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Reforming the Right to Remuneration in the South African Copyright Amendment Bill

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REFORMING THE RIGHT TO REMUNERATION IN THE SOUTH AFRICAN COPYRIGHT AMENDMENT BILL

Malebakeng Agnes Forere¹

ABSTRACT

One of the core goals of South Africa's Copyright Amendment Bill is to provide a right to fair remuneration for all authors and performers. This objective was motivated by the experiences of numerous famous South African creators who, despite their success in the creative industry, died as paupers. The problem that the Bill seeks to address is that the distributors of copyrighted work are dominated by multinational monopolies that are able to exact enormous concessions in their contracts with South African creators. Among the tools to address this problem in the Bill is a new right to a "fair royalty" for authors and performers, which applies to existing as well as future contracts. This provision is among those sent back to Parliament by the President for violating the Constitution. The President and others specifically criticize the retroactive effect of the royalty right with respect to existing contracts. This Article analyzes the Bill's royalty rights and its potential constitutional infirmities, considers how other jurisdictions, especially the European Union has implemented fair remuneration rights, and proposes modest amendments that can help the Bill achieve its compelling purposes without running afoul of constitutional guarantees.

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ABSTRACT	1
INTRODUCTION	2
I. THE RIGHT TO REMUNERATION IN SOUTH AFRICA	7
A. <i>The challenges faced by authors/performers in South Africa</i>	7
B. <i>The response to the authors’ plight: Copyright Amendment Bill</i> . 8	
C. <i>The reactions towards the Copyright Amendment Bill in respect of authors’ rights</i>	11
II. DRAWING LESSONS FROM THE EUROPEAN UNION APPROACH TO REMUNERATION OF AUTHORS/PERFORMERS	13
A. <i>Form and standard of remuneration</i>	13
B. <i>Contract Modification</i>	15
C. <i>Accountability and transparency</i>	15
D. <i>Regulation of Collecting Societies</i>	16
E. <i>Reversion rights</i>	16
F. <i>Retroactive application</i>	17
III. RECOMMENDATIONS.....	17
IV. CONCLUSION.....	20

INTRODUCTION

The Copyright Amendment Bill’s purposes expressly include language to increase the ability of creators to receive fair remuneration for their work.² The final bill passed by Parliament in 2019 includes a right of authors and performers to receive a “fair royalty” in contracts assigning their exclusive rights to publishers and other distributors.³ The Bill applies this right of

² Relevant to this article, the Bill’s purpose is “to provide for the sharing of royalties in copyright works; to provide for the payment of royalties in respect of literary, musical, artistic and audiovisual work”, Copyright Amendment Bill B133 2017, Preamble, available at: https://static.pmg.org.za/B13B-2017_Copyright.pdf.

³ *E.g.*, section 6A(2) provides that:
“Notwithstanding—
(a) the assignment of copyright in a literary or musical work; or
(b) the authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6,
the author shall, subject to any agreement to the contrary, be entitled to receive a fair

remuneration to existing as well as future contracts with creators.⁴ This provision was opposed by organizations representing publishers, collective management organizations and other distributors,⁵ who encouraged the President to send the Bill back to Parliament partly because of their opposition to this provision of the Bill.⁶ The President of South Africa responded to the industry's request in 2020, rejecting the Bill in part because he found that the royalty rights provisions "may constitute retrospective and arbitrary deprivations of property."⁷

This Article assesses the royalty rights provisions of the South African Copyright Amendment Bill to determine whether they live up to the objective of the Bill, which is to ensure fair remuneration of authors and performers, and the constitutionality of retroactive application thereof. While all the provisions of the Bill are centered on asserting the rights of authors and

share of the royalty received for the execution of any of the acts contemplated in section 6."

⁴ See, e.g., section 6A(7)(a):

"This section applies to a literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that literary or musical work—

falls within the application of this Act; and
is still exploited for profit."

⁵ Africa News Agency, *Coalition Urges Parliament To Draft A Better, Fresh Bill Amending Copyright Act*, IOL (Aug. 18, 2020), <https://www.iol.co.za/news/politics/coalition-urges-parliament-to-draft-a-better-fresh-bill-amending-copyright-act-47077ff5-6400-47a2-b313-67bcf930c517> [calling on Parliament to begin a fresh process to draft a better bill amending the Act since the current bill does not adapt the 1979 Copyright Act for the internet age and it is inconsistent with the Constitution as well as South Africa's obligations under international treaties].

⁶ E.g., Steven Budlender & Ingrid Cloete, *Submissions on the Constitutionality of the Copyright Amendment Bill, 2017* (Feb. 22, 2019) https://libguides.wits.ac.za/ld.php?content_id=56780275

25.1 "Though the right to share in royalties only applies to royalties received in the future, subsections 6A(7), 7A(7) and 8A(5) provide that the right to share in royalties applies not only to future assignments, but also where copyright in the relevant work was assigned before the commencement date of the Act.

25.2 Therefore, if copyright in a literary work was assigned in 2010, for instance, its author will, from the commencement date of the Amendment Act, have a right to share in the royalties received in respect of that work, notwithstanding the assignment.

