

Prosecuting and punishing copyright infringements in South Africa: A comment on the Copyright Amendment Bill, B13B-2017

JAMIL DDAMULIRA MUJUZI*

ABSTRACT

Section 27(6) of the Copyright Act provides for penalties to be imposed on those convicted of infringing copyright. In terms of s 27(6), a person who infringes copyright is liable to be sentenced to a fine or to imprisonment or to both a fine and imprisonment. The Copyright Amendment Bill (which was passed by parliament in early 2019), introduces, amongst other things, minimum sentences for juristic persons convicted of infringing copyright. The purposes of this article are: to highlight high court decisions dealing with the prosecution of people who have infringed copyright; recommend ways in which copyright owners may invoke their right to institute a private prosecution as one of the means to protect their rights; highlight the limitations of the right to institute a private prosecution; and to highlight the challenges that are likely to be faced in the implementation of the minimum sentences introduced by the Copyright Amendment Bill.

1 Introduction

Section 27(6) of the Copyright Act¹ provides for penalties to be imposed on those convicted of infringing copyright. In terms of s 27(6), a person who infringes copyright is liable to be sentenced to a fine or to imprisonment or to both a fine and imprisonment.² There have

* LLB (Makerere) LLM (Pretoria) LLM (Free State) LLD (Western Cape), Professor of Law, Faculty of Law, University of the Western Cape.

¹ Copyright Act 98 of 1978.

² It should be noted that there is a distinction between civil copyright infringement (governed by s 23 of the Act) and criminal copyright infringements (governed by s 27). However, there is an overlap between the two sections in the sense that some of the acts which are prohibited under s 23 are also covered under s 27. The remedies for civil copyright infringement are provided for under s 24 of the Act. It has been argued that 'The criminal provisions of the Copyright Act are embodied in s 27. Not all acts of civil law copyright infringement constitute criminal copyright infringement. On the other hand, all acts of criminal copyright infringement also constitute civil law copyright infringement.' See OH Dean, 'Copyright infringement

been cases where people have been convicted and sentenced under s 27(6). In all the cases discussed under this article, the prosecutions were conducted by public prosecutors. South Africa has embarked on the process of amending the 1978 Copyright Act and in order to achieve this objective, the Copyright Amendment Bill was introduced in 2017.³ This Bill was passed by the National Council of Provinces on 28 March 2019 and was forwarded to the president for his assent.⁴ Since its introduction, some people have criticised it arguing *inter alia*, that it will encourage people to infringe copyright with impunity whereas others have supported it arguing, *inter alia*, that it will increase access to copyrighted works.⁵ Some of the amendments the Bill introduces relate to the prosecution and punishment of copyright infringement. The purposes of this article are: to highlight high court decisions dealing with the prosecution of people who have infringed copyright; suggest ways in which copyright owners may invoke their right to institute a private prosecution as one of the means to protect their rights; to highlight the limitations of the right to institute a private prosecution; and to discuss the new sentences introduced by the amendment under s 27(6). The author will start with the discussion of the issue of prosecuting those who have infringed copyright.

2 Prosecution for infringing copyright

Section 27 of the Copyright Act provides for the offences and penalties for infringing copyright. It is to the effect that:

as a criminal offence' (1988) March *De Rebus* 203 at 204.

³ Copyright Amendment Bill [B 13B–2017].

⁴ L Ensor 'NCOP in final dash to conclude its business' *Business Day*, 28 March 2019, available at <https://www.businesslive.co.za/bd/national/2019-03-28-ncop-in-final-dash-to-conclude-its-business/>, accessed on 19 March 2020.

⁵ M Radinku 'Copyright Amendment Bill will undermine the President's SONA promises' *Daily Maverick*, 25 February 2019, available at <https://www.dailymaverick.co.za/article/2019-02-25-copyright-amendment-bill-will-undermine-the-presidents-sona-promises/>, accessed on 19 March 2020; M van der Merwe 'Davies warned that "devastating" Copyright Amendment Bill could cost SA jobs' *Fin24*, 18 March 2019, available at <https://www.fin24.com/Economy/davies-warned-that-devastating-copyright-amendment-bill-could-cost-sa-jobs-20190318>, accessed on 19 March 2020. The Bill was also opposed by the International Intellectual Property Alliance. See, South Africa: International Intellectual Property Alliance 'IIPA 2019 Special 301 Report on Copyright Protection and Enforcement', available at <https://iipa.org/files/uploads/2019/02/2019SPEC301SOUTHAFRICA.pdf>, accessed on 19 March 2020. However, there are many people and organisations in South Africa which supported the Bill. See L Daniels, 'Copyright bill: Protesters picket outside US embassy' *Daily Maverick*, 24 February 2020, available at <https://www.dailymaverick.co.za/article/2020-02-24-copyright-bill-protesters-picket-outside-us-embassy/>, accessed 19 March 2020.

(1) Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright – (a) makes for sale or hire; (b) sells or lets for hire or by way of trade offers or exposes for sale or hire; (c) by way of trade exhibits in public; (d) imports into the Republic otherwise than for his private or domestic use; (e) distributes for purposes of trade; or (f) distributes for any other purposes to such an extent that the owner of the copyright is prejudicially affected, articles which he knows to be infringing copies of the work, shall be guilty of an offence. (2) Any person who at a time when copyright subsists in a work makes or has in his possession a plate knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence. (3) Any person who causes a literary or musical work to be performed in public knowing that copyright subsists in the work and that performance constitutes an infringement of the copyright, shall be guilty of an offence. (4) Any person who causes a broadcast to be rebroadcast or transmitted in a diffusion service knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright, shall be guilty of an offence. (5) Any person who causes programme-carrying signals to be distributed by a distributor for whom they were not intended knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright, shall be guilty of an offence.

