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6 July 2021

The Portfolio Committee on Trade and Industry

For Attention: Mr A Hermans; Mr T Madima; Ms M Sheldon and Ms Y Manakaza

Private Bag X 84

Pretoria, 0001

Dear Sirs,

Written submission with reference only to clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) in relation to the Copyright Amendment Bill [B13B-2017]

Please see below written comment on specified clauses in relation to the Copyright Amendment Bill [B13B-2017] as provided in conjunction with Roux de Villiers from Roux de Villiers & Associates; Paarl; Western Cape and who acted upon instruction from Innovus to submit written comment on the proposed Copyright Amendment Bill.

Yours Sincerely

Anita Nel
Chief Director
Innovation and Business Development

Carol Kat
Head
Copyright; Trade Marks and Short Courses

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Stellenbosch University / Innovus Technology Transfer (Pty) Ltd

Apart from being an academic institution responsible for teaching, research and publication of academic articles, Stellenbosch University (“SU”), with the support of its subsidiary Innovus Technology Transfer (Pty) Ltd who is responsible to manage its intellectual property on SU’s behalf, is a significant role player in the development and commercialisation of technology. SU is the leading patentee of technology in South Africa, has established a large number of SMEs to commercially exploit its technologies and acts as incubator for other technology businesses.

Copyright impacts on teaching, research and publication activities conducted at SU as well as on the technology related business being developed and supported at SU. In the academic environment the focus is more on access to and use of copyright materials, whereas SU’s research, publication and commercialisation activities require suitable protection of research outputs, including for new businesses that make use of technologies based on copyright works such as software and data.

SU is therefore both a large-scale user and producer of copyright materials and the exceptions set out in Clauses 13, 19 and 20 will have material impact on at least our teaching, research, academic publication and technology-related business activities.

Our comments are set out below.

1. General

South Africa as member of GATT-TRIPS and other international treaties must comply with the so-called Three Step Test contained in Article 13 of the TRIPS Agreement.

“Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

We note that the President has expressly confirmed that South Africa is bound to the above Three Step Test in his referral of the Copyright Bill back to Parliament. We are not aware that any of the new exceptions introduced into the Copyright Bill by Clauses 13, 19 and 20 has been properly assessed for purposes of compliance with the Three Step Test.

We also note that the President explicitly states in his referral of the Copyright Bill back to Parliament that *“the new exceptions contained in sections 12A, 12B, 12C, 12D and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution”*.

It is therefore problematic that these same exceptions have now been submitted for public comment without any further amendment to address the concerns raised by the President. It is apparent that material amendments to these Sections may still be required to ensure compliance with the Three Step Test and the Constitution and these amended exceptions will then have to be re-submitted for public comment, failing which *“the failure to consult...could render the provisions constitutionally invalid”* as stated by the President with respect to the current draft exceptions.

2. Concerns with Fair Use Exception under Section 12A

Section 12A is an open-ended general fair use exception with several examples of the purposes for which it may be utilised and the general criteria for its application. Section 12A has been modelled on Section 107 of the US Copyright Act which codified the American “fair use” doctrine. This is a fundamental change in approach

for South African law, moving away from the specific fair dealing exceptions modelled on English law currently contained in our Act.

It should be noted that most of the current South African Act is derived from English law and that our courts rely heavily on English decisions to assist in interpreting the provisions. Other Commonwealth countries such as Australia and New Zealand have also implemented legislation based on English law and our courts therefore also refer to these decisions. By essentially introducing the American “fair use doctrine” into our Act it is unavoidable that South African copyright law as it pertains to the “fair use” exception will in future be heavily influenced by American court decisions since our courts will inevitably have to refer to US precedent for guidance.

The fundamental concern with a generic fair use exception is that it may not pass the Three Step Test in that it apparently fails to provide the specificity required by the requirement that the exceptions apply only in “certain special cases”. Apparently, the drafters of Section 12A has anticipated this problem by, for the most part, closely following the approach of Section 107 of the US Copyright Act. Presumably, they propose to argue at the WTO that if the US can do it then so can we. Also, it could be argued that the South African courts would be able to look to American court decisions as precedents for guidance (and thereby establish the necessary specificity required for the Three Step Test).

However, there are some additions to Section 107 which may be difficult to justify in this manner. In this regard, Section 12A specifically identifies “*education*”, “*preservation of and access to the collections of libraries, archives and museums*” and “*proper performance of public administration*” as permitted purposes of use. None of these appear in Section 107 of the US Code and all are extremely broad concepts. In the absence of adequate international precedent explaining how these would be applied it can easily be found that both these purposes are overly broad and fail to comply with the Three Step Test.

Furthermore, Sections 12B, 12D and 19C provides for comprehensive specific exceptions for many of the purposes listed in Section 12A, including for reporting of current events (Section 12B(1)(e)), personal use (Sections 12B(1)(i) and 12B(2)), scholarship, teaching and education (Sections 12B(1)(b), 12B(1)(f)(ii), and 12D) and for libraries, archives and museums (Section 19C). It therefore seems quite unnecessary to also provide for these in Section 12A. In fact, the unnecessary repetition could cause Section 12A to be viewed as a general catch all provision that is non-compliant with the specificity requirement in the Three Step Test.