⁷ Letter from the President of the Republic of South Africa to the Speaker of the National Assembly (June 16, 2020), https://legalbrief.co.za/media/filestore/2020/06/ramaphosa_on_copyright_amendment_bill.pdf. Specifically, the President said on retrospective and arbitrary deprivations of property:

I also have reservations that Sections 6A(7), 7A(7) and 8A(5) of the Bill may constitute retrospective and arbitrary deprivations of property. These provisions mean that going forward, copyright owners will be entitled to a lesser share of the fruits of their property than was previously the case. The impact of these provisions reaches far beyond the authors it seeks to protect – those that live in poverty as a result of not having been fairly protected in the past. The retrospective provisions deprive copyright owners of property without sufficient reason and will therefore result in substantial and arbitrary deprivation of property. In addition, how assignment by multiple authors would work or what would happen if the owner of the copyright is a non-profit organization aggravates the situation. The sections which raise this concern are likely not to survive constitutional challenge.

owners thereof, this contribution focuses on the provisions relating to contracts and royalties; the regulation of collecting societies; and reversion rights.

The trials and tribulations of authors/artists in the creative industry in South Africa, especially in the entertainment industry, dates back to pre-democratic South Africa. In 1992, the Department of Trade and Industry referred questions of needle-time royalty to the Standing Advisory Committee established in accordance with the Copyright Act to look at the reintroduction of needle-time royalties. This enquiry was particularly important to respond to the plight of artists who were dying poor despite their fame and apparent success – with specific mention of Simon Nkabinde, known as ‘Mahlathini’.⁸ Mahlathini’s economic status upon his death led the Minister of Arts and Culture to establish a task team to look at the problems in the music industry in 1998. The task team found many challenges, key among them being the outdated copyright law and unfair contracts, and made recommendations thereof. Despite the task team recommendations, artists continued to face exploitative treatment from the industry, and that led to the Department of Trade and Industry establishing the Copyright Review Commission (CRC) in November 2010, which released its report in 2011.

The Commission was tasked with studying and making recommendations on the workings of the collecting societies regarding how they license musical and literary works, sound recordings and published editions to prospective users; how they collect royalties on behalf of the rights owners; and how they distribute such royalties to rights holders and authors.⁹ The CRC made several recommendations. Key to the remunerations rights are the following: the regulation of needle-time collecting societies should be extended to all collecting societies;¹⁰ needle-time royalties should be shared equally (50-50) between performers and record labels;¹¹ standardization of contracts between performers and record companies that are fair to both sides;¹² and reversion of rights after 25 years of assignment like in the United States.¹³

The above recommendations called for the amendment of the Copyright Act, which started in 2016. Accordingly, the Bill seeks to safeguard artists/authors’ remuneration rights by adopting the following sections: regulating all collecting societies and making them answerable to members (accountability); standardizing contracts; creating compulsory royalties for exploitation of the work concerned; extinguishing buyout contracts;

⁸ Copyright Review Commission Report (2011), https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf [hereinafter CRC Report]

⁹ CRC Report, 7-8.

¹⁰ CRC Report, Chap. 7

¹¹ CRC Report, Chap. 3, para 3.3.8

¹² CRC Report, Chap.10, para 10.12.5

¹³ CRC Report, Chap. 10, para 10.12.10

assigning a term limit of 25 years; retroactively applying the Bill once it is signed into law; ensuring reversion of rights for non-use; and dispute settlement.

Despite these comprehensive clauses, the Bill still attracts criticism from many sectors, notably the Copyright Coalition of South Africa.¹⁴ In the main, the Coalition rejects the Bill for lessening or taking away the remuneration rights of authors. This, if it is found to be true, means that the Bill goes against the very purpose for which it was drafted. It would also go against the spirit of copyright law, which is embedded in the economic/utilitarian theory of copyright protection which postulates that authors or creators of works should be rewarded enough so that they can invest more time in producing works for public good.¹⁵ Note that even natural law theorists have an objective to reward the author. Therefore, whether argued from the point of utilitarianism or naturalist theory, the common denominator for copyright is to reward or incentivize the creator.¹⁶ In addition, the Coalition rejects the Bill for its retroactive application, which is alleged to have the effect of taking away property rights of copyright owners – thereby rendering the Bill unconstitutional.

As a former British colony until 1961, South Africa has been closely following British laws in the field of intellectual property. Specifically, after the formation of the Union of South Africa, Parliament enacted the Patents, Designs Trademarks and Copyright Act of 1916, which basically incorporated the British Copyright Act of 1911. The 1916 Act was amended in 1965 and it mirrored the British Copyright Act of 1956. This Act was repealed by the current 1978 Copyright Act, which is still heavily based on British copyright laws. The common law countries typically follow the utilitarian theory of copyright in which an economic incentive to the creators of the literary and artistic works is of paramount importance.¹⁷ This was evidenced by the Statute of Anne promising an incentive in a form of protection for more creations, whereas the natural law theory of copyright protection is simply based on the principle of justice and rights of the authors to receive protection over their works without any connotations to utility.¹⁸ Accordingly, the analysis of the Copyright Amendment Bill is predicated on the creators' right to receive an incentive (remuneration), which should be enough for them to be stimulated to devote time, skill and effort to more

¹⁴ Budlender & Cloete, *supra* note 6.

