



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

# Copyright Amendment Bill Performers Protection Amendment Bill

CLSO briefing on NCOP amendments





# Rules on dealing with NCOP amendments

## **JR 185. Process if second House passes Bill**

(1) If the Council passes a section 76 (1) Bill, the Secretary must without delay submit the Bill—

...(b) to the Speaker for consideration by the Assembly, if the Council has amended the Assembly's Bill.

(3) When a House considers an amended Bill in terms of subrule (1)(b) or (2)(b), it does so in terms of its own rules.

## **NAR 311. Reconsideration of Section 76(1) Bills if amended by Council (See next slide for summary)**

### **Bill to be placed on Order Paper or referred to portfolio committee**

(1) If the Council amends a Bill referred to it in terms of Joint Rule 184(1)\*, the Speaker must—

...(b) submit the amended Bill to the portfolio committee concerned or any other appropriate Assembly committee for a report and recommendations on the Council's amendments.

(2) The committee to which the Council's amended Bill is referred —

(a) may consult the appropriate Council committee or the chairperson of that committee;

(b) may not propose any further amendments to the Bill; and

(c) may consult the JTM on whether any of the Council's amendments —

(i) changes the JTM's classification of the Bill, or

(ii) renders the Bill constitutionally or procedurally out of order within the meaning of Joint Rule 161.

\* (incorrect cross reference) (2) If the Council passes a section 76(2) Bill, the Secretary must refer the Bill to the Speaker to deal with the Bill in terms of the Assembly rules.



# Application of Rules related to dealing with NCOP amendments

## NAR 311.

- NAR 311(1)(b) requires that the Portfolio Committee on Trade and Industry consider the amendments and report thereon, which report must contain recommendations on the Council's amendments.
- NAR 311(2)(a) allows the Portfolio Committee on Trade and Industry to consult the appropriate Council committee or the chairperson of that committee, if deemed necessary.
- NAR 311(2)(b) prohibits any further amendments to the Bill.
- NAR 311(2)(c) provides for consultation with the JTM regarding whether the amendments require a change in classification or render the bills constitutionally or procedurally out of order.
  - As will be seen when the amendments are discussed one concept at a time, the amendments are technical in nature and do not affect the classification, nor do they render the bills constitutionally or procedurally out of order.



# Copyright AB



## Amendments related to Policy

DTIC will brief the committee on these amendments:

- Issues of equitable remuneration being added to royalty options
  - Long title, clauses 5, 7, 9, 24, 26, 27, 33, 35, and 37;
- Deletion of definition of “broadcast”;
- Clause 15 – the issue of deleting “of ownership” after “assignment”;
- Clause 35
  - Rates and tariffs only iro resale royalty rights.



**Blind SA v Minister of Trade, Industry  
and Competition a.o. [2022] ZACC 33  
(21 September 2022)**



## Findings of the Court:

Sections 6 and 7, read with section 23 of the Copyright Act, are unconstitutional, invalid and inconsistent with--

- the rights of persons with visual and print disabilities
- as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution of the Republic of South Africa, 1996
- to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.

This declaration of unconstitutionality was suspended for a period of 24 months to enable Parliament to remedy the defect in the Copyright Act giving rise to this unconstitutionality (suspension lapses 20 September 2024).

Pending the legislation to correct the defect, the Constitutional Court provided for a read-in measure.



