



17 July 2018

Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
CAPE TOWN

Via email: ahermans@parliament.gov.za
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Dear Honourable Ms J Fubbs

COMMENTS BY UNIVERSITIES SOUTH AFRICA ON SPECIFIC CLAUSES OF THE COPYRIGHT AMENDMENT BILL [B13-2017]

Universities South Africa (USAf) is the national representative body for 26 public universities in South Africa. It acts as a voice of the sector and engages the state on policy reforms and policy changes. It plays an advocacy role as well. South Africa's public universities are by far the largest producer of research and creative works and contribute significantly to the socio-economic and cultural development of South Africa. One of our key goals is to support South Africa's universities to effectively perform their core functions of teaching and learning, research and community engagement. Without appropriate and balanced copyright legislation to facilitate access to knowledge, encourage creativity and innovation, and preserve knowledge for future generations, our goals cannot be achieved.

Since the current copyright exceptions for education and libraries are 40 years old, and totally outdated, USAf commends you and your Committee for agreeing to process one holistic Bill in 2018, and not a 2-phased Bill.

USAf is pleased that you have recognised the urgency and importance of including fair use provisions, as well as exceptions for education, research, libraries, archives, museums, galleries, and for persons with disabilities. This is in line with and confirms South Africa's support for similar limitations and exceptions in Treaty proposals by the African Group at WIPO, and the Marrakesh Treaty, which South Africa has committed to ratify once the Copyright Amendment Bill has been enacted. These provisions also support many Government policies and projects, and in particular those of the Dept. of Higher Education and Training, and Dept. of Science and Technology, e.g. Open Educational Resources, Open Access, Open Data, and Open Science initiatives.

USAf wishes to bring your attention to the fact that the exceptions for computer programs which were in the original 2017 Bill (Section 19B) have been omitted in toto from the Draft No. 2 Bill. USAf recommends that they are re-inserted into the Bill. There is no reason why they should be removed.

To ensure balance and transparency in the PC technical team nominated to review the Bill in the near future, USAf sincerely requests that IP experts in the tertiary sector, namely, Prof. Caroline Ncube and Dr Tobias Schonwetter from the University of Cape Town be included on the team.

USAf would like to thank you and your Portfolio Committee for the opportunity to comment on the specific clauses sent to us on 20th June 2018 and for extending the deadline to 18 JULY 2018.

KINDLY CONSIDER THE FOLLOWING COMMENTS AND RECOMMENDATIONS:-

- **Clause 1, par (i): The definition of “visual artistic work”.**
This definition is acceptable.
- **Clause 5: Section 6A(4); Clause 7: Section 7A(4) and Clause 9: Section 8A(4) – SHOULD ALL BE DELETED.**
These clauses create an unprecedented form of resale royalty right for the sale of all literary and musical works. This would prevent or restrict the sale of works, particularly in the form of second-hand educational works, which are necessary and important in a developing country. These clauses override the concept of copyright exhaustion and would de-incentivize creators and buyers. Potential buyers would have to make enquiries as to whether they would be able to resell or rent such copyright works and this might result in a slowdown of sales, or no sales at all, depending on how difficult it is to assess the value of the copyrighted products. This could cause problems particularly when the work is an orphan work or is sold out of a deceased or insolvent estate, etc.
- **Clause 5: Section 6A(5); Clause 7: Section 7A(5), Clause 7: Section 7B(3)(a)(i) read with section 7B(5); Clause 7: Section 7B(6) and Clause 9: Section 8A(5). Reciprocal application of the resale royalty right – SHOULD ALL BE DELETED.**
Retrospective application would create immense problems for purchasers who entered into sales in the past at fixed or negotiated prices, and then find they have to pay royalties (worse, perpetual royalties) for the products, which may in some instances have been damaged or deteriorated, and may have lost value over time.