The penalties for infringing copyright are provided for under s 27(6) and will be discussed below. Case law from South African courts shows that there have been cases where people have been prosecuted for copyright infringement.⁶ However, there are very few high court decisions in which people have been convicted of copyright infringement and these cases have reached the high court either as reviews or appeals. This is because all copyright offences are prosecuted in magistrates' courts.⁷ This position is not unique to South Africa. In jurisdictions such as Zimbabwe,⁸ Hong Kong,⁹ Kenya,¹⁰ Fiji¹¹

⁶ See for example, *S v Goncharko* (A459/06) [2011] ZAWCHC 443 (5 December 2011); *S v Maloma* (420/08) [2008] ZAFSHC 99 (7 August 2008); *S v Chirindze* (234/15, A420/15) [2015] ZAGPPHC 494 (25 June 2015).

⁷ This explains why only a few cases are referred to in this article because magistrate court decisions or judgments are not reported.

⁸ *Chiadzwa v S* [2004] JOL 12871 (ZH); *S v Moyo*; *S v Tshaba* [2009] JOL 24094 (ZH).

⁹ See for example, *HKSAR v Chan Nai Ming* [2007] 3 HKC 255; *HKSAR v Yung Lai Lai* [2012] HKCA 210; [2012] 5 HKLRD 670.

¹⁰ See generally, JD Mujuzi 'Private prosecution of copyright infringements in Kenya: A comment on *Albert Gacheru Kiarie T/A Wamaitu Productions v James Maina Munene* [2016] eKLR 1' (2017) 5 *SA Intell Prop LJ* 172–187.

¹¹ *State v Prasad* [2017] FJHC 398; HAA20.2016 (31 May 2017); *State v Chand* [2015] FJHC 295; HAA007.2015 (11 March 2015); *State v Ali* [2012] FJMC 52; Criminal Case 126.2009 (11 April 2012); and *State v Autar* [2018] FJHC 815.

and Singapore,¹² copyright infringement prosecutions take place in magistrate courts and they only come to the high court as appeal or review proceedings. As the Zimbabwean high court observed '[i]t is not often that our courts are called upon to decide copyright cases [in criminal matters]'.¹³ In *S v Moyo; S v Tshaba*¹⁴ where the Zimbabwean high court dealt with a review in which the accused had been convicted of infringing copyright, the court observed that:

This is novel prosecution in this region for the protection of the creations of the human mind. This is a welcome development in our jurisdiction where copyright infringement is very rife but enforcement is extremely low. This scenario has resulted in the confusion of the public as to the source of the goods, products or service. In the circumstances intellectual property rights infringement has to be curbed with zeal and determination.¹⁵

Although there are a few South African high court decisions on copyright offences, only one case deals substantively with the elements that have to be proved before a person can be convicted of an offence under s 27 of the Act. Central to s 27 of the Act is the fact that a person cannot be convicted of infringing copyright unless evidence is led by the prosecution to prove that he, at the time he committed the act in question, knew that copyright exists in the product. In *S v Goncharko*¹⁶ the high court laid down some of the rules that are relevant to the prosecution of those who are alleged to have infringed copyright. In this case the appellant was prosecuted in the Regional Court of Cape Town for violating s 27(1)(a) and (b) of the Copyright Act 'in that, in the period during March and May 2001' he 'sold, by way of trade offered or exposed for sale or hire certain [Microsoft] products which were the subject of copyright at the time.'¹⁷ He was convicted and sentenced to a fine of R5 000 or six months imprisonment.¹⁸ He appealed against the conviction. On appeal, the appellant and the prosecution 'agreed that copyright in the Microsoft products reflected on annexure "A"

¹² See for example, *Public Prosecutor v Kob Eng Kian* [2007] SGDC 166; *Public Prosecutor v PDM International Pte Ltd* [2006] SGDC 91; *Public Prosecutor v Ch'ng Kean Seng* [2012] SGDC 224; *Public Prosecutor v St. Hua Private School Pte Ltd, Song Chunwei* [2014] SGDC 342; *Public Prosecutor v Md Hapiz bin Tabir* [2007] SGDC 40; *Chew Choon Ling Michael v Public Prosecutor* [2012] SGHC 214; *Public Prosecutor v Goh Soo Im Esther* [2007] SGMC 15.

¹³ *Chiadzwa v S* supra (n8) at 5.

¹⁴ *S v Moyo; S v Tshaba* supra (n8).

¹⁵ *S v Moyo; S v Tshaba* supra (n8) at 1.

¹⁶ *S v Goncharko* supra (n6).

¹⁷ *S v Goncharko* supra (n6) at para [1].

¹⁸ *S v Goncharko* supra (n6) at para [2].

(only) had been proven by the State'.¹⁹ One of the issues before the Court was the presumption under s 26(10) of the Copyright Act which is to the effect that:

In any proceedings by virtue of this Chapter with regard to the alleged infringement of the copyright in a cinematograph film, a sound recording or a computer program, it shall be presumed, until the contrary is proved, that any person trading in the selling, letting or distribution of copies of any of the said works, and who was found in possession of a copy of any of such works, sold or let for hire or by way of trade offered or exposed for sale or hire such copy.

