analysis of the fairness of the purpose for which the quotation is used. It is possible that courts would read such a qualitative assessment of purpose into the statute and render it in compliance with international law. The existing quotation right in South Africa explicitly requires that quotation be compatible with fair practice. To resolve any ambiguity and to follow current law, we advise that the "fair practice" criteria be included in the quotation right.

C 12B(1)(c), Broadcasting

We conclude that no amendment is needed for section 12B(1)(c), authorising certain uses of works by broadcasters.

The President lists the exceptions for broadcasters in section 12B(1)(c) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The purpose of the provision is to authorise expressly incidental reproductions made by broadcasters to facilitate their services. The section expressly prohibits any reproduction from being "used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work". The currently in force *Copyright Act* already provides this right; the amendments made by the CAB are merely semantic.⁴² We see no reason to amend this provision.

D 12B(1)(e)(i), News of the day

We propose removing section 12(B)(1)(e)(i) from the Bill.

purpose"); Law No 92–597 of 1 July 1992 on the Intellectual Property Code (amended by Act No. 2016-925 of 7 July 2016) (France) art L211 (permitting "analyses and short quotes justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated"); Law No 65-00 of 21 August 2000 on Copyright (Dominican Republic) art 31 (permitting quotation "provided that they are not of such length and continuity that they might reasonably be considered a simulated, substantial reproduction of the content of his work that causes injury to the author thereof"); Iran's *Act for Protection of Authors, Composers and Artists Rights (Copyright Law)* (12 January 1970) art 7 and *Translation and Reproduction of Books, Periodical and Phonograms Act* (26 December 1973) ("provided that the sources of quotations are mentioned and the customary limitations are observed"); Law No 22 of 1992 on Copyright and its Amendments (2005) art 17 (Jordan) ("for the purpose of clarification, explanation, discussing, criticizing, educating or testing in as much as justifiable by this objective, provided that the name of the product and its author are mentioned); Act of 23 September 1912, Containing New Regulation for Copyright (*Copyright Act* 1912, as amended up to 1 September 2017) (Netherlands) § 15a ("the quotation is in accordance with what is generally regarded as reasonably acceptable and the number and size of the quoted parts are justified by the purpose to be achieved").

⁴² See *Copyright Act* 98 of 1978 s 12(5)(b).

The President lists section 12(B)(1)(e)(i) among those for which he expresses reservations. The section permits the reproduction and communication to the public of articles and broadcasts "on current economic, political or religious topics" if exclusive rights in the work "is not expressly reserved". The provision exists in much the same form in the current Act,⁴³ and is common in other copyright laws.⁴⁴

One commentator posited that permitting uses of works where copyright is "not expressly reserved" violates the Article 5(2) of the *Berne Convention*. That Article requires that the "enjoyment and the exercise" of copyright "shall not be subject to any formality". The notice requirement that copyright has been reserved, required for a work to not be subject to the exception in section 12(B)(1)(e)(i), could be intercepted as the kind of "formality" prohibited by Article 5(2) of the *Berne Convention*. The *Berne Convention* may not apply here, however, because it expressly provides that its protections "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information".⁴⁵ The question is thus raised as to whether section 12(B)(1)(e)(i) only provides a use right for "news of the day or ... items of press information".

We conclude that this section of the law may be safely deleted to resolve any ambiguity as to its permissibility under international law. Any fair use of works for informatory purposes would be adequately dealt with under the general flexible exception in section 12A. As long as that section is maintained, section 12(B)(1)(e)(i) may be deleted without harming the objectives of the Bill.

E 12B(1)(f), Translations

We propose amending the translation exception in section 12B(1)(f) to promote the Bill of Rights and reflect the full range of purposes for which a lawful translation may be made.

⁴³ See *Copyright Act 98 of 1978 s 12(7)* ("The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.").

⁴⁴ See, e.g., *Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organisation* (1999) Art 16 ("it shall be permitted, without the consent of the author and without payment of remuneration, but subject to the requirement of stating the source and the name of the author if such name is given in the source, (i) to reproduce in the press, to broadcast or to communicate to the public, an economic, political or religious article published in newspapers or periodicals, or a broadcast work of like nature, in those cases where the right of reproduction, broadcasting or communication to the public has not been expressly reserved").

⁴⁵ *Berne Convention for the Protection of Literary and Artistic Works* (1886) Art 2(8).

The President lists the exception for translations "for teaching" (as it is presently worded) in section 12B(1)(f) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The right to translate works may be necessary to promote various constitutional rights, such as the right of South Africans "to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable",⁴⁶ the right of everyone "to use the language and to participate in the cultural life of their choice",⁴⁷ and the right of linguistic communities not to be denied the right, "to enjoy their culture" and "use their language".⁴⁸ The current Act provides a right of translation that is not limited to "teaching".⁴⁹ The limitation of the translation right to "teaching" is too narrow to realise the full scope of these rights protected by the Bill of Rights. We therefore recommend the expansion of the translation right to include any translation "for a non-commercial purpose", which is "consistent with fair practice", and which "does not exceed the extent justified by the purpose".

