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Ms J Fubbs
Chairperson: PC on Trade and Industry
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BY E-MAIL

Attention: Mr A Hermans
e-mail: ahermans@parliament.gov.za

Our Ref: CM3000564/HGB
Date: 07 July 2017

Dear Sirs

THE COPYRIGHT AMENDMENT BILL [B13-2017]

We refer to the Copyright Amendment Bill [B13-2017] which was published on the parliamentary website on 17 May 2017.

Spoor & Fisher is an Intellectual Property Law Firm which has been in existence since 1920. Our attorneys deal with matters pertaining to Copyright Law on a daily basis. Spoor & Fisher has no interest or stake in South African Copyright Law, other than to ensure that what becomes law is good law and from a practical perspective workable and enforceable.

Before turning to the specific clauses as contained in the Copyright Amendment Bill, 2017 (hereinafter referred to as "the Bill"), it is perhaps prudent to refer to an issue of a more general nature. South African courts have on various occasions pointed out that Copyright is a technical subject. To illustrate this, we set out below two relevant quotes from judgments, the citations for which are set out in the footnote below:

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*“Copyright is a **technical** subject. In my view it is essential that a person who claims to be the owner of a whole or partial copyright should offer evidence ... to cover the **technical** points necessary to establish his claim”.*

and

*“Because the subject of copyright is a **technical** one it is understandably important that the court should be properly apprised of the relevant facts from which inferences as to the existence or otherwise of rights are sought to be drawn by a litigant. For the litigant himself to draw conclusions and then to present these conclusions as facts, without laying the forecourt the factual basis from which the inferences are so drawn, in a field as **technical** and specialised as this, is, in my view a procedure not to be countenanced”.*¹

Against this backdrop (i.e. that Copyright is a technical subject), it is of the utmost importance in order for amendments to the Copyright Act to become good law that the same technical approach and attention to detail be given to the Bill. As a result of the far-reaching and devastating consequences which inconsistencies and contradictions between the existing Copyright Act (no. 98 of 1978) and the Bill may cause there is, with respect, much work to be done on the Bill before it can ever be considered for promulgation.

We request that serious consideration be given to our submissions below.

1. **Ad clause 1(a)**

We find the definition of “Accessible Format Concept” somewhat confusing. In the event that the meaning to be ascribed to the definition is that a work that has been created may be reproduced into a format that enables a person with disability to “access” the work, perhaps this definition should, rather, read as follows:

¹ **Vagar (t/a Rashree Release) v Chance Avalon (Pty) Ltd t/a Avalon Cinema** 1977 (3) SA 766 (W); **Video Rent (Pty) Ltd and Another v Flamingo Film Hire** 1981 (3) SA 42 at 43 A-B; **Payen Components SAL Ltd v Bovic CC and Others** 1995 (4) SA 441 (A) at 450G; **Fichtel & Sacks Aktiengesellschaft v Road Runner Services Ltd** 174 JOC (W) at 180

““ Accessible Format Copy” means a reproduction of a work in a format which gives a person with a disability access to the work ...”

2. **Ad clause 1(b)**

The term “Audio-Visual Fixation” is not defined in the Performers Protection Act 1967 (Act No. 11 of 1967) although it is defined in the Performers Protection Bill. However, the term “Fixation” is defined in the Performers Protection Act. The word “Audio-visual” should therefore be defined in this Bill as well as “Fixation”, having the meaning ascribed to in the Performers Protection Act. We refer to what is set out in clause 1.10 below.

3. **Ad clause 1(d)**

It would be our recommendation that, when referring to the Companies Act, reference be made to amendments to the Companies Act and any legislation that may replace the Companies Act.

4. **Ad clause 1(d)**

In the definition of “Copyright Management Information” a distinction is drawn between the “author” of a work and the “copyright author”. The distinction should, rather, be between the “author” and the “copyright owner” (as opposed to “copyright author”).

5. **Ad clause 1(g)**

The definition of “Person with Disability” refers to a person with a “perceived” impairment. We would recommend that the words “... perceived or actual ...” be removed and that this clause reads as follows:

“A person who has a physical, intellectual, neurological or sensory impairment ...”

It would then be open to the Court to decide whether or not a “perceived” impairment constitutes an “actual” impairment.

6. **Ad clause 1(h)**

The definition of “Technological Protection Measure” should be corrected in order to read as follows:

*“... is designed to prevent or restrict **an** infringement of **a** work ...”*

7. **Ad clause 2**

Inclusion of “Tables and Compilations” in Section 2A should be deleted and, rather, the definition of “Literary Work” in Section 1 should be expanded. The definition of “Literary Work” in the existing Copyright Act at (g) includes tables and compilations. In our view the proposed amendment should be endorsed as it clarifies and codifies what could be an untenable position.

8. **Ad clause 4(c)**

The proposed amendment to Section 6 by including the proviso is confusing. While we understand the desire to protect authors of literary and musical works, the reference to “user, performer ... (and) producer” is unfortunate. The “user” of a work would surely not be entitled to claim a royalty of the work for the use of the work. By way of example, should we “use” a computer programme owned by Microsoft, we do not acquire any rights to that work. The “performer” would be entitled to claim his/her royalty pursuant to the provisions of the Performers Protection Act and the “producer” would only be entitled to claim a royalty should the “producer” be the author of the work as envisaged in clause (c) of the definition of Author in Section 1 of the Copyright Act or as contemplated in Section 21 of the Copyright Act.

7.1 The further issue that could arise would relate to a situation where, for specific commercial reasons, it is necessary to transfer the copyright in a work and for a “buy out” to apply. By way of example, should an advertising agency be commissioned by a company to create an advertisement for that company, notwithstanding the fact

that the advertising agency has been paid by its client (the company) and the copyright has been transferred to the client, that advertising agency would still be entitled to claim a royalty both for the “jingle” and the actual words of the advertisement. If the advertisement is produced into a visual advertisement for television, there would be at least three “works”: the literary work (the words of the advertisement), the musical work (the tune of the advertisement) and a cinematograph film.