The appellant argued that he had been erroneously convicted because 'the element of possession which is required for the presumption in terms of s 26(10) of the Copy Right Act [sic] to arise, had not been proven'.²⁰ However, the Court agreed with the prosecution's submission that 'there was no need for the State to rely on this presumption, as it had proved, through direct evidence, the sale of the Microsoft products'.²¹ Most importantly, the appellant argued that his conviction had been erroneous because the state 'had failed to prove beyond reasonable doubt, that the accused had the necessary *mens rea* in order to commit the offence' that is, 'that the state had not shown that the accused knew that the Microsoft products were protected by copyright'.²² The Court held that the magistrate had correctly convicted the appellant because the element of *mens rea* 'had been proven on the basis of *dolus eventualis* on the accused's part'.²³ The Court held that the following facts showed that the appellant had the requisite knowledge that the products he was selling infringed copyright:

[1]. As is quite apparent from the "disclaimer" used by the accused in selling the products, and from concessions made by him in cross-examination, the accused well knew that many products of this kind, including Microsoft products, are protected through copy right. His case was that it was also possible that it might not be protected either because it constituted so-called free ware, or because the rights therein may have been ceded to the webmaster in question. The accused did check on the website that there was no express prohibition against the use of such products, but was also not able to say that it was not so protected. In other words, there was no indication to him as to whether copyright prevailed therein, or not; [2]. For that reason, the accused specifically stipulated in the disclaimer that the end user should, were he to

¹⁹ *S v Goncharko* supra (n6) at para [4]. These products were: MS Windows 98 ME; Windows NT4 Workstation; MS Windows 2000 Advanced Server; MS Windows Pro 2000; Windows XP Whistle; MS Office 2000 Premium; MS Office 97 Professional; MS Project 2000; MS Visual Basic 6 Enterprise.

²⁰ *S v Goncharko* supra (n6) at para [7].

²¹ *S v Goncharko* supra (n6) at para [8].

²² *S v Goncharko* supra (n6) at para [10].

²³ *S v Goncharko* supra (n6) at para [11].

ascertain that the product is so protected, either destroy same or purchase another product; [3]. It would have been relatively simple for the accused to make inquiries from Microsoft so as to ascertain the true position. He could also have “run” the discs; [4]. It appears from his cross-examination that he did not do so, quite simply because; “... I was interested on the easiest way to get my service running, so even if I saw this copyright exists somewhere – let the end user, because he is using the software, let him check and make sure if it is protected by copyright or not” He also conceded: “Ja, I didn’t really care (whether copyright existed or not).” [5]. It is therefore clear that he foresaw the possibility that copyright might vest in the products at the time of his sale thereof, and reconciled himself with this possibility.²⁴

The Court concluded that:

[A] person in the position of the accused faced with the possibility that the proposed sale might be unlawful is not entitled to pass on the responsibility to check whether this is so to purchasers of the products. It is the sale or trade of such products that is prohibited by the Copyright Act and this applies equally to the seller and purchaser, who both would be guilty of the offence, provided they had the necessary (criminal) state of mind.²⁵

The Court also dismissed the appellant’s argument that he had not sold the infringing products but rather that he had rendered a service to the buyers by holding that ‘[t]he CD’s in question were clearly advertised for sale and sold. At the very least there was a trade in the copyrighted products’.²⁶ The above case shows that for a person to be convicted of infringing copyright, he must have had knowledge that copyright subsisted in the product at the time of the act in question. The prosecution must prove that the accused had direct knowledge that the copyright exists or that ‘he foresaw the possibility that copyright might vest in the products at the time of his sale thereof, and reconciled himself with this possibility’.²⁷ Dean has argued, on the basis of civil copyright infringement cases, that ‘the form of *mens rea* required by s 27(1) of the Copyright Act is *culpa* and not *dolus*’.²⁸ In *S v Nxumalo*²⁹ the high court held that the legislator’s intention is clear that ‘*mens rea* in the form of *dolus* is required for a conviction of selling infringing copies of a work in contravention of s 27(1)(b) of the Copyright Act 98 of 1978. The accused must accordingly know that the copies are infringing copies’.³⁰ In some countries such as Fiji³¹ and

²⁴ *S v Goncharko* supra (n6) at para [12].

²⁵ *S v Goncharko* supra (n6) at para [13].

²⁶ *S v Goncharko* supra (n6) at para [15].

²⁷ *S v Goncharko* supra (n6) at para [12].

²⁸ Dean supra (n2) at 205.

²⁹ *S v Nxumalo* 1993 (3) SA 456 (O).

³⁰ *S v Nxumalo* supra (n29) at 456.

³¹ See *State v Ali* supra (n11).

Singapore,³² a person will be convicted of infringing copyright if he knew or he ought reasonably to have known that the product he was dealing in infringed copyright. In other words, as the Supreme Court of Singapore put it, 'a person is guilty of an offence under s 136(1) of the Copyright Act if he has the requisite knowledge or ought to have such knowledge'.³³ In Hong Kong '[i]t is a defence for the person charged with an offence [of infringing copyright], to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work'.³⁴ In this case, the burden is on the accused to prove that he did not know or he had no reason to believe that the copy in question was an infringing copy. Failure to satisfy court will lead to his conviction.

The Copyright Amendment Bill introduces another ground upon which a person may be convicted for infringing copyright. The Bill inserts s 27(5A) into the Act which is to the effect that:

Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright (a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device if – (i) such person knows, or has reason to believe, that that device will or is likely to be used to infringe copyright in a work protected by a technological protection measure; (ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or (iii) such person knows or has reason to believe that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by a technological protection measure; (b) publishes information enabling or assisting any other person to circumvent a technological protection measure with the intention of inciting that other person to unlawfully circumvent a technological protection measure in the Republic; or (c) circumvents such technological protection measure when he or she is not authorized to do so, shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

Section 27(5A) makes it an offence to, *inter alia*, deal in a technological protection measure circumvention device or to circumvent a technological protection measure. In other words, it introduces anti-

³² *New Line Productions, Inc v Aglow Video Pte Ltd* [2005] SGHC 118 (6 July 2005).

³³ *Cigar Affair v Pacific Cigar Company* [2005] SGHC 108 para 13.

³⁴ Section 118(3) of the Copyright Ordinance, Cap. 528. For a detailed discussion of this provision, see *HKSAR v Mega Laser Products (HK) LTD* [1999] HKC 161; [1999] 3 HKC 161; *HKSAR v Yung Lai Lai* supra (n9).

circumvention offences.³⁵ The section clearly states that for a person for be convicted of an offence in question, the prosecution has to prove either that he knew or that he had a reason to believe that the act in question infringed copyright. This means that for a person to be convicted of an offence under s 27(1)–(5), the prosecution has to prove one thing – that he knew that the act in question infringed copyright. However, for a person to be convicted under the proposed s 27(5A), the prosecution can prove that he either knew or had reason to believe that his act infringed copyright. It is not clear why different grounds have been used with regards to different offences in the same section.

