

COPYRIGHT AMENDMENT BILL, 2017

(Tabled in Parliament 16 May 2017)

[B13 – 2017]

PUBLIC HEARINGS BY PORTFOLIO COMMITTEE OF TRADE AND INDUSTRY

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INTRODUCTORY REMARKS

THE ORGANISATIONS REPRESENTED

- ❑ **this presentation is made on behalf of –**
 - ❖ **the SA Institute of Intellectual Property Law (SAIIPL)**
 - the SAIIPL submitted written comments
 - ❖ **the Law Society of SA (LSSA)**
 - the LSSA submitted written support for the SAIIPL submission
- ❑ **as a Fellow of the SAIIPL I have been mandated to represent the SAIIPL, and as Chairperson of the LSSA Committee on IP I have been mandated to represent the LSSA**
 - ❖ I have practised as an attorney in the field of IP law since 1965
 - ❖ I have served on different committees in the field of IP, both national and international, over many years
- ❑ **I will be assisted by Stephen Hollis, also a Fellow of the SAIIPL and a member of the Law Society of the Northern Provinces**
 - ❖ he has practised as an attorney in the field of IP and commercial law since 2007
 - ❖ he has participated in preparing the submission of the SAIIPL

INTRODUCTORY REMARKS

THE ORGANISATIONS REPRESENTED

- ❑ **the SAIPL is a voluntary association that has existed since 1954**
 - ❖ the association itself is independent and does not represent any client group
 - ❖ the members are practising attorneys, academics, business practitioners and students committed to the protection and enforcement of IP rights
 - ❖ the members represent a wide spread of clients, businesses and other entities, both national and international
- ❑ **the LSSA is a voluntary association established in 1998**
 - ❖ the association itself is independent and does not represent any client group
 - ❖ its constituting bodies are the statutory law societies, the Black Lawyers Association (BLA), and the National Association of Democratic Lawyers (NADEL)
 - ❖ the attorneys who are members of the constituting bodies represent a wide spread of clients and interest groups, both national and international
- ❑ **the main objective of the SAIPL and the LSSA is to preserve and promote a legal dispensation of integrity and legality and aligned with the needs and imperatives of SA**
 - ❖ both associations approach the copyright issues from a legal perspective
 - ❖ both associations are unbiased and have no commercial preference



**NEED FOR COPYRIGHT LAW
TO BE UPDATED**

NEED FOR COPYRIGHT LAW TO BE UPDATED

COPYRIGHT AMENDMENT BILL NECESSARY

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- ❑ SA's current copyright law is generally accepted to be a good and effective system, but there is also consensus that the current Copyright Act, 1978 must be updated and modernised
 - ❖ many technological developments have taken place since 1978
 - the Act must be amended to cater for technological needs within a proper legal framework
 - ❖ the need for members of the public in general to have access to, and to make use of, copyright works has increased
 - the Act must be amended to provide for these needs on an equitable basis
 - ❖ the need of specific sectors of the public, eg students, disabled persons, performers, to have access to and to make use of copyright works is recognised
 - the Act must be amended to cater for these specific needs
 - ❖ the importance to encourage and to enable creative artists, and creative industries, to benefit from their creative work and input is recognised
 - the Act must be amended to enable these benefits on an equitable basis
- ❑ therefore, the updating and modernisation of the Copyright Act, 1978 is necessary, is timely, and is supported
 - ❖ BUT the changes must be done in a legally correct and effective manner and the outcome must create a fair and equitable dispensation

NEED FOR COPYRIGHT LAW TO BE UPDATED

COPYRIGHT AMENDMENT BILL NECESSARY

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- ❑ **in updating and modernising the current Copyright Act, 1978 it is important to take into account several principles and guidelines**
 - ❖ **SA has to implement, and adhere to, the international treaties and instruments that the country has acceded to**
 - ❖ **SA has to take note of technological developments, including legal solutions applied in other countries, but without compromising the existing legal dispensation of the country and without slavishly adopting legal models of other countries**
 - ❖ **SA has to take account of the need to establish a legal system that will empower and enable – and ultimately benefit – local creators, artists, composers, performers, students – but also local creative industries and business entities**
 - ❖ **SA has to take account of its domestic legal dispensation in the broader field of IP, and should not compromise long-standing fundamental principles**
 - ❖ **SA should take into account the findings and recommendations of bodies that have investigated and assessed the needs and shortcomings of the current IP legal dispensation, also in the field of copyright law**
- ❑ **it is not apparent that these principles and guidelines were taken into account in the drafting of the Copyright Amendment Bill, 2017**