# The rights affected

- **Section 9(3) (equality / unfair discrimination)**
  - The rights protected by the Copyright Act may not become an instrument to disadvantage a class of persons who have the same need to have access to literary works that persons without impairments enjoy.
  - The requirement of authorisation constitutes unfair discrimination on the grounds of disability.
- **Section 10 (human dignity)**
  - Those with print and visual disabilities are radically compromised in the access they enjoy to literary works because authorisation is required – this places an indignity upon the difficult circumstances that these people face.
- **Section 16(1)(b) (freedom of expression)**
  - The freedom to receive and impart information is infringed by the requirement of authorisation.
  - The requirement of authorisation drastically limits access to literary works. This impairs the freedom to receive information, and thus, in turn, to impart information.
- **Section 29(1) (education)**
  - Those with print and visual disabilities struggle to secure books in accessible format copies that they require for their education.
  - Children, and especially poor children, cannot secure the textbooks they require. Others who are admitted to university cannot access the articles and books they need, a substantial impairment to the benefits of a higher education.
  - The right of persons with print and visual disabilities to basic education, as set out in section 29(1)(a) of the Constitution, is plainly infringed.
  - The right to further education must be made, through reasonable measures by the state, progressively available and accessible: There can be no doubt that the relaxation of the requirement of authorisation in favour of persons with print and visual disabilities, is a reasonable measure that the state can and must take.
- **Section 30 (cultural rights)**
  - Literary works are an important source of cultural life and when access to literary works is limited, persons affected by this limitation are compromised in their enjoyment of the right to participate in the cultural activity of their choice.





# Remedy

- Proposed remedy to prescribe measures (regulations) under section 13 of the Act rejected:

“In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.”

  - The Constitutional Court found that an accessible format copy could include an adaptation of a work and thus section 13 is not sufficient.
- Proposed remedy to use the wording of clause 19D of the Bill not possible:
  - The Constitutional Court found that wording of this clause is broader than the remedy sought and thus could not be used.
- The Court provided a read in provision.

“Section 13A Exceptions applicable to beneficiary persons

(1) For the purposes of section 13A—

(a) ‘accessible format copy’ means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy must be used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

(b) ‘beneficiary person’ means a person who—

(i) is blind;

(ii) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(iii) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading regardless of any other disabilities;

(c) ‘literary works’ means literary works as defined in section 1 of this Act, and shall be taken to include artistic works forming part of a literary work;

(d) ‘permitted entity’ means an entity, including a government institution or non-profit organisation, that provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, and has the provision of such services as one of its primary activities or institutional obligations.

(2) A permitted entity may, without the authorisation of the owner of copyright in a literary work, make an accessible format copy of the literary work; obtain from another permitted entity, an accessible format copy, and supply those copies to beneficiary persons by any means, including non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, provided that all of the following conditions are met—

(a) the permitted entity wishing to undertake said activity has lawful access to that work or a copy of that work;

(b) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;

(c) such accessible format copies are supplied exclusively to be used by beneficiary persons; and

(d) the activity is undertaken on a non-profit basis.

(3) A beneficiary person, or someone acting on their behalf, including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.”



## Amendments resulting from the Blind SA judgment

- Clause 19D largely complied with the court order:
  - Differences between the Bill and the read in related to drafting practice, and policy.
  - Blind SA: The Court could not consider other types of disabilities, or all works as it was limited to the facts before it (visual or print disability + literary works).
  - Persons with other types of disability are however also affected and as per section 9 of the Constitution, their rights must also be given effect to (the policy is thus broader than the judgment).
  - **Marrakesh Treaty – Article 12:** 1. “(A) Contracting Party may implement in its national law other copyright limitations and exceptions for the benefit of beneficiary persons than are provided by this Treaty ... 2. This Treaty is without prejudice to other limitations and exceptions for persons with disabilities provided by national law.
- In consultation with Blind SA and Section 27 the following amendments were proposed, to ensure that there is no risk of Clause 19D being interpreted in such a way that it could prejudice a person with a disability:

# Amendments resulting from the Blind SA judgment (2)

## Clause 1:

### Definition: “accessible format copy” and “person with a disability”

Blind SA agreed that the Bill’s definitions of ‘accessible format copy’ and ‘person with a disability’ are constitutional – **No amendments required**

### Definition: “authorized entity”

- CLSO is of the view that the definition in the D-Bill complied with the Treaty (uses the phrase “permitted entity”) - The Bill just uses the phrase “authorized entity”.
- Blind SA was concerned that the definition could be interpreted narrower than the read in and the treaty. The following amendment was agreed to by the NCOP, to align the definition with the court’s read in:

**(b) an entity, including** a government institution or non-profit organization that provides education, instructional training, adaptive reading or information access to persons with a disability **on a non-profit basis** as one of its primary activities or institutional obligations;”;

- Note: Par (b) now provides for an entity however, it is clearly stated that the services must be provided for “non-profit purposes” (this is also a specific requirement in section 19D) and it must be one of its primary activities or institutional obligations. There is thus no real difference in the meaning of the paragraph by adding “an entity”. It still has to be a main activity that is done not for profit.



## Amendments resulting from the Blind SA judgment (3)

### Clause 22: Section 19D - General exceptions regarding protection of copyright work for persons with disability

- The court expressed the concern that subsection (1) may be interpreted to mean that an “authorized entity” will only be able to deliver services once identified in regulations.
- This was never the intention – an “authorized entity” was clearly defined and must be identifiable without the need for regulations. The issue was related to drafting and not to context.
- The following amendment was agreed to by the NCOP, to align the definition with the court’s read in and to avoid any unintended interpretation:

(1) ~~Any~~ An authorized entity, or any person as may be prescribed and who serves persons with disabilities, ~~including an authorized entity~~, may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

(a) ....; (b).....; (c)..... (no changes)



## Amendments resulting from the Blind SA judgment (4)

- Blind SA:
  - Re (2)(a): This subsection requires a new accessible format copy to be made every time – the court also allowed copies to be made of accessible format copies that persons have lawful access to.
  - Proposed s 19D(2)(b) and 19D(4) are constitutional.
  - By referring to subsection (1) in subsection (3), accessible format copies made from a copy that a person has lawful access to is excluded. Further, accessible format copies that are lawfully imported will necessarily not have been made by the persons contemplated in (1).
- This interpretation was not the intention and had to be addressed. The following amendments were agreed to by the NCOP:

(2) .... No amendments.

(new) (3) A person with a disability, or someone acting on their behalf, including an authorized entity, may make an accessible format copy of a work for the personal use of the person with a disability or otherwise may assist the person with a disability to make and use accessible format copies where the person with a disability has lawful access to that work or a copy of that work.

The other existing subsections moved on one number – (3) to (4), (4) to (5).

~~(3)~~ (4) (a) A person with a disability or a person who serves persons with disabilities, including an authorized entity, may, without the authorization 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)~~, for distribution, or to make it available to persons with a disability, as long as such activity is undertaken on a non-profit basis by that person.

(b) ... (no changes)

~~(4)~~ (5) The exception created by this section is subject to the obligation of indicating the source and the name of the author, if it appears on the work, on any accessible format copy.”



## Amendments resulting from the Blind SA judgment (5)

- Blind SA was of the view that section 28P(2) results in the same requirement of authorisation of the right holder that the Court held to be discriminatory.
- CLSO is of the view that section 28P(2) is not necessary:
  - Section 28P(1) states that if a person circumvents a TPM to make use of an exception allowed by the Act, circumvention is allowed.
  - Section 28P(2) then has a strange requirement:
    - Circumvention is allowed by S28P(1) and if you can circumvent on your own, or make use of a service to circumvent, you need not approach the owner.
    - S28P(2) then states that if you cannot circumvent on your own, you can ask the owner to assist – NOT to authorize. If the owner does not want to assist, you can ask a third party to assist you – which is already allowed by S28P(1).
    - Likely 28P(2) became superfluous when “service” was added to the definition of a circumvention device in one of the last amendments – and this consequential amendment was overlooked.
- The NCOP agreed to the following amendments:
  - Clause 31: Exceptions in respect of technological protection measures**
  - 28P. (1) ... (no changes resulting from Blind SA)**
  - ~~“(2)~~ **(Delete in full)**
  - ~~(3)~~ ~~(2)~~ A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure ~~in terms of subsection (2)(b)~~ shall maintain a complete record of the particulars of the—”



# Clause 29, section 27 - Offences

- Subsection (5B) incorrectly stated BOTH subparagraphs (ii) and (iii) as elements of the offence, while subparagraph (ii) is actually a valid defense.
- The following amendment was adopted by the NCOP:

(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if such person—

(i) knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure; or

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

~~(iii) knows that the service contemplated in subparagraph (ii), which they know~~ will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;

...shall be guilty of an offence.