These clauses raise serious questions about constitutionality and enforceability, privacy and moral issues, and could create undue hardship or financial burdens for current owners of those works, who may not be in a position to comply with these requirements. The market for creative works would also be seriously disrupted or damaged. Retrospective application should only come into effect or be applied from the date when the Bill is officially enacted and confirmed in the Government Gazette.
- **Clause 9: Section 8A(4): The minimum content of the agreement related to royalty percentages.**
This clause provides adequate contractual protection for authors.
- **Clause 11: Section 9A(4): Failure to record acts or to report constituting an offence and the penalty for that offence. SHOULD BE DELETED.**
This clause would shift the responsibility of enforcement from Collecting Societies to Government. The penalties of a maximum of 5 years’ imprisonment are draconian and would not rectify the problems. Civil law should apply in this regard and should be enforced by Collecting Societies. They are responsible for ensuring compliance and payment of royalties to authors and creators.
- **Clause 11: Section 9A(1)(aA): Log Sheets.**
This clause seems reasonable to ensure that relevant information is recorded and royalties are paid accordingly.

- Clause 12: Section 11 - Nature of copyright in programme-carrying signals.**
 It would be advisable to apply exclusive rights to the signals only, and not to the works carried over those signals. This has been a contentious issue for several years in the discussions at WIPO for a Broadcasting Treaty and has resulted in the Treaty being delayed for years. The current wording of the consensus draft of the WIPO treaty states: “Broadcasting organizations shall have the exclusive right of authorizing the retransmission of their programme-carrying signal to the public by any means.”
- Clause 15: Section 15: Panorama rights and incidental use.**
 I agree that this clause should remain in the Bill but should not be restricted only to incidental use. It should be broadened to ensure that creators may include copyright works such as public historical buildings, sites, statues, sculptures, landmarks, etc. in their new creations, e.g. in photographs, films, videos, articles, exhibitions, posters, or in printed or electronic educational material, or on educational websites. This will enhance creativity and improve the ability of creators to use material fairly, without infringing the rights of the original creators or rights-holders. It will also allow important public buildings and statues, etc. in the post-1994 era to be photographed and/or promoted for educational, research, historical and tourism purposes. Our current Act does not permit this type of use without prior permission from rights-owners.
- Clause 22: Section 21(3): New process for commissioned work aimed at giving the author more rights.**
 This clause is cumbersome and problematic, and could become a litigious issue rather than benefit creators. It is very important that authors and creators are permitted to use their own works for purposes other than for the commissioned purposes, e.g. a filmmaker makes a video for a broadcaster, which uses the video once and stores it in a warehouse indefinitely without using it again. The creator under the current copyright law, has no recourse to that work and cannot use it for any other purpose. He/she should be allowed to exercise his/her rights non-commercially or commercially in ways that are not in competition with the broadcaster or impact on the broadcasters’ exploitation of the work. If a commissioned work has not been used within a 3 year period from date of signing of the commission, then the copyright should either revert to the creator, alternatively, the creator should be granted a non-exclusive licence by the commissioner to enable the creator to exploit the work and benefit from royalties for uses unrelated or not in competition with the commissioner’s rights.
- Clause 25: Section 22C(3)(c): Reciprocity applying to pay-outs of royalties by Collecting Societies to foreign countries.**
 This a fair clause as it is in compliance with the reciprocity obligations (“most-favoured-nation treatment”) in the Berne Convention and TRIPS Agreement, and will prevent ongoing one-way payments from our country to foreign countries without receiving royalties from foreign countries.
- Clause 25: Section 22B(7): Transitional provisions to provide for existing Collecting Societies.**
 The period of 18 months in 22B(7)(a) should be reduced to 12 months, with the option to extend once for another 6 months. If an extension is required, a written motivation setting out reasons for extension would need to be submitted to the Commission. This will ensure that Collecting Societies that are committed to engage in such activities are accredited as soon as possible, and others do not delay the accreditation process indefinitely.