Finally, we fail to see any justification for an exception for “*proper performance of public administration*”. Governments and government bodies that wish to make use of copyright products should be prepared to pay for them like every other user. This sends out entirely the wrong message about the South African government. Also, it would mean that there would be no incentive for anyone to develop or make available to government any copyright products that specifically support government functions (such as software and data tools developed for use by the different arms of government and government bodies).

3. Concerns with Specific Exceptions under Sections 12B, 12C, 12D, 19B and 19C

The specific exceptions contained in Section 12B(1) and 12D(1) as currently drafted will in our view not comply with the Three Step Test since it does not weigh the impact of the permitted use on the rightsholder properly. In a number of cases the condition for use is only “*that such use shall not exceed the extent justified by the purpose*”. All requirements for “fair dealing” or “fair practice” as contained in the current Act has been omitted. Justification for the extent of use under the new wording is therefore only measured with reference to the purpose of use. This is clearly inadequate since it does not consider whether the permitted use will “*conflict with normal exploitation of the work*” or “*unreasonably prejudice the legitimate interests of the right holder*” as is required by the Three Step Test (as is presently assessed under the “*fair dealing/practice*” requirements contained in the current Act). It is therefore likely that a number of exceptions in Section 12B(1) as well as Section 12D(1) as currently drafted will breach South Africa’s obligations under TRIPS. The Act should in our

view clearly state that justification for the extent of use should be measured with reference to its impact on the normal exploitation of the work and the legitimate interests of the copyright holder.

It is also important to consider that if rights holders are unfairly prejudiced there would be little incentive to create materials for the South African market. There is no point in having free access to copyright materials if there are simply no quality materials to access. The omission of the “fair dealing/practice” requirement of the current Act is therefore of concern since this seems to imply that the potential prejudicial impact on the rights holder is no longer a consideration. Not only will it be extremely unfair to rights holders, it will also entirely disincentivise the development of new copyright materials for the South African market.

Section 12B(6) provides for exhaustion of rights so as to enable *inter alia* the importation and resale of lawfully acquired foreign goods, so-called parallel imports of grey goods. SU fully supports the intent behind this clause since it can be used to enhance competition in the local market while providing the rights holder the ability to obtain fair compensation for its products. However, the approach taken to use the Copyright Act to attempt to override provisions of the Trademarks Act and the Counterfeit Goods Act is questionable. The Copyright Act should in our view limit itself to rights under copyright and should not be used to effect changes to the import of the Trademarks Act or Counterfeit Goods Act. Section 12B(6) should therefore be limited hereunder to the exhaustion of rights of distribution and importation under the Copyright Act only. Corresponding changes to the Trademarks Act and Counterfeit Goods Act may be separately made.

4. CONCLUDING REMARKS

SU supports the copyright exceptions proposed in Sections 12A to 12D and in Sections 19B and 19C of the Copyright Bill. The intent is clearly to improve access to copyrighted material while limiting the potential negative impact on the development and trade of copyrighted works in South Africa. Fairly extensive copyright exceptions that support public access to knowledge or increased competition in trade, but that still comply with our obligations under international law are in our view entirely appropriate and beneficial for South Africa as a developing country, particularly in areas of research and teaching. This is clearly what the exceptions seek to achieve and we support this wholeheartedly.

As an example, SU, as a research institution and enabler of new technology businesses fully support Section 19B which is in line with international laws and is clearly intended to promote the development of complementary and even competitive software technologies in South Africa without unfairly limiting the ability of the rights holders to exploit their own software. We also support the provision for exhaustion of rights as contained in Section 12B(6) which prevents copyright from being abused to stop the importation of lawfully acquired foreign goods, something copyright was never intended to do in the first place.

Finally, SU as an academic institution also fully supports Section 12D (as well as Sections 12B(1)(b) and 12B(1)(f)(ii)) of the Copyright Act, which are clearly intended to support access to copyrighted materials for academic purposes. However, it is also important to consider that the rights holders for academic materials must not be unfairly prejudiced, failing which there would be little incentive to create and distribute such materials. Academic writers that are the authors of academic textbooks should surely also be protected, in the same way as the Act now seems to go out of its way to try to protect creative writers and musicians. Free access to academic materials is pointless if there are simply no up-to-date quality materials to access. The omission of the “fair dealing/practice” requirement of the current Act is therefore of concern since this seems to imply that the potential prejudicial impact on the rights holder is no longer a consideration. Not only will it be extremely unfair to academic authors and publishers, it will also disincentivise the writing and publishing of new textbooks and other study materials needed for the South African education system. The impact on the quality of our education could be dire.

A further concern we have is that a number of the exceptions do not seem to fully conform with the Three Step Test as contained in the GATT TRIPS agreement and may as a result be challenged under international law and

constitutionally. With respect to generic “fair use” exception contained in Section 12A our primary concern pertains to non-compliance with the Three Step Test requirement for the exceptions to apply only in “certain special cases” whereas our concern with Sections 12B and 12D pertains to the omission of any “fair practice” or “fair dealing” requirement or any other requirement to ensure that the use of the copyright work “do not conflict with a normal exploitation of the work” and “do not unreasonably prejudice the legitimate interests of the right holder”, both of which are required by the Three Step Test. It is clearly inadequate to seek to justify use only with respect to the purpose thereof as done in the current draft.