9. Ad clause 5(c)

We refer to what has been set out in relation to paragraph 4c (clause 1.8 above) above. Could there, in reality, in addition be a “performer” of an artistic work? By way of example, how could a painting, sculpture, drawing, engraving or photograph (or for that matter any other artistic work) be “performed”? We are also struggling to imagine the situation where a “producer” would be involved in an “artistic work”. Therefore, reference to “user”, “performer” and “producer” should be deleted.

9.1 We also refer to what has been set out in clause 7.1 above which would be equally apposite to a visual advertisement in a magazine. The author of either a photograph or a drawing, should the proposed amendment be accepted, would always be entitled to claim a royalty on the advertisement and a buy-out by the company would not be possible. A similar situation would arise with a trade mark that has a design: the company commissioning the design of the trade mark would always have to pay a royalty to the author of the design each time the trade mark is used and would not be able to effect a “buy-out” of its own trade mark.

10. Ad clause 6

In the amended section 8, reference is made to “Fixation”. As “Fixation” is defined in the Performers Protection Act, we would recommend a specific definition in the Copyright Act defining “Fixation” as the meaning ascribed to it in the Performers Protection Act.

11. Ad Proviso to section 8

Insofar as the proviso is concerned, we refer to what has been set out above regarding reference to the “user” and “performer”. Furthermore, the issue of the producer should be dealt with under the definition of Author, alternatively it should be dealt with in accordance with the provisions of Section 21(c) where the commissioning of a work is dealt with and, perhaps, reference could be made there to the producer. Once again, the prevention of a “buy-out” of the cinematograph film may well have a negative economic impact.

12. Ad clause 8

The obligation in Section 9A to obtain a licence should not be obtained from the copyright user, author or producer but, rather, from the copyright owner, collecting society, indigenous community or community trust, as the case may be.

12.1 If one has regard to the acts in respect of which one will be obliged to pay a royalty, these are for the broadcast of the sound recording, the transmission in a diffusion service of the sound recording or to communicate the sound recording to the public, it is difficult to understand how the authority can be obtained from the “user”.

12.2 Furthermore, the introduction to Section 9A is particularly relevant: the royalty (correctly it is submitted) is payable, in terms of the Copyright Act, to the owner of the relevant copyright. The rights of the performer should be obtained from the Performers Protection Act.

12.3 It is submitted that all reference to “user, performer, author and producer” being the entities to whom the request for authority must be submitted contradicts proposed Section 9A(1). Correctly, the authority must be obtained from the copyright owner or the copyright owner’s representative, be it a collecting society, community trust, indigenous community or national trust, as the case may be.

- 12.4 An individual who is employed by a company and is responsible for the arrangements for the making of the sound recording will be the “author” of the work. The owner of copyright, however, will be the company for whom that individual works. The proposed amendment to Section 9A(1)(aA) *et seq* will mean that the permission of that individual employee will be required as well.
- 12.5 Similarly, if one has regard to the wording of the aforementioned proposed sections, the individual who is going to be communicating the sound recording to the public (the user) will have to obtain permission from “*the user of copyright*”. This really makes very little sense.
- 12.6 Proposed Section 9A(2)(a) has a similar problem as that referred to above regarding Section 9A(1)(a). However, this issue is exacerbated by the proviso. The proviso, with respect, makes no sense. The first portion of the proviso provides for a sharing between, on the one hand, the copyright user (we are not sure why the user should be getting a royalty). In addition, it refers to the “performer”, on the one hand, who will be sharing it with the “performer” on the other hand. As set out, this proposed amendment makes very little sense.
- 12.7 The proviso has a further complication as drafted in that it refers to a royalty payable for the “*use of a sound recording ...*”. Is this the same “use” contemplated in Section 9(c), (d) or (e)? If so, that should be stated and if not, the “specific use” should be referred to.

13. **Ad clause 9**

The resale royalty rights of an artistic work should entitle the author of the artistic work (author as defined in Section 1 of the Act) to receive the resale royalty. This is in accordance with the provisions of proposed Section 9B(1). Once again, the reference to “user”, “performer”, “owner” and “producer” is unfortunate. We are struggling to understand who the “user” or “performer” of the artistic work could be. In this regard, we refer to what has been set out above in regard to “user” etc.

13.1 With respect, Section 9B(4) makes very little sense. Section 9B(4)(a) essentially reads as follows:

“A resale royalty applies whether or not the author is or was the first author of any copyright in the work”.

Surely reference to this should be “owner” as supposed to “author” of the work?

13.2 This, however, as set out above, will create massive challenges when dealing with artistic works created in the commercial realm. By way of example, should company A appoint a designer to create a trade mark consisting of an artistic work, the ownership of that trade mark would always be subject to the right of the author (as opposed to the owner) obtaining a royalty payment should that trade mark ever be assigned. It is submitted that, even should reference be changed from “copyright author” to “copyright owner”, this will not resolve the anomaly that would be created by the proposed amendment.

13.3 It is submitted that some limitation needs to be set on the resale royalty rights for an artistic work.

13.4 Section 9C(1) correctly sets out the presumption that, should a name or mark purporting to identify the author be on the work, there would be a presumption that that person is the author of the work. It is difficult to contemplate how the name purporting to identify the author of the work could identify the “user”, “performer”, “owner” or “producer” of the work. The presumption should relate only to the author. Similarly, Section 9C(2) should only refer to more than one author of the work as opposed to more than one “performer”, “owner”, “producer” or “user” of the work.

13.5 Proposed Section 9D, similarly, refers to “user”, “performer”, “owner” and “producer” where it should only be referring to the “author”. This argument is

enforced by the fact that the resale royalty right subsists for a period of 50 years from the death of the author.

