



INNOVUS

INNOVUS TEGNOLOGIE OORDRAG (Edms) Bpk | Universiteit Stellenbosch
INNOVUS TECHNOLOGY TRANSFER (Pty) Ltd | Stellenbosch University

15 DE BEER STRAAT | STREET
STELLENBOSCH
7600
SUID-AFRIKA | SOUTH AFRICA

POSBUS | PO BOX 3135
MATIELAND
7602
SUID-AFRIKA | SOUTH AFRICA

T +27 (0) 21 808 3826
F +27 (0) 21 808 3913

info@innovus.co.za

15 June 2017

Ms J Fubbs
Chairperson:
Portfolio Committee of Trade and Industry

For Attention:

Mr A Hermans,
PO Box 15
Parliament
Cape Town
8000

Dear Sirs,

Written comment on the proposed Copyright Amendment Bill [B13-2017]

Please see below written comment on the proposed Copyright Amendment Bill [B13-2017] as provided by Roux de Villiers from Roux de Villiers & Associates; Paarl; Western Cape and who acted upon instruction from Innovus to submit written comment on our behalf.

Yours Sincerely

Anita Nel
Senior Director: Innovation and Business Development

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer,
Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekreteraris | Company Secretary Johan Steyn

Reg.1998/021073/07

Roux de Villiers' Comment on the Copyright Amendment Bill [B13-2017] - (13 June 2017)

Stellenbosch University wants to provide the best quality education at the lowest possible cost. It also understands its role in the South African and African context. The University therefore strongly supports the objects of the latest Copyright Bill. It also acknowledges the work that has gone into producing this latest draft and notes the marked improvement in the quality thereof as compared to the 2015 Draft. That being said, there are still a few key matters in the latest draft that has to be urgently addressed. The comments in this documents will focus on these issues primarily. However, this should not be viewed as a general condemnation of the Bill which we believe to address a number of highly relevant and important issues for the future growth of our country.

The key problems with the latest draft of the Bill that we will highlight stem from an apparent lack of full appreciation of the impact of some of the changes on the development, sale and acquisition of technological products and services. It is important to remember that **copyright does not only pertain to works of art and the media**. It also pertains to functional works such as architectural plans as well as technological works such as engineering designs, computer programs and databases. These latter types of work form critical building blocks of the development of technological products and constitute key assets of any related business. It is equally important to remember that state funding is used in South Africa to support institutions and private enterprise to develop new technologies and internal research and development capacity. State funding also comes in many forms, including through university subsidies, through governmental departments and through agencies such as the Technology Innovation Agency and the Industrial Development Corporation.

Apart from being an educational institution, Stellenbosch University is also a significant role player in the development and commercialisation of technology arising as a result of its research activities. The funding received for conducting such research activities (whether public funds or funds received from industry partners) and the proceeds received from the University's commercial activities are important for the University to sustain its research and commercialisation activities and to establish new technology driven businesses to create jobs and sources of revenue for the South African economy. In this regard the University has established multiple SMEs as well as the Launchlab program (with funding from the Department of Trade and Industry and Nedbank) to incubate technology driven businesses. The University is also in the process of establishing an investment fund funded by global investors to support development and commercialisation activities at South African universities and the incubation of local SMEs established to exploit such technologies. These activities are in line with the policies of the National Development Plan and DST on science, technology and innovation and are intended to create the type of inclusive growth opportunities contemplated therein.

The National Development Plan states as follows:

"Science and technology are key to development ... as an engine of growth, the potential of technology is huge and still largely untapped in Africa... The only form of investment that allows for

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekreteraris | Company Secretary Johan Steyn

Reg.1998/021073/07

increasing returns is in building the stocks and flows of knowledge ... successful countries have grown their ability to innovate and learn by doing, by investing public funding to help finance research and development in critical areas.”

