ReCreate South Africa

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To: Chairperson of the Portfolio Committee on Trade and Industry, Parliament of the Republic of South Africa

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Dear Honourable Chairperson

WRITTEN SUBMISSION BY RECREATE SOUTH AFRICA

COMMENT ON ADDITIONAL DEFINITIONS AND CLAUSES IN RELATION TO THE COPYRIGHT AMENDMENT BILL (2017) [B13-2017]

A. INTRODUCTION

1. ReCreate is a non-profit association established to advocate for a balanced Copyright Act that protects modern creators' rights and the needs of marginalised communities.

2. As creators, ReCreate includes writers, filmmakers, actors, artists and musicians, as well as video game developers, producers of accessible format materials and technology entrepreneurs. As users of copyrighted materials, ReCreate includes teachers, students and learners, librarians, activists and disabled communities. ReCreate is unique in that it houses both creators and users of copyrighted material.

3. Our biggest affiliates are the South African Democratic Teachers Union (SADTU) and the South African Guild of Actors (SAGA). All together we represent the views and interests of several hundred thousand South Africans from various stakeholder sectors.

4. ReCreate makes this submission in response to the call by the Portfolio Committee on Trade and Industry for comments on a set of proposed changes to the Copyright Amendment Bill (2017) [B13-2017] ("the Bill"), advertised on Parliament's website on 3 December 2021. We thank you for the opportunity to comment.

5. For ease of reference we shall mostly use the same headings in the document entitled 'Wording for all amendments' advertised on Parliament's website.

B. PRELIMINARY COMMENT ON THE PANDEMIC, INEQUALITY AND COPYRIGHT

6. Inequality has been exacerbated during the last two years of the Covid-19 pandemic. Government has called internationally for increased access to essential public goods. More specifically President Ramaphosa is arguing for a more progressive intellectual property regime addressing health needs, including access to vaccines. We should make sure that our copyright law is moving in the same direction.

7. At a high level, the fair use provisions of the Bill can be seen as serving an analogous purpose to public health safeguards and flexibilities in patent law that are designed to increase access to medicines. Although the Patents Act of 1978 has yet to be amended to give meaningful effect to such safeguards and flexibilities, government policy in this regard is clear. Recently South Africa and India led a proposal to waive rules of the WTO's Trade-Related Aspects of Intellectual Property agreement, a move that could allow generic or other manufacturers to make more vaccines.

8. Just as the public was outraged at the cost of vaccines produced by ‘Big Pharma’ during the ongoing Covid-19 pandemic, so too should we be outraged at the cost of access to education and learning materials that ought to be facilitated by fair use in copyright law.

9. At the same time, the pandemic has challenged the livelihoods of South African creators, including musicians, performers and many others. Whilst many large media corporations at home and overseas have increased revenues during the pandemic, most local creators have yet to benefit. This makes the provisions on fair royalties for creators which are contained in the Bill even more urgent.

10. In any case, the provisions on fair use and fair royalties in the Bill are urgently required to bring the Copyright Act of 1978 into line with constitutional provisions on equality, the right to education, and the right to pursue a business and trade.

11. In light of this we shall be making holistic comments on the impact of the latest proposed changes to the Bill. Some of the so-called technical changes appear to have a substantive impact and affect the other changes being proposed.

12. A preliminary concern is that the scope of President Ramaphosa’s letter of 16 June 2020 has been extended way beyond the sections of the Bill under review, despite us being told in a number of calls for comments that only submissions relating to those specific sections relating to constitutional issues would be considered. Some of the sections such as 19D and 27 were not under review, yet Parliament has made substantial amendments to them. Also some amendments that are not open to comment are much more than technical in nature and and have not been open to comment before.

C. THE RIGHT TO SHARE IN ROYALTIES

13. Various provisions of the Bill introduce amendments designed to protect creators' right to a fair share in royalties. This is through amendments to sections 6, 7, 8 and 9 of the Copyright Act.

14. We believe that the royalty rights provisions of the Bill should be amended to require only 'fair' remuneration for current dispositions of copyrights. The proposed section 6A would require that authors of literary and artistic works be entitled to "a fair share" of royalties for uses of their work. Sections 7A and 8A change the standard, proposing that authors of "visual artistic works" and performers in audiovisual works "share in the royalty received for" uses of their protected rights.

15. We believe that these fair royalty provisions should continue to cover future income on past contracts. This is not retroactive, in that it only covers future income. It is analogous to minimum wage legislation. Hence the clauses which provide for fair royalties even where copyright was assigned before the Act passes into law should remain. If these clauses are deleted there will be no redress for artists who continue not to receive fair royalties on previous work.

