

Written submissions on Copyright Amendment Bill B13B-2017

The Anton Mostert Chair of Intellectual Property Law

The Anton Mostert Chair of Intellectual Property Law (the “Chair”) is an independently-financed entity that forms part of the Department of Mercantile Law of the Law Faculty of Stellenbosch University. Further details of the Chair, its objectives and its activities can be obtained from its website, which can be accessed at www.sun.ac.za/iplaw. Its focus is on intellectual property law and achieving excellence in that regard. Accordingly, it can speak with authority on matters pertaining to this field of expertise, and, in particular, concerning copyright law.

The Chair’s functions include developing intellectual property law in South Africa and playing a role as custodian of this branch of the law, with a view to fostering lucid, coherent, fair, up-to-date, effective and high-quality legislation, which is in harmony with the principles of intellectual property law and is compliant with South Africa’s international obligations in that regard.

The Chair has no clients or any private interests that it serves or seeks to benefit. The views that it holds and expresses concerning matters of intellectual property law are the consequence of its objective and balanced considerations. It seeks only to promote and safeguard the integrity and quality of South African intellectual property law with a view to having it compare favourably with the best laws elsewhere in the world, having regard to the South African context. Its goal in pursuing this objective is the welfare of South Africa and all its people.

Background

In the letter to the National Assembly Speaker, dated 16 June 2020, President Cyril Ramaphosa referred the Copyright Amendment Bill B13B-2017 (the “Bill”) back to the National Assembly. Amongst the reasons cited by the President for doing so were concerns about the constitutionality of the Bill and the negative effects on the rights of authors and copyright owners.

On 4 June 2021, the Portfolio Committee on Trade and Industry (the “Portfolio Committee”) invited stakeholders and interested parties to submit written submissions with reference only to clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) of the Bill. These comments are submitted in response to such invitation.

Initial remarks concerning the process

It is a matter of grave concern that the Portfolio Committee’s approach remains an attempt to “panel beat” the Bill, which, from the first draft released for comment to the public in 2015, is very poorly drafted, and contains some deeply problematic proposals. Given the troubled passage of the Bill, and, most importantly, given the President’s action of (and reasons for) referring the Bill back to the National Assembly, there appears to no valid reason why the public’s right to submit comments has been limited to specific clauses. Whose interests are being served by this deeply flawed process? This is certainly not in the best interest of the country.

The Portfolio Committee seems to have followed suit where the Department of Trade and Industry (“DTI”) left off, namely, trying to rush through an ill-considered amendment, in a high-handed, and highly-questionable manner. Furthermore, given the Portfolio Committee’s protracted involvement in the Bill, it appears that the Portfolio Committee has arrogated to itself the responsibility of drafting the Bill, and custodianship of the legislation.

In a constitutional democracy, legislation needs to follow a credible and inclusive process, and should evidence a balanced and considered approach. Instead, the Department of Trade and Industry (DTI) appears to have followed a questionable process, and the Portfolio Committee (through its persistent and protracted involvement in the Bill) is, in effect, condoning the failures at the DTI concerning the Bill, and is itself acting in a problematic fashion. For example, the passage of the Bill appears to have come about in the absence of the involvement of the Statutory Advisory Committee on Intellectual Property, which is provided for in the Copyright Act 1978 (the “Act”). Why has there been no accountability concerning the DTI’s flawed

process concerning the Bill? Moreover, what is the appropriate function of a portfolio committee? Surely it is not to *draft* legislation, but the Portfolio Committee has, by now, been more involved in the drafting of the Bill than the DTI. In the circumstances, is it possible for the Portfolio Committee to play a credible oversight function (and advise parliament) when *it* appears to have taken responsibility for the Bill, rather than the DTI? Is that fact in itself not more than sufficient indication of the fact that what parliament received from the DTI was not the product of an acceptable standard, and should the Portfolio Committee not by now have rejected the Bill in its entirety, with the necessary rebuke of the DTI? In other words, if the Portfolio Committee should recommend the passing of the Bill by parliament, it is, arguably, not exercising its oversight function, but rather more doing a “sales pitch” in respect of its own handywork.