COPYRIGHT AMENDMENT BILL, 2017

NEED FOR COPYRIGHT LAW TO BE UPDATED

COPYRIGHT AMENDMENT BILL, 2017

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- ❑ since the first Copyright Amendment Bill, 2015 was published the amendment process has elicited extensive public comment
 - ❖ the Copyright Amendment Bill, 2017 is an improvement on the 2015 Bill but has likewise elicited wide but also conflicting reaction
- ❑ the Portfolio Committee will be addressed over the next days by stakeholder groups emphasising different aspects of the Bill, including perceived benefits but also alleged shortcomings of the Bill
 - ❖ it may be difficult for the Committee, in the light of the conflicting positions put forward, to come to a decision on the various issues
- ❑ therefore, it is proposed that the Committee consider appointing a Task Team of Experts to work through the Bill and inform the Committee
 - ❖ such a Task Team should address the various drafting and legal problems raised, and try to correct the numerous errors and shortcomings identified
 - ❖ such a Task Team should consider and assess the arguments raised in regard to policy considerations, legal models used in other countries, and economic factors
 - ❖ such a Task Team should also consider convening an inclusive consultative workshop for stakeholders to debate the issues and to seek acceptable solutions

COPYRIGHT AMENDMENT BILL, 2017

CRUCIAL LEGAL ISSUES TO BE ADDRESSED

- ❑ **it is not possible within a time span of 20 minutes to deal fully with all of the problematic issues of the 2017 Bill**
 - ❖ **in its written submission the SAIPL addresses all of these issues in detail**
- ❑ **only a number of crucial legal issues, arising from ill-considered legislative provisions, will be addressed**
 - ❖ **provisions for new or enhanced enforceable rights packages**
 - **a new enforceable right is the user royalty right**
 - **another new enforceable right is the resale royalty right**
 - ❖ **provisions for new or extended exceptions to, or dilution of, enforceable rights**
 - **the introduction of 'fair use' concessions**
 - **the introduction of extended exceptions from copyright protection**
 - ❖ **provisions with unclear terms and concepts and/or ill-considered outcomes**
 - **the indiscriminate use of the phrase 'user, performer, owner, producer, author'**
 - **the provisions in respect of 'orphan works'**
 - **the provisions in regard to state-owned copyright**
 - **the provision to restrict the duration of an assignment of copyright**



CRUCIAL LEGAL ISSUES TO BE ADDRESSED

CRUCIAL LEGAL ISSUE

NEW ENFORCEABLE RIGHT: USER ROYALTY RIGHT

- ❑ the Bill (s 4, 5, 6) will introduce a new and highly questionable right to receive a new type of royalties, namely a user royalty right
 - ❖ the Act (s 2) provides for 9 categories of copyright works, namely
 - literary works
 - cinematograph films
 - programme-carrying signals
 - musical works
 - sound recordings
 - published editions
 - artistic works
 - broadcasts
 - computer programs
 - ❖ what is notable is that the Bill only seeks to provide for the user royalty right in respect of 4 of these categories of copyright works, namely
 - literary and musical works (Bill s 4)
 - artistic works (Bill s 5)
 - cinematograph films (Bill s 6)
 - ❖ the other categories of copyright works, although also potentially 'usable', will not be subject to this user royalty right
 - ❖ this appears to be discriminatory in regard to the author of the work, the owner of the copyright, and the user of the work

CRUCIAL LEGAL ISSUE

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NEW ENFORCEABLE RIGHT: USER ROYALTY RIGHT