In the light of the fact that the second ground, the one that relates to the ‘reason to believe’ is new under the Act and there is no reported South African case in which courts have dealt with this test, courts may have to refer to foreign jurisprudence in deciding which factors the prosecution would to prove to convince court that the accused had reason to believe that his act infringed copyright. In Singapore courts have dealt with the burden that the prosecution has to discharge to convince court that the accused had reason to believe that his conduct amounted to a criminal act. Although the case in question is related to the offence of receiving stolen property, the same principles could be applied in South Africa in the context of s 27(5A). In *Public Prosecutor v Ambrose Dionysius*³⁶ the Court held that:

(a) The phrase “having reason to believe” is something short of actual knowledge. (b) However, it is not sufficient to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired. (c) “Believe” is a much stronger word than “suspect”, and it involves the necessity of showing that the circumstances were such, that a reasonable man must have felt convinced in his mind, that the property was stolen. This is more properly confined to the effect on the mind in what is termed “probable reasoning” and not “the absolute conquest” of the mind by argument/evidence, leaving no room for doubt. (d) A person is held to have “reason to believe”...when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal with was stolen property although the circumstances may fall short of carrying absolute conviction to his mind on the point. (e) Whether or not a person had “reason to believe” certain property was stolen must be viewed from the perspective of the

³⁵ Clause 1 of the Bill defines a ‘technological protection measure circumvention device’ to mean ‘a device primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure’. In Australia, the words ‘circumvention device’ and ‘technological protection measure’ are defined separately. See *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 221 ALR 448; (2005) 79 ALJR 1850 (6 October 2005).

³⁶ *Public Prosecutor v Ambrose Dionysius* [2018] SGDC 35 (15 February 2018).

accused person and must relate to the standards of belief of a reasonable man and not to those of any particular accused person. Some element of subjectivity must be involved, because what might be apparent to a person with specialized knowledge might not be apparent to a layman of even very high intelligence. (f) The court must assume the position of the individual (ie including his knowledge and experience) but must reason from the facts known to him like an objective reasonable man.³⁷

In other words, as the District Court put it in *Public Prosecutor v Hergobind s/o Arjandas Goklani*³⁸

The test for “reason to believe”...can be summarized as follows: [i] It involves a lesser degree of conviction than certainty and a higher one than speculation; [ii] To be applied from the perspective of the accused person; [iii] Must relate to the standards of belief of a reasonable man but some element of subjectivity must be involved, because what might be apparent to a person with specialised knowledge of a certain field might not be apparent to a layman of even very high intelligence; [iv] The court must assume the position of the actual individual involved (including his knowledge and experience) but must reason from that position like an objective reasonable man.³⁹

The above decisions show that the prosecution does not have to prove that the accused had actual knowledge but the evidence must show that a reasonable person must have believed that the act in question infringed copyright. South African case law is very clear on the criteria to be used by the court to determine who a reasonable person is.⁴⁰

As mentioned above, in *S v Goncharko*⁴¹ the Court held that ‘[i]t is the sale or trade of such products that is prohibited by the Copyright Act and this applies equally to the seller and purchaser, who both would be guilty of the offence, provided they had the necessary (criminal) state of mind.’⁴² This holding could create the impression that it is an offence for a person to buy, irrespective of the purpose, any infringing copy. Section 27 does not make it an offence for a person to buy or possess any infringing copy for his private and domestic use.

In all cases where people have been prosecuted for infringing copyright in South Africa, the prosecutions have been conducted by public prosecutors. There is no reported case in South Africa in

³⁷ *Public Prosecutor v Ambrose Dionysius* supra (n36) at para [62]. The district court cited the high court’s decision of *Kob Hak Boon v PP* [1993] 2 SLR (R) 73.

³⁸ *Public Prosecutor v Hergobind s/o Arjandas Goklani* [2014] SGDC 398 (27 October 2014).

³⁹ *Ibid* at para 74.

⁴⁰ See for example, *Roberts v S* [1999] 4 All SA 285 (A); *Constantia Insurance Company Ltd v Compusource (Pty) Ltd* (143/2004) [2005] ZASCA 29 (30 March 2005); *Le Roux v Dey* 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC).

⁴¹ *S v Goncharko* supra (n6).

⁴² *S v Goncharko* supra (n6) at para [13].

which a copyright owner has ever instituted a private prosecution against a person for allegedly infringing copyright. This situation should be distinguished, for example, from the situation in Kenya⁴³ and Singapore⁴⁴ where copyright owners have instituted private prosecutions against those who are alleged to have infringed their copyright. However, this does not mean that copyright owners cannot institute private prosecutions in South Africa. The Copyright Act is silent on the issue of private prosecutions as one of the remedies available to the person whose copyright has been infringed. Section 24(1) of the Copyright Act provides for the remedies available to a person whose copyright has been infringed. It is to the effect that:

Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.

It is thus clear that only the owner of copyright can bring an action against a person who has allegedly infringed his copyright. According to ss 3, 5 and 21 of the Copyright Act, copyright can be owned by both natural and juristic persons and the State. As mentioned above, the Copyright Act does not provide for private prosecutions as one of the remedies at the disposal of the owner of the copyright which has been infringed. However, this does not mean that such an owner cannot institute such a prosecution. It is to this remedy that we turn below.

In South African law there are two types of private prosecutions: private prosecutions by individuals (natural persons) and private prosecutions by statutory bodies. This distinction is important because it determines whether or not some owners of copyright can institute private prosecutions. Private prosecutions by natural persons are provided for under s 7 of the Criminal Procedure Act⁴⁵ which is to the effect that:

In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence – (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; (b) a husband, if the said offence was committed in respect of

⁴³ See Mujuzi supra (n10).