F 12C, Transient copies

We find no reason to amend the exception for transient copies in section 12C.

The President lists the exception for uses of transient copies in technological processes authorised by section 12C of the CAB among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Exceptions for transient copies are necessary to facilitate many modern digital activities such as streaming video, reading a website, and sending and receiving email. The provision is substantially similar to the exception for transient copies in current EU law,⁵⁰ as well in

⁴⁶ The Constitution s 29(2).

⁴⁷ The Constitution s 30.

⁴⁸ The Constitution s 31(1)(a).

⁴⁹ See *Copyright Act* 98 of 1978 s 12(11) ("(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.").

⁵⁰ See *Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (2001) Art 5 (requiring exception for "[t]emporary acts of reproduction ... which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance").

the laws of many countries around the world.⁵¹ It is widely accepted that exceptions for transient copies for technological processes are reasonable and comply with international law.⁵²

G 12D, Education

We conclude that section 12D is constitutional in its present form.

The President lists the exception for educational uses in section 12D among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Some commenters question section 12D(3), which allows educational institutions to copy an entire book into a course pack if "a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions". Section 12D(4) permits reproduction of "a whole textbook" solely for "educational or academic activities" if the "textbook is out of print", "the owner of the right cannot be found", or "authorised copies ... cannot be obtained at a price reasonably related to that normally charged in the Republic". It is asserted by some commenters that the use of entire works without payment of equitable remuneration could unreasonably prejudice the legitimate interests of the authors.

In our considered view, section 12D is defensible as a legitimate policy choice made by the South African legislature that reconciles its international obligations in respect of copyright and human rights and gives effect to the Bill of Rights in line with its constitutional obligations. The core provision of sections 12D(3) and (4) is to require that copyright holders of educational materials serve the South African market on reasonable terms and conditions. This power to control abuses of monopoly power is enshrined in international law, including in the *Berne Convention* and *WTO TRIPS Agreement*, which protect the right of countries to control abuses of intellectual property rights.⁵³ There are parallel concepts in South African

⁵¹ See, e.g., Botswana's *Copyright and Neighbouring Rights Act* 8 of 2000 art 19(a) (providing exception for "temporary reproduction of a work ... made in the process of a transmission of the work or an act of making a stored work perceptible").

⁵² See Ricketson 2003 https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1680579 (explaining that "no provision concerning temporary reproductions found its way into the text of the WCT", and "[a]ccordingly, it remains a matter for national legislators to determine whether, and to what extent, they will provide for exceptions for this kind of reproduction in their laws").

⁵³ See WIPO *Records of the Intellectual Property Conference of Stockholm, 1967* 1175 ("263. The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuses of monopoly."); WIPO *Guide to the Berne Convention* ("17.4. However, quite apart from these powers of censorship, it was unanimously agreed in Stockholm that

patent and competition law, both of which define a failure to serve the market on reasonable terms as an abuse.⁵⁴ The provision reflects long standing practice in South Africa, where universities and other educators during Apartheid commonly reproduced for educational purposes articles and whole books that were not available in South Africa because of censorship or economic boycotts.⁵⁵ The provisions reflect the laws of many other countries that permit greater free uses of works that are not commercially available at reasonable prices.⁵⁶ The expansion of education

questions of public policy should always be a matter for national legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies."); Ricketson 2003 https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805 ("Berne Union members are free to take all necessary measures to restrict possible abuses of monopoly, and this will not be in conflict with the Convention so long as this is the purpose of the measures, even if, in some instances, this means that the rights of authors are restricted. All private rights have to be exercised in accordance with the prescriptions of public law, and authors' rights are no exception to this general principle."); *World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994) (WTO TRIPS Agreement) Art 8(2) (clarifying that WTO members may adopt measures "to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade").

⁵⁴ See the South African *Patents Act* 57 of 1978 s 56(2)(c) ("The rights in a patent shall be deemed to be abused if—(c) the demand for the patented article in the Republic is not being met to an adequate extent and on reasonable terms"); *Competition Act* 89 of 1998 s 8(a) (prohibiting dominant firm from charging "an excessive price to the detriment of consumers", defining "excessive price" as "a price for a good or service which- (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value referred to in subparagraph (aa)"); WTO TRIPS Agreement Art. 8(2) ("Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.") and Art 40(2) ("Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.").

⁵⁵ See Gray and Czerniewicz "Access to Learning Resources" 112 (reviewing publishing practices before and after Apartheid).

