



THE STAKEHOLDERS



Fair use is misuse.

**SA**

Professional Photographers

Fair use is THEFT!

The Chairperson
Portfolio Committee on Trade and Industry
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Attention: Mr D Nkosi
Chairperson

28 January 2022

Honourable 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:

- Southern African Freelancers' Association (Safrea);
- African Photographers and Videographers Association (Apva);
- Professional Editors' Guild (PEG);
- South African Professional Photographers (Sapp);
- Independent Photographers;
- South African Science Journalists' Association (Sasja);
- ("The stakeholders") and others not mentioned.

2. On 8 December 2021, the Portfolio Committee on Trade and Industry published an advert calling for written submission on proposed amendments - Copyright Amendment Bill.

Dear Stakeholder

For ease of reference, please find an additional document that includes wording for all proposed amendments. Please note that proposed amendments captured in blue are the only wording on which a call for comments are made.

Please note that comments on any other clauses would not be considered.

Regards,

Andre

3. In line with the directives we submit our documents in response to the recommendations.
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 highly concerned about the inclusion of the **'Fair use'** mandate of the amendments that 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 Appendix A in which extracts from our initial concerns in the submission have been copied (see below).

Further to our initial submission the stakeholders would like to submit this document commenting on the written proposed amendments.

1. Why is there such a narrow scope of the consultations and why are all other concerns closed?
2. We understand that this scope of the consultation is limited and narrow only to concentrate on certain points / sections.
 - 2.a. If this is the perception of the Committee that the fixing of these very obvious errors and these points alone would render the bill constitutionally compliant, we disagree.
 - 2.b. The proposals do not fully resolve the President's concerns or serve the key objective of improving the conditions of all creatives in South Africa, which was the main aim of the amendments. The vulnerable disadvantaged community is of primary concern.

It can be seen now that since the stakeholders submission in August there have been no further consultations between the Committee and stakeholders on the serious points of concern that were submitted during the two days in August 2021. We implore the committee to respond to the many points made by the different stakeholders, especially those that relate to Constitutional matters.

The submission by the South African Institute of Intellectual Property Lawyers (SAIPL), on 16 July 2021 covers the key issues of our current proposal.

The 19 covered points within the document cover serious constitutional matters, and some of those recommendations were amended into the current document. If these serious matters are not covered in this series of amendments, they will be dealt, starting within the Constitutional court as Section 25 reads:

Property

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

If the 'fair use' mandate is endorsed within the jurisprudence of South Africa, this action alone would render all property accessible to any person who wishes to commandeer it.

The recordings demonstrate the misunderstanding the members have about the Bill and process.

(RECORDINGS from Parliament*)

Burns-Ncamashe, Prince Z AN

00:27:56:29 ... To simply assume that we all understand, it may leave some of use behind.

It was the opinion of Advocate Charmaine van der Merwe, Senior Legal Advisor, office of the Constitutional and Legal Services, who says, the concept was "**not clear**".

The hybrid system was fully explained by Dr Evelyn Masotja, the Deputy Director General, as she explained the full concept of the hybrid system to the committee.

DTIC has confined further deliberations beyond the initial Presidential recommendations. It now should be open to the full concerns of each affected creatives' section. Each section will have a representative backed by a team, i.e. literary, audiovisual, music, etc, with one aim to better inform the House about their concerns and remedies.

If the concerns are not settled now, they will constantly be a bother.

If the Committee wishes to bring in the 'fair use' mandate, this concept has to be fully debated; where it should bring in a balance of privileged exceptions because, at present, the balance of the scale leans in favour towards the users' domain.

The creative is at a disadvantage in enforcing any of their © rights, especially against those who wish to use the 'fair use' mandate as a defence in infringing on the work of creatives.

The fair use clause is problematic, as can be shown.

There are impact assessment reports that can be shown where fair use is a system that gives the user any reason to use another's work, to the creatives' detriment. Users are in conflict with normal exploitation of the work which unreasonably prejudices the legitimate interests of the owner of the copyright.

It has been shown that the creative in South Africa has been and is at a disadvantage due to big media and tech corporations.*

This 'fair use' mandate will only be an advantage to those who do not want to pay anything or any market-related price for the work of creatives.

In the document : **Copyright Amendment Bill and the Performers' Protection Amendment Bill Background document for Portfolio Committee on Trade and Industry 25 August 2021:**

In 2014 the dtic commissioned a

Regulatory Impact Assessment Study on the Draft National Intellectual Property (Policy 2013) it included the Treaties, fair use, Treaties, exceptions, etc

Notably, Canada's Supreme Court – in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (12 July 2012) – recently applied a set of very similar factors to their fair dealing provision...