- 13.6 The conflation of the “author” of the artistic work and the “owner” of the artistic work is exemplified in proposed Section 9F(2). One cannot, we submit, bequest “authorship” of a work. One can only bequest “ownership” of the artistic work and, by virtue of the amendment, the entitlement to claim a resale royalty as envisaged in proposed Section 9F.

Ad clause 9(E)

- 13.7 The blanket prohibition of the waiver or resale of a royalty right is unfortunate and may well create commercial problems. In any event, Section 9F(2) requires an amendment to the drafting. If this clause is to remain and make any sense, it should read along the following lines:

“In the case of a bequest of ownership of copyright in an artistic work by an author who did not transfer such ownership ~~authorship~~ of that work ...”

We also do not understand the intention or meaning of the proviso.

Ad clause 9F(4):

- 13.8 The resale royalties will be recoverable by a collecting society and/or the indigenous community, and not always both. The word “or” therefore should be included after the word “and”.

14. Ad clause 10 – Section 12(1)(iv)

The proposed amendment extends so-called “fair dealing” / “fair use” to “scholarship, teaching and education”. Scholarship, teaching and education have in recent times, particularly through private institutions, become an immensely lucrative and profitable

business. To extend fair use across the board to all types of scholarship, teaching and education will likely be prejudicial to the interests of authors who would otherwise be entitled to earn an income from the use of their works, e.g. through sales or royalties thereof. It can certainly not be justified to allow students and/or institutions who can afford paying for new books and other relevant teaching material protected by copyright to enrich themselves at the expense of the authors. The concern also exists that this provision may disincentivise authors from creating new books that may be intended for teaching, education and/or academic purposes.

15. Ad clause 10 – Section 12(1)(vii)

The fair use / fair dealing provision is also extended to “expand access for underserved populations”. The phrase “underserved populations” is, however, not defined by the Amendment Bill and accordingly leaves the provision open to possible abuse for its vagueness. It is recommended that the phrase “underserved populations” be clearly defined so as to set specific parameters on who and in what circumstances deserving candidates may have the benefit of this provision.

16. Ad clause 11 - Section 12A(1)(f)(ii)

This clause may also need some consideration. The entitlement of an entity to translate a work for educational, “teaching” purposes is problematic in our view.

17. Ad clause 11 - Section 12B

The objective of this provision seems to be the removal of any possible objection based on the trade in grey goods that exists in copyright law. If this is indeed the intention, we submit that this provision does not make it clear enough and may clash with the provisions of Section 23(2) of the Copyright Act as it currently stands. Section 23(2) provides for the possible remedy to object to the trade in grey goods / parallel imports on the basis of a hypothesis. We recommend that the possible amendment of Section 23(2) of the Copyright Act as it currently stands rather be considered to align with the draughtsman’s intention

and to ensure that there are no contradictory provisions between what Sections 12B and 23(2) provide for.

18. Ad clause 12 - Section 13B(1)

18.1 This provision is highly problematic in that it offers a blanket right to “any person” to copy any work if it is for the purpose of educational and academic activities. We have already made reference above to the highly profitable nature of certain educational and academic activities and it can certainly not be the intention of government to advance the interests of such persons at the expense of authors’ interests.

18.2 The provision provides that such copying may not “exceed the extent justified by the purpose”. This phrase is, however, not defined by the Amendment Bill and is therefore also left open-ended. In our view, there are ways and means to ensure that persons who cannot afford study material can be granted access to protected works so as to use it for educational or academic purposes. However, the open-ended nature of this provision greatly prejudices and disincentives authors.

19. Ad clause 12 - Section 13B(2)(a)

This provision suggests that “educational establishments” may no longer have to clear copyrighted (i.e. pay for the right to reproduce protected works) subject-matter which they wish to include in their course packs, study packs and related teaching material. In our view, no justifiable reason exists why educational establishments should not continue to pay royalties to deserving authors for the reproduction of their works, as they have done in the past. Protected works may now be exploited by educational establishments without any benefit to the authors of the protected works which seems unfair.

20. Ad clause 12 - Section 13B(3)

20.1 This provision seemingly permits plagiarism. To allow a person to incorporate portions of works in assignments, portfolios and dissertations etc. without any further requirements or conditions leaves the provision open-ended. We submit that the Copyright Act as it stands already makes provision for the use of quotations, subject to certain qualifications (e.g. of acknowledging the author and source etc.) but to simply state that portions of works may be incorporated in other works and leave it at that again invites abuse.

20.2 Generally speaking, the provisions introduced under Section 13B are prejudicial to the authors of works in every respect. It is not clear why such limitations should be put on copyright, when the amendment bill in so many other respects seeks to improve the authors position.

21. Ad clause 17 - Section 19B(1)

The provisions of this section appear redundant. Any person is already entitled to “reverse-engineer” computer programs, in the absence of contractual restrictions.

22. Ad clause 17 - Section 19B(2)

The term “indispensable” in the provision does not make sense. We wonder whether the term “unavoidable” may have been intended.

23. Ad clause 20 – Section 21

23.1 The proposed amendment ends with the proviso that “the author of a work shall have a licence to exercise any right which by virtue of this Act would, apart from the licence, be exercisable exclusively by such author”. With all due respect, the proviso does not make sense. It is unclear what is intended with the proposed amendment.

23.2 The proviso also appears problematic, from the sense we are able to make thereof, in that the author of a work, the copyright of which is owned by the commissioning party, will have a licence to use the work. In this respect, Section 21(c) of the Amendment Bill generally allows sub-licencing, which may become problematic and disadvantageous to the interests of the commissioning party herein. Generally, the owner of copyright is the only party who may grant licences in respect of any exploitation of its work. To allow the author of a work which no longer owns copyright therein to either exploit the work himself, or sub-licence others to do so, generally conflicts directly with the principle that granting a licence falls within the exclusive rights of the owner of the copyright. In the circumstances, we recommend that the proviso to Section 20(1) be deleted.

24. Ad clause 21(a) – Section 22(1)

The Amendment Bill introduces a proviso that prohibits the state from assigning its own copyright. It is not clear why the state should be restricted from commercially exploiting, as it may wish to do, its own copyright, which includes the sale thereof through an appropriate transaction. We recommend that this proviso be deleted.

25. Ad clause 21(b) – Section 22(3)

25.1 The Amendment Bill introduces a proviso that assignments of copyright will only be valid for a period of 25 years from the date of the assignment. With all due respect, we consider this proviso highly problematic and recommend that it be deleted from the Amendment Bill.

25.2 Firstly, the Amendment Bill does not state what happens with the copyright after the period of 25 years since the assignment has occurred. Does it automatically revert back to the author of the work? If so, this should be expressly provided for.

- 25.3 Secondly, the principle of freedom to contract should remain a fundamental principle in copyright law. There exists no justifiable reason why parties' freedom to contract must be limited by statutory interference. As long as the agreement is legal, it should be permitted.
- 25.4 Situations are easily conceivable where persons / businesses may have invested heavily in the creation of works for their sole use in which independent third parties (contractors) may have been involved. It is then only fair for such persons / businesses to own the copyright which was created in pursuance of their investment. In the event that third party contractors may have assigned their copyright to the persons / businesses in return for their efforts and payment in respect thereof, that should be the end of it. It will only create unnecessary disputes if such assignments are valid for 25 years only; after which the situation as the Amendment Bill currently stands is unclear.
- 25.5 Further situations may arise where, for example, independent / third party graphic designers may have created artistic works such as logos for businesses which are then used by the businesses and possibly even registered as their own trade marks. After the period of 25 years from which the independent graphic designer may have assigned the copyright in the artistic works to the persons / businesses, it is easy to imagine how the businesses may lose their copyright in their logos, which may then be used and/or licenced by the original graphic designer at their behest. There are numerous other similar situations which can be conceived of that will render the proviso that copyright assignments only be valid for a period of 25 years problematic.

26. Ad clause 22 – Section 22A(2)

- 26.1 The steps which must be taken by an applicant in respect of orphan works are likely to be so burdensome and costly that compliance therewith may be unlikely. The effect is that applicant's will likely have lost interest in using possible orphan works or will proceed to use them in disregard of the requirements.

26.2 The requirements set by Section 22A(2), i.e. that notice must be published in the Gazette and in an English and other official language in two daily newspapers having general circulation throughout the entire South Africa may be so expensive and time consuming as to render this provision particularly problematic. Consideration should be given to deleting this requirement and to rather accept less burdensome and expensive means as sufficient attempts made at locating the rights holder(s) of an orphan work.

27. Ad clause 22 – Section 22A(7)

27.1 This section refers to “the author of the copyright” or as the case may be, his or her heirs, executors or legal representatives that will be entitled to the royalty paid in respect of orphan works. The proposed section is problematic in light of two underlying fundamental principles.

27.2 Firstly, it is incorrect to refer to “the author of the copyright”. A person is rather the author of any of the types of work which may be protected by copyright, but not the author of the copyright itself. In this respect, we submit that it is more correct to refer to “the author of the work”.

27.3 Be that as it may, we similarly believe that the reference to “author” in this provision is incorrect as it should rather refer to the owner / rights holder of the copyright. It is ultimately the owner of copyright that is entitled to licence a work and the royalties that may flow therefrom. Whilst the author of a work and owner of the copyright in that work may, and often is, one and the same person, it is not necessarily always so. In order to render the proposed section legally correct, we believe that reference to “the author of the copyright”, should rather be replaced / substituted with “the owner of the copyright”.

28. Ad clause 22 – Section 22A(8) and (9)

For the reasons outlined above, we reiterate that the reference to “copyright author” and/or “author of an orphan work” is not legally correct as it is rather the owner of copyright which is entitled to compensation for the possible assignment and/or licencing thereof. In both instances, we submit that it would be correct to rather replace references to “copyright author” and “author of an orphan work” with “the owner of copyright”.

29. Ad clause 23 – Section 22D(1)

29.1 The reference to a collecting society or community trust that is subject to the control of “the users, performers, owners, producers or authors of rights under this Act”, appears problematic. It can simply not be the intention to make a collecting society subject to the control of the users of the works which it is entitled to licence. Instead, the collecting society should rather be intended as a facilitator of the rights owned by the rights holders which it represents. It must ultimately be its aim to protect the interests of the authors of the works and/or owners of the copyright subsisting therein and make it convenient to the public at large to administer the granting of licences etc.

29.2 In the circumstances, we doubt whether it is correct to make any reference to “users”, “performers” and “producers” in the context of this section and elsewhere in the amendment bill. It is ultimately only the owner of copyright which can permit third parties to perform what would otherwise be restricted acts in terms of the Copyright Act. As a result, we submit that it is correct rather to limit the scope of whose control a collecting society must be under to the “owners” of the copyrights in the works that are administered.

29.3 We submit that the same principle should apply in each instance where reference is made to “users, performers, owners, producers or authors of rights” in the course of the amendment bill.

30. Ad clause 23 – Section 22F(1)

30.1 For the same reasons mentioned above, we submit that the reference to “interests of the authors of rights” should rather read “the interests of the owners of the copyright in the works”. The distinction might be a fine one, but is necessary. In copyright, it is the owner of the copyright which is entitled to, for example, licence a work and the person who is entitled to receive compensation (e.g. by way of royalties) in return. As intimated above, an author and the owner of copyright are often one in the same person, but there are exceptions provided for both in the Copyright Act and other exceptions include situations whereby authors assigned their copyright to third parties.

30.2 The same amendment should be made throughout Sections 22F(2) and (3) where reference is made to “authors of rights” to replace the word “author” with “owner” and the section to read “owners of rights”.

31. Ad clause 24 – Section 23(1)(c)

It is generally only the owner of copyright which is entitled to receive compensation (by way of a royalty fee) for the exploitation of that work. It is not a performer of the work under copyright which is entitled to a royalty fee and the same applies to the producer and/or author. As a result, we submit that it is legally correct to delete references to “performer”, “producer” and “author of copyright” from this section and to retain only the “owner of the copyright” as the person who is entitled to a royalty fee.

32. Ad clause 24 – Section 23(1)(d)

31.1 This section is presumably intendeds to provide “teeth” to the authors of artistic works to be able to enforce their resale royalty right. In the event that this is the intention, we propose that the wording of this section rather be amended to read:

Copyright shall be infringed by any person who omits to pay the author of an artistic work a royalty fee as prescribed by this Act as and when the artistic work is disposed of in a commercial resale.

32.2 It is perhaps necessary to mention again that the reference to “an artistic work” which is subject to the resale royalty right is no doubt so broad as to render it problematic. We understand that the intention of the resale royalty right is aimed at compensating authors of certain types of artistic works such as paintings, portraits, sculptures etc. However, the definition of artistic work as it is contained in the Copyright Act is so broad as to include, for example, architectural drawings and three-dimensional buildings. The effect of a resale royalty right that extends to all artistic works may be that in each instance where a property with a structure on is sold both the architect and/or the construction company will be entitled to a resale royalty each time that property is sold. In the circumstances, we again submit that it may be more appropriate to clearly delineate the specific types of artistic works to which the resale royalty right will apply.

33. Ad clause 24 – Section 23(1)(e)

The meaning of this provision is by no means clear and it is not apparent what the intention is therewith. We believe that it is necessary for the draughtsman to reconsider the formulation of the provision and clarify both the intention and specific wording thereof.

34. Ad clause 24 – Section 23(b)

This proposed amendment deletes paragraph (b) of Section 23(2) in the Copyright Act as it currently stands. This deletion refers to the “sale, letting, or by way of trade offering or exposing for sale or hire an article in the Republic”. We submit that this cannot be correct as this includes the trade in an infringing article, which can never be justified or permitted. The indirect infringement, by for example offering or selling infringing articles must be retained as a type of infringement under the Act and as a result, we submit that Section 24(b) of the amendment bill simply be deleted.

35. Ad clause 28

The proposed amendment to the heading of Chapter 3, i.e. Regulatory and Enforcement Agencies, does not correspond with what follows in the Bill. Proposed Section 29 deals with the establishment of an “Intellectual Property Tribunal” which is a single juristic person/body to replace the Copyright Tribunal. Therefore, the reference to “Agencies” (i.e. plural) in the amended heading is misleading. We suggest that the heading should read as follows: “*Regulatory and Enforcement Agency*” or alternatively “*Intellectual Property Tribunal*”.

With regards to the “Intellectual Property Tribunal”, we are of the view that the creation of such a Tribunal with the authority to adjudicate any matter relating to Intellectual Property as provided for in the proposed Section 29A should be created through a separate piece of legislation rather than the Copyright Act.

36. Ad clause 29

The proposed sub-section (1)(a) to Section 29 makes reference to “*the Republic*”. No formal definition is provided for the term “Republic” in the Copyright Act 98 of 1978, nor the proposed Copyright Amendment Bill. We suggest that Section 1 of the Copyright Act 98 of 1978 be amended by the insertion of a definition for the term “*Republic*” which potentially could read as follows: “*“Republic” means the Republic of South Africa as referred to in the Constitution of South Africa*”.

The proposed sub-section (1)(b) to Section 29 reads as follows “... *is independent and subject only to the Constitution and the law*”. It is not clear to which “law” this proposed amendment is referring to. The “law” must be specified, failing which the Bill is vague and unenforceable. We are of the view that sub-section (1)(b) to Section 29 should be amended to read as follows “... *is independent and subject only to the Constitution and the laws of the Republic of South Africa*”.

The proposed sub-section (2) to Section 29 reads as follows “*Each organ of the state must assist the Tribunal to maintain its independence, impartiality and to perform its functions*”.

effectively". It is proposed that this sub-section should be amended to read as follows "Each organ of the state of the Republic of South Africa must assist the Tribunal to maintain its independence, impartiality and to perform its functions effectively" to provide clarity as to the organ of the state.

It is not clear what exactly is intended under the proposed sub-section (2)(a) to Section 29A. This clause requires revision and appropriate formulation to clearly convey the meaning it intends. As it stands, sub-section (2)(a) to Section 29A provides the Tribunal with the authority to adjudicate any application or referral made to it in terms of any legislation in the Republic of South Africa. In other words, the Tribunal has the authority to adjudicate, for example, matters such as land claims, family law disputes or third party claims, or any other matter governed by any legislation, which in our view is not the appropriate forum for all types of applications or referrals. Therefore, we suggest that sub-section (4) to Section 29 be amended to read as follows:

"... adjudicate any application or referral made to it in terms of this Act, the Companies Act, 2008 (Act 71 of 2008) or any other legislation authorising the Tribunal to do so and make any appropriate order in respect of such applications or referrals;"

As mentioned under paragraph 1 above, we are of the view that the Copyright Act is not the suitable legislation to create the "Intellectual Property Tribunal". We are of the view that the Copyright Act should only deal with matter of a copyright nature. Therefore, the reference to "intellectual property rights" in proposed sub-sections (2)(b) – (e) to Section 29A is not appropriate.

Section 29B requires reconsideration and appropriate redrafting. The section commences by stating as follows:

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

There is no clear indication in the Bill as to what qualifies as “*suitable qualifications and experience*”.

It is not clear what the intention/purpose is for knowledgeable persons on the Tribunal. As with any copyright proceedings (albeit in the High Court or the current Copyright Tribunal), both parties will lead evidence through independent experts. It is up to the adjudicating officer with the required legal background to make a decision based on the evidence provided by the independent experts. Therefore, even though we believe a qualification in the field of economics, commerce or public affairs qualifications is relevant for Members of the Tribunal, we believe that a solid legal background should be the overwhelming consideration when electing Members of the Tribunal.

If one considers other jurisdictions (e.g. Australia, New Zealand and the United Kingdom), it is evident that it is a requirement that the Chairperson and Deputy Chairperson of the Tribunal should be either a judge or a retired judge. With regards to the other “ordinary” members of the Tribunal, we believe that the approach followed by Australia provides some guidance as to the qualifications which the members should have to be seen as suitably qualified to serve on the Intellectual Property Tribunal, and particular to adjudicate matter relating to copyright.

In this regard, the Australian Copyright Act (1968) provides that a member (other than the President or a Deputy President) cannot be appointed unless he or she meets one of the five criteria. These five criteria’s in order are as follows:

- he or she is or has been a Judge;
- he or she is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years;
- he or she has had experience, for not less than 5 years, at a high level in industry, commerce, business, public administration, education or the practice of a profession;

- he or she has obtained a degree of a university, or an educational qualification of a similar standing, after studies in the field of law, economics or public administration; or
- he or she has, in the opinion of the Governor-General, special knowledge or skill relevant to the duties of a member.

What is evident from the above is that when electing ordinary members of the Australian Copyright Tribunal, candidates with a legal background is giving preference over candidates with out any legal background.

The aforesaid Australian approach corresponds with the recommendations made by the Copyright Review Commission Report (2011), which recommended that the Tribunal should consist of:

- a President and a Deputy President, both of whom should be High Court judges appointed by the President of the Republic on the recommendation of the Judicial Service Commission (JSC); and
- three other members appointed by the President of the Republic on the recommendation of the JSC, each of whom have at least five years' experience at a high level in industry, commerce, business, public administration education or the practice of a profession.

Therefore, we are of the view that the fundamental requirement to be appointed as the Chairperson or Deputy Chairperson of the Intellectual Property Tribunal should be that he or she should either be a sitting judge of the High Court of South Africa or a retired judge of the High Court of South Africa.

With regards to the other "ordinary" members, in light of the legal nature of the proceedings, we are of the view that only persons **with at least five years' experience** in the fields of **law** should be considered for membership. However, any candidate with an additional qualification or experience in the field of economics, commerce or public affairs

should be given preference over candidates without any of the aforesaid qualifications or experience. Since the Tribunal will serve the function of a Court, we are of the view that its members should also be selected in the same manner as High Court judges. Should the Tribunal require assistance in respect of any particular matter in relation to economics, commerce or public affairs, the Tribunal will always have the ability to appoint an assessor (who is an expert in the relevant field) to advise the member(s) of the Tribunal in the relevant matter.

Proposed Section 29B(3)(b) refers to “... *the chairperson is for any other reason temporarily unable to perform those functions*”. The word “those” is inappropriate when used in this manner. We recommend that the word “those” be replaced with the word “his”.

Proposed Section 29C(2)(e) refers to “*has been found in any civil or criminal proceedings by a court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonourably, in breach of a fiduciary duty or of any other offence for which such person has been sentenced to direct imprisonment without the option of a fine*”. We recommend that “of South Africa” be added after “Republic” or a definition should be added for “Republic” under the definition clause.

Proposed Section 29D makes provision for the resignation of the Chairperson and a member of the Tribunal. However, proposed Section 29D does not make any provision for the resignation of the Deputy Chairperson. Therefore, it is unclear and vague as to the notice period which the Deputy Chairperson is required to provide the Minister and whether the Deputy Chairperson, similar to the Chairperson, has the option of resigning as Deputy Chairperson, but still remain a member of the Tribunal. This provision requires revision.

With reference to the above, we propose that proposed Section 29D(2) be amended as follows:

“The chairperson or deputy chairperson may, on one month written notice addressed to the Minister -
(a) resign from the Tribunal; or

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

We also proposed an amendment to proposed Section 29D(3) as follows:

"A member of the Tribunal other than the chairperson or deputy chairperson may resign by giving at least one month written notice to the Minister"

The heading to proposed Section 29E contains a grammatical error. We suggest that the heading to proposed Section 29E be amended to read as follows:

"Removal or suspension of members of the Tribunal"

Proposed Section 29E(1)(b) refers to "*repeatedly fails to the satisfaction of the Minister and board to perform the duties of the Tribunal*". Firstly, neither the Copyright Act 98 of 1978, nor the proposed Copyright Amendment Bill refer to the "duties of the Tribunal". Proposed Section 29A refers to the "Functions of the Tribunal". Therefore, we suggest that Section 29E(1)(b) be amended to read as follows:

"repeatedly fails to perform the functions of the Tribunal"

We propose the following amendment to proposed Section 29E(2)(a): "*immediately and fully disclose the fact and nature of such interest to the chairperson, deputy chairperson and the presiding member or panel at that hearing, as the case may be*".

Section 29G(1)(a) refers to "... a member of the Tribunal". We are of the view that the wording should be "*a single member of the Tribunal*". This wording corresponds with proposed Sections 29G(5) and 29L(1) which makes specific reference to a single member.

We propose the following amendment to Proposed Section 29G(3)(b): "*terminate the proceedings before that panel and constitute a new panel which may include any member of the original panel, subject to the requirements of subsection (2)(a), and direct the new panel to conduct the hearing afresh.*"

The proposed Section 29G does not make provision for a scenario where a single member is unable to complete the proceedings in a matter assigned to it due to his or her resignation, illness, death, removal, suspension or withdrawal from the hearing. Therefore, this provision requires revision by making provision for the aforesaid scenario.

The proposed Section 29G(6) makes provision as follows:

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

Logistically it does not make sense to allow a participant to take the Tribunal’s decision, judgment or order on review or appeal to any High Court. Since the aforesaid section refers to *“a High Court”* this will be the case. As such, we propose that a specific High Court be designated, for example the High Court within which jurisdiction the Tribunal falls.

Proposed Section 29I makes reference to *“... through a representative ...”*. It is not clear who would qualify as a representative for the purpose of this Section, for example, would this include a legal representative or does this refer to a representative of a company who is either the Complainant or Respondent in the proceedings. This paragraph requires amendment, failing which the Bill is vague and unenforceable.

Proposed Section 29I(a) refers to *“...the applicant, complainant and respondent”*. To our minds an Applicant and Complainant is the same person in a complaint to the Tribunal. Therefore, this provision requires revision by removing either the reference to Applicant or Complainant from this sub-section.

We propose the following amendment to proposed Section 29I(c): *“any other person who has a material interest in the hearing, unless, in the opinion of the presiding member or panel of the Tribunal, such interest is adequately represented by any other person participating at the hearing.”*

Even though it might be obvious that a “*full panel*” will consist of 3 (three) members, we are of the view that this should be made clear in Section 29L(1) and (2). Therefore, we suggest that sub-section (1) to Section 29L be amended to read as follows:

“A participant in a hearing before a single member of the Tribunal may appeal against a decision of that member to a full panel of the Tribunal consisting of 3 (three) members.”

Section 29M(2)(a) refers to “*there is prima facie evidence that the allegations may be true*”. Generally, in terms of the common law, the Applicant for interim relief is required to show that it has a *prima facie* right. It is not important where the right is derived from, (e.g. from a contract, the common law or in terms of a statute) but it must be an actual right. A mere interest in the relief sought is not enough. Therefore, this provision requires revision by either including a sub-section to the effect that the Applicant for interim relief is required to show that it has a *prima facie* right or by replacing sub-section (1) of Section 29M(2) with the aforesaid provision.

Generally, in terms of the common law, the Applicant for interim relief is required to show that “*it has no other satisfactory remedy available to it*”. Section 29M(2) does not make any provision for such a requirement. Therefore, we suggest that Section 29M(2) be amended by including a sub-section (e) to read as follows:

“...that the applicant has no other satisfactory remedy.”

Section 29N(1)(f) refers to “*...confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act*”. The words “unregistered person” as used in this clause is without proper defined meaning and therefore renders the clause vague and virtually unenforceable.

Section 29N(1)(g) refers to “*...suspending or cancelling the registrant’s registration or accreditation subject to any such terms and conditions the Tribunal deems fit*”. The words “registrant” and *registration*” as used in this clause is without proper defined meaning and

therefore renders the clause vague and virtually unenforceable. It is not clear who the registrant is and what registration he or she owns.

We propose the following amendment to proposed Section 29P(2)(a): *“has not made a finding against a respondent, the member or panel of the Tribunal presiding at the hearing may award costs to the respondent and against a complainant who referred the complaint to the Tribunal.”*

We propose the following amendment to proposed Section 29P(2)(b): *“has made a finding against a respondent, a member or panel of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint to the Tribunal.”*

The reference to paragraph (Cd) in Clause 32(a) is incorrect since neither the Copyright Act 98 of 1978, nor the proposed Copyright Amendment Bill contain a paragraph (Cd). Therefore, proposed Clause 32(a) should be erased.

Proposed Clause 36(b) incorrectly referred to paragraph (cE). The Section 39 of the principal Act does not have a paragraph (cE). It only have a paragraph (cA). Therefore, we suggest that proposed Clause 36(b) be amended to read as follows:

“by the insertion after paragraph (cA) of the following paragraphs:”

Proposed Clause 36(b) paragraph (cH), erroneously refers to Section 28B. As previously mentioned, neither the Copyright Act 98 of 1978, nor the proposed Copyright Amendment Bill makes provision for Section 28B. If one considers paragraph (cH), the correct section would be proposed Section 28O.

Proposed Clause 36(b) paragraph (cl), is vague and unclear. It is not clear what would constitute as “use”. The “use” must be specified, failing which the Bill is vague and unenforceable. We suggest that proposed Clause 36(b) be amended to read as follows:

“prescribing royalty rates or tariffs for various forms of use of copyright protect works,”

Proposed Clause 36(b) paragraph (cL) is vague and embarrassing. It seems strange that the Minister be authorised to prescribe which local music content may be used for television and radio broadcasting. This paragraph requires amendment, failing which the Bill is vague and unenforceable.

37. Ad clause 34

Ad Schedule 2 of the Bill

The title to Schedule 2 states that the schedule is introduced pursuant to section 22(3) which deals with assignments and exclusive licences. This is nonsensical as the schedule does not address assignments or exclusive licences. The reference in section 22(3) to “as stipulated in Schedule 2” is for this reason also nonsensical.

It must be noted that the existing Section 46 of the Act refers to a “Schedule” containing a list of laws that were repealed by the Act. In light of the insertion of Schedule 2 by the Bill, the references to “Schedule” in existing section 46 should be amended to read “Schedule 1”.

The schedule appears to interchangeably refer to a “Commission” and “Tribunal”, with no provision apparently being made for the creation of a Commission. This inconsistency should be rectified.

We commend the drafters of the Bill for adopting the Appendix to the Berne Convention making provision for translation and reproduction licenses. We note however that South Africa has not deposited a notification or made a declaration in terms of Article I of the Appendix to the Berne Convention. Before enacting the Bill, the South African Government should arrange for such a declaration to be made so as to take advantage of the protections afforded in terms of Article I(6)(b) of the Appendix to the Berne Convention (i.e. the exclusion of reciprocal treatment).

We note however that the schedule permits terms of licenses that are far broader than those permitted in the Appendix to the Berne Convention (“the Appendix”) and recommend that the drafters alter the schedule so as to comply with South Africa’s international obligations in terms of the Berne Convention and its Appendix.