The fact that these submissions largely repeat previous submissions made by the Chair (as, no doubt, will submissions by others be repetitive) concerning the relevant clauses, the latest invitation for comments does raise serious doubts about the motive of this exercise. Why would the Portfolio Committee take these submissions any more seriously than the previous submissions concerning the Bill? In fact, for the Chair (and others who will be making submissions), the submission of further comments does tend to border on the irrational, because — based on prior conduct — there cannot be any reasonable expectation that the Portfolio Committee will be taking the submissions (or its supervisory role) seriously. In other words, this submission, once again, appears to be part of just another cosmetic exercise of public engagement?

Clause 12 “Repeal of section 12”

While this clause has not been specified as one of the clauses on which comments may be submitted, it does serve to illustrate: the absurdity of limiting comments to specific clauses; and, the poor quality of the legislative drafting in the Bill. Section 12 is repealed but not replaced. The new proposed section 12A is clearly meant to replace section 12, so why are those provisions not being proposed as a new section 12?

Clause 13 “Insertion of sections 12A, 12B, 12C and 12D in Act 98 of 1978”

General remarks concerning fair use

Before dealing with the specific provisions, a few general remarks would be in order. It is clear that the Bill seeks to introduce the American fair-use approach to exceptions. There are two approaches by which the exceptions to the exclusive rights granted to copyright owners are provided for in copyright legislation in different countries, namely, fair dealing and fair use. It should immediately be noted that — despite the rhetoric of supporters of fair use — the overwhelming majority of jurisdictions employ a system of fair dealing, so it would be inappropriate to suggest that fair use is a readily-accepted alternative to fair dealing.

Under a system of fair dealing, such as that which currently exists in South African law, there are a limited number (or a *numerus clausus*) of exceptions for specified purposes in respect of each category (or type) of copyright work. In contrast to the fair-dealing approach to copyright exceptions, fair use is an open-ended approach to possible exceptions to copyright protection. The fair-use approach is not confined to specified uses (or purposes) that are provided for in the legislation, and *any* unauthorised use of copyright works may be considered to be permissible, if a court considers that the particular use amounts to fair use.

The introduction of fair use is highly problematic, and questionable, for two main reasons. First, fair use creates a level of uncertainty amongst copyright stakeholders that does not exist with fair dealing. In comparison with fair dealing, fair use greatly increases the threat of litigation, and the costs associated with it, as it does not provide sufficient clear guidelines as to what is permissible. If anything, it simply favours parties with great financial resources to litigate. Very significantly, even in the country of its origin, the United States, the fair use doctrine has been the subject of sustained criticism. For example, it is said that “the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific

cases are futile.”¹ On what basis is it then considered to be a superior approach to copyright exceptions than our current system of fair dealing?

Second, adoption of fair use may cause South Africa to breach its international treaty obligations under the Berne Convention and the TRIPs Agreement, in particular, the so-called “three-step test”. The three-step test provides that the exclusive rights of a copyright owner can be limited, provided the limitations satisfy the following requirements: they are confined to certain special cases; they do not conflict with the normal exploitation of the copyright work; and, they do not unreasonably prejudice the legitimate interests of the copyright owner. A broad, open-ended exception — which is what fair use amounts to — will not satisfy the first step of the test.

For the aforementioned reasons alone, the proposed introduction of fair use should be rejected. A more detailed critique of fair use has been provided in the only South African peer-reviewed article on the topic (S Karjiker, “Should South Africa adopt fair use? Cutting through the rhetoric” 2021 *TSAR* 2 240), which has been attached to these written submissions, and should be considered to form part thereof. Nonetheless, specific submissions will now follow on the particular proposed provisions.

Section 12A

The Act does not protect performances. That is the province of the Performers’ Protection Act, and is just another example of the conceptually-garbled approach being proposed in the Bill. Having said that, the introduction of fair use will cause a corresponding dilution of performers’ rights pursuant to the Performers’ Protection Amendment Bill (see proposed section 8(2)(f)).

Fair use in respect of a work covers all the restricted acts for literary (or musical) works included in section 6 and the corresponding sections for other categories of work. So, for instance it will cover acts, such as, reproducing, publishing, performing,

¹ B Sookman & D Glover “Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations” (2009) 2 *Osgoode Hall Review of Law and Policy* 139 at 151 quoting Gideon Parchomovsky *et al* “Fair Use Harbors” (2007) *Virginia Law Review* 1483 at 1484-1486

broadcasting, the copyright work. While performing the copyright work may be an exclusive act given to the copyright owner (for example, section 6(c)), this is clearly not what is being referred to, as there is no good reason why only one specific exclusive right is mentioned. It is, therefore, unnecessary and wrong to make specific reference to performance of a work as that creates the anomaly that an exemption is given in the Act to performances protected under the Performers Protection Act.