We have also recently been presented with a draft White Paper by the Department of Science and Technology named Towards the 2017 White Paper on Science, Technology and Innovation: Inclusive development through science and innovation. In this White Paper the DST sets out its policy for transforming South Africa through science, technology and innovation (“STI”). The DST Draft White Paper states as follows: **“Internationally, STI are recognised as future sources of economic growth with potential to create new types of jobs, and new solutions to challenges like poverty, poor health and water shortages”**. This is an understanding we share.

The NDP and DST White Paper foresees a future in which science, technology and innovation is used for job creation, wealth creation and inclusive economic growth and to assist in establishing a sustainable South African economy. It foresees public investment as well as private investment in private enterprise, and particularly SMEs, to foster innovation, entrepreneurship and eventually the supply and export of technology driven goods and services for the betterment of all South Africans and Africans. Clearly, and in our view correctly, STI is also viewed as one of the key drivers in creating a more equal South African society.

The DST Draft White Paper states: *“The measure of success of new STI policy will be how it helps to transform the lives of people and communities throughout South Africa and the continent through improved access to services; how it promotes inclusive economic growth by expanding opportunities for **competitive, technology-based businesses among all South Africans, particularly black, female and youth entrepreneurs; how it enhances government performance; how it supports environmental sustainability; and how it contributes to an engaged society that prepares young Africans to live in a world undergoing enormous technological change.**”*

Copyright law establishes the framework of rights under which many technological products and services are developed, supplied and acquired. Copyright is therefore globally recognised as a critical tool for economic development. We previously commented as follows on the 2015 Bill (with emphasis): *“It should be noted that copyright forms a critical building block of our economy and of the world economy. This applies not only to media and technology driven enterprises but to virtually all economic (and governmental) activity. **There is no way that South Africa can hope to develop any significant technology driven economy unless there is substantive certainty about the protections afforded by copyright and such protections are competitive and appropriate as compared to the rest of the world.**”* It is critical that any proposed change to the copyright regime therefore also be viewed from this perspective.

We do not propose to comment on all aspects of the Bill in light of the limited time to do so, but will focus on certain key problems with the latest Bill which we believe to be particularly problematic. Each

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekretaris | Company Secretary Johan Steyn

Reg.1998/021073/07

are discussed below.

1.1. State Funded Works

Section 5 of the Act provides that copyright in a work made under the direction or control of the state or an international organization shall vest in state or such organization. The Bill proposes to amend this section by substituting subsection (2) of the Act with the following provision:

*(2) (a) Copyright on every work which is eligible for copyright and which is made by, **funded by** or under the direction or control of the state or an international or local organization.*

(b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organization in question.”

This proposal should be read in conjunction with the following proposal in Section 21 which seeks to insert as Section 22(1) of the Act the following:

*(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law: **Provided that copyright owned by, vested in or under the custody of the state may not be assigned.**”*

The amendments are far-reaching. It does not seem to appreciate that state funding is often used as seed funding for the development of new technologies and economic growth through research institutions and private enterprise. A typical example of this is the funds managed by the Technology Innovation Agency. Claiming state ownership for state funded developments is in direct conflict with the Intellectual Property Rights from Publically Financed Research and Development Act No. 51 of 2008 (“IPR Act”) which expressly allocates ownership to the recipient of the funding and provides a carefully considered regime for *inter alia* copyright works emanating from state funded research and development that is managed by the National Intellectual Property Management Office (“NIPMO”) under the auspices of the Department of Science and Technology. The notion that the state will own all works created using state funding will be a total departure from the established positions under existing law, and will effectively negate the IPR Act and render the role of NIPMO obsolete for the purposes of copyright works. This amendment will negate the University’s ability to benefit society through the licensing and dissemination of copyright works emanating from wholly or partly state funded research and the University ability to establish new businesses to exploit such copyright works and create jobs and economic growth.

As indicated above, the proposals also apparently conflict with the approach in the DST’s new draft policy on science, technology and innovation which provides for the following:

- *The present innovation policy mix will be reshaped by increasing the use of demand-side measures and **increasing direct public funding of business R&D,***

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekreteraris | Company Secretary Johan Steyn

Reg.1998/021073/07

particularly experimental development.