⁴⁴ See for example, *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd* [2009] SGCA 9. See generally, JD Mujuzi 'Private prosecution of intellectual property rights infringements in Singapore' (2019) 9 *Queen Mary J Intell Prop* 484–489.

⁴⁵ Act 51 of 1977.

his wife; (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if (d) the death of such person is alleged to have been caused by the said offence; or the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

For a person to institute a private prosecution under s 7 of the Criminal Procedure Act, he has to obtain a certificate from the Director of Public Prosecutions (DPP) to the effect that the DPP 'has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State'.⁴⁶ For a person to institute a private prosecution under s 7, he/she must be a victim of crime and must be a natural person. In *Barclays Zimbabwe Nominees (Pvt) Ltd. v Black*⁴⁷ it was argued that 'person' under s 7 of the Criminal Procedure Act includes a juristic person such as company. In rejecting this argument, the Supreme Court of Appeal held that:

The general policy of the legislature is that all prosecutions are to be public prosecutions in the name and on behalf of the State...The exceptions are firstly where a law expressly confers a right of private prosecution upon a particular body or person (these bodies and persons being referred to in section 8(2) of the Criminal Procedure Act) and secondly, those persons referred to in section 7. There may well be sound reasons of policy for confining the right of private prosecution to natural persons as opposed to companies, close corporations and voluntary associations such as, for example, political parties or clubs.⁴⁸

This reasoning, which has been upheld by the Supreme Court of Appeal in a recent decision,⁴⁹ makes it clear that juristic persons whose copyright has been infringed cannot institute private prosecutions under s 7 of the Criminal Procedure Act. Only natural persons can proceed under s 7. The challenge is that juristic persons may also not institute private prosecutions for copyright infringement under s 8 of the Act unless their establishing legislation specifically empowers them to do so. This is because s 8(1) provides that '[a]ny body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try

⁴⁶ Section 7(2).

⁴⁷ 1990 (4) SA 720 (AD).

⁴⁸ *Barclays Zimbabwe Nominees (Pvt) Ltd. v Black* supra (n46) 726.

⁴⁹ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 (1) SACR 308 (SCA). See also *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (1) SACR 284 (CC).

that offence'. A prosecution under s 8 can only be instituted after consultation with the DPP and after the DPP has withdrawn his right to prosecute the offence in question.⁵⁰

The above discussion has the following implications for private prosecutions for copyright infringements in South Africa. First, only copyright owners can institute private prosecutions. This means, inter alia, that collecting societies do not have the mandate to institute private prosecutions against those who infringe their members' copyright. This is because of two reasons. First, they do not own the copyright in question and secondly, legislation does not specifically allow them to do so. This is the case although such societies can institute and have instituted civil claims against those who have infringed their members' copyright.⁵¹ Secondly, and related to the above, only copyright owners who are natural persons can institute private prosecutions. This is the case although, as mentioned above, both natural and juristic persons can own copyright. Case law from South African courts shows that there have been cases where natural and juristic persons have petitioned courts in cases where their copyrights have been infringed and courts have found such infringements and granted different remedies.⁵² These juristic persons include local and international organisations. The South African situation is different from that of other countries such as Kenya and Singapore where, as demonstrated above, juristic persons can and have instituted private prosecutions against those who have infringed their copyright.

3 Punishment for copyright infringements

As mentioned above, the Copyright Act criminalises certain forms of copyright infringement. Section 27 of the Act provides that a person who infringes copyright commits an offence.⁵³ Section 27(6) provides

⁵⁰ Section 8(2).

⁵¹ *Foschini Retail Group (Pty) Ltd v South African Music Performance Rights Association* (0003/2009) [2013] ZAGPPHC 304 (25 October 2013); *National Association of Broadcasters v South African Music Performance Rights Association* [2014] 2 All SA 263 (SCA); 2014 (3) SA 525 (SCA).

⁵² *Snap-On Africa (Pty) Ltd v Joubert* (41993/2012C) [2015] ZAGPPHC 821 (7 December 2015); *Transunion Auto Information Solutions (Pty) Ltd v Autobid (Pty) Ltd* (6494/2011) [2012] ZAKZDHC 22 (14 March 2012); *King v South African Weather Services* 2009 (3) SA 13 (SCA); *Golden China TV Game Centre v Nintendo Co Ltd* 1997 (1) SA 405 (SCA); [1996] 4 All SA 667 (A); *Heald v Combined Artists CC* (68766/2012) [2014] ZAGPPHC 439 (24 January 2014); *Schultz v Butt* [1986] 2 All SA 403 (A); *Sugarless Company (Pty) Ltd v Quad Africa Energy (Pty) Ltd* (25802/2018) [2018] ZAGPJHC 579 (19 September 2018); *Claasen v TEC Novation Solution (Pty) Limited* (2017/40521) [2018] ZAGPPHC 16 (16 February 2018).

⁵³ Section 27(1)–(5).

for the penalties a court is empowered to impose on a person who has been convicted of an offence under the Act. It is to the effect that:

A person convicted of an offence under this section shall be liable – (a) in the case of a first conviction, to a fine not exceeding five thousand rand or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, for each article to which the offence relates; (b) in any other case, to a fine not exceeding ten thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, for each article to which the offence relates.

