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26 January 2022

The Portfolio Committee on Trade and Industry

For Attention: Mr A Hermans

Private Bag X 84

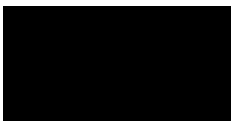
Pretoria, 0001

Dear Mr D Nkosi: Chairperson of the Portfolio Committee on Trade and Industry

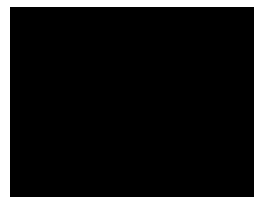
Written submission and comment on additional definitions and clauses in relation to the Copyright Amendment Bill [B13B-2017]

Please see below written comment on definitions and 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 our behalf.

Yours Sincerely



Anita Nel
Chief Director
Innovation and Business Development



Carol Kat
Head
Copyright; Trade Marks and Short Courses

saam vorentoe • masiye phambili • forward together

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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 SU's intellectual property on its 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 proposed amendments to the Copyright Act as contained in the Copyright Bill will have material impact on at least our teaching, research, academic publication and technology-related business activities.

SU has since 2015 commented on the proposed amendments to the Copyright Bill. We note that the majority of our comments have now been addressed. As an academic institution we are particularly supportive of the carefully crafted exemptions for educational and related purposes that are now proposed in the Copyright Bill.

We further note that the latest drafting proposals have to a large extent been crafted to ensure that the Copyright Act conforms to South Africa's obligations under international treaties. We fully support and commend these steps.

We note with particular interest that a number of these amendments were apparently not strictly within the scope of the concerns raised by South Africa's President and that some of the newly proposed changes are made in order to achieve conformance to international treaties of which South Africa may or may not yet be a member. We are fully supportive of these changes since these changes are essential to bring our copyright regime into conformance with international norms and standards of protection, which in turn provides our local institutions and businesses reliant on copyright products with the ability to compete at an international level.

Unfortunately, there remains in our view one critical issue that we have raised repeatedly and that has still not been addressed by the latest amendments, namely the 25 year limit on assignment of literary and musical works. Section 22(3) as proposed still provides as follows: *"Provided that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment."*

This is a matter which not only renders our Copyright Act non-conforming with all international standards and norms, it is in our view also unconstitutional and is likely to be extremely harmful to us as an academic institution and for the technology businesses that we incubate to generate income for the South African economy.

Notwithstanding our previous comments and recommendations and the oral presentations we made to the Parliamentary Committee in 2017 the proviso contained in Section 22(3) remains. We understood that we were not to comment on this matter again in 2019 since it apparently fell outside of the scope of the concerns raised by the South African President and accordingly refrained from doing so. However, it is clear that the latest amendments are also not strictly within the scope of the concerns raised by South Africa's President and that a number of the newly proposed changes are in fact made primarily in order to achieve conformance to international norms and standards, even with respect to treaties of which South Africa is not yet a member.

In light of this, we believe it is prudent and imperative that we again raise the issue of the proposed 25 year limitation on assignment of literary and musical works as being the single greatest threat to South African education and commerce contained in the current Bill.

Not only does this provision interfere with every South African's freedom to trade by limiting his/her ability to fully divest him/herself of his/her intellectual property, it is also completely out of line with international norms and standards and places South African institutions and businesses at a massive disadvantage as compared to the rest of the world. Furthermore, it will undoubtedly have a negative impact on technology transfer and innovation.

The only saving grace of the proviso is that it is so poorly drafted that it can be circumvented to avoid its disastrous impact. Nonetheless it still creates significant commercial uncertainty and risk for investment in local business. It is therefore only harmful and provides absolutely no benefit to any South African or to the South African economy.

We again discuss the problem in more detail below.

SU'S PREVIOUS COMMENTS

The initial Copyright Bill proposed to limit assignment for all types of works to 25 years. Our initial commentary on this submitted in 2015 was as follows:

"Another aspect related to ownership and which unfortunately has also received attention under the Bill is with respect to the assignment of copyright. The Bill would amend Section 22 of the Act to, inter alia, restrict the duration of an assignment to 25 (twenty-five) years. The result is that the ownership of an assigned copyright work would revert to the assignor after this period.

This amendment would prove as disastrous as those relating to state ownership. 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 copyrighted 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. This 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. In short, this type of proposal will simply mean the end of most private sector funded research at any South African university. 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 technology driven businesses and assets virtually impossible. The notion that one cannot permanently transfer ownership of a copyright work is simply economically suicidal."