- **Support SMEs and emerging industries to develop and maintain in-house R&D capability.** *Additional support programmes (e.g. an R&D voucher schemes for eligible firms to cash in with registered R&D service providers) will be developed.*

This policy clearly proposes to use public funding to support local businesses to develop their own capacity. It is apparently irreconcilable with a claim for inalienable copyright ownership for all works wholly or partially funded by the state. Unfortunately, claiming state ownership for all state funded work would render state funding positively harmful to the development of in-house R&D capacity and the development of local technology businesses instead of contributing to it and to the building of a transformative South African economy based on science, technology and innovation.

Recommendation: We urgently request the scrapping of the proposed changes to Section 5(2) vesting copyright ownership in the state or organizations based on funding.

1.2. Authorial Rights

The Bill proposes several new Sections which reserves inalienable rights to royalties for authors of copyright works notwithstanding their transfer of their rights under copyright in respect of such works. As an example, the proviso proposed in Section 4 of the Bill reads as follows:

Provided that notwithstanding the transfer of copyright in a literary or musical work 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."

Similar provisos appear in respect of artistic works and films and fixations. This provisions are apparently consistent with the approach of Section 14^{ter} of the Berne Convention which states that "*The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original **works of art** and original **manuscripts of writers and composers**, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work". The provision in the Berne Convention is **limited to authors of literary manuscripts and works of art.***

The purpose of introducing the obligatory royalty is stated in the explanatory memorandum attached to the Bill as being "*to ensure that **artists** do not die as paupers*" and to ensure "*payment of royalties to alleviate the plight of the **creative industry***". This is a laudable goal. However, if the intent is to protect artists, then the proposed compulsory royalty rights should focus on works of a truly artistic nature such as **works of art, literary manuscripts and musical compositions only.**

The problem with the proposals in the Bill are that they are simply too wide and far-reaching. The

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekreteraris | Company Secretary Johan Steyn

Reg.1998/021073/07

proposals apply not only to authors of a few types of work of purely artistic nature, but also to many functional works such as architectural plans, databases and design drawings. It also applies to academic dissertations and journal articles as well as to films. Furthermore, in addition to authors, it extends rights to users, performers, owners and producers. Finally, it determines that the interest retained be *“an equal portion of the royalty payable for the use of such copyright work”*. Unfortunately, this extends far beyond ensuring that *“artists do not die as paupers”* and instead introduces massive additional risk and costs for the development and commercialisation of technology.

A large number of people contribute to the academic and research outputs produced at a university such as Stellenbosch University. Often cooperation with one or more other universities and state or private sector enterprises are required. Multiple individuals are likely to be involved in the development process. Often the final outputs of such a process include copyright works such as a set of industrial designs, circuit board diagrams, databases etc. If these works are then used to develop commercial products it would appear that the Bill requires that contributors are entitled to half the income generated. This conflicts directly with the approach under the Intellectual Property Rights from Publically Financed Research and Development Act No. 51 of 2008. It also fails to take into account the costs and efforts to be expended by the University and its partners in order to develop and market commercial products and the fact that the individual contributors are usually already fully compensated for their efforts. The obligatory royalty share will therefore impact on established commercial arrangements and amount to a massive and unjustifiable increase in the cost of commercialisation that is likely to have a debilitating impact on the University’s commercialisation activities including its ability to establish viable new SMEs.

We also restate the DST position on science technology and innovation: *“The measure of success of new STI policy will be how it helps to transform the lives of people and communities throughout South Africa and the continent through improved access to services; **how it promotes inclusive economic growth by expanding opportunities for competitive, technology-based businesses among all South Africans...**”*

The imposition of an obligatory royalty on functional and technical works as proposed in the current draft of the Bill will have exactly the opposite effect. No such royalty is imposed on foreign businesses. Accordingly, it will render South African businesses entirely uncompetitive. The impact of such a royalty on the South African industries such as advertising, publishing, media, broadcasting, architecture, film and music will be devastating.