- ❑ the Bill (s 4, 5, 6) will amend the Act (s 6, 7, 8) to provide that, despite the transfer of copyright in the work concerned
 - ‘by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have the right to claim an equal portion of the royalty payable for the use of such copyright work’
 - ❖ the wording of this provision simply does not make sense
 - how can the user or performer or producer of a literary or musical work (s 4), or an artistic work (s 5), or a cinematograph film (s 6) have the right to transfer the copyright?
 - which party is liable to pay the user royalty, to which party must the ‘claim’ be addressed, and to which party must the royalty be paid?
 - must the author of the copyright work, or the owner of the copyright, pay the user, since the user has the right to claim an equal portion of the royalty
 - what does the term ‘use’ of the copyright work mean: If I read a book, or listen to a musical work, am I ‘using’ the work and thus liable to pay a royalty?
 - ❖ BUT if I listen to a sound recording, or use a computer program, no user royalty is payable
- ❑ the Bill (s 33) will also introduce into the Act (s 39B) a provision that a term in any contract which purports to renounce a right afforded by the Act shall be unenforceable
 - ❖ the current provisions for a user royalty right must be reconsidered

CRUCIAL LEGAL ISSUE

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NEW ENFORCEABLE RIGHT: RESALE ROYALTY RIGHT

- ❑ **the Bill (s 9) will introduce into the Act new sections (s 9B – 9F) to provide for a new type of royalty, namely a resale royalty right**
 - ❖ **the objective with this royalty was understood primarily to benefit emerging creative artists, by enabling them to benefit from the sales of their works; however, it is not clear that this objective will be achieved**
 - ❖ **many aspects of the resale royalty right provisions simply do not make sense**
- ❑ **in terms of s 9B(1) the author of an ‘artistic work’ shall enjoy an ‘inalienable right’ to receive royalties on the commercial resale of the work subsequent to the ‘first transfer by the user of that work’**
 - ❖ **an ‘artistic work’ is defined in the Act (s 1) to mean paintings, sculptures, drawings, engravings, photographs, works of architecture, works of craftsmanship; so, theoretically when any of these items are sold a resale royalty will be payable**
 - ❖ **it is not clear what was intended by ‘the first transfer by the user of the work’; it seems that an artistic work must first be used and then transferred by the user before the resale royalty will be payable**

CRUCIAL LEGAL ISSUE

NEW ENFORCEABLE RIGHT: RESALE ROYALTY RIGHT

- ❑ in terms of s 9B(2) the resale royalty shall be payable at the rate prescribed by the Minister
 - ❖ there is no provision for a sliding scale to be prescribed; so, theoretically the rate will be the same for a very costly work by a famous artist and a less costly work by an emerging artist, so that the famous artist will receive more money
- ❑ in terms of s 9B(3) the 'user, performer, owner, producer or author' of an artistic work shall be entitled to the resale royalty
 - ❖ so, not only the creative artist (ie the author) will receive the royalty, but also the user (eg the tenant of a building), or the owner (eg of an art work displayed in a gallery), or the performer (eg a model for a sculpture), or the producer (eg the maker of a work of craftsmanship) will be entitled to a resale royalty
- ❑ in terms of s 9C, where a name/mark appears on an artistic work purporting to identify a person as the author, such person shall presumed to be the 'user, performer, owner, producer or author'
 - ❖ this makes no sense; the author of an artistic work is expressly defined in the Act
- ❑ in terms of s 9B(4), the resale royalty right will apply whether or not the author was the 'first user, performer, owner, producer or author' of the copyright in the work
 - ❖ this provision creates confusion; the author was the author, not the copyright owner

CRUCIAL LEGAL ISSUE

NEW ENFORCEABLE RIGHT: RESALE ROYALTY RIGHT

- ❑ in terms of s 9D(1) the resale royalty right of a ‘user, performer, owner, producer or author’ expires 50 years from the end of the calendar year in which the author died
 - ❖ so, presumably the ‘user, performer, owner, producer’ will also lose their resale royalty rights 50 years after the death of the author
- ❑ in terms of s 9E assignment or waiver of a resale royalty right is unlawful and unenforceable
 - ❖ however, in terms of s 9F a resale royalty right may be transmitted by testamentary disposition or by operation of law
- ❑ in terms of s 9F(2) it seems that an author may transfer authorship of a work
 - ❖ authorship is defined in the Act; no provision is made for authorship to be assigned
- ❑ finally, the Bill does not indicate who would be responsible to pay the resale royalty – the seller or the buyer of the work?
- ❑ in conclusion, the principle of a resale royalty is supported if the outcome would be to benefit and reward young and emerging artists, but the model as set out in the Bill has many flaws and inconsistencies and will have to be revised and improved