Subsequently, in 2017 we commented on this same issue as follows:

"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 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 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.

We also made oral presentations to the Parliamentary Committee on this issue and subsequently, the Copyright Bill was amended to limit the proviso in Section 22(3) to **literary works and musical works**. Although this did limit the scope of the proviso significantly, it still meant that assignments of literary works such as educational materials, databases, instruction manuals, technical reports and design documents etc. will be limited to 25 years. There is no public interest justification for the limitation of assignment with respect to any of these works. In our subsequent comments submitted in 2018 we addressed this issue as follows:

“The draft Bill still proposes to amend Section 22 of the Act to restrict the duration of any assignment of copyright in literary and musical works to 25 (twenty-five) years. The intended result is apparently that the ownership of an assigned literary or musical work would revert to the assignor after this period. Despite strong warnings by a multitude of commentators the drafters of the Bill have persisted with this economically disastrous provision.

Any business relies on intellectual property to conduct its business. Such intellectual property will inevitably include large numbers of literary works and typically also include some musical works. Literary works may be in the form of instruction manuals, databases, reports, memoranda, correspondence etc. Musical works may form part of web sites, video or software products, marketing campaigns etc. It is essential that the business either owns or must at least have the necessary rights to use all of its intellectual property. Not having such rights exposes the business to interdicts and infringement actions with potentially disastrous consequences. The reversion right contemplated in Section 22 creates massive business risk for all South African businesses. For no

apparent reason businesses are now faced with the prospect that gaps may suddenly appear in its core intellectual property ownership and these gaps can expose the businesses to potential legal action. Business value will be affected by this. Infringement risk will accordingly lead to the devaluation of effectively all South African businesses as compared to businesses established in other parts of the world.

In our view the reversion right introduced into Section 25 of the Copyright Amendment Bill can only be described as a disastrous act of economic self-sabotage by the South African government. It is utterly incomprehensible that this proviso still remains after years of criticism and comment. It is equally hard to believe that a country striving for economic growth would even contemplate this type of provision.

Recommendation: The proposed proviso to Section 22(3) limiting the assignment of copyright in literary and musical works to 25 years should be scrapped."

We believe these comments are self-explanatory: Ideally the proviso limiting assignment should be scrapped, but if it is determined to stay then it must be limited to non-technical works only, such as musical compositions and literary manuscripts. In our view this is also clearly mandated by our international obligations and Constitution as follows.

INTERNATIONAL OBLIGATIONS

South Africa is a member of the World Trade Organisation and is bound to the GATT-TRIPS Agreement. The GATT-TRIPS Agreement provides as follows:

Article 7

Objectives

*The protection and enforcement of intellectual property rights should contribute to the **promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge** and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*

Article 8

Principles

*2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed **to prevent** the abuse of intellectual property rights by right holders or the resort to **practices which unreasonably restrain trade or adversely affect the international transfer of technology.***

The Objectives of the GATT-TRIPS Agreement in Article 7 are clear in that its intent is to foster and ensure that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare. The Principles in Article 8 make it clear that measures may be adopted to prevent practices which unreasonably restrain trade or adversely affect the international transfer of technology.

In our opinion, a 25 year restriction on the assignment of copyright on literary works of a technical nature such as databases, instruction manuals, technical reports and design documents etc. will undoubtedly restrain trade and adversely affect the international transfer of technology and clearly conflict with the stated objectives of the GATT TRIPS Agreement to which South Africa is bound. The 25 year restriction will undoubtedly be an impediment to technological innovation and to the transfer and dissemination of technology. It will be detrimental both to producers and users of technological knowledge and will be harmful to social and economic welfare.

Article 1 of GATT TRIPS provide as follows:

Article 1

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.

We believe South Africa would do exactly that if it allows the current 25 year limit on assignments of literary works and artistic works to remain as is since it clearly encompasses works that are required for technical innovation and technology transfer. These works are very different from the types of works addressed in Article 14ter of the Berne Convention, which provides as follows:

Article 14ter

["Droit de suite" in Works of Art and Manuscripts:

1. Right to an interest in resales; 2. Applicable law; 3. Procedure]

(1) 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 resale royalty rights contained in the Copyright Amendment Bill are clearly founded on this provision. However, it should be clearly noted that "original works of art and original manuscripts of writers and composers" are non-technical (and non-functional) in nature and it is for this reason that authors can comfortably be granted the inalienable rights granted under Article 14ter of the Berne Convention without impeding on technological progress. Any time limit on assignment can and should therefore only be applied to these types of works. However, placing a time limit on the assignment of works that are of a technical (or functional) nature is nonsensical and clearly in conflict with South Africa's obligations under GATT-TRIPS since this will constitute a serious impediment to technological progress.