Under s 27(6)(a) and (b), a court has the discretion to decide which of the three sentences to impose on the offender – a fine, imprisonment or both a fine and imprisonment. Case law shows that a court will impose a sentence depending on, for example, the purpose of which the accused was in possession of the infringing article and the personal circumstances of the accused. For example, in *S v Chirindze*⁵⁴ the accused was prosecuted in the magistrate's court for being in possession of counterfeit DVDs and CDs. He was 'convicted of the offence of contravening the provisions of section 2(1) read with sections 1, 2(2), 10, 19 and 20 of the Counterfeit Goods Act 37 of 1997 and read with the Trade Marks Act 194 of 1993 and the Copyright Act 98 of 1978'.⁵⁵ He was sentenced to a fine (R6 600) or to six months imprisonment suspended for five years on condition that during that period he does not commit another offence under the Act.⁵⁶ On review, the high court held that the facts of the case showed that the accused intended to plead guilty to the offences in question.⁵⁷ However, the court found that the fine imposed on the accused was excessive because:

What is not clear from the record is why a fine in the amount of R6 600.00 was imposed. Whatever the reasoning was, what is patently clear is that considering that the common cause value of the goods found in possession of the accused was R220.00, the fine was inappropriate.⁵⁸

The court added that in determining the sentence to impose on the accused, the magistrate should have considered his personal circumstances. It outlined them in the following terms:

The personal circumstances of the accused are as follows: He does odd jobs and has no steady source of income. His approximate earnings are R1 000.00 per month. He is a first offender. He has two minor children that

⁵⁴ *S v Chirindze* supra (n6).

⁵⁵ *S v Chirindze* supra (n6) at para [4].

⁵⁶ *S v Chirindze* supra (n6) at para [3].

⁵⁷ *S v Chirindze* supra (n6) at paras [6]–[7].

⁵⁸ *S v Chirindze* supra (n6) at para [12].

he maintains. His legal representative indicated that the accused could afford to pay a fine not exceeding R500.00 or a suspended sentence.⁵⁹

The court added that '[t]he circumstances of the accused are such that the trial court ought to have considered the accused's ability to pay the fine in instalments'⁶⁰ and that 'the trial court ought to have considered a fine that was within the reach of the accused'.⁶¹ The high court observed that in imposing the sentence on the accused, 'it would appear that the trial court misdirected itself by not properly weighing the well-known triad, namely, the crime, the criminal and the interests of society'.⁶² Against that background, the high court set aside the sentence imposed by the magistrate and substituted it with one requiring the accused 'to pay a fine of R3 000.00 or undergo a term of 3 months imprisonment which is wholly suspended for 5 years' on condition that the accused is not convicted of another offence under the Act during the period of suspension.⁶³ Likewise, in *S v Maloma*⁶⁴ which was a review matter, the magistrate 'convicted the accused of the crime of contravening sub-s 27(1)(b) of the Copyright Act...and sentenced the accused to undergo 12 (twelve) months imprisonment or pay a R3 000,00 fine both of which were wholly suspended for three years conditionally'.⁶⁵ The accused's conviction was based on his plea of guilty. The High Court confirmed both the conviction and sentence.⁶⁶

However, the Court's discretion under s 27 has been limited by the Copyright Amendment Bill. Clause 27 of the Copyright Amendment Bill amends s 27 of the Principal Act by substituting s 27(6) with the following:

A person convicted of an offence under this section shall be liable – (a) in the case of a first conviction, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates or (b) in any case other than that contemplated in paragraph (a), to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.

⁵⁹ *S v Chirindze* supra (n6) at para [13].

⁶⁰ *S v Chirindze* supra (n6) at para [14].

⁶¹ *S v Chirindze* supra (n6) at para [15].

⁶² *S v Chirindze* supra (n6) at para [16].

⁶³ *S v Chirindze* supra (n6) at para [17.2].

⁶⁴ *S v Maloma* supra (n6).

⁶⁵ *S v Maloma* supra (n6) at para [2].

⁶⁶ *S v Maloma* supra (n6) at para [3].

Clause 27 of the Copyright Amendment Bill also inserts a new subsection (sub-s 9) in s 27 of the principal Act to the effect that:

(9) (a) For the purpose of subsection (6), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences, as the case may be, were committed and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, in respect of all uses to which this Act applies. (b) If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsection (6), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

There are at least three observations to make about the above new provisions. First, the provisions clearly provide for punishments which are applicable to both natural persons and to juristic persons. A natural person may be sentenced to a fine or to imprisonment or to both. However, in the case of a juristic person, a court can only impose a fine. Secondly, the minimum sentence is only applicable to juristic persons. In other words, in the case of natural persons, the court still retains its pre-amendment discretion to determine which sentence to impose on the offender putting into consideration the traditional factors that South African courts consider in determining the appropriate sentence – the nature of the crime, the nature of the criminal and the interests of society.⁶⁷ The rationale behind providing for minimum sentences for juristic persons and not for natural persons is not clear. It could be argued that the provision is discriminatory against juristic persons.⁶⁸ Thirdly, the Copyright Amendment Bill does not define or describe what amounts to ‘substantial and compelling circumstances.’ This phrase was first introduced in South African penal law in the aftermath of the abolition of the death penalty when parliament enacted the Criminal Law Amendment Act⁶⁹ which provides that a person convicted of some serious offences has to be sentenced to a minimum sentence or sentences unless substantial and compelling circumstances exist.⁷⁰ For many years, different high court judges came up with different and sometimes contradictory interpretations of substantial and compelling circumstances. This debate was brought to an end by the Supreme Court of Appeal when it clarified what factors

⁶⁷ SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 137–178.

⁶⁸ Section 9 of the Constitution prohibits discrimination and s 8(4) provides that ‘[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person’.

⁶⁹ Act 105 of 1997.

