

In re:

Copyright Amendment Bill

OPINION

To: K Kropman
Kropman Attorneys

From: S A Nakhjavani

1. My consultant is ReCreate SA (“ReCreate”), a coalition of creators and users of copyrighted materials. ReCreate’s membership includes, amongst others, writers, filmmakers, photographers, educational content producers, software and video game developers, technology entrepreneurs, artists, poets, producers of accessible format materials as well as teachers, learners, librarians, community activists and disabled groups. ReCreate’s purpose is to promote the interests of South African creators and communities with regards to copyright legislation.
2. I am instructed that:
 - 2.1. The **Copyright Amendment Bill**¹ (“the Bill”) has a protracted and somewhat fraught legislative history, from 16 May 2017 to date. The Bill passed in its original form on 29 March 2019, but did not receive the assent of the President, and on 16 June 2020 was referred to Parliament for reconsideration.
 - 2.2. Since then, at the behest of the Portfolio Committee on Trade and Industry, two rounds of amendments have been considered and opened for public comment.

¹ B13-B of 2017.

The first call opened on 4 June 2021 and closed on 9 July 2021. An initial set of public hearings were held on 11 and 12 August 2021. The current call for comments, on “*additional definitions and clauses*”² of the Bill, opened on 3 December 2021 and is set to close on 28 January 2022.

- 2.3. Concurrently, the Bill has been subject to a set of further amendments, which are ostensibly immaterial or merely technical in nature, or otherwise no longer open to comment.
3. I am further instructed that ReCreate supports the reform of copyright legislation, in line with the broad strokes of the Bill, and within the framework of the relevant international treaties,³ including those to which South Africa is not yet a party.
4. My consultant’s concern is that the scheme of copyright protection introduced by the Bill should protect the right to own content; to earn fairly from content; to create content; and to use and access content to create, educate and innovate.
5. I am briefed with the following documents:
 - 5.1. Three opinions of Cowen SC,⁴ Berger and Nxumalo, in respect of: (1) the constitutionality of a prior version of the Bill; (2) the decision of the President

² https://www.parliament.gov.za/storage/app/media/Links/2021/December/3-12-2021/02122021_Wording_for_Amendments_proposed_for_advert.pdf.

³ These include the following treaties administered by the World Intellectual Property Organisation (WIPO): the Beijing Treaty on Audiovisual Performances; the Berne Convention for the Protection of Literary and Artistic Works (in force for South Africa from 3 October 1928); the Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite; the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; the WIPO Copyright Treaty (signed by South Africa on 12 December 1997); and the WIPO Performances and Phonograms Treaty (also signed by South Africa on 12 December 1997), together with the Agreement on Trade-Related Aspects of Intellectual Property Rights (administered by the World Trade Organisation).

⁴ Prior to her elevation to the Land Claims Court.

to refer the Bill back to Parliament; and (3) the reservations of the President on the “tagging” of the Bill under section 75 of the Constitution, and whether section 76 of the Constitution ought instead to apply to the Bill.

- 5.2. Two joint academic opinions on the Bill, authored by Professors Malebakeng Forere (Wits), Klaus Beitar (NWU), Sean Fiil-Flynn (American University Washington), Jonathan Klaaren (Wits), Caroline Ncube (UCT), Enniya Nwauche (NMU) and Tobias Schonwetter (UCT), Dr Andrew Rens (Research ICT Africa) and Dr Sanya Samtami (Oxford). The second of these opinions was provided to me in working draft form, and thus may not yet have received the approval of the same group of academics.
 - 5.3. A colour-coded document prepared by Parliament setting out the scope of previous and current calls for comment on the Bill, where the current amendments are marked in blue, ostensibly technical or non-material amendments are marked in green, and amendments now closed for comment are shown in black.
 - 5.4. Internal analysis prepared by ReCreate on the most recent round of amendments to the Bill.
6. My opinion is requested on the following questions:
- 6.1. whether the decision of the National Assembly’s “Joint Tagging Mechanism”, on the recommendation of the Portfolio Committee, to retag the Bill under section 76 of the Constitution is tenable in law and any consequences of so doing;

- 6.2. whether the decision of the Portfolio Committee to exclude from public comment the so-called “*non-material*” amendments to the Bill is tenable in law;
- 6.3. whether the most recent substantive amendments to the Bill may offend the Bill of Rights as well as applicable international law; and, if so
- 6.4. which practical solutions or refinements ought to be implemented by Parliament to ensure that the Bill more fully conforms to the Bill of Rights and to applicable international law.