CONSTITUTIONALITY

Section 25 of the Constitution provides as follows:

25. Property.

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application--

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

It is trite law that Intellectual Property including copyright is a form of property as confirmed by the Constitutional Court in the Moneyweb case. If copyright is assigned outright by an assignor, the assignee becomes the owner of the property involved free from any restriction. Any statutory limitation on such assignment as proposed in the Section 22(3) of the Copyright Bill is clearly intended to override the assignee's rights of ownership of the copyright as transferred to it by the assignor and automatically transfer the property rights back to assignor after 25 years notwithstanding that the mutual intent between the parties was a full perpetual transfer of ownership. Giving effect to Section 22(3) would in our view therefore constitute an expropriation of the property of the assignee as transferred to it by the assignor.

It is clear that such expropriation is done in terms of a law of general application, but what is equally clear is that such expropriation cannot be reasonably be argued to serve any public purpose or public interest (in fact it is very much against the public interest since it impedes technological progress and technology transfer) and no compensation for such expropriation is agreed or falls to be determined by a court of law. In other words, the requirements of Section 25(2) of the Constitution are not being complied with. Accordingly, in our view, the current proviso contained in Section 22(3) of the Copyright Bill which limits assignments of literary works and artistic works to a maximum of 25 years would be in contravention of Section 25(2) of the Constitution and therefore unconstitutional.

CONCLUSIONS

The Copyright Bill has come a long way from the first drafts as presented for comment in 2015 and the latest proposed amendments is another step in the right direction. SU supports all of these amendments fully. However, there remains one very serious problem with the Bill that has not been correctly addressed namely the proviso contained in Section 22(3) of the Bill which seeks to limit the assignment of copyright in literary works and artistic works to 25 years as follows: *"Provided that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment."*

Since literary works, in particular, contain a vast array of works of technical nature, including databases, instruction manuals, technical reports and design documents it is clear that the limitation on assignment will restrain trade and adversely affect the international transfer of technology and will achieve exactly the opposite of the stated objectives of the GATT TRIPS Agreement to which South Africa is bound, namely to promote technological innovation and the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare. Furthermore, the effect of Section 22(3) is to expropriate the copyright property of an assignee and hand it back to an assignor notwithstanding an agreement to the contrary. It is our submission that this constitutes an unconstitutional expropriation in contravention of Section 25(2) of the Constitution since it is clearly against public interest and involves no compensation, either agreed or determined by a court.

Notwithstanding our previous comments and recommendations and the oral presentations we made to the Parliamentary Committee in 2017 the proviso contained in Section 22(3) remains. We understood that we were not to comment on this matter again in 2019 since it apparently fell outside of the scope of the concerns raised by the South African President and accordingly refrained from doing so. However, it is clear that the latest amendments are also not strictly within the scope of the concerns raised by South Africa's President and that a number of the newly proposed changes are in fact made primarily in order to achieve conformance to international norms and standards, even with respect to treaties of which South Africa is not yet a member.

In light of this, we believe it is prudent and imperative that we again raise the issue of the proposed 25 year limitation on assignment of literary and musical works as being the single greatest threat to South African education and commerce contained in the current Bill.

Not only does this Section 22(3) interfere with every South African's freedom to trade by limiting his/her ability to fully divest him/herself of his/her intellectual property, it is completely out of line with international norms and standards and places South African institutions and businesses at a massive disadvantage as compared to the rest of the world. Furthermore, it will undoubtedly have a negative impact on technology transfer and innovation, which will place South Africa in breach of its obligations under the GATT TRIPS Agreement and, finally, it constitutes, in our view, an unconstitutional expropriation of property under Section 25(2) of the South African Constitution.

We therefore urge the drafters of the Bill to reconsider the proviso in Section 22(3) in addition to the amendments already provided for. In our view, Section 22(3) should be wholly removed from the Bill, but if it is retained, then its retention can only be justified with respect to the types of works identified in Article 14ter of the Berne Convention namely original works of art and original manuscripts of writers and composers. It can, however, never be justified with respect to works of a functional or technical nature such as databases, technical design documents and reports, specification documents, process documents, spreadsheets etc. Big data is huge business. Deprivation of rights to databases would be disastrous to our economy. Literary works and musical works are also often integral components of much larger technological solutions and the deprivation of ownership of any of such components would have equally devastating consequences to both the producers and the users thereof.