- **Clause 25: Section 22D(2)(b) and 22D(3): How Collecting Societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer.**

Pay-outs of royalties should not be later than 12 months. Collecting Societies are generally members of international bodies and they have Boards who set policies and procedures governing the collection and distribution of royalties. When payments are collected and rights-owners are not traceable, it should be incumbent on the relevant Collecting Society to find the rights-owners, or to keep their royalties in a Trust Fund, and to advertise in the Government Gazette and one main newspaper at least once a year for a period of 3 years, to ensure royalties are eventually paid out. Currently, rights-owners do not always know that the Collecting Societies have collected royalties for them and unless they are notified somehow, they will never receive the money. When an author once asked a Collecting Society why they hadn't paid out his royalty (as someone had notified him that they had used his material and applied for permission), the Collecting Society responded that he should have contacted them. How was he to know? Had the person not told him about this, he would never have known that the Collecting Society had money for him. This could lead to Collecting Societies accumulating huge sums of money, which could ultimately be used for other purposes, or lead to misappropriation of authors' royalties. The problem lies in how long a Society should keep these funds and what should happen to it when rights-owners cannot be traced. A reasonable period would be 3 years from the date the Collecting Society receives formal notice of its use. Thereafter, unpaid/unclaimed royalties should be invested in the local cultural industries through a Development Trust for creators and authors.

- **Clause 27: Section 27(6): Increased penalties for infringement. Provision for fines when the convicted person is not a natural person.**

The recommended fines are draconian and the amount could far exceed the seriousness of the infringement. The fine should be proportionate to the infringement and actual harm suffered by the copyright owner.

Provisions should be included to safeguard or indemnify educational institutions, research institutes, NGOs, entities servicing disabled persons, cultural organisations, or any individual or entity that uses copyright material is found to have copied or downloaded in good faith, where the understanding is that the use was lawful, either under fair use or an exception, or that it was public domain material, or under an open access licence. Misinterpretation of the law is no excuse but if the user genuinely believes their interpretation is correct and the use is lawful and in good faith, the user should not be punished.

Just as Section 13 (4) (in the Current Copyright Regulations of 1978) provides indemnity for libraries and archives, for unsupervised use of reproducing equipment located on their premises, so Clause 27: Section 27(6) should provide an indemnity or safe harbours in the digital environment, for libraries, archives, museums, galleries, cultural organisations, educational and research institutions and entities serving disabled communities, as well as carriage service providers. Australia has just ruled on such provisions in their law and it would be worth including them in the Bill. See: <https://www.computerworld.com.au/article/634487/safe-harbour-rules-australia-new-copyright-battleground/>.

- **Clauses 29 and 30: Copyright Tribunal:**
 - a. Section 29: Composition. An additional requirement for eligibility should be that the individual does not have a criminal record.
 - b. Section 29A(3): No power to review administrative action by the Commission.
 - c. Section 29E: Proceedings of the Tribunal.

These clauses 29 and 30 are satisfactory, except for the recommendation for the Composition as underlined above.

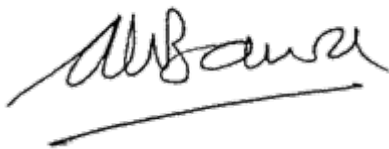
- **Clause 37: Transitional provision.**

There is the Intellectual Property Laws Amendment Act No. 28, 2013, under the portfolio of the Department of Trade and Industry. There is also a “sui generis” Bill called The Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, 2016, drafted by the Department of Science and Technology, which is going through the legislative process at the moment. Until such time as the contradictory and/or conflicting clauses and problems between these two pieces of legislation are resolved, it would be difficult to refer only to the IPLAA, 28, 2013, in this Clause 37. If for any reason, the latter Bill supersedes the IPLAA, or is enacted as a second TK Act, then this would render the wording in Clause 37 incorrect. It should perhaps read as follows:

“Any reference in the Copyright Amendment Act, 2019, to the phrases ‘indigenous cultural expressions’ or ‘indigenous community’ shall only be effective upon the date on which the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013) (IPLAA), or any other related Act that may be enacted concurrently with, or supersede the IPLAA 2013.”

USAf trusts that these comments and recommendations will be seriously considered for amendment and/or incorporation in the Copyright Amendment Bill, as the case may be.

Yours sincerely,



**PROFESSOR AHMED BAWA
CHIEF EXECUTIVE OFFICER**

This document was drafted by Denise R. Nicholson (Scholarly Communications Librarian, University of the Witwatersrand, Johannesburg) under