⁵⁶ See Canada's *Copyright Act* (RSC, 1985, c C-42) s 29.4 (providing that "[i]t is not an infringement of copyright for an educational institution ... to reproduce a work, or do any other necessary act, in order to display it" if the work is not "commercially available" - defined as "available on the Canadian market within a reasonable time and for a reasonable price"); the Indian *Copyright Act* 14 of 1957 s 52(1)(o) (providing that "the making of not more than three copies of a book ... for the use of the library if such book is not available for sale in India"); 17 US Code § 108 - *Limitations on Exclusive Rights: Reproduction by Libraries and Archives* (United States) (providing right of libraries to make replacement copies of an "entire work, or to a substantial part" if the work "cannot be obtained at a fair price"); Afghanistan's *Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law)* (2008) art 44 (permitting Minister to grant "a nonexclusive license to reproduce and publish" any work if "Copies of the work were not distributed in the state ... for a price similar to the prices of similar works"); Albania's Law No 35/2016

rights in the *Copyright Act* was recommended by professional reviews of the law commissioned by the Department of Trade and Industry.⁵⁷

Sections 12D(3) and (4) are quite narrow in their application. Each is subject to section 12D(1), which clarifies that the only purpose for which a whole book can be copied is for non-commercial "educational and academic activities". Similarly, section 12D(3) provides that educational institutions must by default first try to secure a licence from the copyright owner to incorporate whole works into course packs or any other form. If and only if such a licence is unobtainable on reasonable terms can they incorporate whole works.

H 19B, Reverse engineering

We find no reason to amend the new exception in section 19B for reverse engineering.

The President listed this exception in his criticisms, but no other commentator to our knowledge criticised this exception as being out of compliance with the Constitution or international law. Reverse engineering exceptions are widespread throughout the world.⁵⁸ Section 19B(2) closely

of 31 March 2016 on Copyright and Related Rights art 72 (providing right to make personal copy of a whole book if "its sold copies are exhausted for at least two years"); Australia's *Copyright Act* of 1968 s 40(2)(c) (including as a factor for determining a fair dealing for research or study "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price") and s 49 (providing right of libraries and archives to make replacement copies of a whole work if "the work cannot be obtained within a reasonable time at an ordinary commercial price"); Cabo Verde's Decree-Law No 1/2009 of 27 April 2009 on the Revision of Copyright Law, art 72 (permitting reproduction "of a single copy of works which are not yet available in trade or are impossible to obtain, for purely scientific or humanitarian interest purposes"); China's *Regulation on the Protection of the Right to Network Dissemination of Information* 468 of 2006 art 7 (permitting libraries to make a digital replacement copy of a work "which is unavailable or only available at a price obviously higher than the marked one on the market"); Sudan's *Copyright and Neighbouring Rights (Protection) and Literal and Artistic Works Act*, 2013 art 31 (authorising libraries and archives to make replacement copies of works if "the edition of the copy in their possession might be out of stock or is impossible to get in a reasonable price").

⁵⁷ See Genesis Analytics 2014 https://static1.squarespace.com/static/5af97dc05cfd7928de4ee753/t/5d7f3ca1de5a2c25a5546d9e/1568619696643/impact+study+DTI+Genesis+Study_2.pdf 77-78 (advocating for expansion of educational exceptions in the law, including through a general fair use provision, allowances for the utilisation of whole works for teaching, extending exceptions to all types of education, and removing restrictions on the number of copies for educational purposes that can be made of a work).

⁵⁸ See e.g. India's *Copyright Act* 14 of 1957 art 52 (providing an exception for "the doing of any act necessary to obtain information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available").

follows the text of Article 6 of the *European Union Software Directive* (2009/24/EC) with minor textual changes. Section 19B(1) is almost exactly the same as Article 5(3) of the *European Union Software Directive*. Both exceptions are narrowly tailored to allow very specific actions necessary for the advancement of technology. Such exceptions are critical for enabling competition in the supply of parts of inputs to standard technology that needs to interoperate with other components.

I 19C, Library uses

We find no reason to amend the library rights in section 19C.

These provisions appear substantially similar to a frequently-referenced international model law to meet the interests of libraries.⁵⁹ Some commenters question the provisions in section 19C(4) and (9) that permit the making available of works in their collection through a "secure computer network", without the requirement contained in some laws that such network be accessed only from the premises of the library. These criticisms were made before the Covid-19 pandemic cut off physical access to libraries around the world. The CAB now appears prescient. Many libraries and educational institutions in the United States, Canada and Europe provide remote access to at least some works via secure computer networks. This right is necessary to promote the rights of all South Africans to information and to education during periods when physical facilities are closed or inaccessible. We find no reason to amend this section.

