FREEDOM OF EXPRESSION INSTITUTE

7 July 2017

To: Ms. J. Fubbs
Chairperson of the Portfolio Committee on Trade and Industry
Attention: Mr. A. Hermans
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WRITTEN SUBMISSION BY THE FREEDOM OF EXPRESSION INSTITUTE ON THE COPYRIGHT AMENDMENT BILL (2017) [B13-2017]

INTRODUCTION

1. The Freedom of Expression Institute (FXI) is a non-profit, non-governmental organization established in 1994 to promote and advance the right to freedom of expression as enshrined in section 16 of the Constitution of the Republic of South Africa. The FXI also campaigns for associated rights, notably the freedom to receive or impart information or ideas and freedom of artistic creativity. Our mission is to promote and protect these constitutionally-protected rights in pursuit of a pluralistic and tolerant South African society bolstered by a strong democratic foundation.

2. To fulfill our mandate, the FXI works to:
   - promote and defend freedom of expression;
   - oppose censorship;
   - ensure equal access to information and knowledge; and
   - support free press and access to media.

3. The FXI provides litigation and legal support services, conducts research on trends in the exercise of free expression, organizes civil education programs and engages in policy advocacy on related issues. While our work primarily targets vulnerable and marginalized communities, it benefits a diverse range of individuals and entities, including grassroots organizations, social movements, academics, journalists and government institutions in all nine provinces of South Africa.

4. The FXI welcomes the opportunity afforded by the Portfolio Committee of Trade and Industry to make a written submission regarding the Copyright Amendment Bill [B13-2017] released for public comment.

SCOPE

5. For its submission, the FXI limits its comments to those sections of the Bill, which could potentially affect the right to free expression, including freedom of the media. The FXI identifies the pertinent provisions as sections 12, 12A, 21, 22 and 27. Though other aspects of the Bill deserve praise and/or critique, the FXI leaves such input to those with direct interest or expertise.

6. The FXI contends that there is an inherent tension between copyright law and the right to free expression. When viewed expansively, copyright law can be repurposed as a tool to curb and even suppress speech, dissent and other forms of expression. As recognized by the Constitutional Court in the *Laugh It Off*[1] and *Gidani*[2] cases, the bundle of rights granted by copyright law is protected under section 25 of the Constitution (the right to property). The FXI does not contest the legitimacy or importance of copyright law. However, freedom of expression is also a constitutionally-mandated right (s16 of the Constitution) on par with the right to property (in this case, copyright protection).[3] The FXI thus asserts that, from a legal standpoint, copyright law should be narrowly construed when it comes into conflict with freedom of expression and freedom of information.

7. Public interest concerns also weigh in favor of striking a balance between copyright law and freedom of expression. In a country like South Africa, which is working to expand access to education, knowledge should not only be confined to those rich enough to pay royalties or licensing fees. Instead, the law should be designed to favour the previously disadvantaged and promote their rights to expressive freedom and access to information. When copyright law diverges from this goal, the FXI maintains that it should be narrowly construed.

8. The comments in our submission reflect the core propositions identified in paragraph 6 and 7. We sincerely hope that the Portfolio Committee—and Parliament as a whole—will bear them in mind while reviewing the pertinent sections of the Bill.

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[1] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).
[2] *National Soccer League v Gidani (Pty) Ltd.* 2014 JDR 0526 (GSJ).
[3] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC); *National Soccer League v Gidani (Pty) Ltd.* 2014 JDR 0526 (GSJ).

THE FXI HEREIN SUBMITS THE FOLLOWING:

9. The FXI offers the following comments on B13-2017 and suggests improvements when necessary or helpful:

9.1 **Section 12**: This section of the Bill has benefited significantly from the inclusion of a balancing test to evaluate the legitimate invocation of a fair use exception to copyright protection. Fair use essentially constitutes an affirmative defence to claims of copyright infringement. If properly invoking this exception, an individual need not request the permission of the artist, author, copyright owner, etc., before using portions of their work. South Africa's incorporation of a flexible approach to fair use exceptions brings it more in line with, *inter alia*, America, Israel, South Korea and Singapore, whose citizens profit from this doctrine.

However, despite these positive steps forward, the Bill should be further amended to include an open list of permissible purposes for which the fair use exception can be invoked. As currently written, the Bill only permits the fair use exception for a closed set of purposes (specified in s12(1)(a)(i)-(viii)) denoted through the "for the following purposes" language. The FXI proposes that the language of s12(1)(a) should be amended as follows:

> "In addition to uses specifically authorised, fair use in respect of a work or the performance of that work does not infringe copyright for purposes, **such as**..."

This amendment would allow individuals to repurpose the fair use doctrine to accord with evolving mediums or expressive needs, instead of confining them to the purposes delineated in the Bill. While some critics argue that a flexible, open and general standard without any limiting principle introduces significant unpredictability into copyright law, the FXI believes that this constitutes a strength since it bolsters freedom of expression. Indeed, the United States Supreme Court—and many scholars—have opined that copyright law would constitute a violation of the right to free speech in that country, but for the existence of a flexible fair use exception that permits the balancing of copyright and free-expression values in individual cases.[4]

For example, if an emerging artist wanted to use part of a copyright-protected image in his/her work to evoke an emotional response in his/her audience, an open-purpose balancing test for fair use exceptions would be preferable. Under the current version of the Copyright Bill, such an expressive act might not fall under one of the closed purposes, and thus, the artist might not dare to play off another's work, chilling his/her speech and depriving society of a (potentially) important artistic contribution. Since the cost of

[4] Eldred v. Ashcroft, 123 S. Ct. 769, 788–89 (2003); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); Michael Birnhack, *Copyright Law and Free Speech After* Eldred v. Ashcroft, 76 UNIVERSITY OF SOUTHERN CALIFORNIA LAW REVIEW 1275 (2003); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 13–19 (1987).

royalties/licensing might factor into this decision, a closed list of purposes may entrench inequalities further.

Copyright protection could also lead to private censorship in instances where an artist is willing and able to pay licensing fee but a copyright holder simply refuses to license a work because he/she does not agree with the substance of the would-be user's expression.

As a whole, the Bill could do more to protect and advance artistic creativity, an important facet of the right to free expression, which is not simply limited to conveying information or opinion. By widening fair use doctrine, the government would grant opportunities to the previously underrepresented to have their voices and opinions heard.

An open fair use doctrine would additionally allow for copyright law to adapt to new technological mediums that change the expressive landscape—for example, "transformational uses," such as mash-up videos, or the advent of the internet and search engine. Copyright law should not stand in the way of individuals utilizing these technological innovations as recognised in The Hague Declaration on Knowledge Discovery in the Digital Age.[5] The Declaration creates a useful roadmap for navigating the interplay between intellectual property law (including copyright law) and content mining (i.e., "the process of deriving information from machine-readable materials"). The FXI proposes that the fair use doctrine should be expanded to apply to such important innovations so that South Africans can enjoy the increased access to information and the expressive freedom it brings without fear of violating copyright protections.

Critics might challenge the expansion of the fair use doctrine by asserting that it will destroy innovation, the core purpose of copyright law. However, the balancing test of *s*12(1)(b) provides enough protection so that copyright-protected works still maintain their value, while simultaneously promoting creativity by permitting the "correct" amount of free-flow for information and ideas. The FXI believes that a strong fair use doctrine is essential to striking a balance between the right to freedom of expression and copyright law.

9.2 **Section 12A**: This section outlines some helpful and clarifying general exceptions to copyright protection. The FXI suggests that the section be combined with s12 to create a single list of permissible purposes subject to a flexible balancing test. This would effectively promote appropriate uses of copyright-protected materials to stimulate discussion, create dialogue and preserve expressive freedom, while preventing abuse of the exceptions.

Nevertheless, as it currently stands, s12A makes significant improvements to the 2015 amendments, which demonstrate that the drafters value the s16 constitutional right to freedom of expression. For instance, **section 12A(1)(b)** now extends the exception for "illustrations" beyond the limited confines of teaching within the limits of "fair practice" (we assume that this refers to the "fair use" balancing test of s12, but further clarification

[5] The Hague Declaration on Knowledge Discovery in a Digital Age, http://thehaguedeclaration.com/the-hague-declaration-on-knowledge-discovery-in-the-digital-age (6 May 2015).

is required). The provision thus enables important public discussion, political discourse and commentary in recognition of the importance of this practice to freedom of expression and democratic vitality. **Section 12(1)(d)** also adds to the political and cultural expressive landscape by permitting the reproduction of a "lecture, address, or other work of a similar nature…delivered in public" when used for "information purposes." This recognizes the importance of access to information for all South Africans (e.g., through press conferences, educational talks, public meetings etc) by not restraining these works through royalties or licensing fees. The provision is also mindful of the use of modern mediums, such as YouTube, for disseminating or receiving information.

Despite these advances, **section 12A(1)(a)** could be significantly improved by removing the comma after "periodical" to make clear that "any quotation" compatible with fair use can be used by journalists, filmmakers, etc., to express themselves and impart information to their audiences. These professionals would heavily rely on this exception in their craft, and thus, it should be crafted to promote the right to freedom of the press and other media (*s*16(1)(a)). If the comma is not removed, this exception becomes extremely narrow and out of step with the Constitution and industry needs.

Overall, section 12A demonstrates an admirable commitment to balancing freedom of expression and copyright law, which should be emulated throughout the Copyright Amendment Bill. However, the FXI contends that this section could be even further improved from a freedom of expression (and simplicity) standpoint by subsuming s12A within *s*12. The suggested amendment to section 12A(1)(a) should also be incorporated.

9.3 **Section 21**: This section of the Bill continues to vest the commissioner of works with default ownership, even when the creator retains complete creative control. Practically, this has resulted in films, photos and other creations being locked away in archives, if the commissioning entity decides not to share the work with the wider public. As it currently stands, the provision thus deprives both the public from enjoying the piece and the artist from economic gain, the right to free expression and the right to impart his/her ideas.

The FXI has represented several frustrated filmmakers commissioned by the SABC to produce documentaries, which the public broadcaster then refused to air. Since the SABC owned the copyright, the artists were unable to screen their films elsewhere in some cases. This amounts to an act akin to censorship. A prominent example is the Broad Daylight matter. In 2006, the SABC refused to air a commissioned work (a documentary about the former-President Mbeki) and attempted to interdict the film from screening through other channels.

The section should be amended so that ownership lies with the author by default. The commissioning party would then hold a non-exclusive license, unless modified through contractual agreement. Several other countries have adopted—or contemplate adopting such a system, including the United Kingdom and New Zealand, in recognition of its benefit for free expression and for the economic position of creators. Since copyright protection aims to enhance creativity and innovation through economic incentives, the

default position advocated by the FXI aligns more closely with the principles of copyright law.

9.4 **Section 22A**: The FXI questions the wisdom of the current orphan works provision, which contemplates a cumbersome and impractical process for granting licenses for those works whose authors are indeterminate or uncontactable. For instance, s22A(2) requires individuals applying to obtain a license to publish a notice in the *Government Gazette* and two other daily newspapers in different official languages. The expense behind such a process prevents, *inter alia*, students, libraries and struggling artists from gaining access to or using these works. This is problematic from a freedom of expression and access to information standpoint. Many countries, such as the United States, have struggled—or are currently struggling—with how to reconcile orphan work provisions with these essential rights.

We suggest that the Bill should be amended to allow a fair use exception to apply to orphan works, especially for educational purposes, digitisation efforts of libraries, and other non-commercial functions. If applying fair use exceptions to orphan works, the third and fourth prongs of the balancing test (s12(1)(b)(iii) and s12(1)(b)(iv)) would likely be fulfilled easily. Without an exception of this nature, *s*22A of B13-2017 conflicts fundamentally with *s*16 and *s*32 of the Constitution, stifling creativity, knowledge and expressive freedom. If necessary, the orphan work procedure as it stands in *s*22A could continue to apply to commercial purposes.

9.5 **Section 27**: The criminalisation of the circumvention of technological protection measures, even when lawful or justified, remains a threat to freedom of expression, including the related rights to academic and scientific freedom and to receive or impart information and ideas. The Bill does make advances compared to its 2015 predecessor since it provides an exception for those "authorised to do so." This could arguably protect the interest of investigative journalists and similar professionals. However, for legitimate pursuits, one would still need to seek and obtain permission. This would likely constitute an expensive process, which again would limit access to information to those with means, thereby undercutting the tenuous balance struck between public interest goals (such as freedom of expression) and copyright law. Such a complete ban on circumvention devices should be amended.

CONCLUDING REMARKS

10. The FXI believes that the proposed amendments to the Copyright Act of 1978 could be further improved based on our submissions. Copyright law plays an important role in South Africa for promoting creativity and benefiting creators of an original work. However, the FXI firmly asserts that copyright protection should not outweigh the right to freedom of expression, which remains a fundamental tenet of a constitutional democracy.

11. The FXI appreciates the opportunity to provide its input to the Portfolio Committee on Trade and Industry and stresses that the above comments are made in the spirit of strengthening the fundamental right to freedom of expression in South Africa.

12. If any additional information regarding these submissions is required, please contact the FXI using the details provided below.

13. The FXI would welcome the opportunity for further engagement with the Portfolio Committee on Trade and Industry.

Sincerely

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