THE BILL OUGHT NOT TO HAVE BEEN “RETAGGED”

7. I concur with the conclusions of Cowen SC *et al*, and those the first joint academic opinion, that the tagging of the Bill under section 75 of the Constitution was entirely appropriate.
8. The records of the Portfolio Committee indicate that its recommendation to retag the Bill based on the reservation of the President was taken “*to rather err on the side of caution*”.⁵ Parliament’s “Joint Tagging Mechanism” (“JTM”) determined on 18 June 2021 to “retag” the Bill under section 76.⁶ The JTM did so despite the fact it is ordinarily advised on tagging by the Parliamentary Legal Adviser,⁷ whose advice in this instance was that the Bill was correctly tagged under section 75.⁸

⁵ “Report of the Portfolio Committee on Trade and Industry on the President’s reservations regarding the Copyright Amendment Bill”, 14 May 2021 (<https://pmg.org.za/taled-committee-report/4595/>)

⁶ See “Announcements, Tablings and Committee Reports”, Item 3, 18 June 2021 (<https://www.parliament.gov.za/storage/app/media/Docs/atc/55566f1a-ee5d-4f2f-9759-315caf4f1270.pdf>).

⁷ See **South African Municipal Workers' Union v Minister of Co-Operative Governance & Traditional Affairs and others** 2017 (5) BCLR 641 (CC), fn 9.

⁸ As set out in the Parliamentary Legal Adviser’s presentation in Parliament, 5 May 2021, a copy of which appears online (https://libguides.wits.ac.za/ld.php?content_id=61553221).

9. On a proper application of the test for direct regulation – namely, whether the provisions of the Bill “*actually regulate*”⁹ “*in substantial measure*”¹⁰ any functional area of competence within Schedule 4 – my view is that the Bill ought not to have been retagged under section 76. This is so for the following reasons:
- 9.1. The extent to which the Bill might regulate “*cultural matters*” under Schedule 4 of the Constitution would include, as a high water-mark, the application of its provisions to the licensing of indigenous knowledge and the payment of royalties, as well as the express protection of the interests of indigenous communities in sections 12D (3) and 19C (9).
- 9.2. Significantly, the scheme for licensing of indigenous knowledge for commercial use is regulated principally by other legislation, which was itself tagged under section 76.¹¹
- 9.3. Thus, the scope of regulation of the rights of indigenous communities within the Bill itself cannot amount of regulating cultural matters “*in substantial measure*”, particularly where the actual licensing of indigenous knowledge is governed by other legislation.
- 9.4. The extent to which the Bill purports to regulate “*trade*” as a Schedule 4 matter is even more tangential, and would not, in my view, satisfy the test of direct regulation.

⁹ **Democratic Alliance v President of South Africa and others** [2014] 2 All SA 569 (WCC) para 79; applying **Ex parte President of the Republic of South Africa; In re: Constitutionality of the Liquor Bill 2000** (1) SA 732 (CC) and **Tongoane and others v National Minister for Agriculture and Land Affairs and others** 2010 (6) SA 214 (CC).

¹⁰ **Democratic Alliance** para 80.

¹¹ **The Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019.**

10. I can only surmise that the motivation to tag the Bill under section 76 might have been prompted, at least to some extent, by the underlying and well-intentioned policy of the Department of Trade and Industry (“the DTI”) in respect of indigenous knowledge, and its close, logical and practical connection to matters of culture.
11. The relevant DTI policy document,¹² which predates the Bill by at least a decade, makes the following recommendation in respect of copyright protections:

“Licensing of traditional knowledge would be more favourable than the deed of sale that is currently under the Copyright Act. Licensing would result in continuous payment of royalties as opposed to a once-off payment that would result from the sale of the intellectual property. In this regard there is a need to amend the Copyright Act, 1978.”