V International law

The President's letter states that the President refers the Copyright Amendment Bill back to Parliament "so that it may consider the Bills against South Africa's International Law obligations". However section 79(1) of the Constitution permits referral back to Parliament only for constitutional issues. It is possible that in a limited number of highly specific cases a failure to comply with International Law has implications for the constitutionality of a legislative provision. However the President's letter does not explain why any of the reservations on the CAB's compliance with international law raises a constitutional issue, and cites several treaties to which South Africa is not a party.⁶⁰ We nevertheless examine each of the President's reservations and suggest possible amendments to respond to any legitimate concerns we identify.

⁵⁹ See EIFL 2016 https://www.eifl.net/system/files/resources/201607/eifl_draft_law_2016_online.pdf.

⁶⁰ For further discussion of these points, see Samtani 2020 <https://digitalcommons.wcl.american.edu/research/61/31-39>.

A Section 19D, Marrakesh Treaty

We propose that Parliament may add a reference to "authorised entities" in section 19D to clarify the application of the cross-border provisions of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*. We emphasise, however, that we do not conclude that this clarification is required by the Constitution or to implement the *Marrakesh Treaty*.

The President's letter asserts that the Bill may not be in compliance with the *Marrakesh Treaty*, without giving any detail.⁶¹ It has been claimed by some commenters that the CAB does not adequately authorise cross border trade in accessible format copies of works, as intended by the *Marrakesh Treaty*. We disagree.

It is claimed that the Bill does not establish a mechanism for the cross border trade in accessible format copies of works by so-called "authorised entities" – a term used in Article 5 of the *Marrakesh Treaty*. Article 5.1 of the *Marrakesh Treaty* requires that member countries "shall provide" that accessible format copies of works "may be distributed or made available by an authorised entity to a beneficiary person or an authorised entity in another Contracting Party" (emphasis added). Article 5.2 provides that parties "may" meet this obligation through a specific provision of law for authorised entities. But Article 5.3 makes clear that countries do not need such a provision: "A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law".

Section 19D(3) of the CAB promotes cross-border trade of accessible formatted works, including through authorised entities:

(3) A person with a disability or a person that serves persons with disabilities may, without the authorisation of the copyright owner export to or import from another country any legal 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.

Section 19D(3) is adequate to implement the cross border provision of the *Marrakesh Treaty*. By authorising cross border trade by "a person that serves persons with disabilities", the section clearly authorises cross border trade by legal persons, including authorised entities.⁶² If Parliament desires

⁶¹ South Africa is not currently a member of the *Marrakesh Treaty*. However, we recognise that one of Parliament's stated purposes for enacting the CAB is to put in place appropriate domestic legislation in order for South Africa to accede to the *Marrakesh Treaty*. In its current form, we believe that section 19D is constitutionally required as the current *Copyright Act* does not contain any provisions at all to facilitate access to materials under copyright for persons with disabilities.

⁶² The term "person" in South African law includes a legal person - i.e. an organisation.

to make this fact more clear, it could add a definition of "authorised entity" and add the phrase "including an authorised entity" in section 19D(3) after the words "a person that serves persons with disabilities". We emphasise, however, that these provisions are not required to implement the *Marrakesh Treaty*.

B Technological protection measures, WIPO Copyright Treaty

We find that no amendments to the Bill are needed for South Africa to accede to the *WIPO Copyright Treaty* (WCT), including in its definition of a technological protection measure. But, as with the *Marrakesh Treaty*, South Africa is not a party to the Treaty, so compliance with it cannot raise a constitutional concern. Rather, an intent of the Bill is to allow South Africa to accede to the WCT.

The President states that the WCT requires "legal remedies against the circumvention of technological measures used by authors to protect their works", implying that the Bill does not provide such protection. The Bill provides protections against circumventing technological protection measures, defined in section 1(i)(a) as "any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work". This definition is consistent with the *WIPO Copyright Treaty* Article 11, which requires "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used ... in connection with the exercise of their rights". There is no requirement in the *WIPO Copyright Treaty* to protect measures that control access to work for a non-infringing purpose. Accordingly, we find no amendment is needed in response to the President's objections.

Appendix I: Proposed Amendments to the CAB

We offer the following proposed amendments to the Bill to better tailor its provisions to its purposes. As we describe above, we do not find that any of these amendments is constitutionally required.

VI Section 6A, 7A, 8A

Option 1

Add the word "fair" before "share of royalty" throughout sections 7A and 8A.

Option 2

To add further definition of the application of the concept of the fair royalty requirement, including to prospective uses under existing agreements, Parliament could add a definition of a "fair royalty". For example:

Definitions

'Royalty' means a periodic payment based on a percentage or other share of the revenue or sales made from commercial exploitation of a work or performance.

'Fair royalty' means appropriate and proportionate remuneration based on the totality of the circumstances, including:

the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or performance;

market practices, the actual exploitation of the work, and amount normally paid in the particular industry in South Africa and globally;

amounts or ranges determined fair through collective bargaining or a determination by the Minister, if any.