D. AMENDMENTS TO MAKE THE FAIR USE FACTORS APPLICABLE TO EXCEPTIONS IN SECTIONS 12B, 12C, 12D, 19B AND 19C: SECTION 12A

Fair use

16. Several exceptions from copyright protection are deleted in section 12A (a). These are the illustrations of fair use. It would be preferable to retain the deleted subsections, firstly because these are all very good examples of fair use, especially if there are uses we cannot anticipate now. Secondly, we should keep them in because our basic understanding of what fair use is, is weakened by not having

them in, because these are the classic examples of what fair use is. Education and research, for example, are at the heart of fair use. Note that currently "research" is ONLY mentioned in the fair use provision in 12A; there is no specific exception relating to research in 12B, 12C or 12D. Hence a whole area of activity would not be protected if this illustration is removed from the fair use clause.

17. In making provision for a number of fair uses, the Bill should properly enable the ability of learners and artists to advance their rights of access to education protected in section 29 of the Constitution by enhancing access to works that would otherwise have been inaccessible to most people for educational purposes and through library, archival and museum collections.

18. A fair use exception for educational purposes, that enables broad access to educational materials where needed, would both unlock the system for those who can afford to buy textbooks, and give special attention to the particularly vulnerable.

19. It is trite that the Bill is required to respect, promote, fulfil and protect multiple rights protected in the Bill of Rights. This is in part achievable through the fair use provisions in the Bill. The inclusion of fair use provisions that protect the rights to dignity and equality, freedom of speech and the right of access to education are necessary in order for the Bill, when enacted, to survive constitutionality scrutiny.

Stacking of tests

20. Parliament has seen fit to extend the fair use test in section 12A to the copyright exceptions in sections 12B, 12C and 12D. In section 12D, this clause unreasonably 'stacks' fair use, fair practice and the three-step test. This is an unnecessary over-qualification. A teacher would now be expected to know what she can and can't do in an education/copyright situation, facing an absurdly complex stack of tests. Even a copyright expert would be hard-pressed to know what is allowed in this situation. The fair use test should apply only to section 12A, and the other copyright exceptions should be free standing without being re-tested. Section 12A (d) should be removed altogether.

Fair practice

21. The phrase ‘fair practice’ has been inserted in section 12B (1) (d) (i) and (ii). This is at worst a ‘hidden dragon’ that may come back to bite us. At best it is a complication that is not useful; at worst it could be highly problematic. Parliament keeps referring to the term ‘fair practice’ which is not defined anywhere and which is left completely open to subjective or unpredictable determination. ‘Fair practice’ sits uncomfortably alongside fair use. The section used to say ‘where the use justifies the purpose’, which is a lot clearer, that you only put in as much as you need to in order to achieve what you’re trying to achieve.

22. There is again an improper ‘stacking of tests’ here. Parliament might wish to remove some references to fair practice in section 12B that are already subject to the test of fair use.

E. AMENDMENTS RELATED TO PERSONAL COPIES: SECTION 12B

23. Parliament has made a decision to rip out half of section 12B (1). Many examples of fair use have been deleted. Parliament claims it wants to remove examples of fair use to avoid duplication, with specific exceptions. This misunderstands the distinction between an open-ended clause and having specific, narrow exceptions. That distinction has been made all along by the Department of Trade and Industry (DTI) and worldwide. The DTI has tried to take personal copies out of fair use. If there is a problem with an overbroad personal use section, the correct approach would be to leave personal copies in the fair use section of 12A.

24. Section 12B (3) (b) also deals with personal copies. This subsection is hugely ambiguous; we do not know what purpose it serves. This is part of the problematic attempt to narrow personal use. The problem of trying to do this goes away if Parliament simply leaves personal use at the very least at the standard set out in the current Copyright Act. Parliament should at least give us the rights that we had

under the current Copyright Act; that we didn't have to lawfully acquire a copy before making a copy of it. In that case section 12B (3) (b) is probably redundant.

Lawfully acquired

25. The phrase 'lawfully acquired' has been inserted in section 12B (1) (i). This is problematic and the phrase should be deleted. Not only has Parliament taken personal copies out of the fair use clause, but they significantly weaken the ability to make personal copies by requiring that the original work be lawfully acquired. What that would mean is if children in a village in Limpopo borrow a book from a library and want to make personal copies, share or keep for themselves, they wouldn't be able to do so. There is no provision that specifically allows that, because the original was not unlawfully acquired – it was borrowed. In the definition of 'lawfully acquired' the drafters specifically say that 'borrowed' does not mean 'lawfully acquired'. In other words you cannot make personal copies from a book borrowed from a library. Millions of people in South Africa depend on borrowed works from libraries and donated material to access learning materials. This exception would bar them from doing so.