[at p 18]

12. The facts in my brief do not provide any basis to draw firm conclusions in respect of the reasons for retagging the Bill.
13. Neither the Portfolio Committee nor JTM set out the actual reasons for their retagging decision. In their opinion, Cowen SC *et al* traverse the inadvisability of retagging the Bill out of caution alone – as Parliament has now done.
14. Counsel have also opined generally on the consequences of the incorrect tagging of the Bill.
15. I venture to add that the consequences of incorrect tagging have been specifically considered by the Constitutional Court in the matter of **South African Municipal Workers' Union (SAMWU) v Minister of Co-operative Governance and Traditional Affairs and others** 2017 5 BCLR 641 (CC), in which the Constitutional Court confirmed

¹² “The Protection of Indigenous Knowledge through the Intellectual Property System: A Policy Framework” Government Gazette No 31026 (5 May 2008).

the High Court's order of constitutional invalidity of legislation incorrectly passed under section 75.¹³

16. In **SAMWU**, the High Court (*per* Jansen J) had held that Parliament's failure to correctly tag a section 76 bill, which was then passed under section 75, must necessarily result in the invalidity of the impugned legislation. The High Court did not suspend the order of constitutional invalidity, subject only to its confirmation by the Constitutional Court.
17. Given that section 76 imposes more stringent legislative and public participation standards than section 75, the incorrect retagging of the Bill in this instance has the practical effect of giving the provinces too much of a say, not too little.¹⁴ This is the converse of the facts that obtained in **SAMWU**.
18. I concur with Cowen SC *et al* that the delay occasioned by incorrect tagging would amount to a delay in realising constitutional rights.
19. On a conspectus of the existing case-law, however, I am unable to conclude that the incorrect retagging of the Bill in this instance would necessarily lead to its immediate constitutional invalidity.
20. In **SAMWU**, the Constitutional Court held, *obiter*, that it would have been prepared to suspend the order of constitutional invalidity on the basis of "*specific evidence...as to the far-reaching and potentially dire consequences of a failure to limit a declaration of invalidity*",¹⁵ had any such evidence been put before the High Court.

¹³ [2016] 2 All SA 603 (GP)

¹⁴ See **SAMWU** (CC) para 61.

¹⁵ At paragraph 90.

21. Thus, were the Bill to be invalidated in future proceedings, on the basis of incorrect tagging, the likely consequence would be to gravely compound the delay in realising constitutional rights. A Court would give serious consideration to suspending any order of constitutional invalidity, limiting its retrospective effect, and affording Parliament the time needed to remedy the incorrect tagging.
22. I turn to the second question, concerning the amendments to the Bill purportedly excluded from the current call for comment.

MATERIAL AMENDMENTS ARE EXCLUDED FROM COMMENT

23. The amendments now open to comment¹⁶ include text highlighted in blue which are expressly “*open for comment*”. The document also includes several other amendments, marked in green (ostensibly non-material amendments) and black (not currently open for comment).
24. In **South African Veterinary Association (SAVA) v Speaker of the National Assembly and others** 2019 (2) BCLR 273 (CC), the Constitutional Court considered the scope of the constitutional obligation of the National Assembly (“NA”) to facilitate public participation under section 59(1)(a) of the Constitution.
25. The Court referred to Rule 286(6)(c) of the NA, which requires that a committee inquiring into a Bill “*must...as far as possible*” invite “*further public comment and submissions on the substance of a Bill*” [emphasis added].¹⁷

¹⁶ https://www.parliament.gov.za/storage/app/media/Links/2021/December/3-12-2021/02122021_Wording_for_Amendments_proposed_for_advert.pdf.

¹⁷ At para 30.