It could also consider replacing the standard for application to works or performances assigned before the commencement date of the *Copyright Amendment Act* (i.e. sections 6A(7), 7A(7), 8A(5)) with language based on the so-called "bestseller" clause in current EU law, described above in footnote 5. For example:

(xx) An author or performer is entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights or to whom the author or performer licensed or assigned his copyright, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the work or performance. Where parties cannot agree on fair remuneration in such a case, any party may refer the matter to the Tribunal for an order determining the fair remuneration.

VII Section 12B(1)(a)

We offer the following amendment as an option to return the "consistent with fair practice" requirement to the quotation right.

- (1) Copyright in a work shall not be infringed by any of the following acts:
 - (a) Any quotation: Provided that—
 - (i) the quotation is compatible with fair practice
 - (ii) the extent thereof shall not exceed the extent reasonably justified by the purpose; and
 - (iii) 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

VIII Section 12B(1)(e), News of the day

We offer the following amendment to remove the exception for uses of news unless the reproduction right is expressly reserved:

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

...

- (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, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;~~
 - (ii) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or
 - (iii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;

IX Translation

We propose the following language be used to replace the current section 12B(1)(f) to better reflect the full range of purposes for which a lawful translation may be made.

- (f) the translation of such work into any language: Provided that such translation is done for a non-commercial purpose, is consistent with fair practice, and does not exceed the extent justified by the purpose.

X Section 19D, Disability

We offer the following amendments to better tailor the CAB to the terms of the *Marrakesh Treaty* designed to enable cross-border exchanges of works.

Definitions

"authorised entity" means an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

Amend section 19D(3) to read:

- (3) A person with a disability or a person that serves persons with disabilities, **including an authorised entity**, may, without the authorisation of the copyright owner export to or import from another country any legal 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, **provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used for other than for persons with disability.**

3 The second Joint Opinion

The second Joint Opinion responds to the Committee's proposed amendments to the CAB having considered stakeholders' submissions from the previous round of public consultation. It addresses the implications of the proposed published amendments as well as the unintended implications of the proposed unpublished amendments that have a material impact on the proposed published amendments. It also provides alternative text to address the concerns raised. This opinion responds to the call for public comments made in late 2021. The opinion with the names of its authors follows below.

Joint Academic Opinion

Re: Copyright Amendment Bill (B-13B of 2017), Proposed Changes November and December 2021

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28 January 2022

Introduction

We offer the enclosed Joint Opinion on the changes to the Copyright Amendment Bill proposed in November and December 2021.

We wish to offer our sincere condolences for the loss of Chairperson Honourable Duma Nkosi and Macdonald Netshitenzhe, former DTI Director of Policy and Legislation. These were two critical leaders in South Africa's effort to enact a more just and equitable copyright law and they will be sorely missed. We also express our condolences for the losses caused by the Parliament fire, including of works in its collections that may not have been adequately preserved.

We thank the Committee for this and the long history of opportunities for public comment on the Copyright Amendment Bill.

We confine our comments largely to those provisions on which the call for comments was made. We also provide some comments on wording that resulted from the previous call or are technical in nature where we believe serious errors or omissions detract from the purposes the changes are meant to promote, many of which are inseparable from the advertised changes. We do not comment on all of the proposed changes.

Proposed Changes to the Copyright Amendment Bill

Amendments related to people with disabilities

Clause 20, section 19D(3)(b)

The proposed section 19D(3)(b) "only" permits export or import of accessible format copies "where such person knows, or has reasonable grounds to believe that the accessible format copy will only be used to aid persons with a disability". The stated purpose of this provision is to align the CAB with the *Marrakesh VIP Treaty*. However, we submit that it does the opposite. The proposed section reverses the *Marrakesh VIP Treaty's* test in Article 5(2), which requires that the provider "did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons" (emphasis added).

The proposed standard places an onerous and near-impossible burden on authorised entities to acquire affirmative knowledge of the end-user. This is not required by the *Marrakesh VIP Treaty*,⁶³ and will likely dissuade legitimate import and export of accessible copies that the Treaty was meant to permit. Moreover, it risks falling foul of the principle of legality under sections 1(c) and 33 of the Constitution as well as the right to equality and non-discrimination under section 9 of the Constitution, as it is an onerous

⁶³ We note that the President did not raise any constitutional concerns about this aspect of s 19D, and that the current *Copyright Act* has been held to be unconstitutional to the extent that it does not make provisions for blind or visually impaired persons. See *Blind SA v Ministry of Trade, Industry and Competition* (14996/21) [2021] ZAGPPHC 871 (7 December 2021).

burden that is placed only on people with disabilities or people serving people with disabilities.

