Portfolio Committee on Trade & Industry
National Assembly
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SUBMISSION BY RECREATE ACTION: Copyright Amendment Bill - Latest Proposed Changes

ReCreate Action is a voluntary association formed by activists and trade unionists working on copyright reform. ReCreate Action was formed in 2021 to support the lawsuit brought by Blind South Africa aimed at ensuring that visually impaired persons can make use of accessible-format copies of works.

We believe the work undertaken by the legislature and the government over the past 10 years to reform the copyright regime in South Africa are vital and urgent contributions to transformation of the creative sector and the knowledge economy in the interests of the masses of our people who have been excluded. We are worried that some of the latest proposed changes might weaken the reforms quite considerably.

AIM OF THE COPYRIGHT REFORMS

The original aims of copyright reform are understood to be broadly as follows:

- Update the apartheid era Copyright Act of 1978, which is unconstitutional and denies rights especially to the poor black majority by discriminating against many different historically marginalised groups
- Ensure that creatives and performers receive the fair remuneration they are entitled to from their work, especially those black artists who have been exploited over many years in the creative sector
- Ensure that learners, educators and communities have access to the educational materials they need to realise their right to education, especially those in historically marginalised communities
- Address the discrimination against blind, visually impaired and other disabled persons who cannot currently make use of accessible copies of works
- Modernise the copyright regime to encourage high tech innovation and ensure South Africa can participate in the Fourth Industrial Revolution

TOOLS OF THE REFORMS

There are 3 main mechanisms in the Copyright Amendment Bill which seek to meet the transformative objectives outlined above. These are

- Fair Royalties for creators
- Fair Use and other exceptions and limitations to copyright for users
- Regulation of institutions such as collecting societies

OPPOSITION TO THE REFORMS BY INTERMEDIARIES

It was understood from the very beginning that some large media corporations and publishers would be hesitant to support the reforms as they have enjoyed monopoly positions for decades which have proved highly lucrative for them, although not for many creatives. Such groups include certain TV broadcasters, media companies, multinational record labels, book publishers and others who seek to maximise profit by selling entertainment and knowledge whilst limiting both user access and remuneration of creatives. In reality we know that some of these groups succeeded in getting the US and EU governments to lobby against the reforms. Misinformation has also been used to generate fear amongst some creatives that the reforms could harm their interests.

THE PRESIDENTS CONCERNS and arguments about EXPROPRIATION of PROPERTY

Broadly speaking in the Presidents concerns it was asserted that exceptions and limitations to copyright could constitute an arbitrary deprivation of the property of IP owners (mostly the large corporations). Also that the right to fair royalties for creators when applied to contracts signed in the past, might also be considered retroactive and arbitrary. Most of the President's concerns appeared to be taken directly from the arguments of intermediaries opposing copyright reform. These objections mirror the objections raised to our Medicines Control Act in 1997, which was a law aimed to make antiretroviral medicines more accessible and affordable. In that case the pharmaceutical companies used arguments about property rights and trade threats to block the legislation.[1] In the end when despite opposing the reforms, no large companies pulled out and the price of medicines was reduced dramatically.

We say textbooks are the new medicines!

[1] https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620381/bn-access-to-medicines-south-africa-010201-en.pdf?sequence=1&isAllowed=y

PROBLEMS WITH THE LATEST PROPOSED CHANGES

The latest proposed changes circulated by parliament seek to address the concerns raised by the President. There are also some proposed technical edits which apparently seek to simplify and rationalise the Copyright Amendment Bill in places where there might have appeared to be some duplication or a lack of clarity.

HOWEVER, as creatives and communities committed to the original transformative objectives of the bills, **we are quite concerned about some of the latest proposed changes.** We feel there might be some unintended consequences of the changes, both the substantive changes and the technical ones. In fact we think **several of the proposed technical changes will weaken the substance of the Bill quite dramatically and harm transformation.**

If the aim of the Copyright Amendment Bill is to ensure that the masses of our people can participate more meaningfully in the Fourth Industrial Revolution and the global Knowledge Economy, **we need to remain steadfast in ensuring we don't undermine our aims in the name of technical improvements or in response to pressure.**

SPECIFIC CONCERNS

1. **IT IS PROBLEMATIC TO TRY TO RATIONALISE OR MERGE FAIR USE WITH THE OTHER EXCEPTIONS TO COPYRIGHT**

   In the version passed by Parliament there is a section on FAIR USE (12A) and a number of sections addressing specific exceptions to copyright (12B, 12C, 12D). The latest proposal seems to be to rationalise these sections and remove any duplication where the same purpose is addressed under FAIR USE and under SPECIFIC EXCEPTIONS. We believe this rationalisation is unecessary and may have some negative unintended consequences.

   For example, in 12A (1) (a) there is a reference to “research, private study or personal use” as an example of Fair Use. Meanwhile there are specific exceptions for personal copies in 12B. Hence it is proposed in the latest draft that research, private study or personal use be removed as an example of Fair Use apparently to avoid duplication. Similarly the illustration of a fair use for “scholarship, teaching and education; “ is to be removed since there is a specific exception for education

   This is a mistake since the specific exceptions are far more restrictive than the fair use clause. Imagine a person at home researching health or legal issues who wants to copy part of a library book. Or an informal study circle set up by learners in a township to share extracts from a textbook on whatsapp. This informal research or study would

satisfy the conditions of Fair Use BUT it is not covered in any specific exception. Hence **the result of these deletions will be to harm our most marginalised communities.**

In fact there are many other types of research, private study, personal use, scholarship and education that are not covered in the specific exceptions in 12B, 12C or 12D, some of which we can't even anticipate at ths stage. For example online research tools which make copies in order to summaries and index works. This is classic Fair Use as Fair Use is defined in other countries.

MoreoverIn most countries with Fair Use, its understood that Fair Use supplements and complements the specific exceptions that may also be in the law. That way, where a particular use is not covered in a specific exception, users may have recourse to the Fair Use clause.

WE NEED ALL THE EXAMPLES OF FAIR USE TO REMAIN, including:
12A (a) (i) research, private study, personal use
12A (a) (iv) scholarship teaching and education
12A (a) (vi) libraries archives and museums

2. IT COULD BE PROBLEMATIC TO MAKE THE FAIR USE FACTORS APPLY TO ALL EXCEPTIONS IN SECTIONS 12B, 12C, 12D, 19B AND 19C

As noted above Fair Use should be seen as a separate provision to the other exceptions. For example, where a broadcaster is to be permitted to keep recordings of current affairs on hand in the public interest, this is a specific exception which may or may not be covered by Fair Use. It is very specific purpose covering a very limited use. Another clear example comes under 12D where our law allows whole textbooks to be copied where they are out of print or they are not on sale at a reasonable price. This is a very specific exception aimed at getting textbooks to underprivileged learners and/or encouraging publishers to price their books fairly. It's similar to South Africa's efforts to make ARV medicines affordable to people living with HIV. It addresses a very specific historical problem and urgent need in South Africa.

In this context it doesn't make any sense to try to apply the Fair Use test to these specific exceptions. Fair Use protects creators by ensuring that users do not substitute copies for the original works. But the in the case of inaccessible textbooks (as with ARV medicines) we may need to have a period where copies replace the originals to meet the transformative needs and bring the the prices down.

SOLUTION: Remove the new proposed clause 12A (d) which says "The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the

performance of that work, are subject to the principle of fair use, determined by the factors contemplated in paragraph (b)."

3. **IN THE INTERESTS OF TRANSFORMATION WE DO NOT BELIEVE IT IS NECESSARY OR WISE TO REMOVE THE APPLICATION OF FAIR ROYALTIES TO FUTURE INCOME ON PAST CONTRACTS**

In South Africa many black artists, musicians and other performers sold their rights to large companies at a time when local black artists had very little negotiating power. This was partly due to apartheid and the associated economic disadvantages faced by these artists.
In the previous draft of the Bill (as passed by parliament) these artists are given a right to fair royalties ON FUTURE INCOME, even if they sold their rights in the past. This is an important step to redress exploitation of our veteran artists, including many anti-apartheid icons.

It has been mistakenly asserted that this might be interpreted as a retroactive redistribution of income. This would only be the case if previous income already handed out was to be redivided, something that was never intended.

Providing artists with a right to A FAIR SHARE OF FUTURE INCOME ON PAST CONTRACTS is perfectly legitimate and is very similar to minimum wage legislation, which applies to all FUTURE INCOME including workers whose employment contracts were signed before the minimum wage was passed.

SOLUTIONS:

DO not delete the subsections from Clause 5, 7 and 9 which allow the Fair Royalties provisions to apply to FUTURE INCOME on PAST CONTRACTS. These deletions are set out on page 25 of the document circulated by Andre Hermans.

Instead insert a subsection to clarify that these clauses are NOT RETROSPECTIVE, i.,e. THEY DO NOT APPLY TO PAST INCOME. Also insert the word "Fair" with royalties wherever the entitlement to royalties is mentioned throughout these sections.

IF the subsections from Clauses 5, 7 and 9 are removed, another mechanism will have to be found rapidly to address the entitlement to a fair share and fair royalties for artists of future income on past contracts. It is unclear what this alternative mechanism would be.

4. IT IS PROBLEMATIC TO REQUIRE THAT PERSONAL COPIES CAN ONLY BE MADE IF THE ORIGINAL OF A WORK WAS "LEGALLY ACQUIRED"

One of the key purposes of Fair Use is to make the knowledge economy accessible to the masses of our people. The whole point of allowing personal copies is so that the masses of our people can have access to information about everything that allows them to be equals in our society, from health and economics to arts, culture, science, law and history.

For example, where our people borrow a work from a friend or a library, personal use copies should allow them to copy extracts, share them, reference them and so on. This is perfectly legal in most countries that have Fair Use, including the USA.

The effect of the latest changes to the legislation might be to require that the person making the copy first has to purchase the work before copying any part of it. This is quite absurd in a country like South Africa with such extreme inequality. In fact this provision appears to be the worst example of bending over backwards to accommodate the profits of media corporations and publishers in a way that most other countries do not do.

This is also a reason why personal use copies must be left in the Fair Use clause, as the fairness test which is integral to Fair Use will ensure that such personal copies are restricted to uses that do not harm the original creator.

Keep personal use and private study in the fair use clause! Be very cautious about requiring that works have to be "legally acquired" (i.e. purchased) before personal copies can be made. Knowledge and Education must be accessible to all our people!

5. THE LATEST DRAFT OF THE LEGISLATION MAKES LIFE MUCH MORE DIFFICULT FOR PEOPLE WANTING TO MAKE USE OF COPYRIGHT EXCEPTIONS (TEST STACKING)

In the previous draft of the legislation, there is a simple division of checks and balances to ensure copyright exceptions are not abused. These are as follows:

Fair Use is allowed, subject to the fairness test (what is the work, how is it to be used, how much is to be used, will it harm the original creator)

Specific exceptions are allowed for specific purposes which go beyond fair use but which are very narrowly defined to support transformation or the public interest. For example, reporting on news and current affairs or accessing textbooks that are too expensive for the poor majority. In these narrow cases it is sometimes mentioned that the extent of

copying must be justified by the purpose.

In the new proposed amendments, there is a confusing array of extra tests that are applied as follows:

- The fairness test is extended to cover the specific exceptions
- The phrase “fair practice” is introduced and used extensively without being defined
- In some places the wording of the Berne 3-step test is also laid on top of the other tests

This situation is likely to complicate the life of a learner, a teacher, a journalist or a community activist for example, who needs to make a copy. Other countries dont have this kind of complexity where one test is overlaid on top of another.

Simplify the law! Remove the complex stacking of tests on top of each other!

In conclusion - as government and progressive civil society we have been on a long journey for over 10 years to bring in fair copyright laws. We cannot afford to have this process derailed at the last minute by those who are opposed to reform or in the name of technical improvements.

Fair Royalties now! Fair Use now!
Forward to an Inclusive Knowledge Economy!

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For RECREATE ACTION