EXCEPTIONS TO ENFORCEABLE RIGHTS

NEW EXCEPTIONS TO ENFORCEABLE RIGHTS: FAIR USE

- ❑ the Act stipulates (s 6 – 11B) tailor-made packages of exclusive and enforceable rights in respect of the different categories of copyright works; these rights are enjoyed by the copyright owner
 - ❖ the Act also stipulates (s 12 – 19B) specific exceptions to the enforceable rights in respect of the different categories of copyright works; these exceptions are intended to permit ‘fair dealing’ by the public with these works
 - ❖ this system has always been regarded as a fair and equitable dispensation, providing for a balance of rights between the owners of copyright and the public
 - ❖ however, updating or modernising of the dispensation to cater for the digital era and the electronic technology, and also for the needs of disabled persons, was deemed necessary
- ❑ the Bill (s 10) will amend the Act (s 12) by substituting for s 12(1), applicable to literary and musical works, a new s 12(1) to provide that ‘fair use’ in respect of a work for certain purposes will not infringe copyright
 - ❖ a list of 8 specific purposes is set out that may qualify as ‘fair use’, followed by a provision that all factors, but in particular 4 listed factors, must be taken into account to determine whether an act constitutes ‘fair use’

NEW EXCEPTIONS TO ENFORCEABLE RIGHTS:

FAIR USE

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- ❑ **the current s 12(1) of the Act refers to the concept ‘fair dealing’ that will not constitute infringement; the new s 12(1) to be introduced by the Bill refers to the concept ‘fair use’**
 - ❖ **the use of the new concept ‘fair use’ is noteworthy, since this is a concept foreign to SA law but used in the copyright law of the US; the concept ‘fair dealing’ as used in the Act has been part of the law of SA for decades**
- ❑ **the current s 12(1) of the Act applies only to literary and musical works; the new s 12(1) to be introduced by the Bill will apply to ‘fair use’ of works in general**
 - ❖ **it is not clear how all of the listed ‘fair use’ acts could be equally applicable to all of the different categories of works**
- ❑ **the Bill (s 11) then introduces into the Act a new s 12A setting out a long list of acts, again applicable to works in general, that will not constitute infringement**
 - ❖ **although this is not clear, it seems that the new s 12A is intended to expand the acts to be regarded as ‘fair use’ in terms of new s 12(1)**
 - ❖ **some of the excluded acts are justifiable, some are confusingly repetitive of the provisions of the new s 12(1), and some are questionable**

FURTHER EXCEPTIONS TO ENFORCEABLE RIGHTS: 19

GENERAL EXCEPTIONS

- ❑ **the Bill (s 12, 17) will also introduce into the Act new s 13A, 13B and 19B – 19D to make further provision for new exceptions to enforceable copyrights in addition to the existing exceptions**
 - **new s 13A will permit the making of temporary or incidental copies of a work for technological reasons**
 - **new s 13B will permit the making of copies or recordings of a work for academic and educational purposes**
 - **new s 19B will permit certain acts entailing the use of a computer program to observe or test or adjust the functioning of the program**
 - **new s 19C will create certain general exceptions in respect of copyright works in favour of libraries, archives, museums and galleries**
 - **new s 19D will create an exception for the making of accessible format copies for persons with disabilities**
- ❑ **the Bill (s 13 – 16) then totally repeals some of the current exception provisions in the Act (s 17, 18, 19A), applicable to different categories of works, and also repeals the exception provisions in the Act (s 16(1)) in respect of cinematograph films**
 - ❖ **it is presumed that the intention was to introduce a new set of general exceptions; however, the appropriateness and impact of the new dispensation will have to be assessed**

FURTHER EXCEPTIONS TO ENFORCEABLE RIGHTS: 20

GENERAL EXCEPTIONS

- ❑ **a revision of the current exception provisions in the Act is supported and is indeed necessary**
 - ❖ however, any new dispensation must preserve a balance between the rights of authors and copyright owners, and the rights of potential users (including performers, producers, students, etc)
- ❑ **the need is recognised for the public, and in particular certain sectors of the public (such as students, persons with disabilities, small business entities, educational institutions, libraries) to have easier access to copyright works**
 - ❖ however, it is submitted that it would be important to reassess the ambit and potential consequences of the proposed exceptions to ensure that the envisaged objectives will be achieved while preserving a balance of rights
 - ❖ for instance, if 'any person' (as per s 13B(1)), not only academic institutions, may freely make copies of entire textbooks for use by students, the rights of the publishing industry will be negatively impacted although the overall purpose of education may be pursued



**UNCLEAR TERMS AND CONCEPTS
ILL-CONSIDERED OUTCOMES**

UNCLEAR TERMS AND CONCEPTS

ILL-CONSIDERED OUTCOMES

- ❑ **the Bill appears to make indiscriminate use of the phrase ‘user, performer, owner, producer, author’ to refer to a person or party, eg in s 4(c), s 5(c), s 9 [introducing s 9B, 9C, 9D into the Act]**
 - ❖ **it is submitted that this phrase is undefined and lacks clarity, inasmuch as it is not clear which relevant item is intended to apply in a specific case**
 - ❖ **the use of this phrase must be reconsidered and corrected**
- ❑ **the Bill introduces a definition of the concept ‘orphan work’ and will insert into the Act (new s 22A) comprehensive provisions for the granting of licences and for the assignment of ‘orphan works’**
 - ❖ **the introduction of the concept is supported; however it is submitted that the provisions regarding orphan works have flaws and should be revised**
- ❑ **the Bill will also effect certain changes to the Act (s 5, 22(1)) in regard to State-owned copyright**
 - ❖ **although the changes have merit, it is submitted that the potential consequences of the provisions should be reconsidered, eg the potential conflict with the provisions of the Act on IP Rights from Publicly Financed Research and Development, 2008**

UNCLEAR TERMS AND CONCEPTS

ILL-CONSIDERED OUTCOMES

- ❑ **the Bill will amend the Act (s 22(3)) to provide that an assignment of copyright shall be valid for a period of 25 years from date of assignment**
 - ❖ presumably this provision is intended to introduce into SA's copyright law the so-called reversionary right; the amendment gives no indication to whom the copyright would revert
 - ❖ it is submitted that this fundamental change of SA's copyright law will have far-reaching, and probably unintended, outcomes
 - ❖ the potentially damaging outcomes of this provision are exacerbated by the provision of proposed new s 39B, namely that a term in a contract that purports to renounce a right afforded by the Act, shall be unenforceable
- ❑ **it is accepted that a reversionary provision could assist to address the apparent imbalance and unfairness in cases where an inexperienced or emerging creative artist is coerced into assigning his/her copyright**
 - ❖ however, the provision as proposed would not necessarily resolve this problem; it is not clear whether a subsequent assignment would not be demanded
 - ❖ moreover, the provisions of s 22 of the Act will apply to all works and regardless of whether or not the assignor is well-briefed on the consequences of an assignment and is adequately rewarded for the assignment
- ❑ **it is recommended that this fundamental change should be reconsidered and appropriately formulated**



**CONTENTIOUS POLICY ISSUES
ALSO TO BE ADDRESSED**

COPYRIGHT AMENDMENT BILL, 2017

CONTENTIOUS POLICY ISSUES TO BE ADDRESSED

- ❑ in conclusion it is submitted that a number of contentious policy positions appearing from the Bill may have to be addressed
 - ❖ the policy position in general to deal with the 'use' of a copyright work
 - to date the Act does not in general prohibit/permit the 'use' of a copyright work
 - the restricted/prohibited acts are specified in respect of each category of works; 'use' is not such a prohibited act
 - the concept 'use' is not defined in the Act, and it is not clear what this concept will cover
 - this lack of clarity manifests itself in the new user royalty right to be introduced
 - ❖ the policy position to introduce the US-based 'fair use' system
 - to date the Act does not in general permit 'fair use' of a copyright work
 - the Act currently specifies the acts that will be exempted from copyright infringement in respect of each category of works; in respect of these exempted acts the concept of 'fair dealing' is used
 - to introduce the US-based concept and system of 'fair use', which is foreign to SA law, is expected to cause uncertainty and lead to conflict
- ❑ the Portfolio Committee is urged to consider the appointment of a Task Team of Experts to address also these issues and to inform the Committee

QUESTION TIME