26. Moreover this requirement of 'lawfully acquired' violates the principle of non-retrogression, because it takes away rights that already exist in the current Copyright Act. The principle of non-retrogression is recognised in South Africa's Constitution as well as international law.

27. The regulations to the current Copyright Act, as limiting as they are regarding personal copies, allow a single copy to be made at least if it is for teaching and learning purposes. Even the admittedly problematic numerical ceilings in the regulations to the current Copyright Act provide more that this amendment does.

28. From a right to know perspective, this requirement of 'lawfully acquired' would be outrageous. It would be a step backwards for education and freedom of expression in poor communities across our country, that we can't even make a copy of a book that is borrowed from a library or that is lent from a friend or even a document that is obtained from a Government office in order to secure one's personal health or

other right. It would be outrageous that we cannot make copies for our own personal, activist or similar use.

To the extent that it is practicable

29. The phrase 'to the extent that it is practicable' has been deleted in section 12B (1) (a) (ii). This is problematic and the phrase should be restored. If you have 50 images on screen in a collage at one time, then it would not be practicable to have on screen at the same time a credit to the author. The claim made to justify the deletion is to make it more closely aligned to treaty language. But this is a misunderstanding of the space that countries have to include wording such as 'to the extent that it is practicable', because we are doing this in 2022 and not in 1975 when the Berne Convention was last revised.

F. AMENDMENTS RELATED TO EPHEMERAL RIGHTS: SECTION 12B

30. The amendments in section 12B (1) (b) relate to ephemeral rights. In South Africa we have only ever referred to ephemeral *copies,* not ephemeral *rights*. The idea, historically, was that there was a right of a broadcaster who had used for example a musical work or a sound recording in their broadcast, to keep a copy of their broadcast without having to strip out that sound recording from their work, because they are broadcasters. They could keep it in their archives for 6 months. If it related to an important historical or artistic event, they could keep it indefinitely. The amendments in section 12B (1) (b) mean that now they cannot keep it indefinitely, but can only keep it for a brief while - 30 days. And even if it is very important, they cannot keep it in archive, but instead must send it to an official archive and must tell the person who owns the rights in the sound recording.

31. The amendments in section 12B (1) (b) have clearly been motivated by the record companies, especially RISA and other intermediaries, wanting to sell to broadcasters a licence. For the SABC, which keeps a huge back-catalogue in archives, they will not have the time or resources to strip out everything they're not allowed to have. So they will be forced to pay a hefty licence fee.

32. The new ephemeral rights scheme is the new licensing scheme that the record companies want. The change from ephemeral *copies* to ephemeral *rights* shows that the DTI is on board with the idea of a new licensing scheme. But this is very difficult to comply with in practice.

33. Ephemeral rights is also dealt with in section 12B (2) which is even harsher: it gives a broadcaster no option but to obtain a licence from a collecting society.

34. The combination of sections 12B (1) (b) and 12B (2) makes it very difficult for broadcasters to just passively keep incidental or ephemeral appearances in their archives; yet we want them to be able to do so.

35. A further problem is what happens after the licence expires or is terminated, what happens to the archive then?

G. AMENDMENTS RELATED TO TECHNOLOGICAL PROTECTION MEASURES: CLAUSE 1

36. Millions of people in South Africa have decoders from Multichoice, OpenView etc. There will be more decoders in the future with digital terrestrial television (DTT) coming into the country. Two things might happen in the era of DTT. You might see a broadcast of something which you think you might want to apply fair use to. You might see the President making an announcement about vaccines. You might see an uprising in Kwazulu-Natal. You might want to make your own long-term recording of this at home, because you're working in health, education or politics. You may have a fair use for the broadcast. Another example would be if you saw your family member on the broadcast. It should not then be a problem to record that broadcast, as long as you won't commercially exploit the broadcast, to compete with Multichoice. To circumvent technological protection measures (TPMs) in this way for reasons as yet undetermined, which may turn out to be legitimate fair use or personal use, should not be unlawful. It is really an over-extension to criminalise TPMs, given the fact that we all support free media and the free flow of information. We are in any event bound to uphold the freedom of expression and access to information rights in the Constitution.

37. We thank the Portfolio Committee on Trade and Industry for the opportunity to make this written submission and commend Parliament for its progressive work on the Copyright Amendment Bill.