The proposed section corresponds, to some extent, with the present section 12 of the Act, but with one important difference. It is clear that, as a consequence of the words “such as”, the specific examples given of fair use are simply illustrative (and not a closed list), and gives the court an extremely wide discretion to exempt any uses of whatsoever nature of a copyright work. This is very far reaching and will probably make our range of exemptions from copyright infringement one of the widest in the world. The situation is aggravated by the proposed new section 12B, which provides for yet further mandatory exemptions that are over and above the discretionary exemptions in section 12A. The net result is that tremendous uncertainty is created as to precisely what a copyright owner can actually prevent. This uncertainty does not benefit copyright owners and creatives, and especially not South African copyright owners and creatives (who are purportedly among the main beneficiaries of the Bill). If anything, it only serves the interest of certain large technology companies, who have an interest in diluting the rights of copyright owners.

An example (and this is but one of many examples) of the significant widening of the possible exceptions is paragraph (1)(i), which allows for the making of a personal copy of a work for non-commercial purposes, without qualification and irrespective of whether the individual acts reasonably, fairly or otherwise. In other words, the individual can legitimately make an exact reproduction of an entire book that he has borrowed, or taken, from a library in order to avoid having to purchase his own copy. If every potential reader (or a large number of readers) of a book was to adopt this approach (which is contemplated by the section), the author’s entire market would be destroyed. This renders the whole purpose of copyright largely nugatory. Such conduct is clearly unreasonably prejudicial to the legitimate interests of the copyright

owner. This situation is avoided under the present fair-dealing approach because the use for the specified exempted purpose must still be reasonable or fair.

As already indicated, countries generally give exceptions on the basis of fair dealing, or, far less commonly, fair use. While the Bill seems to adopt both of these forms of exceptions, it, in substance, now introduces an open-ended, fair-use system. This approach cannot be supported, and the Bill should remove any attempt to introduce a system of fair use, for the reasons already stated. Any grounds for the expansion of the list of exceptions, such as, for the purposes of parody, should be expressly provided for. No other exceptions should be allowed to be created by the courts under an open-ended fair-use system.

Neither the DTI, nor the Portfolio Committee has provided any basis to suggest that the adoption of fair use is in compliance with South Africa's treaty obligations. In fact, despite some support amongst academics for the introduction of fair use, there is no detailed analysis — other than bald assertions about its alleged compliance with the Berne Convention or the TRIPs Agreement. On the contrary, as detailed in the attached article, it has been rejected in the UK, Australia, New Zealand and the EU. The DTI and the Portfolio Committee are being misled, or are now willingly accepting a false narrative about the merits (and lawfulness) of fair use, and its level of acceptance internationally.

In light of the aforesaid, simple questions need to be answered: Who is seeking this change, and why?

Section 12A(b)(iii)(bb)

This again illustrates the absurdity of allowing only piecemeal submissions on a fundamentally-flawed Bill. The proposed section uses the term “commercial”, and there is a proposed definition of “commercial”, which makes this provision potentially highly problematic.

In the proposed definition of the term “commercial” (clause 1), why is the meaning limited to “direct” economic advantage? Surely an activity attaining any economic advantage should be considered to be commercial. For instance, distributing free copies of a musical CD, which ultimately leads to a song becoming a hit and, thus, in great demand to be purchased, although not immediately achieving economic advantage, ultimately does so and, therefore, should be considered to be commercial. It appears that the attempted definition of “commercial” may simply create grounds for some types of infringing activity to be excused. If this is what is being intended, it is deeply mischievous. This is particular the case in the context of the new proposed fair use provision in the proposed section 12A. For example, when an Internet user uploads infringing content onto YouTube and that user, or Google, potentially earns advertising revenue as a consequence of that copyright infringement, is that non-commercial use because the benefit is considered to be “indirect”?

The definition appears to be unnecessary, and the issue of what is commercial should be considered in the context of a particular provision. Accordingly, this definition should be deleted. Of course, for the avoidance of any doubt, the introduction of fair use is also strongly condemned.