Recommendation

We propose adding the emphasised portions below, using the *Marrakesh VIP Treaty* language, so that section 19D(3)(b) reads:

A person contemplated in paragraph (a) may only so export or import provided that prior to the distribution or making available they did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.

Amendments related to personal copies (requiring that the work must have been lawfully acquired)

Clause 1 - section 1, clause 13 - section 12B(1)(i) and (3)

The proposed amendments would change sections 1 (by inserting a definition) and 12B(1)(i) to limit copying for personal use to works "lawfully acquired", defined to exclude copies from works "borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy".

The proposed restriction would forbid common usages that most laws, including the current section 12(1)(a) of the *Copyright Act*, permit, including:

- making a personal use copy from a library, archive, or other public collection;
- recording from a public broadcast;
- making a private copy from a source in which access is licensed, such as through a journal or media subscription service.

Many of these activities are permitted under the current law allowing fair dealings for personal and research purposes – prohibiting them is retrogressive.⁶⁴ To the extent that there is a concern about duplication, then "personal use" should be retained in section 12A(a) where it is restricted by the fair use balancing test in section 12A(b).

Recommendation

Retain personal and research uses as an explicit example of a lawful purpose for fair use in section 12A(a).

⁶⁴ For example an Internet service provider makes one or more copies of a webpage to display it to someone so that they can read it. Millions of such copies are made in South Africa at present without any authorisation in the *Copyright Act*, without any evidence these affects the interests of authors.

Replace the phrase "lawfully acquired" with "lawfully accessed" in Section 12B(1)(i), leaving courts free to define lawfully acquired.

Amendments related to technological protection measures

Section 1

Definition of "technological protection measure"

It is proposed to amend the definition of technological protection measure to remove paragraph (b), which makes clear that the definitions "does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes". This amendment is not required by international law and would have harmful effects.

The treaties to which South Africa plans to accede, *WIPO Copyright Treaty* (WCT), and the *WIPO Performances and Phonograms Treaty* (WPPT), that refer to technological measures explicitly exclude acts "permitted by law" from any prohibition of circumvention of technological measures. Paragraph (b), quoted above, took advantage of this flexibility in international law. The proposal would give up this flexibility. The flexibility is important to allow the circumvention of digital locks for lawful means – e.g. to make a copy for classroom use or to quote in a documentary film.⁶⁵

Recommendation

Retain the following part of the definition of technological protection measure, and add "product", to confirm with the rest of the section:

(b) does not include a process, treatment, mechanism, technology, device, product, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes

"technological protection measure circumvention device or service"

It is proposed to expand the definition of technological measure to include a device or service that has a mostly non-commercial use, such as enabling access by disabled persons or non-profit education that can also be used to circumvent technological protection measures. But circumvention of TPMs (technological protection measures) is often required for lawful commercial purposes, such as quoting a film in a documentary or television

⁶⁵ These changes do not appear in the December 8 document from Parliament entitled "Wording for all amendments" but only in the document of 24 November 2021.

program. It is also proposed to prohibit a device or service advertised as circumventing technical protection measures in the definition.

Note 18 of the proposed changes to the CAB circulated for comment on 24 November 2021 states that the expansion of the definition is required to "align the wording with treaty wording". However none of the treaties to which South Africa is a party or seeks to be a party, including the WCT and WPPT, contains such wording.

Recommendation

Do not expand the definition of "technological protection measure circumvention device or service".

Section 280

It is proposed to replace the phrase "has reason to believe", which requires intention, with the phrase "should reasonably have known", which imposes criminal liability based on negligence, in section 280(1) and section 280(2)(b).⁶⁶ The result would be to criminalise many more actions than the current wording. Using negligence as grounds for criminal liability will make it much more dangerous for people who want to engage in a lawful use, and must circumvent a digital lock to do so.

The treaty provisions applicable to technological protection measures do not require criminalisation of circumvention, much less doing so based on a negligence standard. Leading jurisdictions such as Canada do not criminalise circumvention.⁶⁷ Section 23(2) of the 1978 *Copyright Act* sets the standard for secondary infringement as "to his knowledge". This requires actual knowledge and thus provides an appropriate standard without imposing negligence.

Recommendation

Delete "has reason to believe" but to insert "to his knowledge" in section 280(1) and (2)(b).

As an alternative, parliament may consider having only civil penalties for circumvention.

⁶⁶ Although s 28P contains a defence to the offences relating to digital locks it is too narrow to protect all lawful uses, it only protects acts involving circumvention devices or services whereas acts that do not involve circumvention devices are criminalised and it is limited to exceptions and not all lawful acts. The second part of the definition is required to protect lawful acts from criminalisation.

⁶⁷ See s 41 of the Canadian *Copyright Act* (RSC, 1985, c C-42) (treating circumvention as an infringement of copyright subject to an interdict or damages).