The schedule is replete with grammatical errors, for example, that contained within the second line of clauses 2(1) and (2) of Part A of the schedule.

The schedule often refers to the “user, performer, owner, producer or author” whereas this is inappropriate in the circumstances. A user generally has no proprietary interest in the work concerned and this should rather be revised to refer to the copyright owner or some such analogous term.

Clause 2(3) of Schedule A provides that the licence can be granted by the Tribunal after the expiration of periods of time that are far shorter than those prescribed in the Appendix. We submit that a period of one week (as set in clause 2(3)(a)) is far too short a time to give the rights holder to itself publish translations of its work, especially in light of the periods of three years and one year prescribed in the Appendix. The same applies to the periods prescribed for the rights holder to be heard in terms of clause 3(1)(f).

Clause 3(2) is nonsensical given that the requirements of (presumably) clause 3(1)(a)-(e) are already applicable to works consisting of mainly illustrations. For such works, the Appendix requires that the applicant also meet the requirements set in relation to reproduction licenses, and so clause 3(2) of Part A should be altered to refer to the requirements set in Part B.

There is considerable overlap between Part A and the new translation exception introduced by section 12A(1)(f). The latter introduces a broad exception for translations that would appear to render much of the scheme introduced by Part A redundant. Also, section 12A(1)(f) refers to “education” whereas Part A refers to “teaching” and the terminology in this regard is inconsistent between the two provisions.

Clause 4(1)(a) limits the licence to the purpose of “teaching only” whereas clause 4(1)(b) goes on to refer to “training, scholarship or research”. These are not reconcilable with the limitation to teaching and it is recommended that clause 4(1)(b) is deleted and clause 4(1)(a) is revised in line with the Appendix to refer to “teaching, scholarship or research” only.

Clause 4(1)(c)(iv) is in conflict with the Appendix, which requires such licenses to be non-transferable.

It appears nonsensical to exclude a licence where the copyright holder cannot be located, as per section 3(1)(e). This is surely a good instance where a compulsory licence would be appropriate.

“Systematic instructional activities” in clause 5(2) and elsewhere in the schedule should be defined given that the term is vague.

Many of the comments made above in relation to Part A apply equally to their equivalents in Part B.

38. Ad Clause 35

Proposed Section 38 contains a grammatical/linguistic error. We suggest that proposed Section 38 be amended to read as follows:

“This Act is called the Copyright Amendment Act, 2017 and shall come into operation on a date fixed by the President by proclamation in the Government Gazette”

39. Recommendation that Copyright be Registered

We appreciate that South Africa as a country subscribes to certain minimum requirements for the protection of copyright (as required by the Berne Convention and TRIPS Agreement). These include that registration of copyright is not a requirement for the acquisition of copyright protection. We are fully in support of this principle and do not propose that a registration system be put in place subject to which a person may acquire copyright.

However, we wish to propose that the Portfolio Committee on Trade and Industry considers amending the Copyright Act by making provision for a system of registration of copyright in all works, which may serve to alleviate the burden of proof on a copyright owner in infringement proceedings. The proposal is effectively that the system created by the registration of copyright in the Cinematograph Films Act, no. 62 of 1977 be extended beyond cinematograph films to all the other different types of works provided for under the Copyright Act, i.e. literary works, musical works, artistic works, sound recordings, sound – and television broadcasts, programme carrying signals, published additions and computer programs.

Various countries around the world have made provision in their national laws for a voluntary registration system. These countries are spread out internationally and include Mozambique, Ghana, India, China, the United States and Canada.

Throughout the years, we have seen that one of the reasons why a copyright owner may be hesitant to enforce his rights is due to the onerous evidentiary burden and resulting high costs to sufficiently prove his rights (as opposed to having a certificate which constitute *prima facie* proof of such rights) in pursuing infringement proceedings (which, as intimated above, is a technical field of law). We envisage that a registration system whereby copyright owners may voluntarily register their copyright, which may provide for *prima facie* rights on issues such as originality, ownership etcetera, may serve to dramatically reduce the costs for copyright owners to enforce their rights. This is but one of the advantages to be gained by a registration system.

The registration of copyright in the Cinematograph Films Act has effectively set a precedent that the system of registration of copyright in South Africa can work. It is thus not a matter of breaking new ground, but simply extending a system which is already in place.

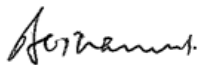
A registration system for all works may provide certainty as far as the works so registered are concerned with regard to issues such as originality, authorship, ownership, duration of copyright, all of which are to be welcomed. Government may also consider possible advantages to be gained through the registration system generating revenue, which may

on its turn be used by the Department of Trade and Industry to further its objectives under the Copyright Act.

40. Recommendation for injunctions against intermediaries

As the Committee will no doubt be aware, copyright infringement on the internet is rife including the unlawful sharing of unauthorised, copyright protected materials via streaming and linking sites and peer-to-peer networks. Often the infringing content is hosted overseas in territories where enforcement of copyright may not always be achievable or practical. The content at issue often includes content produced by the South African creative industries, as we all saw with the Four Corners film debacle involving the pirating of a locally produced film via peer-to-peer networks. In circumstances such as these, it is often very difficult or impossible for the rights holder to prevent access to the infringing content in South Africa given that the notice and take-down provisions of the Electronic Communications and Transactions Act only apply to content hosted locally by South African internet service providers and not that hosted overseas but accessible in South Africa. For these reasons, the EU implemented directives, notably article 8(3) of the InfoSoc Directive, and Article 11 of the Enforcement Directive, requiring member states to make injunctions against intermediaries (read internet service providers) available to rights holders. We therefore respectfully request that that Committee considers inserting a provision similar to that of section 97A of the UK Copyright, Designs and Patents Act providing for blocking orders against intermediaries in our own Copyright Act.

Yours faithfully
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