⁷⁰ Terblanche *supra* (n67) 41–78.

courts should consider in determining what amounts to substantial and compelling circumstances. In *S v Malgas*⁷¹ the Supreme Court of Appeal, after reviewing several high court decisions on substantial and compelling circumstances held that:

[T]he courts are a good deal freer to depart from the prescribed sentences... and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed [sentences] are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary – [A]... [B] Courts are required to approach the imposition of sentence conscious that the legislature has ordained...the particular prescribed [sentence]...as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. [C] Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts...The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial” and “compelling”) and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained. [H] In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion. [I] If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. [J] In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.⁷²

Applying the above criteria, with the necessary modifications, shows that there is a high possibility that many juristic persons convicted under s 27, as per the proposed amendment to the Act, will get minimum sentences. This is because the Supreme Court of Appeal makes it very clear that the prescribed minimum sentences should not be departed from lightly. Another important point to note about the minimum sentences is that, as the name suggests, this is the minimum sentence. A court still has the discretion to impose a sentence heavier than the prescribed minimum sentence.⁷³ This means that under s 27(9) of the Copyright Amendment Bill, courts can impose a fine

⁷¹ *S v Malgas* [2001] 3 All SA 220 (A).

⁷² *S v Malgas* supra (n71) at para [25].

⁷³ See for *DPP, Free State v Mashune* (675/17) [2018] ZASCA 60 (18 May 2018); *Luningo v S* (CA&R 207/2018) [2019] ZAECGHC 13 (19 February 2019) para [11]; *Swartz v S* 2016 (2) SACR 268 (WCC) para [22].

which exceeds ten per cent of the juristic person's annual turnover. In other words, a court which has convicted a juristic person of an offence under the proposed amendment to s 27 of the Copyright Act has three sentencing options: impose a minimum sentence; impose a sentence less than the minimum sentence; or impose a sentence higher than the minimum sentence.

Another observation to make about the Copyright Amendment Bill is that it removes the R5 000 as the maximum amount of a fine that a court may impose on a natural person who has been convicted of an offence. Put differently, the section does not expressly provide for a minimum or maximum amount. This gives courts discretion to determine the amount of the fine to impose on an offender. However, this amount cannot be determined in a vacuum. In this case, courts would have to refer to s 1(a) of the Adjustment of Fines Act⁷⁴ to determine the maximum fine to impose on the person. This section provides that:

If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92(1)(b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92(1)(a) of the said Act, where the court is not a court of a regional division.

The effect of this proposed amendment is to increase the maximum amount of fine that can be imposed by a magistrate's court. This is because the present ratio is R40 000 or one year's imprisonment.⁷⁵ As a result, the maximum fine that a magistrate can impose on a person convicted of copyright infringement under the proposed s 27(6)(a) is R120 000 and the maximum fine that a magistrate can impose on a person convicted of copyright infringement under the proposed s 27(6)(b) is R200 000.⁷⁶ This amendment also affects the court that has jurisdiction over offences under the Copyright Act. Since the maximum

⁷⁴ Adjustment of Fines Act 101 of 1991.

⁷⁵ See GN 217, 'Magistrates' Courts Act, 1944 (Act No 32 of 1944): Determination of monetary jurisdiction for causes of action in respect of courts for districts', GG 37477, 27 March 2014. See the following cases in which courts have applied the calculation in question *S v Shongwe* (1769/2015, 10/15,429/15, 430/15, 431/15,432/15,433/15) [2015] ZAGPPHC 983 (2 November 2015) at para [7]; *Liang v S* [2016] 3 All SA 571 (WCC) at paras [56]–[58].

⁷⁶ For a detailed calculation of the ratio see, *S v Permall* 2018 (2) SACR 206 (WCC) paras [9]–[14].

fine a district court can impose is R120 000 and the maximum years of imprisonment is three,⁷⁷ a prosecution under the proposed s 27(6)(b) of the Copyright Act has to be conducted before a regional court because it has jurisdiction to sentence a person to any sentence including life imprisonment or to a fine not exceeding R600 000. Alternatively, a prosecution under s 27(6)(b) may be conducted in district court and the matter is referred to the regional court for sentencing.⁷⁸ If the court is of the view that the offender should be sentenced to imprisonment as opposed to a fine calculated on the basis of the Adjustment of Fines Act, it will impose a custodial sentence.⁷⁹ The fine which is imposed on the offender does not belong to the copyright owner. It belongs to the State.⁸⁰ This raises the question of whether a copyright owner who would like to claim damages from the offender who has been convicted of an offence under the Copyright Act (whether through a private or public prosecution), may proceed under s 300 of the Criminal Procedure Act. Section 300(1) of the Criminal Procedure Act provides that:

Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss.

The importance of s 300 was emphasised by the high court in *Stow v Regional Magistrate, PE NO, Meyer v Cooney NO*⁸¹ when it held that '[s]ection 300...is a convenient means of recovering a debt without having to institute a civil action. The order will be made for the full amount determined as compensation for the damage or loss and would be executable for the full amount'.⁸² There is no doubt that copyright is intellectual property.⁸³ Although there is a debate whether or not

⁷⁷ See s 92(1) of the Magistrates' Court Act 32 of 1944 read with GN 217, *GG* 37477, 27 March 2014.

⁷⁸ This is possible in terms of ss 114 and 116 of the Criminal Procedure Act. See generally, Terblanche *supra* (n67) 108–109.

⁷⁹ *Moyo v Minister of Justice and Constitutional Development; Sonti v Minister of Justice and Correctional Services* 2017 (1) SACR 659 (GP) at para [92].

⁸⁰ See Terblanche *supra* (n67) 261.

⁸¹ 2017 (2) SACR 96 (ECG).

⁸² *Stow v Regional Magistrate* *supra* (n81) at para [64].