The slight difference that Canada made to its Fair dealing provisions was only for education, not general copying of copyright material. **Nothing at all about 'fair use'.**

We can assess what has been taken into account, and correct what needs to be corrected, as we can read that the fair use clause was not in the initial assessment.

(RECORDINGS)

The government has been totally misinformed and educated on this subject of copyrights, importantly the 'fair use' mandate.

Chairperson:

01:31:16:28 Background .. where we are now ... issue the Constitutional Reservation[s] by the President.

01:32:18 Comments please...

01:32:10 Hon Mr W Thring (ACDP} ...

..." thank you for the presentation, concise; as well as of lots legal terms (BASIC) one had sensed that perhaps we had ought to had done a crash course in copyright law, before listening to and studying the presentation, but none the less thank you ..."

Chairperson:

"I know what Hon Thsring is saying, that we should have been acutally workshopped, for the lack of a better term, to understand what these two bills mean, because they were one bill before".

This shows just how uninformed and lacking in instruction some are within the Select Committee.

Our solution is to give the DTIC a two-day workshop on every aspect of the Bill, as it appears you have already been instructed by those who endorse the 'fair use' mandate. We, as a national united creative body, would within two months complete the proposed amendments.

One can observe that the honourable members are not fully aware of the consequences that fair use will bring, or why there are only seven of the 47 registered countries in the world using the mandate of 'fair use'.

Of the seven countries, six of them use a hybrid system, as the USA's fair use is too vast a mandate on creativity. Each county has adapted the USA mandate into a doctrine, where it has been changed slightly to meet the requirements of each country. South Africa almost adopted the same the hybrid system that was within the previous edition of the CAB.

The initial hybrid system that was proposed was a great starting point.

17. CONCLUSION

The stakeholders' key submissions are as follows:

- 17.1. Clauses as indicated 12A 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 submission and are hopeful of an opportunity to make a verbal presentation on a mutually agreeable date.

Yours faithfully,

[REDACTED]

SHAUN EARL HARRIS

Intellectual Property / Copyright coordinator (SAFREA)

[REDACTED]

On behalf of:

Hush Naidoo (APVA) | Chairperson |

Alexis Grewan (PEG) | Chairperson |

Peter Hassall (SAPP) | Chairperson |

Mandi Smallhorne (SASJA) | President |

[REDACTED]

APPENDIX

1. We refer to the principle of *fair use* as contemplated by Clause 13 of the Bill – the **insertion of sections 12A* in Act 98 of 1978**.

General exceptions from copyright protection:

1.1. 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:

1.2. 12A. 1(a)(iii) reporting current events;

1.3. Specific exceptions from copyright protection applicable to all works 12B. (1)(a) Any quotation: Provided that— ...

2. Comments under *general exceptions from copyright protection*

Fair use

2.1. 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 ...

2.1.1. 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).

2.1.2. 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.

2.1.3. 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.

2.1.4. 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.

2.1.5. 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.

2.1.6. 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.

2.2. 12A. 1(a)(iii) Reporting current events

Comments:

- 2.2.1. 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.
- 2.2.2. 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.
- 2.2.3. 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.
- 2.2.4. 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.
- 2.2.5. 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 judgments 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.
- 2.2.6. 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.
- 2.2.7. 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.

2.2.8. 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.

3. **Specific exceptions from copyright protection applicable to all works**

3.1. 12B. (1) Copyright in a work shall not be infringed by any of the following acts:

Our comments as follows:

3.2. 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;

3.2.1. 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.

3.2.2. 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.

3.2.3. 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.

3.2.4. 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

3.2.5. Hence, all work carries the strict caveat that the intellectual property should not be used outside the agreed usage rights.

3.2.6. All professionals expressly reserve their rights for reproduction of their property and Honorable Members should be apprised of the technologies of embedded metadata.

3.2.7. We furthermore contend that users should be refrained from the deletion of such metadata during the authorised use of the digital file.

4. Reproduction for educational and academic activities

4.1. 12D. (1) states: ‘Subject to subsection (3), a person may make copies of works ...’

Our comments:

4.1.1. 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.

4.1.2. 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.

4.1.3. Currently, the author and copyright owner most certainly make an economic living through the exchange of licenses for original work.

4.1.4. 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.

5. 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.

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These license violations have the potential to result in up to R9,471.81 Trillion

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€532.5* Billion in damages daily.

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FAIR USE IS THEFT

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