¹⁵ Ernest Chua, *Fan Fiction and Copyright; Mutually Exclusive, Coexist-able or Something Else - Considering Fan Fiction in Relation to the Economic/Utilitarian Theory of Copyright*, 14 *Murdoch U. eLaw J.* 215 (2007) (discussing the economic/utilitarian theory of copyright using US and Australian law).

¹⁶ Rebecca Giblin, *A New Copyright Bargain: Reclaiming Lost Culture and Getting Authors Paid*, 41 *Colum. J.L. & Arts* 369, 373 (2018).

¹⁷ Martin Senftleben, *More Money for Creators and More Support for Copyright in Society- Fair Remuneration Rights in Germany and the Netherlands*, 41 *Colum. J.L. & Arts* 413, 416 (2018).

¹⁸ *Id.*

creations. The question is whether the above-mentioned provisions of the Bill safeguard adequate remuneration of creators.

The issue of remuneration is not unique to South Africa, many jurisdictions have grappled with it for some time and they still do. Writing in the context of Germany and The Netherlands, Martin Senftleben discusses remuneration right at the beginning of the contract and after the contract was concluded in both the Netherlands and Germany.¹⁹ The laws in both countries place a heavy burden on the representative organizations to negotiate common remuneration rules and that has proved difficult.²⁰ Consequently, these countries are still grappling with how best creators can realize the remuneration right, and this is a problem for South Africa as well, which this paper seeks to address. Another salient feature of remuneration right is reversion of rights to the creator. To this end, there are many proposals in the literature, with scholars such as Kretschmer advocating for mandatory reversion rights to the creator after a period of 10 years²¹ while Giblin advances automatic reversion after 25 years.²² These studies do not discuss the circumstances under which rights can revert to the creator other than a set period. Therefore there is a need to delineate applications for reversion rights other than just imposing a blanket expiration of a particular term limit. The analysis into South Africa's proposed reversion model will be based on whether it rewards the creators.

In light of the above, this contribution seeks to assess the veracity of the above criticisms and it is accordingly arranged as follows: Part I discusses the right of remuneration as provided for in the Bill. It does so by first providing the context, that is, the challenges that authors/artists in South Africa face. Then the discussion proceeds to the Copyright Amendment Bill, providing a summary of those provisions that impact on the right of remuneration of authors/artists. Lastly, we look at the contributions of other scholars and practitioners on the Copyright Amendment Bill as it relates to remuneration of artists/authors. Part II draws lessons from the European Union. It starts by summarizing those provisions of the Copyright Directive that relate to remuneration of authors in exploitation contracts and draws parallels to the South African Copyright Bill. Predicated on the economic theory of copyright protection, Part III makes recommendations on how the Bill can be framed to ensure that artists are adequately remunerated in light of international practice, and finally concludes.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Martin Kretschmer, *Copyright Term Reversion and the 'Use-It-Or-Lose-It' Principle*, 1 Int'l J. of Music Bus. Res. 44 (2012).

²² Giblin, *supra* note 16.

I. THE RIGHT TO REMUNERATION IN SOUTH AFRICA

A. *The challenges faced by authors/performers in South Africa*

The right of remuneration for many South African authors and performers has been an illusion. Who cannot forget that Solomon, an author of the million-dollar song, *The Lion Sleeps Tonight*, died a pauper yet his song appeared in the big screens of Walt Disney, making millions of dollars?²³ Solomon was not the last South African author to experience unfair treatment as regards remuneration of his work – there are many stories of this nature in South Africa in which the fame does not translate into adequate or fair remuneration, if at all. Solomon’s daughters, as represented by Professor Owen Dean, were fortunate enough to get a settlement, which comprised of back royalties payments and the right to earn future royalties in line with international practice.²⁴ There are many instances in which the work has turned out to be the seller, not anticipated by the exploitation contract. The current Copyright Act of 1978 does not protect authors’ right of remuneration, rather, it is left to the parties – authors and owners – to negotiate remuneration, and it certainly does not cater for best seller. It goes without saying that authors have been at the receiving end because the playing field is not leveled. The vulnerability of authors is further evidenced by the licenses that they conclude, in which they basically assign all their rights to the owners in perpetuity. In some instances, this is attributed to ignorance of their rights,²⁵ which is a cause for concern because one cannot demand the enforcement of the rights that s/he is not aware of.

The other challenge that authors face in South Africa is that sometimes they work hard to produce works under contract, in which case the copyright vests in the person commissioning the work. But it becomes a problem where the commissioning party decides not to use it and refuses to license it to the author. The example in point is “Project Spear: Stolen billions, spies and lies”, authored by Sylvia Vollenhoven as commissioned by the South African Broadcasting Corporation (SABC). This work never aired because of allegations that the government would not be happy with the revelations that the state turned a blind eye to massive corruption to the tune of R30 billion during the years leading to the end of apartheid in South Africa. Vollenhoven attempted on numerous occasions to license the work from SABC but it was refused,²⁶ despite the court directing the copyright owner – the SABC – to negotiate in good faith the possibility of a licensing agreement with the author

²³ *Disney Settles Lion King Song Lawsuit*, Aljazeera (Feb. 16, 2006), <https://www.aljazeera.com/news/2006/2/16/disney-settles-lion-king-song-lawsuit>

²⁴ *Id.*

²⁵ Sean M. Flynn & Peter A. Jaszi, *Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Am. U. WCL Res. Paper No. 23 (2010), <https://ssrn.com/abstract=1654025>