Amendments to make the fair use factors applicable to exceptions in sections 12b, 12c, 12d, 19b and 19c

Clause 13 - section 12A

It is proposed to remove mention of several purposes from the fair use clause which are addressed in other sections and to make the exceptions in sections 12B, 12C, 12D, 19B and 19C "subject to the principle of fair use, determined by the factors contemplated in paragraph (b)".

We advise parliament to retain the mention of the excluded purposes of education, research and scholarship in fair use, because fair use is intended to apply as a supplement to specific exceptions.

Section 12A(a), Removal of illustrative purposes regarding research, private study and personal use; scholarship, teaching and education; and libraries, archives and museum use

Specific exceptions provide clarity and certainty for defined uses. The value of fair use is to provide flexibility, including for approving of uses that are fair to the rights holder and valuable for society but do not fall within specific exceptions. To serve this purpose, it is most useful to define fair use as a supplementary exception that applies independently of specific exceptions, including to uses in the same general category of, but not addressed by, such exceptions. United States law, for example, provides that nothing in the specific exception for library uses "in any way affects the right of fair use as provided by section 107".⁶⁸ Singapore's recently amended *Copyright Act* likewise includes fair use and explicitly provides that permitted uses are to be applied independently of one another.⁶⁹

Removing some of the identified examples of fair use purposes could inhibit courts from correctly applying fair use "in addition to" the specific exceptions, as the first words of section 12A require. It is not necessary to avoid the mentioning of permitted purposes for fair use that are also covered in specifically defined exceptions. US law, for example, provides a specific exception for performance and display of works in education (17 USC 110)

⁶⁸ This proposed change is marked in blue as a proposal advertised for comment in the document advertised on 24 November 2021.

⁶⁹ The Agreed Statement concerning Article 5(2) at fn 7 of the *Marrakesh Treaty* specifies that authorised entities may voluntarily adopt their own practices to ensure that the work reaches the end user. In particular, the Agreed Statement read with Article 5(2) has been interpreted to mean that States must not impose onerous due diligence obligations upon authorised entities in this regard as that would inhibit cross-border exchange of works and hamper the functioning of the Treaty. See Helfer *et al World Blind Union Guide* 138.

and also defines "teaching (including multiple copies for classroom use)" as a permitted purpose for fair use in section 107.

The sections of the CAB that the proposal mentions as "duplicative" do not provide the same scope of applicability as fair use. Fair use is applicable to any exclusive right, of any work, by any user, as long as that use meets the fairness test. Each specific exception is much more limited:

- Section 12B(1)(i) does not apply to "research", only permits a "copy" not a "use", and only applies to a natural person. So limited, it would not, for example, permit individuals or organisations to engage in text and data mining research (aka computational analysis).⁷⁰
- Section 12D authorises only "reproduction" and "broadcast" of works, and thus fails to authorise the uses (including communications of works) essential for online schooling.
- Section 19C is cabined to library, archive and museum "activities in accordance with subsections (2) to (13)" and requires that "the work is not used for commercial purposes". These restrictions fail to authorise many fair uses of works, such as providing copies to a local business or making research corpuses for text and data mining research.⁷¹

Recommendation

1. Retain the purposes of research, private study and personal use; scholarship, teaching and education; and libraries, archives and museum use as illustrative examples of fair use.
2. Add after "research", "including computational analysis".

Section 12A(d), applying fair use to sections 12B, 12C, 12D, 19B and 19C

Section 12A(d) appears to require that the four-factor fair use test be applied in addition to the carefully drafted internal limitations that exist in sections 12B, 12C, 12D, 19B and 19C. This could cause great confusion by the courts.

⁷⁰ Text and data mining is the process of using computational research to analyse a corpus of works, which is the first step toward creation of artificial intelligence programs, these uses are examples of computational analysis. See ss 243-244 of the Singapore *Copyright Act*, 2021.

⁷¹ For an example of a library program explicitly designed to assist businesses, see New York Public Library 2022 <https://www.nypl.org/about/locations/snfl/business> ("offering an array of free resources, including premium electronic resources and services for businesses of all sizes, from start-ups to established businesses seeking expansion, and for job seekers").

The traditional ways to define the boundaries of limitations and exceptions are through a definition of the fairness of the purpose and extent of a use in relation to the rights holders interests. In the specific exceptions in sections 12B, 12C, 12D, 19B and 19C, the scope is limited through internal conditions, such as "fair practice" and "to the extent justified by the purpose". Adding the fair use factors to these existing statutory conditions stacks tests with equivalent purposes on top of one another. This will likely cause confusion. Each exception should have one, and only one, framing of a fairness test setting the boundaries of the exception.

Recommendation

Amend the proposed section 12A(d) to read:

Nothing in Sections 12B, 12C, 12D, 19B and 19C in any way affects application of the principle of fair use, determined by the factors contemplated in paragraph (b).