## Clause 29, section 27 (Offences) read with Clause 31, Section 28P (TPMs)

- Section 28P(1) only allows a TPM to be circumvented when an exception is applicable.
  - Section 27(5B) imposes criminal liability for circumventing a TPM if a person does not comply with section 28P(1).
  - Not every lawful use is in the form of an exception: 12C and 12D are not exceptions, rather “limitations”.
  - Lawful uses include those permitted by regulation and statutory licences such as those in Schedule 2.
- The following amendment was adopted by the NCOP:

“**28P.** (1)(a) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following: ... (a) An act permitted by law, including in terms of any exception provided for in, or prescribed under, this Act; or”



## Clause 35 - Section 39 (Regulations)

- Farlam Commission – CRC report: “the dti is urged to draw up standard contracts between performers and record companies that are fair to both sides and that parties to such agreements are encouraged to use. See Chapter 10, paragraph 10.12.5”
- Concerns were raised that the Minister may interfere in the freedom of parties to decide on their own contract terms.
- This was never the intention. The intention was to ensure that the protection offered by the Act is preserved in contracts.
- The following amendment was agreed to by the NCOP to ensure that guidance is given to the Minister (i.e. that the clause is not an open-ended empowerment):
  - (cG) prescribing the standard elements for agreements to be entered into in terms of this Act, to ensure that rights or protection afforded by this Act are duly provided for;



## Clause 40 (Short Title And Commencement)

- A concern was raised that too much discretion is given into the operational dates of Acts.
- Furthermore, the clauses dealing with Blind SA judgment had to be made operational immediately.
- **The following amendments were agreed to by the NCOP:**

### **Short title and commencement**

40. (1) This Act is called the Copyright Amendment Act, 2017, and comes into operation ~~on a~~ 24 months from the date of publication in the *Gazette*, or an earlier date fixed by the President by proclamation in the *Gazette*.

(2) The definitions for 'accessible format copy', 'authorized entity' and 'person with a disability' contained in section 1 come into operation upon the date of publication.

(3) Section 19D comes into operation upon the date of publication.



# Performers Protection AB



## Amendments related to Policy

DTIC will brief the committee on these amendments:

- Deletion of the definition of “broadcast”;
- Express exclusion of “extras” from definition of “performers”

# Long Title

## Clause 3 – Section 3A (Transfer of rights)

## Clause 6 – Section 8D (Regulations)



- Farlam Commission – CRC report: “the dti is urged to draw up standard contracts between performers and record companies that are fair to both sides and that parties to such agreements are encouraged to use. See Chapter 10, paragraph 10.12.5”.
- Concerns were raised that the Minister may interfere in the freedom of parties to decide on their own contract terms. This was never the intention. The intention was to ensure that the protection offered by the Act is preserved in contracts
- The following amendment was agreed to by the NCOP to ensure that guidance is given to the Minister (i.e. the clauses are not open-ended empowerment):

### Long title:

- To provide for the Minister to prescribe standard elements to be included in agreements ...

### Clause 3 – Section 3A

“(3) The written agreement contemplated in subsection (2)—

(a) must at least contain the standard elements, as may be prescribed, to ensure that rights or protection afforded by this Act and the Copyright Act are duly provided for;

### Clause 6 – Section 8D

“(3) The Minister must make regulations prescribing standard elements that must be included in agreements to be entered into in terms of this Act, to ensure that rights or protection afforded by this Act and the Copyright Act are duly provided for, which contractual terms must include—



**THE END**