²⁶ Sylvia Vollenhoven, *Bankers and Spies, Politicians and Lies*, *The Journalist* (Jan. 24, 2017), <http://www.thejournalist.org.za/spotlight/bankers-and-spies-politicians-and-lies/>

within 14 days of the judgement.²⁷

In the creative industry, the enjoyment of the right of remuneration is facilitated by collecting society organizations, and this is the case for South African authors as well. However, the collecting societies in South Africa continue to make the right of remuneration a dream for authors and owners alike. For example, the Minister of Arts and Culture, Mr Nathi Mthethwa called for an enquiry into the affairs of the South African Music Association (SAMRO) in the collection and distribution of royalties following a public outcry on how the organization handles distribution of royalties.²⁸ In addition, SAMRO has been accused of lack of transparency in conducting the affairs of those it represents – artists. Specifically, SAMRO was chastised for unlawfully reducing royalties dating back to 1963.²⁹

B. *The response to the authors' plight: Copyright Amendment Bill*

This section summarizes the relevant provisions of the Copyright Amendment Bill, which are necessary for ensuring remuneration of authors. These provisions cover the following aspects of the right of remuneration; standard of remuneration; form of remuneration; accountability clauses; reversion rights; and retroactive application.

On the right to remuneration, sections 6A and 7A of the Bill makes it compulsory for the author of literary and musical works, and visual artistic works respectively to receive royalties in respect of exploitation of the works. The right of remuneration applies irrespective of any assignment of the work. In fact, it also applies to subsequent assignments and/or successors in title of copyright in the works concerned.³⁰ The right to receive royalty is made compulsory regardless of whether the author chooses not to receive such royalties. The relevant part of the Bill in respect of literary and musical works, and visual artistic works reads as follows:

Notwithstanding—

- (a) the assignment of copyright in [the work]; or
- (b) the authorisation by the author of ...[the work concerned] of the right to do any of the acts contemplated in [the related section], the author shall have the right to share in the royalty received for the execution of any of the acts contemplated in [the relevant section].

The performer in the audio-visual work is also entitled to receive royalties

²⁷ *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* [2016] 4 All SA 623 (GJ).

²⁸ SAMRO, *SAMRO CEO Response to Media Reports*, <https://www.samro.org.za/news/articles/samro-ceo-response-media-reports>

²⁹ Jamaine Krige, *Samro Accused of Unlawfully Deducting Royalties from Musicians*, SABC News (April 2, 2018), <https://www.sabcnews.com/sabcnews/samro-accused-unlawfully-deducting-royalties-musicians/>

³⁰ Copyright Amendment Bill, s6A (3)(b); s7A(3)(b) & s8A(3)(b).

for the exploitation of such works. The agreement between the performer and the copyright owner shall be in writing and it must be in accordance with the template that the Minister is yet to develop,³¹ perhaps through the Regulations. The agreement on the share of royalties binds successors in title of the copyright in the work concerned. Notable about section 8A, which provides for a right of a performer to receive royalties is that it is not as strictly worded as sections 6A and 7A on literary and musical works, and artistic works respectively. Thus, the performer in the audio-visuals can choose not to receive the royalties whereas the author of the literary and musical works as well as artistic works **MUST** always receive royalties irrespective of whether he has authorized the exploitation of his work without the accompanying royalty payment. The inalienable right to receive royalties will be a nightmare for charitable events. To this end, I have seen many contracts where the artists license their work on a once-off fee for charitable events, and this section will cause fundraisers to share the proceeds with artists contrary to the spirit of charity.

Section 9A entitles the copyright owner in sound recordings to receive royalties as a matter of right but recognizes that there may be an agreement to not receive payment or as sanctioned by the law.³² The section further binds the copyright owner to share royalties equally with the performer,³³ as recommended by the CRC.

Form of remuneration: The author of the literary and musical works, as well as the artistic works can only be remunerated through periodic royalties.³⁴ There is no option for lump sum payments or buy-outs despite the widely accepted practice that under suitable circumstances the author can get lump sum payment or buy-out. The performer in the audio-visuals and sound recordings is also to be paid by royalties, and this is in line with the general practice given the nature of exploitation of these works.

Standard of remuneration: There is no standard upon which remuneration shall be determined in respect of literary and musical works and audiovisual works – it is left to the parties to determine the share of royalties that the author will receive. If there is no agreement, parties can refer the matter to the Tribunal for determination. On the other hand, the performer in the sound recordings is entitled to half of the royalties collected.³⁵ However, there is another standard of remuneration for the performer in the sound recording – fair and equitable – standard.³⁶ It is not immediately clear why the sound recordings have two different standards of remuneration other than that it is an error on the part of the drafters of the Bill.

³¹ See e.g., Copyright Amendment Bill, section 6A (3)(a).

³² Copyright Amendment Bill, section 9A(1).

³³ Copyright Amendment Bill, section 9A(2)(a).

³⁴ Copyright Amendment Bill, section 6A(2)(b); section 7A(2)(b).

³⁵ Copyright Amendment Bill, section 9A(2)(a).

³⁶ Copyright Amendment Bill, section 9A(2)(b).

Accountability and transparency: whereas the Bill provides authors with the right to remuneration in the form of royalties, there is no provision for the copyright owner of literary and musical works, and artistic works to account in a transparent manner to the author in respect of the royalties received. The same is the case with regard to the performer in the audio-visuals. Nevertheless, there is a burden on the user of sound recordings to keep a record of the usage of sound recordings and submit such record to the performer and copyright owner for determination of royalties payable.³⁷ Despite the foregoing, remuneration in the creative industry is often facilitated by the collecting societies. Accordingly, the Bill contains some accountability clause to the extent that it requires the collecting societies to “provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner.”³⁸

Term limits for assignment and reversion rights for non-use: The term of assignments in respect of literary and musical works cannot exceed 25 years after which the work returns to the creator. As indicated above, many jurisdictions have placed term limits on assignment albeit with different term limits. The other form in which rights revert to the creator is in relation to commissioned works in certain circumstances. Copyright in these works vest in the person commissioning the work.³⁹ However, ownership may be in respect of certain restricted acts relevant to the purpose for which the work was commissioned.⁴⁰ The author of the commissioned work may approach the tribunal in respect of the commissioned work for an order reverting the rights where:

- i) the person who commissioned that work does not use it for the purpose for which it was commissioned – the author can get an order licensing him to use the work for such purpose subject to the fee payable to the person who commissioned the work;

when determining whether to grant the license or not, the Tribunal will take the following into account: (a) The nature of the work; (b) the reason why and period for which the person who commissioned the work did not use the work; and (c) public interest.

- ii) the work is used for a different purpose than the one it was commissioned for, the author of such work can request an order for payment of royalties for that other use.

Retroactive application: This is the most controversial provision of the Bill. Retroactive application only covers those works – literary and musical works – that although created and exploited prior to the coming into effect of

³⁷ Copyright Amendment Bill, section 9A(1)(b).

³⁸ Copyright Amendment Bill, section 22D(1)(c).

³⁹ Copyright Amendment Bill, section 21(1)(c).

⁴⁰ Copyright Amendment Bill, section 21(3)(a).

the Bill, are still under copyright protection and commercially exploited.⁴¹ The problematic aspect of this provision is its blanket coverage of all contracts irrespective of whether an author was fairly remunerated. Thus, even in cases where the author was paid a handsome lump sum, this provision would make this particular author to claim royalty thereby making this provision unjust. We should recall that the intention of the legislature here is to end the injustices that have been orchestrated against authors not to unfairly taking away from the owners.

The retroactivity of the Bill will not require back royalties. Accordingly, creators will demand a right of remuneration going forward, which should be in line with this law and not in line with the concluded contracts especially where such contracts do not comply with this Bill. Existing contracts will be revised to include the following: The author's share in the royalties, which must be done by agreement between the parties;⁴² the rights and responsibilities of the author/performer and copyright owner; method of payment of royalties and period within which royalties must be paid. If there is no agreement, the matter shall be referred to the Tribunal for determination of share of royalties.⁴³

C. The reactions towards the Copyright Amendment Bill in respect of authors' rights

Whereas there is no literature on the Copyright Amendment Bill, other than anecdotal publications focusing on remuneration, there is relevant literature published in the context of the European Union, Canada, the United States, and many other countries. Given the interconnectedness of the jurisprudence especially in the field of copyright, which gets its source from multilateral organizations and the fact that the Bill is drawing from countries such as the United States and the European Union, the literature that was published in the context of these countries will be relevant for South Africa. The most direct and highly relevant publication is by Martin Senftleben who discusses remuneration rights in both the Netherlands and Germany.⁴⁴ Both countries provide for fair remuneration *ex ante* (during the conclusion of the contract) and *ex post* (after the conclusion of a contract similar to renegotiation), which is determined through common remuneration rules as agreed upon by the representative societies of both the creators and exploiters. The challenge in Germany has been the inability of representative organizations to establish these rules, which then led the courts to import the remuneration rules of one sector into other sectors instead of exercising section 32(2) UrhG, which requires the rules to be determined based on the

⁴¹ Copyright Amendment Bill, sections 6A(7)(a) & 7A(7)(a).

⁴² Copyright Amendment Bill, sections 6A(3) & 7A(3)(a)

⁴³ See for example, Copyright Amendment Bill, section 6A(4).

⁴⁴ Senftleben, *supra* note 17.

customary practices of the sector concerned.⁴⁵ As Senftleben indicated in his paper, the court finds it challenging to accept remuneration rules founded on the customary practices because they may not be fair as required by the law as they could potentially yield very low royalties. The author also notes that in seeking to work around the German problem, the Netherlands gave the Minister power to develop common remuneration rules after a joint request with clear guidelines from the representative organizations. Clearly this still poses a problem because representative organizations will always find it difficult to agree on anything as it has been the case in Germany. Accordingly, the German system of remuneration, although a good starting point, still poses challenges that countries such as South Africa wishing to adopt a similar model have to improve on to ensure that creators can get fair remuneration. This contribution will therefore make recommendations on how best South Africa can ensure that creators get a fair remuneration of their works.

Writing against the backdrop of studies that show unused copyrighted works in the United States and Europe, which are not available for use, Kretschmer advocates for mandatory reversion rights to the creator after a period of ten years for re-use or further non-exclusive licensing.⁴⁶ The objective for this recommendation is to make works that are in the back catalogue and out of print accessible to the public. The back catalogue rationale for reversion rights has increasingly faced attacks on the basis that due to a shift to digitization, works are never out of print, thus, print on demand makes this rationale irrelevant in the digital age.⁴⁷ Another objection is that since creators now receive on-going royalties, it makes no sense to trigger reversion rights.⁴⁸ Nevertheless, the ten year period which then triggers reversion of rights is inspired by the Statute of Anne, which provided for reversion of rights after fourteen years for a further fourteen years provided the author was still alive. Specifically, Kretschmer proposes the following options for the creator after ten years of licensing or assignment:

- (i) re-assigning or re-licensing their work if there is still demand,
- (ii) joining a collective management scheme (converting in effect the exclusive right into a right to remuneration), or
- (iii) abandoning the work.⁴⁹

The latter proposal would not bode well with those jurisdictions embedded in the natural right theory of copyright protection. Nevertheless, the proposal as a whole does not adequately address the economic interests

⁴⁵ *Id.*

⁴⁶ Kretschmer, *supra* note 21.

⁴⁷ Steve Gillen, *Reversion in the Digital Age: Is Out-of-Print Out of Style?*, Independent Book Publishers Association Online (2016), <https://perma.cc/2S9Y-6VPL>

⁴⁸ Jane C. Ginsburg, *Foreign Authors' Enforcement of U.S. Reversion Rights*, 41 Colum. J.L. & Arts 459 (2018).

⁴⁹ Kretschmer, *supra* note 21, at 46-47.

of creators during the initial term of licensing, especially exclusive licensing or assignment. There seems to be a move towards reverting the rights to the author for non-use, and this is found in jurisdictions such as the EU, United States of America and others while South Africa is only introducing it now in the Copyright Amendment Bill. The analysis into South Africa's proposed reversion model will be based on whether it takes care of the economic interests of creators or not.

The quest for protecting the economic interests of creators continues throughout the world and in South Africa. Countries and scholars alike have attempted to guard against unfair treatment of creators yet the solutions provided still leave gaps. Thus, the German and Netherlands models as discussed above have not translated into success that one would have hoped for, while the South African Bill continued to attract criticism for its failure to ensure economic interests of authors. Consequently, this contribution borrows from some elements of the European Copyright Directive on fair remuneration to address the gaps in the South African Copyright Amendment Bill.

II. DRAWING LESSONS FROM THE EUROPEAN UNION APPROACH TO REMUNERATION OF AUTHORS/PERFORMERS

South Africa is not the only country grappling with remuneration of authors/performers. Other jurisdictions have started the process, thereby creating lessons for South Africa. The European Union is a case in point in which member states are obligated to ensure fair remuneration of authors/performers in Chapter III of the Copyright Directive. To this end, there are five salient features of the fair remuneration right as follows: a) a principle of appropriate and proportionate remuneration; b) freedom of contract; c) contract modification; d) transparency; and e) alternative dispute settlement, which I discuss below.

A. *Form and standard of remuneration*

Starting with appropriate and proportionate remuneration, the Directive provides that where an author or a performer transfer or license their rights in the work, they have a right to receive an appropriate and proportionate remuneration.⁵⁰ In implementing the right to appropriate and proportionate remuneration, member states must safeguard the principle of contractual freedom.⁵¹ This EU provision is particularly important for South Africa in that while the intention is to ensure that authors and performers are duly remunerated, the manner in which they are remunerated should not be cast in

⁵⁰ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC [hereinafter *Copyright Directive*], Art 18(1).

⁵¹ Copyright Directive, Art 18(2).

stone so much that it can undermine freedom of contract. In the EU, there is still an option for parties to opt for lump sum as indicated by the usage of the term “appropriate remuneration” and emphasized in Recital 73 in which lump sum buyout can still be regarded as appropriate and proportionate although it should not be the rule. The Directive leaves it to member states to determine the limited circumstances upon which lump sum buy-outs can be implemented but the European Copyright Society recommends that guidelines should be developed by the specific sector’s CMOs involved.⁵² The relevant Copyright Directive provision reads as follows:⁵³

1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.
2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

The above Article 18 is elaborated in Recital 73 of the Directive as follows:

The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. A lump sum payment can also constitute proportionate remuneration but it should not be the rule. Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector...

The current Bill takes away the option for lump sum, which might be necessary to the South African authors who are treated by the services industry as free lancers or independent contractors and therefore not eligible for certain finance agreements that normal full time employees are entitled to. Thus, instead of getting periodic royalties, it might be appropriate to receive a lump sum to buy property because the banks would not be willing to finance property over a period of 20 years for an independent contractor, and even if they eventually do, the conditions become harsh thus entrenching South African authors deeper into poverty. Therefore, this provision has taken away freedom to contract available to all the parties involved.

Whereas the Bill speaks of right of remuneration, which as one would imagine is not just remuneration but one that will be enough to stimulate

⁵² Severine Dusollier et al., *Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market*, U. Copenhagen Fac. L. Res. Paper Series No. 102, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695935.

⁵³ Copyright Directive, Art 18(2).

further creation as underpinned by the utilitarian values of the South African society, there is a problem with the Bill in its current form – its failure to provide a standard of remuneration. The Bill rightly leaves it to the parties to determine remuneration, or to the Tribunal in the event that there is no agreement, but it fails to provide guidelines to determine remuneration. The EU standard of remuneration embodied in the Recital 73 is “proportionate... to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work...and all other circumstances of the case, such as market practices or the actual exploitation of the work.”⁵⁴ In a nutshell, the standard of remuneration should ensure “that rewards be distributed among participants according to the marginal contribution that each plays in a cooperative activity, such that each one does not receive less than that which she would have earned by operating alone.”⁵⁵

For these reasons, I would recommend herein to adopt Article 18 of the Copyright Directive as defined in Recital 73.

B. *Contract Modification*

The EU has adopted another principle of contract modification, which caters for bestseller works. Effectively, this principle allows parties to renegotiate and modify the initial contract, especially the royalty rate, if the “remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.”⁵⁶ There is no equivalent of the EU bestseller clause in the current Copyright Amendment Bill. Without a right to remuneration adjustment, authors and performers will be severely compromised – we do not want a repeat of Solomon’s Lion Sleeps Tonight. Therefore, it is recommended again that Parliament incorporates an equivalent of Article 20 of the EU Copyright Directive.

C. *Accountability and transparency*

The right to receive appropriate and proportionate remuneration is predicated on access to information regarding the use of the works in question. Thus, transparency is the cornerstone of the enjoyment of the right to appropriate and proportionate remuneration. Accordingly, the EU Copyright Directive provides as follows:

Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their

⁵⁴ Copyright Directive, Recital 73.

⁵⁵ Ruth Towse, *Copyright Reversion in the Creative Industries: Economics and Fair Remuneration*, 41 Colum. J.L. & Arts 467, 469 (2018).

⁵⁶ Copyright Directive, Art 20.

works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.⁵⁷

Given the different dispensations for different sectors, the reporting and transparency obligations shall be proportionate to the revenue expected or generated such that where the obligations are burdensome in comparison to the revenue generated, they may be relaxed.⁵⁸ Further, the obligations herein may be waived altogether if the contribution of the author or performer is not significant.⁵⁹ For those agreements subject to the collective agreement, the rules of the CMO concerned may be applicable provided they are no less than the rules discussed above on reporting and transparency.⁶⁰

There is no equivalent of Article 19 in the CAB except for audiovisuals. This might be attributed to the fact that copyright works are not registered in South Africa except for audiovisuals. Therefore, it might be cumbersome to expect registration of exploitation if the underlying work itself is not registered. However, I cannot begin to emphasize the importance of reporting in a transparent manner if authors/performers are to enjoy the right of remuneration. Therefore, whether copyright works are registered or not, all forms of exploitation must be registered, and the authors/performers should have access to such data. The right to receive information must not be inferred from the provision that regulates the CMOs. It should stand out as it is the case with Article 19 of the EU Copyright Directive.

D. *Regulation of Collecting Societies*

As indicated above, the right of remuneration is made possible by the collecting societies, yet these organizations have been instrumental to creators' poverty in South Africa. To this end, many of them are not regulated, and so they act as they see fit and there has been no accountability to members. Finally the Bill regulates all the collecting societies and makes them accountable to the members as recommended by the CRC Report. We can only hope that with this new development in mind, the creators will start to earn their income.

E. *Reversion rights*

There are two types of reversion of rights in the South African Bill. On one hand is the reversion of rights after the expiration of 25 years for assignments. This is a reasonable period, which can neither enrich nor impoverish the creator as studies have shown that works are rewarding in the first 10 years. Perhaps this is the reason why scholars such as Giblin and

⁵⁷ Copyright Directive, Art 19(1).

⁵⁸ Copyright Directive, Art 19(3).

⁵⁹ Copyright Directive, Art 19(4).

⁶⁰ Copyright Directive, Art 19(5).

Kretschmer recommend a 10 year period. On the other hand, South Africa introduces reversion for non-use in respect of commissioned works but excludes licenses and assignments. Thus, this provision was drafted with SABC in mind, as a commissioning party, for its habit of not exploiting commissioned works yet non-use can extend to licenses and assignments. It is also notable that the Bill limits application for reversion to the author's own use. Yet the author may want to get his rights back and license or assign them to another exploiter that can make the work worthwhile as it is the case in the European Union. In addition, it is notable that the Bill allows the creator to allow the commissioning party to exercise certain rights in respect of the work, which are necessary for the purpose for which the work was commissioned. This is in line with other jurisdictions such as Belgium in which the law prohibits the creator from assigning future exploitation modes that are unknown at the time of the conclusion of contract. Thus, when such new exploitation rights are introduced, they vest in the creator, not the exploiter who licensed the work.⁶¹ This clause should have extended to licenses and assignments as well, otherwise remuneration of the creator becomes unfair especially in light of the fact that there is no right of contract modification.

F. *Retroactive application*

Article 27 of the Directive seeks to bring all contracts in line with a transparency mechanism taking effect from 7 June 2022. This means that the transparency provision together with its accompanying dispute settlement clause have retroactive application, and the parties are given one year to bring their contracts to comply with Article 27. It seems that South Africa seeks to do the same but flouted the language used in the Copyright Amendment Bill with the resultant effect of arbitrary deprivation of rights. and will arbitrarily enrich authors/performers who were paid lump sum, adequately.

III. RECOMMENDATIONS

Based on the gaps identified in the Bill and the lessons that can be drawn from the EU Copyright Directive, Part II above covered recommendations that are necessary for the Bill to safeguard the remuneration rights of authors and performers. Whereas some recommendations are straightforward, some are complex and requires major revisions in order to reflect the purposes of the Bill. Therefore, this section provides a template of two problematic provisions – the right of proportionate and appropriate remuneration as well as the transparency provision.

Starting with the principle of the right of remuneration, it is proposed herein that there should be substitution of sections 6A, 7A and 8A with the

⁶¹ Senftleben, *supra* note 17.

below section.

- (1) 'royalty' means sum based on the agreed percentage of the gross profit made from the exploitation of a literary work or musical work by a copyright owner or a person who has been authorized by the author to do any of the acts contemplated in section 6.
- (2) Subject to subsection 6 below, the author shall be entitled to receive payment of a fair periodic royalty received for the execution of any of the acts contemplated in section 6 notwithstanding -
 - (a) the assignment of copyright in a literary or musical work; or
 - (b) the authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6.
- (3) The author's share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or between their respective collecting societies.
- (4) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to subsection 2 above or the order contemplated in subsection (7).
- (5) 'fair royalty' means appropriate, which includes buy-outs in exceptional circumstances and proportionate remuneration in the form of a percentage of gross revenue earned from exploiting the work or performance. Fairness is to be determined based on the totality of the circumstances, which may include:
 - (a) the actual or potential economic value of the licensed or transferred rights, taking into account the author or performer's contribution to the overall work;
 - (b) the actual exploitation of the work or performance, and amount normally paid in the particular industry in South Africa and globally;
 - (c) amounts or ranges determined fair through collective bargaining or a determination by the Minister.
- (6) author or performer may waive the right to a fair royalty provided-
 - (a) the waiver is clear and prominently displayed; and
 - (b) the waiver is in respect of a donation to the public domain or donation to a specified recipient or open license; OR
 - (c) the waiver is in lieu of a fair once off lump sum payment. Fairness in this section shall be determined in accordance with the circumstances specified under subsection 5 above.
- (7) Where the author's or performer's royalty cannot be agreed upon, and is not validly waived, either party may refer the matter to the Tribunal for an order determining the fair royalty.
- (8) The agreement contemplated in subsection 3 must include the following:
 - (a) The rights and obligations of the parties contemplated in subsec (2);
 - (b) the royalty agreed on, or ordered by the Tribunal, as the case may be;
 - (c) the method and period within which the remuneration contemplated in subsec 2

must be paid; and

(d) a dispute resolution mechanism,.

(9) Any person who exercises the exclusive rights under section 6 of this Act is bound to ensure that:

(a) Creators of works and performers shall have a right to receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, in particular as regards modes of exploitation, all revenues generated and remuneration due.

(b) Where the administrative burden resulting from the obligation set out above would become disproportionate in the light of the revenues generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases. The obligation set out above shall not apply when the contribution of the creator or performer is not significant having regard to the overall work or performance.

(c) For agreements subject to or based on collective bargaining agreements, the transparency rules of the relevant collective bargaining agreement will be applicable instead of this section, provided that the transparency rules of this section provide minimum standard.

(10) Subsections (8) and (9) shall apply to licenses and assignments concluded before and after the commencement date of this Act. For agreements concluded before the commencement date of this Act, parties shall bring such contracts within the framework of subsections (8) and (9) within a year of the commencement date of the Act.⁶²

(11) Creators of works and performers are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances. This section does not apply to agreements concluded before the coming into effect of this law.

(12) This section does not apply to—

- (a) a copyright owner who is the author of the literary or musical work in question;
- (b) a work created in the course of employment contemplated in section 21(1)(b) or (d); or (c) a work where copyright is conferred by section 5 in the state, or a prescribed local or international organization
- (c) work which is subject to open license

(13) This section applies to a literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that literary or musical work—

⁶² All authors and performers in South Africa need to know the contents of their contracts, and this clause does not entitle them to renegotiate their existing agreements. It simply gives them the right to information regarding their contracts and the royalties thereof. This applies irrespective of when the contracts were concluded. Thus, collecting societies and agents need to be transparent in their interactions with authors or performers.

- (i) falls within the application of this Act;
 - (ii) is still exploited for profit; and
 - (iii) the author or performer's remuneration agreed between the parties or their representatives was disproportionately unfair contrary to subsection 5.
- (a) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2017.

IV. CONCLUSION

The debate and criticisms against the Bill have been very intense and those criticizing the Bill have rallied support from creators by indicating to creators that the Bill threatens their livelihood. A closer analysis of this Bill on those provisions that facilitate the right of remuneration indicates that the Bill is at par with many parts of world where artists fare better than South African artists in terms of the right to receive remuneration under the 1978 Copyright Act. Thus, the Bill unequivocally guarantees the right of remuneration through standardizing contracts. It reverses the rights where the commissioning party fails to exploit, it provides for the resale royalty right, and regulates collecting societies. Nevertheless, a few modifications will have to be implemented to cement the creators' right of remuneration, and these include – giving creators an option to receive lump-sum in certain circumstances, provide for the standard of remuneration and expand on application of reversion rights. This Bill, if passed with the recommendations made in this article, will potentially facilitate the end to an era of poverty for South African creators.