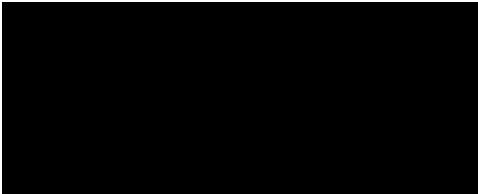


9 July 2021

The Secretariat
Portfolio Committee on Trade and Industry
House of Assembly
CAPE TOWN 8001



COPYRIGHT AMENDMENT BILL B13:2017– COMMENTS ON BEHALF OF VARIOUS ORGANISATIONS

Honorable Members

Attached please find submission to the Portfolio Committee in line with the call for public comment on sections of the Copyright Amendment Bill: B13:2017

Yours faithfully

Thea Aboud
Executive Administrator
Southern Africa Freelancers' Association
Secretariat for the submitting organisations named.

The Chairperson
Portfolio Committee on Trade and Industry
National Assembly
Parliament Street
CAPE TOWN 8001

Email:

ahermans@parliament.gov.za; tmadima@parliament.gov.za;
msheldon@parliament.gov.za; ymanakaza@parliament.gov.za

Attention: Mr D Nkosi
Chairperson

9 July 2021

Honorable Chairperson

COPYRIGHT AMENDMENT BILL B13:2017– COMMENTS ON BEHALF OF VARIOUS ORGANISATIONS

1. We greet you on behalf of the following reputable media industry stakeholders:
 - 2.1 SOUTHERN AFRICAN FREELANCERS' ASSOCIATION (SAFREA);
 - 2.2 AFRICAN PHOTOGRAPHERS AND VIDEOGRAPHERS ASSOCIATION (APVA);
 - 2.3 PROFESSIONAL EDITORS' GUILD (PEG);
 - 2.4 SOUTH AFRICAN PROFESSIONAL PHOTOGRAPHERS (SAPP);
 - 2.5 INDEPENDENT PHOTOGRAPHERS;
 - 2.6 SOUTH AFRICAN SCIENCE JOURNALISTS' ASSOCIATION (SASJA).
("the stakeholders")
2. On 4th June 2021, the Portfolio Committee on Trade and Industry published a call for submissions on the Copyright Amendment Bill, 2017 ("the Bill" or "CBA"), in line with objections raised by the State President.
3. In line with your request, this submission references the Bill, Clause 13 (sections **12A**, **12B**, and **12C** including **12D**, and Clause 20 (section **19C**).
4. In addition to these written submissions, the stakeholders (listed above) would greatly appreciate an opportunity for their representatives to make oral submissions to the Committee.
5. The stakeholders are concerned that certain of these amendments threaten our rights under the Constitution of South Africa and indeed a most fundamental right: the right to make a sustainable living.

6. We refer to the principle of *fair use* as contemplated by Clause 13 of the Bill – the **Insertion of sections 12A, 12B, 12C, 12D and 19C in Act 98 of 1978.**

General exceptions from copyright protection:

6.1 **Section 12A. (1)(a)**

Summary: In addition to uses specifically authorised, our objections relate to the stated *fair use in respect of a work* under the following paragraphs:

6.2 **12A. 1(a)(iii) reporting current events;**

6.3 **Specific exceptions from copyright protection applicable to all works**

12B. (1)(a) Any quotation: Provided that— ...

6.4 **Reproduction for educational and academic activities**

12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works ...

6.5 **General exceptions regarding protection of copyright work for libraries, archives, museums and galleries**

19C. (1) A library, archive, museum or gallery may, without the authorisation of the copyright owner, ...

7. **Comments under *general exceptions from copyright protection***

Fair use

- 7.1 **12A. (1)(a)** In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work ...

7.1.1 To test whether any ‘fair use’ infringes any copyrights, is to ascertain whether the use is within the stipulated rules for **fair use** (the 4-point test as per footnote is recommended)¹ or if the use is for a specific exempted purpose as per section 12A. (1)(a)(i-iv).

7.1.2 The current ‘fair dealing’ mandate within the Copyright Act No. 78 of 1998 is permissible only in respect of specific purposes. No other uses are permitted in any other way, and the users know the boundaries.

7.1.3 The proposed ‘fair use’ provision provides guidelines only to the user. Users therefore will assume an open-ended mandate to decide for themselves if the use is “fair” in every aspect, including the actual use of the property. This is prejudicial to the rights of the copyright holder.

¹ 4-Point Test: Nature of work; Amount used in relation to whole work; Purpose of use; Substitution effect upon the market

- 7.1.4 When a user uses copyrighted property within the existing boundaries and exceptions they can justifiably use the work without infringing on the copyright owner's work.
- 7.1.5 We submit that if the 'fair use' provision is implemented as contemplated in the Bill, the user will be able to use the creative property without the permission of the property author, or copyright owner. The author or owner of the copyrighted property would then have a difficult time to claim for infringement against the user.
- 7.1.6 The stakeholders submit that 12A. (1) and 12A. (1)(a)(iii) of the exceptions 'constitute an arbitrary deprivation of property' as stated in section 25 (1) of the Constitution.

7.2. **12A. 1(a)(iii) Reporting current events**

Comments:

- 7.2.1 When an author's property (for example photographer or videographer) is repeatedly used by media houses and even unauthorised users, as suggested in the context of 'reporting current events', where the content is being used and can be re-used for months, years, even decades into the future, every time that topic becomes a current event again, the author and copyright owner are being deprived of their economic royalties.
- 7.2.2 In the annual reporting of national tragedies, creative content is virally aired or published without the consent of the property rights holder.² This repetitive practice is continuous until the noted topic is no longer current news. It also brings into question the duration or definition of 'current' time.
- 7.2.3 Authors or creative persons have experienced much abuse over many years. Their property has been infringed and they have had to pursue lengthy litigation against infringers within the limitations of the current rulings of the Acts.
- 7.2.4 Within the provisions of the amended Act 2017, that task will be even more prejudicial, as it is up to the author or creative to search all published material to establish if their copyrighted work has been used. Understandably, this practice is not feasible for authors/creatives.
- 7.2.5 There is a paucity of case history in the public space relating to copyright claims made by copyright holders against transgressors. This hampers the equitable decision-making processes of the relevant authorities, including the proposed Copyright Tribunal.

Likewise, should copyright abuse matters end up in a South African Court of Law, there is little by way of judicial precedent to guide the

² Mpho Paparrazzi Hlapisi continuous use of his images from the Ellis Park tragedy.

judgements of that Court in South Africa. Again, this places the plaintiff in such cases at a distinct disadvantage since they often do not have the financial resources or time to prove and win their case against the (often corporate) organisations against whom they are filing the claim.

Hence, in our view, the adoption of clauses relating to 'Fair Use' in the new Bill will allow more leeway for copyright transgressors to abuse creatives and copyright holders than the existing 'Fair dealing' provisions in the Act of 1978.

- 7.2.6 The stakeholders believe that section 12A. (1)(a) and 12A. (1)(a)(iii), constitute an arbitrary deprivation of property in which the creative author and owner's constitutional rights would be infringed upon.
- 7.2.7 We also submit that sections 12A. (1)(a) and 12A. (1)(a)(iii) in their present form herald a bleak future for creative property workers. This has an impact on choice of trade, occupation and profession and could lead to a decline in employment prospects. If the creative property is freely used as contemplated in the categories mentioned above, creatives will remain in the dark about who is using their intellectual property. In addition, the unprofitable future due to loss of income and value of their property will make the career undesirable for creative persons to pursue. An author/creative will know that even though their property is copyrighted, any user can use that work freely. Such copyright will be hollow if the bill is enacted in the current form.
- 7.2.8 The stakeholders contend that sections 12A. (1)(a) and 12A. (1)(a)(iii) violate section 22 of the Constitution. The author or copyright owner rights will be restricted to the full rights of any occupation or profession, including the freedom to trade their property.

8. Specific exceptions from copyright protection applicable to all works

- 8.1 12B. (1) Copyright in a work shall not be infringed by any of the following acts:

Our comments as follows:

- 8.2 12B. (1)(a) states: Any quotation: Provided that—
- (i) the extent thereof shall not exceed the extent reasonably justified by the purpose; and
 - (ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;

- 8.2.1 When 12B. (1) applies to all work, including visual content, it is open ended. A user could replicate an image in its entirety because the visual property was what was used at the time to illustrate the topic being presented by the originator. Hence, the author and/or copyright owner would be at a disadvantage when their property is being quoted.
- 8.2.2 With regards to 12B. (1)(e) which states: ‘subject to the obligation to indicate the source and the name of the author in so far as it is practicable— ‘
We argue that the source and name of the author/creator should always accompany the creative property, as stated in section 20 of the current Act. The author always has the right to be known as the author of the property and this acknowledgement is never waived.
- 8.2.3 Notwithstanding permissible exceptions, the author or copyright owner should have the unalienable right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author. The user should communicate with the author/copyright owner about whether the work can be used in such an instance.
- 8.2.4 Further to section 12B. (1)(e)(i), many creatives write embedded captions and descriptions of copyright ownership within the metadata of a digital image file. Hereby, the creative property owner can be contacted and users may be apprised using other special information embedded within the metadata, including the stipulated usage rights and confirmation of ownership by the originator
- 8.2.5 Hence, all work carries the strict caveat that the intellectual property should not be used outside the agreed usage rights.
- 8.2.6 All professionals expressly reserve their rights for reproduction of their property and Honorable Members should be apprised of the technologies of embedded metadata.
- 8.2.7 We furthermore contend that users should be refrained from the deletion of such metadata during the authorised use of the digital file.

9. Reproduction for educational and academic activities

- 9.1 12D. (1) states: ‘Subject to subsection (3), a person may make copies of works ...’

Our comments:

- 9.1.1 The supply of materials to support South Africa’s education system, including the tertiary education programmes, is a commercial undertaking where everyone is being taught the educational content

with copyrighted material – written or visual in form. In many cases, the institutions charge the students who pay for the learning material, or it is covered by the State.

- 9.1.2 In the proposed section 12D, students and teachers are given more access to educational material. In the exercise of this liberty, copyrighted work may be freely copied in the name of education and deprivation of property would be carried out arbitrarily.
- 9.1.3 Currently, the author and copyright owner most certainly make an economic living through the exchange of licenses for original work.
- 9.1.4 In the interests of fairness and a sustainable system, the institution or the student concerned should have to contribute to the cost of the educational material, which contains copies of the copyrighted property. The agreed fees for the copyright property could be extracted from the students' fees, or from the State in the case of lower education, should the institutions be allowed to copy books wholesale. In this way, the student should still be paying the same fees for the copy material which will become profitable through the action of wholesale copying of educational material.
- 9.1.5 The stakeholders submit that section 12D constitutes an arbitrary deprivation of property in which the creative would object to their work being used in such a manner, especially in the case of individual or small originators of such work.
- 9.1.6 It is recommended that parts of books and learning material will still be copied for educational purposes, with the agreement from the license holders. In this case, the institution will pay for a number of books at full cost and a remainder of copies at a reduced cost. In this manner, all parties win.

10. Insertion of sections 19C in Act 98 of 1978

Our response:

10.1 Section 19C. General exceptions regarding protection of copyright work for libraries, archives, museums and galleries

10.1.1 In particular, section 19C. (3) provides for a library, archive, museum or gallery to provide 'temporary access' to copyright work for a user in another library.

Comment: This paragraph is complicated by the fact that the meaning of 'access' is not clear.

10.1.2 Section 19C. (4) provides for a library, archive, museum or gallery to permit a user to view or listen to an entire work, for educational purposes, on its premises, in a classroom or over a computer network.

- 10.1.3 Section 19C. (5)(b) permits a library, archive, museum or gallery to place works reproduced for preservation on publicly accessible websites.
- 10.1.4 Section 19C. (9) permits a library, archive, museum or gallery to make a copy of a work for its own collection.
- 10.1.5 Comment: The stakeholders agree that copying for libraries, archives, museums and galleries should be permitted. A practice carried out at Johannesburg City Library is that one is allowed to copy parts of books at a cost per page, only so many pages a book.

11. Comment requested: The stakeholders and interested parties to submit written submissions with reference to the alignment of the Copyright Amendment Bill [B13B-2017] with the obligations set out in international treaties, the World Intellectual Property Organisation (WIPO) Copyright Treaty.

- 11.1 It is the aim of the CAB to be aligned to International Intellectual Property Treaties as much as possible, as South Africa is signatory to many of the documents and has to abide by these treaties.
- 11.2 Alignment with the World Intellectual Property Organization (WIPO) Copyright Treaty:
- 11.3 WIPO Article 6(1) Right of Distribution
 - 11.3.1 Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership.
 - 11.3.2 It is understood that only the author or copyright owner has the right to make the property available to the public and make copies.
 - 11.3.3 Comment: If section 12A is mandated this would mean that other third parties can make copies of one's work without the authority of the owners.

11.4 WIPO Article 8 Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter (1)(i), 14(1)(i) and 14bis(1)(i) of the Berne Convention, **authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works**, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

- 11.4.1 If 12A. (1) and 12A. (1)(a)(iii) are implemented, this would enable third parties to use and make available the property of the creator to the public, not giving the author exclusive rights to their work.

12. WIPO Article 10 Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

- 12.1 'Unreasonably prejudice the author': Any use of the copyrighted property will prejudice the author when the content is reused time and time again without the author being able to make a reasonable economic benefit from the use. This would jeopardise the income and future endeavors of the author.

13. Alignment with the Berne Convention

13.1 6bis Article

[Moral Rights: 1. To claim authorship; to object to certain modifications and other derogatory actions; ...].

13.1.1 *(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.*

13.1.2 For the author to be able to claim authorship or object to any of the modifications of their property, they must be contacted by the user before any use.

14. Berne Article 9 Right of Reproduction

14.1 *(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.*

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

14.1.1 As stated in 12.1 above any use will economically prejudice the author/ owner.

15. Article 10bis and 11bis Further Possible Free Use of Works:

15.1 (1) *It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character... in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved.*

15.1.1 The reproduction (syndication) of the property of photographers by media houses is in contravention of Berne because when a freelancer gives a publication a license to use their creative property, the license is normally for one time use in one publication, with strict reservations expressed in the license that the property is copyrighted and is not to be used without the permission of the author. This warning is carried within each image by means of the metadata. All media houses know this fact; some still republish the items knowing that it is infringing on the rights of the owner who has expressly restricted the further use of the work.

16. Berne Article 12 Right of Adaptation, Arrangement and Other Alteration

16.1 *Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.*

16.1.1 Authors must be notified, where possible, of any future use of their property so that they can object to the adaptations or alterations of their works.

17 CONCLUSION

The stakeholders' key submissions are as follows:

17.1 Clauses as indicated above constitute arbitrary deprivation of property.

17.2 The exceptions objected to are, in particular,
Section 12A. (1)(a)(iii),
Section 12D,
Section 12B. (1)(a)(i).

17.3 Sections 12A and 12D violate the right to freedom of trade, occupation and profession. These sections not only limit copyright owners' choice of occupation without justification, but also constitute irrational regulation of copyright owners' occupations.

17.4 The law on arbitrary deprivation indicates that, in order for there to be an infringement of section 25(1) of the Constitution:

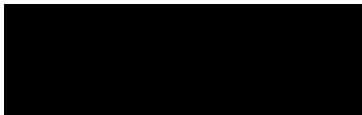
- (i) the thing in question must be property;
- (ii) there must be a deprivation;
- (iii) the deprivation must be arbitrary.

'Deprivation' entails interference with a property right that is 'substantial'. This means that the extent of the interference or intrusion must be so extensive that it has a legally significant impact on the rights of the affected party.

Deprivation of property is 'arbitrary' in terms of section 25 of the Constitution when the depriving law does not provide 'sufficient reason' for the particular deprivation in question or is procedurally unfair.

We thank you for the opportunity to make this literal (~~oral~~) submission and are hopeful of an opportunity to make a verbal presentation on a mutually agreeable date of either the 4th or 5th August as advised.

Yours faithfully,





SHAUN EARL HARRIS


Intellectual Property / Copyright coordinator (SAFREA)


On behalf of:

Shaun Earl Harris (SAFREA) | Advocacy | 

Hush Naidoo (APVA) | Chairperson | 

Alexis Grewan (PEG) | Chairperson | 

Peter Hassall (SAPP) | Chairperson | 

Mandi Smallhorne (SASJA) | President | 

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