26. The Court then held that “*a complete failure to take any steps to involve the public in a material amendment to a Bill cannot be reasonable by any measure.*” Specifically, the insertion of the word “*veterinarian*” in the impugned bill had the effect of “*bringing an entire profession under the control of an Act that never applied to it*”, and the Court held that such an amendment “*cannot be considered a technical or semantic amendment.*”¹⁸
27. In my opinion, a number of the additional amendments to the Bill not opened for comment are more than “*technical or semantic*” in nature, as in **SAVA**. These include, at the very least:
- 27.1. The elimination of the following eight illustrative, general “*fair use*” exceptions from copyright protection, ostensibly for reasons of duplication:
- 27.1.1. research, private study or personal use [section 12A(a)(i)];
 - 27.1.2. scholarship, teaching and education [section 12A(a)(iv)];
 - 27.1.3. preservation of, and access to the collections of libraries, archives and museums [section 12A(a)(v)];
- 27.2. The addition of the “*fair practice*” test to the following specific exceptions from copyright protection, and the concurrent elimination of the test “*to the extent justified by the purpose*”:
- 27.2.1. quotations [section 12B(1)(a)(i)];
 - 27.2.2. current events reporting, reproduction, broadcasting or communication [section 12B(1)(d)(i)];

¹⁸ At para 27.

- 27.2.3. translations for personal use, education, teaching, judicial proceedings, research, or professional advice [section 12B(1)(f)(ii)];
- 27.2.4. personal use [section 12B(1)(i)]; and
- 27.2.5. academic and educational activities [section 12D(1)(a)];
- 27.2.6. illustrations for the use of teaching [section 12D(9)];
- 27.3. The extension in 12A(d) of the fair use test to apply to the copyright exceptions in 12B, 12C and 12D;
- 27.4. The redoubled application of the “*fair practice*” test to all subcategories of permitted reproduction for academic or educational activities [section 12D(8)(b)];
- 27.5. The addition of the “*furtherance of language and culture*” to the translation exception [section 12B(1)(f)(ii)];
- 27.6. The addition of the “*lawful copy*” requirement and the limitation to “*devices owned by that natural person*” to the personal use exception [section 12B(1)(i)];
- 27.7. The extension of the proviso “*as long as there is no commercial significance to these acts*” from one to both of the permitted uses of transient copies [section 12C(1)]; and
- 27.8. The lowering of the mental state (*mens rea*) requirement for specific statutory offences in the Bill from “*knows or has reason to know*” “*knows or should reasonably have known*” [sections 28O, 28P, 28S].

28. I consider below three of the most significant of these amendments, to demonstrate their material character in the public participation process.

Eliminating the illustrative examples of “*fair use*” are material amendments

29. As I have set out above, seven illustrative examples of “*fair use*” in the Bill have been eliminated from section 12A(a), which deals with “*general exceptions to copyright protection*” and now appear only as specific exceptions.

30. As a matter of international law, this is well within the permissible range of legislative action of any State, including our own.

30.1. Article 9.2 of the Berne Convention, to which South Africa is a party, recognises the freedom of States, in their national legislation, to provide for a general exception to copyright protection that allows for the reproduction of the work. This freedom is subject to two limitations: compatibility with the normal exploitation of the work and the absence of unreasonable prejudice to the legitimate interests of the author.

30.2. Article 13 of the TRIPS Agreement, to which South Africa is a party, extends the freedom of States, in their national legislation, to enact a general exception to all exclusive rights in a work (beyond merely reproduction), but subject to the same two limitations in the Berne Convention.

30.3. There is nothing in the Berne Convention, the TRIPS Agreement or any other treaty binding on South Africa, that could cognisably require Parliament to recognise a general exception or to prescribe its scope. In this respect, the binding international law is permissive not mandatory. Put differently, South Africa bears no international obligation to enact a general exception.

- 30.4. All that is required, at international law, is that South Africa allow the limitations of the rights of copyright holders in Article 10 of the Berne Convention, which are essentially aimed at ensuring the free flow of news reporting.
- 30.5. It is apparent from the phrase “*In addition to uses specifically authorised...*” in section 12A(a) of the Bill that South Africa would be opting to exercise its freedoms under international law and to expand the scope of its general exception, when compared with section 12(1) of the Copyright Act, 1978.
31. As a matter of domestic law, however, the general exception in section 12A(a) is clearly framed in terms of illustrative examples. The phrase “*...for purposes such as the following...*” demonstrates this illustrative character. The effect of the current amendments, which eliminates seven of these illustrative examples, will likely be to restrict the scope of application of the general exception.
32. This is because our Courts, when interpreting legislation, routinely apply the approach set out by Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹⁹ and approved by the Constitutional Court in **Diener NO v Minister of Justice and Correctional Services and Others**.²⁰ The **Endumeni** approach is the following:

“A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation [...] The

¹⁹ 2012 (4) 593 (SCA).

²⁰ 2019 (4) SA 374 (CC) para 52; confirming **Diener NO v Minister of Justice** 2018 (2) SA 399 (SCA); see also **FirstRand Bank Ltd v KJ Foods CC** (in business rescue) 2017 (5) SA 40 (SCA)

“inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[para 15; footnotes omitted; emphasis added]

33. In my view, a future court interpreting the Bill, if enacted as legislation, may well reason in the following way:

- 33.1. the scheme of general and specific exceptions to copyright protections in the new Act is a feature of the WIPO-administered and WTO-administered treaties most relevant to copyright protection, including those binding on South Africa, and thus forms part of the body of “*international law*” which the court ought to prefer when interpreting any legislation, in terms of section 233 of the Constitution;
- 33.2. the exceptions for research, private study, personal use and private use were an express and non-illustrative part of the general exception in section 12(1)(a) of the Copyright Act, 1978, read with section 13 (which provides the two limitations in Article 9.2 of the Berne Convention);
- 33.3. four of these permitted uses would have disappeared from the general exception in new Act;
- 33.4. in addition, during the drafting process, Parliament chose to eliminate from the new Act the illustrative examples of scholarship, teaching, education, and the preservation of and access to collections;
- 33.5. the remaining 13 permitted uses in the general exception are intended to be illustrative;

- 33.6. all 13 of these permitted uses relate directly to the freedom of the press, the exposure of wrongdoing in public administration and other archetypal activities of the media sector.
34. The conclusion to be drawn by such a future court, in my view, could be that the general exception exists for the purpose of safeguarding media freedoms, and that its scope ought to be restricted to that sector of societal activity. This would not be consistent with the intention of the present drafters of the Bill and hence the full range of illustrative examples of fair use should remain.
35. In this way, the proposed amendments to section 12A(a) materially alter the substance of the Bill and ought to have been opened for comment.
36. As a further example, there is no specific exception for “research” contained in the Bill. Excluding it from the illustrative examples in the general exception for “*fair use*” might have the effect of excluding this area of activity from the scope of copyright exceptions covered in the Bill. This exclusion is both material (requiring public consultation) and inadvisable (failing to meet the objectives of the Bill to broaden access using balanced copyright exceptions).

Adding the “*fair practice*” test to the specific exceptions are material amendments

37. In SAVA, the word “*veterinarian*” was inserted in 15 amendments. The Constitutional Court agreed with SAVA’s submissions that the very absence of veterinarians from the previous versions of the Bill in itself demonstrated the “*material nature of the*

amendments”, triggering the National Assembly’s duty of public participation in respect of those amendments.²¹

38. A less drastic but still analogous concern applies to the manner in which the “*fair practice*” test has been inserted in eight amendments to the Bill.
39. These amendments, too, are not conceivably technical or semantic. It appears that they were intended to selectively²² substitute “*fair practice*” for the test of proportionality in prior versions of the Bill and in the Copyright Act, 1978, namely “*to the extent justified by the purpose*”.
40. I have not been able to locate any reported or unreported judgment in which our courts have interpreted the meaning of “*to the extent justified by the purpose*”. The origin of the phrase is patently Article 10(2) of the Berne Convention.²³
41. Instructively, the 1978 WIPO Commentary to the Berne Convention²⁴ sets out clearly that “*fair practice*” is conceptually distinct from “*to the extent justified by the purpose*”. The two tests are not coterminous. The former is concerned with the equities, while the latter tests the proportionality of means and ends.
42. In my view, the substitution of a broader test of equities in place of a proportionality test affects the substance of the Bill, and these amendments must accordingly be material amendments.

²¹ At para 27, read with para 32.

²² The test of “*to the extent justified by the purpose*” remains unamended, for example, in section 12B(i) of the Bill.

²³ Strikingly similar but not identical formulations of the test appear at Article 10(1) and 10*bis*(2) of the Berne Convention.

²⁴ https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf

43. This is so especially because the position in international law differs, where both tests apply cumulatively.
44. Thus, these amendments alone introduce unwarranted complexity into the Bill, and raise the real prospect of a finding of incompatibility between the Bill, if passed in this form, and South Africa's international obligations under the Berne Convention.
45. I deal later in this opinion with other areas of unwarranted complexity in the substantive amendments. I turn now to the third and final set of concerns arising from the amendments which were not opened for comment.

Lowering the *mens rea* requirement for statutory offences are material amendments

46. The import of the amendments to specific statutory offences in the Bill is to lower the threshold for the imposition of criminal liability for violations of copyright protections. The amendments in section 28O, 28P and 28S of the Bill, which are significantly harsher than the previous text, would expose a much wider range of conduct to potential criminal liability. These cannot be other than material amendments in character.
47. More specifically, the mental state (or *mens rea*) requirement is lowered from a subjective standard requiring intention (*dolus*) to an objective standard which encompasses mere negligence (*culpa*).
48. The requirement "*knew or had reason to know*" necessarily includes both actual and constructive or imputed knowledge, encompassing *dolus eventualis*. It requires, at the very least, that a person was subjectively on notice to inquire into certain alarming facts or circumstances, but conspicuously failed or refused to do so. This mental state excludes *culpa*.

49. In **Stannic v Samib Underwriting Managers (Pty) Ltd** [2003] 3 All SA 257 (SCA), the Supreme Court of Appeal (*per* Lewis JA) the Supreme Court of Appeal cited the following passage from the judgment of Wunsh J in **Frankel Pollak Vinderine Inc v Stanton NO** 2000 (1) SA 425 (W) at 438B—G:

“If a person’s professed ignorance is so unreasonable that it cannot be accepted that he or she laboured under it, evidence of the ignorance will not be believed in the absence of some acceptable explanation. But this amounts to a finding of actual, subjective knowledge made when a person willfully precludes himself or herself from acquiring it. We are, here, in the field of *dolus eventualis*.”

[emphasis added]

50. The Supreme Court of Appeal added the following clarification to the reasoning in **Frankel**, leaving intact the finding on *dolus eventualis*:

“One must be careful to distinguish between an inference of actual knowledge from the established facts, on the one hand, and the attribution of knowledge because of the application of the ‘shut-eyes’ doctrine on the other. In the case where a person has deliberately avoided establishing the truth, despite the flashing of warning lights, it cannot be said that he or she has actual knowledge. In such a case, a court will impute knowledge to him or her – constructive knowledge. The consequences are generally the same, however.”

[emphasis added]

51. By comparison, in **Prinsloo v S** [2016] 1 All SA 390 (SCA), the Supreme Court of Appeal interpreted the meaning of the *mens rea* requirement “*knows or ought reasonably to have known*” in a statutory racketeering offence in section 2(1)(f) of the **Prevention of Organised Crime Act, 1998** (“POCA”). The Court was unanimous that the statutory offence encompassed *culpa*, not only *dolus*. The Court stated (*per* Fourie and Eksteen AJJA):

“[51] *We are further of the view that, in any event, the wording of POCA and in particular s 2(1)(f) makes it clear that culpa is a sufficient form*

of mens rea for a contravention of this subsection. In S v Arenstein 1964 (1) SA 361 (A) at 366C-D, it was reiterated that the degree of blameworthiness required for a culpable violation of a statutory prohibition must in the first place be sought in the language used by the lawgiver. In the absence of any words expressly indicating the particular mental state required, the degree of mens rea must depend on that foresight or care which the statute in the circumstances demands.

[52] *The offence in terms of s 2(1)(f) is committed by a person managing the operation or activities of an enterprise and who knows or ought reasonably to have known that the enterprise's affairs are conducted through a pattern of racketeering activity. The plain wording of the subsection requires mens rea in the form of either dolus or culpa. As explained by Albert Kruger in Organised Crime and Proceeds of Crime Law in South Africa (2008) at 148, the words 'ought reasonably to have known' introduce the element of reasonableness, which must be assessed objectively. No subjective intent or dolus eventualis is required. The question is whether the fictional reasonable person, the diligens paterfamilias, would have known. See also Jonathan Burchell Principles of Criminal Law 4 ed (2014) at 874."*

[emphasis added]

52. In my view, nothing turns on the difference between the words “*ought reasonably to have known*” in **Prinsloo** and “*should reasonably have known*” in the Bill.

All material amendments ought to be open for comment

53. The character of all these amendments must, in my view, affect the “*substance of the Bill*” in terms of **SAVA** and Rule 286(6)(c) of the Rules of the NA. The amendments alter the substantive rights of existing and prospective rights-holders and creators, including the elements of statutory offences. They are neither technical nor semantic.
54. The import of these amendments is to bring a range of creative, artistic, literary, journalistic, educational and research activities within the scope of the Bill; and to limit the conditions under which an individual may cognisably benefit from a general or specific exception to copyright protection.

55. For these reasons, the current call for comment on the Bill ought to have included the provisions eliminating the illustrative examples of “*fair use*”; adding the “*fair practice*” test; and lowering the *mens rea* requirement for statutory offences.
56. I turn now to the third question and the substantive amendments to the Bill which are included in the call for comment.

THE SUBSTANTIVE AMENDMENTS TO THE BILL WARRANT SCRUTINY

57. The current round of amendments to the Bill introduce a number of substantive changes, and I focus here on three of the most far-reaching in terms of their potential impact on constitutional rights and internationally-protected human rights of creators:
- 57.1. The aggregation of multiple and overlapping legal tests (which I refer to as “test-stacking”) in section 12A, and its impact on legal certainty;
- 57.2. The exclusion of the right to royalties or equitable remuneration on future income arising from contracts concluded prior to the enactment of the Bill, and its misconceived reliance on non-retrospectivity of legislation; and
- 57.3. The requirement of ownership of a legal copy of a work as a pre-requisite for the right to make personal copies, and its potential consequences on the realisation of the right to education in a developmental state.
58. I deal with these in turn.

The practical impact of “test-stacking” is impermissibly vague legislation

59. The amended scheme of section 12A, if enacted, would include the following legal consequences, ostensibly within the scope of its regulation of the general exception:

59.1. by operation of the existing section 13 of the Copyright Act, 1978, read with Article 13 of the TRIPS Agreement, the “three-step test” from Article 9.2 of the Berne Convention would apply to all exceptions, general and specific, in the Bill;

59.2. by operation of section 12A(b), which was not itself amended, the general exception is additionally subjected to the four “fair use factors” borrowed from the influential provisions of the law of the United States of America, contained in section 107 of its Copyright Act, 1976;

59.3. by operation of section 12A(d), the specific exceptions in sections 12B, 12C, 12D, 19B and 19C are then further subjected the “*principle of fair use*”;

59.4. the specific exception for educational activities in section 12D is then finally subjected, in three places, to the test of “*fair practice*”.

60. Put plainly, a layperson attempting to understand how to exercise their rights under the Bill, in the specific context of educational or academic activities – for instance, by a primary or secondary school learner or a university student – would need to weigh four distinct legal tests in order to ascertain their legal position.

61. Considerations of legal certainty are “*central*” in a constitutional state.²⁵ In **Affordable Medicines Trust and Others v Minister of Health and Another** 2006 (3) SA 247 (CC),

²⁵ **Ferreira v Levin NO and Others** 1996 (1) SA 984 (CC) para 26.

Ngcobo J described the doctrine of vagueness of legislation as part of the rule of law, itself a “*foundational value of our constitutional democracy*”.²⁶

62. The learned justice cautioned that:

“...laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly”²⁷

[emphasis added]

63. This degree of certainty will be especially “*critical*”, according to Ngcobo J, where a “*criminal penalty is imposed for violation of a statutory provision*”.²⁸

64. It is readily apparent that section 27 of the Bill allows for the imposition of criminal sanctions on persons who violate copyright protections, up to a maximum of five years’ imprisonment.

65. In my view, the practice of threefold and fourfold “test-stacking” in sections 12A, 12B, 12C and 12D of the Bill is unlikely to satisfy the requirement of reasonable certainty. If adopted in its present form, it will not only require elucidation by the Court, but may well be impermissibly and irremediably vague.

66. To resolve this, the fair use test in 12A should not be extended to 12B, 12C and 12D and fair practice should not be introduced in the Bill.

The exclusion of claims to royalties and equitable remuneration arising prior to enactment may be arbitrary

²⁶ Affordable Medicines Trust para 47.

²⁷ Affordable Medicines Trust para 47.

²⁸ Affordable Medicines Trust para 47.

67. It appears that the current set of amendments asserts that certain retrospective provisions in the Bill have been removed at an earlier stage. These include the removal of future claims for royalties and equitable remuneration for audiovisual works and sound recordings arising from contracts concluded prior to the commencement date of the Bill, once enacted.
68. These changes are no longer open for comment. However, they appear to rest on a mischaracterisation, as a matter of law, of the principle of non-retrospectivity of the rights of creators.
69. In my view, where copyright subsists in a work in terms of the Copyright Act, 1978, the principle of non-retrospectivity would not prevent Parliament from introducing new remedies for enforcement of those rights, including the payment of royalties or equitable remuneration.
70. This salutary approach – which differentiates between the non-retrospective source of a right and the evolution of effective mechanisms for its enforcement – was adopted by the Appellate Division in **Appleton and Another v Harnischfeger Corporation and Another** 1995 (2) All SA 693 (A) at 705-706 (*per* Corbett CJ), applying its prior decision in **Klep Valves (Pty) Ltd v Saunders Valve Co Ltd** 1987 (4) All SA 147 (A).
71. Accordingly, this aspect of the Bill has the effect of barring creators from an effective remedy – namely future royalties or equitable remuneration – solely on the basis that the underlying right was granted under a contract concluded in terms of legislation no longer in force. This may amount to arbitrary deprivation of a right or discrimination against rights-holders on arbitrary grounds, and may in future provide grounds for a challenge to the constitutional validity of these provisions of the Bill.

72. Where a work protected under the previous version of the Act is being exploited in new ways and under the umbrella of new legislation, it is difficult to see how enforcement of remedies requiring fair royalties or equitable remuneration for future exploitation of the work would amount to an impermissible, retroactive application of legislation.

The restrictive definition of a lawfully-acquired copy and its impact on the right to personal use

73. An amendment to section 12B(i) of the Bill restricts the specific exception for personal and non-commercial use to personal copies of a work that was “*lawfully acquired*”, and additionally subject to the “*fair practice*” test.
74. The applicable definitions in the Bill are also amended to define “*lawfully acquired*” in the following way:

“a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift and does not include a copy which has been 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.”

[emphasis added]

75. This definition is restrictive, because it excludes a range of modes of lawful acquisition of works apart from purchase and gift, such as inheritance.
76. It is also vague, because it fails to specify whether the ultimate user herself must have lawfully acquired the work, or whether the ultimate user may permissibly make a personal copy (compatible with fair practice) of a work lawfully acquired by another, to which the ultimate user has access through, for instance, a school or community library or perhaps through an informal study group of learners in a community..

77. The practical impact of this amendment may well be, for instance, to prohibit a primary or secondary school learner from copying limited pages of a book from the school or community library or from another learner for the purpose of completing that day's homework, because the exception for educational or academic activities in section 12D does not expressly provide for this use, and section 12D itself is expressly restricted to the right to reproduce a work "*in cases stipulated in this section*" [section 12D(1)(b)].
78. Such an outcome would clearly hamper the realisation of the right to education and access to knowledge which the Bill professes to promote.
79. The Constitutional Court held as follows in **Doctors for Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC): "*A majority of the people had, for many years, been denied the right to influence those who ruled over them. They had been discriminated against in almost every sphere of life . The result was gross inequality in education, financial resources, access to knowledge and other areas...*"
80. Together with the other amendments open for comment which I have traversed above, this present amendment would appear, with respect, to introduce legal complexity in the name of a precautionary approach. The outcome is to weaken the legislation, not strengthen it.
81. I advise accordingly.

S A NAKHJAVANI
Chambers, Sandton
27 January 2022