Amendments related to adding the wording of the three step test

Clause 13 – section 12C and 12D

It is proposed to amend section 12D and 12C to insert modified versions of the "three-step test" found in the *Berne Convention*. The three-step test is a principle of international law used to assess domestic law. Its inclusion in domestic law is not required and is rare in copyright laws around the world. It is inappropriate as a standard to set the boundaries of exceptions when combined with other internal limitations that serve the same purpose.

Section 12C

Section 12C permits the making of transient copies, a mundane feature of the automated systems that enable the Internet to operate.⁷² The making of transient copies is an extremely limited action for a very limited purpose, thus the section has sufficient internal restrictions and the three step test is unnecessary. Importing the three step test into the *Copyright Act* adds yet another test to those already in the *Copyright Act* and to be inserted by the Copyright Amendment Bill which may lead to confusion.

Recommendation

Delete proposed subsection 12C(2).

⁷² 17 USC 108(f)(4): "Nothing in this section— ... (4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections."

Section 12D(1), (8) and (9)

It is proposed to add both a fair practice requirement and the three step test to the right to make educational reproductions in section 12D(1), (8) and (9).

Section 12D(1)(a) authorises the making of copies and broadcasts for educational and academic purposes, and is subject to a number of restrictions set out in (2) to (5) and (8). As discussed above, it is important that this section apply to "uses" not only repercussions, including to authorise communications needed in online learning.

The *Berne Convention* stipulates in Article 10(1) that "extent justified the purpose" and "fair practice" are the appropriate restrictions for educational uses. Sections 12D(1)(c) and (d) propose to add additional limitations contained in the three-step test from Article 9 of the *Berne Convention*. Adding the three-step test in addition to the fair practice test is an example of test-stacking that is duplicative, and will likely cause confusion.⁷³

Adding a fair practice requirement in section 12D(1) is duplicative since it is applied in subsection 12D(8)(a).

Recommendation

Delete proposed sections 12D(1)(a)(b)(c) and (d).

In section 12D(1), change "reproduction" to "use", and add after "activities": "including in the cases stipulated in this section".

Removal of duplication – advertisement recommended

Clause 20 – section 19C(4)

The proposed change to section 19C(4) would remove the words "for commercial purposes" because 19C(1) already prohibits uses under the section for commercial purposes so it is duplicative. However the effect is to create an unanticipated prohibition on copying in a subsection not intended to deal with copying. Section 19C permits a library or archive to permit a user to view or listen to an audiovisual work. It originally prohibited making a copy for commercial purposes. Merely removing the words "for commercial purposes" leaves the words "but may not permit a user to make a copy or recording of the work". According to the parliamentary record this is not the result of a policy decision. This is likely to have unanticipated effects because it would prohibit libraries and archives using innovative technologies, for example streaming an audio visual work to a user's device, which make technical copies of the work. It can also create confusion in

⁷³ Section 184 of the Singapore *Copyright Act*, 2021.

respect of copies permitted in the remainder of Section 19C. The prohibition on copying is unnecessary since the authorisation is already limited to permitting "a user to view" – which does not include an authorisation to copy.

Recommendation

Remove the entire phrase "but may not permit a user to make a copy or recording of the work for commercial purpose" from section 19C(4).

Removing duplication, changing wording to be more similar to Treaty wording / section 12(4) of the Act (in respect of moral rights)⁷⁴

Clause 13 – section 12B

Section 12B(1)(d)(ii) and (iii)⁷⁵

The proposal will add a fair practice requirement to exceptions which permit reproduction for reporting of current events and of speeches to the public. This is not required by the *Berne Convention* which creates a specific exception for this use, not subject to fair practice nor the three step test, since this is such an important function for a democracy. Since section 12B(1)(e)(ii) and (iii) contain their own internal restrictions that limit the use and the CAB aims to increase access to information the unnecessary restriction of fair practice should not be applied.

Recommendation

Do not add fair practice requirements to section 12B(e)(ii) and (iii).

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⁷⁵ See WIPO *Guide to the Berne Convention* 59 (explaining that the "fair practice" requirement "is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales and circulation, etc..").

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List of Abbreviations

CAB	Copyright Amendment Bill
CRC	Copyright Review Commission
DTI	Department of Trade and Industry
DTIC	Department of Trade, Industry and Competition
EIFL	Electronic Information for Libraries
EU	European Union
LIASA	Library and Information Association of South Africa
NCOP	National Council of Provinces
PMG	Parliamentary Monitoring Group
PPAB	Performers Protection Amendment Bill
USTR	United States Trade Representative
WCT	WIPO Organisation Copyright Treaty
WIPO	World Intellectual Property Organisation
Wits	University of the Witwatersrand
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation
WTO TRIPS Agreement	World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights