



EOI - Visual Arts Network of South Africa (VANSA)

16 July 2021

The Honourable Mr Duma Nkosi
Chairperson: Portfolio Committee on Trade and Industry
Attention Mr A Hermans
Parliament of the Republic of South Africa
Cape Town

By email only to: 

Dear Mr Nkosi

COPYRIGHT AMENDMENT BILL, B13 OF 2017/ PERFORMERS PROTECTION AMENDMENT BILL, B24 OF 2016; Submission by the Visual Arts Network of South Africa (VANSA)

Introduction

The Visual Arts Network of South Africa welcomes this opportunity to make a submission on the Copyright Amendment Bill, B13 OF 2017/Performers Protection Amendment Bill, B24 OF 2016 issued by the Department of Trade and Industry (DTI). We have limited our comments largely to those areas of the document that have direct relevance for the visual arts sector.

VANSA operates as a support point and development agency for contemporary art practice in South Africa. We develop industry knowledge, resources, networks and projects that are concerned with realising new social, cultural and economic possibilities for contemporary art practice in the South African—and wider African—context. VANSA is a national network of artists and arts organisations with over 7000 members that works to support and develop knowledge and resources for art practitioners, communities and organisations in South Africa.

For visual and applied artists, as well as for practitioners of visual and applied arts in which rights of traditional knowledge or indigenous expressions of culture subsists, copyright and rights in traditional knowledge and traditional cultural expressions constitutes, essentially their life-blood and livelihoods. In practice, the copyright and rights in traditional cultural expressions is the right to protect and exploit their intellectual property and manifestations of cultural expressions of which they form a long line and unbroken part and if managed carefully can play a productive and valuable role for all stakeholders in the visual arts sector.

The Importance of the Principle of Copyright in Artistic Work

The artworks or creative content that creators of visual and applied art produce is protected by exclusive rights which prevents others from making copies without prior permission or licensing revenue which can be used to re-invest to generate yet more art and expressions of culture.

There is also beneficiation and value-adding downstream from creators and artists, but they are at the source: Consequently it is also important for anyone who has reason to reproduce the work of creative artists in the course of their work to know about and respect copyright - academics, writers, curators, entrepreneurs, galleries and auction houses, trading partners internationally, corresponding creators and licensing agencies abroad under a system of reciprocity and international comity.

Following the findings of the 2010 Human Sciences Research Council report on the visual arts sector, VANSAs initiated a process of dialogue with DALRO and public consultation on the specific issue of copyright in the visual arts. During the course of 2012, VANSAs undertook wide-ranging consultations, developed resources and convened workshops and meetings across all nine provinces aimed at raising awareness among artists and other stakeholders in the visual arts on the application of copyright law to the visual arts in South Africa. In 2013 and 2015, VANSAs made submissions to the draft policy on Intellectual Property issued by DTI. VANSAs and many of its members work with the Dramatic, Artistic and Literary Rights Organisation (DALRO) for the purpose of education, communication, and engagement with all the downstream beneficiaries and users of visual and applied art.

Whoever owns the copyright in an artistic work is legally allowed to make copies or reproductions of the work, and to grant permission for others to do so. The first owner of these rights is normally the **individual visual artist**. The Copyright Act of 1978 and subsequent amendments, informed by a number of international agreements, describe the legal framework for copyright in South Africa.

Why is updating the Copyright Act important and what are the Challenges for Visual Artists?

Copyright law empowers visual artists to prevent the unauthorised copying and adaptation (amongst others) of creative content produced by artists. It is also, importantly, a right that has an economic aspect – copyright can be converted into income, through the charging of fees for the reproduction or adaptation of artwork by others. In this last area, the visual arts sector in South Africa is lagging significantly behind our counterparts in other parts of the world, as well as other areas of the creative arts within South Africa.

Historically prior to the Covid-19 pandemic started to decimate the art market world-wide, in 2019, the Dramatic, Artistic and Literary Rights Organisation (DALRO) – a South African Rights Management Organisation (RMO) – distributed tens of millions of Rand in copyright related payments annually to authors and publishers of literary works, and to authors of dramatic works. The South African Music Rights Organisation (SAMRO) distributed hundreds of millions of rands annually in copyright payments to South African musicians and composers.

This contrasts with the fledgling stage of the visual art and indigenous art market: while the visual arts generally do not generate the same scale of rights-related revenue as the music industry, the

money distributed to artists by visual arts Rights Management Organisations in other parts of the world is significant and updating the Copyright Act will enable VANSAs and its members to work with DALRO to uplift the sector, if (and that is a big if) the Copyright Act is amended in a competent way and in a way that does not play into the hands of downstream users who essentially want a free lunch: reap the benefit of South African Art without paying the artists and indigenous communities.

Strengthening the rights of visual artists and practitioners of traditional art expression, enabling them to license and collect more revenue which is due to them through copyright can represent a modest but nevertheless valued source of additional income for artists, a group of workers whose income is notoriously unpredictable. The adoption of such new up-to-date rights is also **important to address past injustices**: The revenue to be generated from existing artwork may also be an important source of ongoing income for the **heirs** of artists, as **copyright extends beyond the death of the artist**, and also allows originals and reproductions of originals to be repatriated back home to South Africa, if the originals are currently held as part of the **African Diaspora** abroad (the willingness of Italy and Germany to return art work to Ethiopia and Benin, are noted examples).

Exceptions and Limitations - VANSAs's Submission on Section 12A and 12D OF Copyright Amendment Bill B13 OF 2017

VANSAs aligns itself with the submission of DALRO regarding the exceptions and limitations that form the core of the current call for submissions.

In addition VANSAs would like to **stress the following points**:

- VANSAs notes that an over-broad hybrid fair use and over-broad educational exceptions will harm local and indigenous artists:
 - o **The fair use exception in particular will risk allowing down-stream actors to "manufacture" fake and unauthorised copies** of South African original art or Art that is inspired by the traditions of culture present in Southern Africa. Without a strong licensing system in place, the excuse of so-called "fair use" will be all too easy.
 - o Broad educational re-use rights may seem attractive from the vantage points of students. However, **indigenous expressions of culture and visual artists need the exposure often first in schools and public educational institutions and in art schools**. Selling tools and examples to these schools is their bread and butter. While foreign rich artists may be able to give away art to educate and maintain the predilections in taste for art derived from countries of the North, forcing the making available or digitisation of local art for free in the guise of "education" or "fair use" will decimate and erode the rights the new copyright act just professes to give the visual arts. It is as if one hand gives only to take away with the other. **We urge you to strip the over-broad exceptions to a reasonable proportion or limit their application consistent with the tree-step test of the Berne Convention.**
- VANSAs offers the following solution that would allow a sustainable and equitable balance between the exclusive rights and the interest of users that are catered for by copyright rights, enforcement and exceptions from infringement:

- o VANSAs urges that exceptions of fair use in Section 12A should only apply to natural persons and not companies and the exception should also not be invoked by online platforms. Similar to the "value gap" legislation in the European Union, platforms should only be allowed to digitise art and make it available non-commercially, if they have tried in good faith to license the art and expressions of culture;
 - o VANSAs urges that educational exceptions in section 12 D (1), (2) and (3) should not apply to three dimensional art and should also not apply paintings or other forms of original visual art.
 - o VANSAs in any event urges that exceptions under sections 12D should only apply if there is no licensing scheme in place that also covers visual art and indigenous knowledge systems and indigenous and traditional cultural expressions.
- VANSAs urges the Portfolio Committee to seriously require the DTI to commission an economic and social impact study on introducing the many exceptions that they seek to introduce. To VANSAs's knowledge at least for the visual arts sector and for the indigenous and traditional knowledge sector, no such studies have been commissioned or undertaken.

Finally, VANSAs notes that from 28 June to 2 July, the Standing Committee of Copyright and Related Rights (SCCR) no 41 was held in Geneva at WIPO. South Africa, as the coordinator for the African Group demanded that the resale royalty right (ARR) be placed as a permanent agenda item on the agenda of the SCCR. This has been a demand of the African Group at least for the last three years. We thank South Africa for standing up for visual arts in this way and we note also the contributions of observers that were made: Covid-19 has led to the "onlinification" of the art market: greater not less international collaboration is required so that clear rules apply to where an online art market auction takes place and also better rules on reciprocity in respecting the resale royalty right internationally. It is encouraging that South Africa as coordinator of the African Group has contributed to building international consensus on these important questions.

Conclusion

VANSAs would like to thank you for the opportunity to make this submission and also offers to participate in further consultations which VANSAs understands will ensure the future Copyright Act becomes a progressive and transformative piece of legislation that will address inequalities and cultivate greater social and economic justice within the visual arts sector.

On behalf of the members of the Visual Arts Network of South Africa



Refilwe Nkomo | Director
Visual Arts Network of South Africa