⁸³ See World Intellectual Property Organisation *What is Intellectual Property?*, available at https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf.

intellectual property is property,⁸⁴ in this article the author takes the view that copyright is property.⁸⁵ However, for a copyright owner to succeed under s 300, he would have to convince court that infringing his copyright caused damage to or loss of his property. This is an issue that South African courts have not yet addressed. In *S v Ngceni*⁸⁶ the court referred to s 300 and held that:

For the Court to make an order of compensation or restitution against the accused he or she must have been convicted of an offence which has resulted in damage or loss of property which can be calculated in monetary value...The injured person must, after conviction, have made an application for compensation, such compensation to be made by the convicted person. In that case the public prosecutor must bring the application on behalf of the injured person who suffered as a result of the offence committed by the convicted person.⁸⁷

A court should make an order under s 300 if there is evidence that the accused will be able to compensate the victim of his crime.⁸⁸ If the court makes an order under s 300, the victim cannot institute a civil claim against the offender. That is why it is necessary for the prosecutor to only ask the court to make an order if he/she is expressly instructed by the victim.⁸⁹ The order in question can only be made against the offender and not a third party.⁹⁰

Another observation to make about s 27(6) is that 'in the case of a first conviction' under paragraph (a), the sentence is less compared to that of a conviction in any other case (under paragraph (b)). Although s 27(6)(a) does not state that 'in the case of a first conviction under this Act', the first conviction under s 27(6)(a) refers to the first conviction

⁸⁴ HE Smith 'Intellectual property as property: Delineating entitlements in information' (2007) 117 *Yale LJ* 1742; M Du Bois, 'Justificatory theories for intellectual property viewed through the constitutional prism' (2018) 21 *Potch E LJ* 13.

⁸⁵ In *National Gallery of Canada v. Canadian Artists' Representation*, 2013 FCA 64 (CanLII) at para 83, the Canadian Federal Court of Appeal held that, '[t]he fact that copyright is property does not preclude a finding that granting another the right to use that property is a service'. In the United Kingdom, s 1(1) of the Copyright Designs and Patents Act 1988 provides that 'copyright is a property right'. On the basis of this provision, in *Phonographic Performance Ltd v Ellis (t/a Bla Bla Bar)* [2018] EWCA Civ 2812 (18 December 2018), the Court of Appeal held that '[b]ecause copyright is a property right, someone who does one of the restricted acts without the consent of the copyright owner infringes that property right. The infringement of that right gives the property owner a cause of action'. Para 3. The Court added that '[w]here the court awards compensatory damages it is compensating the property owner for invasions of his property right that have already happened'. See para 5.

⁸⁶ *S v Ngceni* (CA&R: 176/2015) [2015] ZAECGHC 69 (7 July 2015).

⁸⁷ *Ngceni* supra (n86) at para 3.

⁸⁸ *S v Khoza* 2011 (1) SACR 482 (GSJ) at para 8.

⁸⁹ *S v Smith* (A457/09) [2009] ZAGPPHC 251 (28 May 2009).

⁹⁰ *S v Mgabhi* 2008 (2) SACR 377 (D).

under the Copyright Act.⁹¹ This is because, in case the accused has a criminal record for any other offence, this is covered under s 274 of the Criminal Procedure Act⁹² and it would not have been necessary for the legislature to specifically legislate for this situation in the Copyright Act. However, the fact that he is a first offender in terms of s 27(6)(a) of the Copyright Act does not mean that a court cannot consider his previous conviction under s 274 of the Criminal Procedure Act if he has ever been convicted of another offence either at common law or in terms of another statute other than the Copyright Act. However, even if he has a previous conviction for any other offence other than under the Copyright Act, he is considered as a first offender in terms of the Copyright Act and his sentence cannot exceed the maximum sentence under s 27(6)(a). It is important that in imposing a sentence on the offender, courts make it very clear that he is a first offender in terms of the Copyright Act (and therefore considering s 27(6)(a)) or is a first offender in terms of s 274 of the Criminal Procedure Act (and therefore considering s 274 of the Criminal Procedure Act). For example, in *S v Chirindze*⁹³ the Court, in imposing the sentence on the offender for, inter alia, violating the Copyright Act, mentioned that one of the mitigating factors was that he was a first offender. The court did not specify whether he was a first offender in terms of s 27(6) of the Copyright Act or s 274 of the Criminal Procedure Act.

4 Conclusion

In this article, the author has highlighted some cases in which people have been prosecuted and punished for copyright offences in South Africa. It has been illustrated that in all these cases, the prosecutions were conducted by public prosecutors. It has been argued that under s 7 of the Criminal Procedure Act read with the Copyright Act, copyright owners may institute private prosecutions should the DPP decline to prosecute. However, this right is only available to natural persons. It is recommended that there may be a need for juristic persons to challenge the Supreme Court of Appeal's decision which interpreted s 7 of the Criminal Procedure Act as only providing for the right to institute a private prosecution to natural persons. This is

⁹¹ *Mobunram v National Director of Public Prosecutions* 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) at para 151.

⁹² Section 274(1) provides that '(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. (2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.'

⁹³ *S v Chirindze* supra (n6).

because this section does not expressly provide that only natural persons can institute private prosecutions⁹⁴ and a similar section has been interpreted by the Zimbabwean Supreme Court as conferring the right to institute a private prosecution on both natural and juristic persons.⁹⁵ The second approach would be for the copyright owners and the collecting associations to lobby parliament to amend the Copyright Act to expressly enable juristic copyright owners to institute private prosecutions. The author has demonstrated that the Copyright Amendment Bill provides for minimum sentences for juristic persons and not for natural persons. It is also argued that the minimum sentences introduced by the Copyright Amendment Act could be challenged on the ground that it discriminates against juristic persons. The author has also demonstrated how a copyright owner can invoke s 300 of the Criminal Procedure Act to be compensated for damages in the event of a court convicting an offender of infringing copyright. The article has also illustrated how courts are likely to deal with the issue of sentencing generally and fines in particular should the bill be passed in its current form.

⁹⁴ Although the Supreme Court of Appeal held that s 7 of the Criminal Procedure Act was not unconstitutional, this issue was not addressed by the Constitutional Court. See *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (2016) supra (n49); and *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (2017) supra (n49).

⁹⁵ *Telecel Zimbabwe (Pvt) Ltd v Attorney-General of Zimbabwe* 2014 (1) ZWSC 1 (27 January 2014).