Apparently this was not the intention of the drafters of the Bill. The scope of the obligatory royalty should therefore be carefully limited to achieve its stated goal only namely to “ensure that artists do not die as paupers”. We do not believe it would be appropriate to apply the obligatory royalty to

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekretaris | Company Secretary Johan Steyn

Reg.1998/021073/07

copyright works made under contract – whether under employment contract or a commissioned services contract.

Finally, it is worth considering that under the principle of national treatment required by the Berne Convention, South African copyright law cannot only apply to South African authors. Our law therefore applies equally to foreign authors. This would mean that foreign authors granting rights to South African businesses will also be able to claim the prescribed royalties with respect to copyright works exploited by South African business. The additional costs for South African businesses are likely to be significant.

Recommendation: If it is determined to proceed therewith, we recommend the restriction of the obligatory royalty rights ONLY to works of art, literary manuscripts and musical compositions that are NOT produced under contract.

1.3. Assignment Term

The Bill proposes to amend Section 22 of the Act to, *inter alia*, restrict the duration of any assignment of copyright to 25 (twenty-five) years. The result is that the ownership of an assigned copyright work would revert to the assignor after this period.

We assume the reason behind this proposal is the same as for the obligatory royalty payable to authors, namely “to ensure that **artists** do not die as paupers” since limited reversion rights have been used in some countries to enable authors to renegotiate royalties after a certain period of time. As an example of the limitations imposed, Section 203 of the US Copyright Act does not apply to “works for hire”.

However, the current proposal in the Bill is unlimited and far-reaching. It effectively eliminates the mechanism of copyright assignment entirely for all types of works including purely functional or technical types of work such as computer programs, databases, industrial design drawings, circuit board diagrams etc. It changes the sale of an IP asset into a 25 year lease of such IP asset. The effect is therefore that the globally established commercial principle of copyright assignment will no longer form part of South African law. This has, to our knowledge, not being implemented anywhere else in the world and accordingly, this will render South Africa an extremely unattractive investment destination for any media or technology business. Since they would not be able to acquire outright copyright ownership for commissioned works investors and businesses will simply avoid using the South African workforce, including in the film, publishing and software industries.

Generally, assignment is and must be by its nature a once off divestment of rights to give certainty to the purchaser of its unimpeded title and ownership. Any exception to this position must be carefully considered and regulated. Assignment enables the purchaser to make long term investments in the

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekreteraris | Company Secretary Johan Steyn

Reg.1998/021073/07

development and marketing of a product based on the underlying intellectual property so as to ensure a return on such investment and the purchaser will pay a premium to obtain this. Assignment of copyright is one of the fundamental principles on which the global knowledge economy is built. **Without it, there can be no outright sale of technology or of a technology business.** The risks of investors acquiring South African developed technology will be massively increased and any purchase price payable to South Africa will be reduced accordingly.

There are many other unintended consequences. IP assets subject to copyright or related businesses may be resold multiple times. A reversion of copyright could therefore impact on a whole chain of business transactions, potentially rendering these transactions meaningless or substantially reducing the value of the asset or business acquisitions. Reversion of copyright may even render the *bona fide* purchasers of copyright products such as software or databases unable to continue trading. Furthermore, under South African law the author of a computer program, being the person responsible for controlling the development thereof, can be (and usually is) a juristic person that could be non-existent at the time of reversion. Finally, it is worth considering the international impact of the amendment. South African copyright law does not only apply to South African authors. It applies equally to foreign businesses and authors. This would mean that foreign authors granting rights to South African enterprises will also be able to claim reversion rights with respect to copyright bought and transferred into South Africa. The loss of value and impact on ability to trade for South African businesses are unimaginable.

As alluded to above, the University does a great amount of research and development work for industry partners. A significant portion of such work done at the request and using investments made by industry partners with the purpose to enable the industry partners to take ownership of the intellectual property in the deliverables arising as a result of such research. This is a significant value proposition for the University as it benefits not only financially, but also through knowledge gained by the University personnel (researchers and students) which are involved in the research. The current form of the proposed amendment regarding assignment will destroy this relationship with such industry partners, as they will no doubt not be willing to invest in the development of copyright deliverables which they cannot take full ownership of. No global partner will be convinced to use South African entities – whether academic or in private business - for research or development work if they cannot be guaranteed perpetual ownership of the results they pay to have developed for them. In short, this type of proposal will simply mean the end of much of the private sector funded research in South Africa. This in addition to the fact that the copyright in the deliverables often constitute business critical assets for the industry partner enabling such industry partner to trade globally. The amendment will make sales of such technology driven businesses and assets virtually impossible.

The draft DST STI policy states: *“The NDP has elevated science, technology and innovation (STI) in government planning, and line departments must choose their research priorities informed by the NDP ... Strategic engagement in multilateral partnerships, has the potential to position the country as an*

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekreteraris | Company Secretary Johan Steyn

Reg.1998/021073/07

international STI partner of choice... As competition for international cooperation opportunities intensifies, efforts to promote South Africa's profile as a global STI partner of choice will be stepped up.

Unfortunately, this laudable objective of the NDP and DST cannot be achieved if South Africa's laws do not provide for a valid perpetual assignment of copyright. To illustrate, how can anyone be expected to purchase a South African technology company if the core IP assets of such company (such as its software and databases) will be lost to third party authors due to reversion rights? Further, how can any client be expected to acquire technology products from a South African company if the South African company's rights to license use of such products may terminate as a result of reversion of copyright?

This amendment in its current form will unfortunately render South Africa a pariah state as far as the technological development and the global knowledge economy is concerned. The impact on any industry that relies on the acquisition or sale of technology, including retail, mining, banking, insurance and telecommunications will be devastating. The same applies to content driven industries such as broadcasting, media and film.

If any restrictions are to be placed on assignment of copyright these must be carefully limited and regulated so as to not interfere with development and commercialisation of our economy through science, technology and innovation. Such restriction could in our view only be considered with respect to the types of works created by artists such as manuscripts, works of art and musical compositions and should never be applied to works created under contract (whether an employment contract or a commissioned services contract) even if it is of such a nature. The fact that the rights will benefit foreign authors in the same way as local authors should also be considered.

Recommendation: We propose the scrapping of the proposed proviso to Section 22(3). If reversionary rights are included in the Bill, these should be limited to apply ONLY to literary manuscripts, works of art and musical compositions NOT developed under contract.

2. CONCLUDING REMARKS

Certain provisions in the current draft Bill, although apparently drafted with the best of intentions, unfortunately fails to fully appreciate their impact on economic growth through science, technology and innovation.

In our view, certain proposed amendments to the Copyright Act in their current form will be devastating to the inclusive growth of our economy through science, technology and innovation as envisaged by the NDP and DST. The 3 critical issues we highlight with respect to the current Bill are:

- Compulsory state ownership of all state funded copyright works.

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekreteraris | Company Secretary Johan Steyn

Reg.1998/021073/07

- Obligatory royalty for authors of copyright works
- Limitation of copyright assignment to 25 years

We recommend these changes be scrapped. Alternatively, we request that these changes be appropriately limited so as to achieve the stated intent and avoid the apparently unintended harmful consequences the current draft will produce.

We request the drafters of the Bill to provide further engagement opportunities with respect to these changes to interested parties. If nothing else, we urge that they meet with and discuss the impact of the above three key proposals contained in this Bill with their counterparts at the Department of Science and Technology responsible for preparing the SA government's Draft White Paper setting out the new Science, Technology and Innovation policy.

DIREKTEURE | DIRECTORS

Desmond Smith Voorsitter | Chairperson, Nandu Bhula, Prof Eugene Cloete, Prof Wynand Coetzer, Jannie Durand, Joe Kieser, Michiel le Roux, Anita Nel, Prof Leopoldt van Huyssteen

Maatskappysekretaris | Company Secretary Johan Steyn

Reg.1998/021073/07