Section 12B

Section 12B(1)(f)(i)

In light of the previous comments concerning the proposed definition of “commercial”, it is problematic that it may now be acceptable to make an unauthorised free translation and to benefit indirectly therefrom. This should not be permitted.

Section 12B(1)(i)

Again, in light of the proposed definition of “commercial”, this exception is of considerable wider application than it should be. Given the scope of the other exceptions, and in light of section 12B(2), the words “and made for ends which are not commercial” should be deleted.

Section 12B(2)

The inclusion of the word “include” means that the list of examples is not exhaustive, and is, in fact, unlimited. There is no justification for making this provision open ended. Accordingly, the word “include” should be deleted.

Section 12B(3)

What is the purpose of this provision? It just seems to provide for uncertainty, or an even wider, unwarranted, dilution of copyright. This provision should be deleted.

Section 12B(6)

This subsection is incomprehensible in its present form and should be re-drafted. It demonstrates that the person(s) responsible for the drafting lack understanding of the applicable law and the relevant legal principles.

Presumably, what is intended is to make provision for the so-called first-sale doctrine (or exhaustion). On this assumption, what the sub-section should say is something along the following lines:

“The first sale of an article in any country by, or with the authority of, the copyright owner in respect of a work embodied in it shall enable that article to be imported into the Republic and to be resold or otherwise disposed of, without infringing that copyright and irrespective of any right of copyright held by any person in that work.”

Of course, there is an even simpler solution to deal with the problem of parallel importation, and that is to amend section 23(2) of the Act. However, it does require the draftsman to know what the current law in South Africa is, which does not appear to be the case.

Section 12D

Section 12D(1)

This subsection is very badly worded and contains mixed, and incorrect use of terminology, which makes its interpretation uncertain and difficult. It ought to read along the following lines:

“...a person may make a reproduction of a work, or may broadcast it, for the purposes of educational and academic activities; provided that the extent of the reproduction or of the portion broadcast does not exceed the bounds of what can reasonably be justified, having regard to the legitimate interests of the copyright owner.”

Section 12D(3)

The Act contains no reference to “indigenous communities” and confers no rights on such groups. This is a consequence of the Intellectual Property Law Amendment Act 2013 (“IPLAA”) not having been brought into operation. This reference should be deleted. For the avoidance of doubt, it is submitted that IPLAA should never be brought into operation as it would simply distort the legal principles in the different legislation it seeks to amend.

Section 12D(6)

The “instruction” should be taking place at a recognised educational institution.

“Incorporate” is not a restricted act under Act. “Reproduce”, which is a restricted act, should be substituted for it. The effect of an exemption is to authorise the performance of a restricted act under Act.

“Assignment” has a recognised specific meaning in copyright law, namely, to transfer the ownership of copyright. It should not be used in this context as it is potentially misleading and could cause confusion.

Section 12D(7)

Before recommending some suggested changes to this subsection, it should be noted that the impact on the viability of South African academic publishing by this proposed section needs to be properly investigated. Given the fact the academic publications form a significant part of funding of tertiary institutions, which is funded by the state, it is important that there remain viable publications to promote such academic publishing. Of course, arguably, the greatest beneficiary of this proposed provision is Google Scholar, who has not invested in the academic publication, but will benefit from. Unless a service like Google Scholar similarly financially contributes directly to academic publication, why should it be granted this type of benefit? For example, there is not even an obligation for such a service pay a portion of any revenue it receives (such as, from advertising) in connection with its publication of the relevant work. Why not?

Section 20 “Substitution of section 19B”

Section 19B(2)

The subsection refers to “reproduction of the code and translation of its form”. This does not conform to the Acts terminology. A computer program is usually programmed in source-code form. Any version of the code that is created thereafter, such as, the object code (or machine code), is protected as an “adaption” of the source code (see sections 1 (sv “adaptation” para (d)) and 11B(f)). The section should, therefore, refer to “reproduction of the computer program or adaptation thereof”.

Section 19B(2)(c)

Second, it limits the decompilation exception to those “parts of the original program which are necessary in order to achieve interoperability”. It must be noted that the process of decompilation is complex and computer-aided. Prior to the process of decompilation being carried out, it is seldom possible (and usually impossible) to identify the parts of a computer program that are needed to achieve interoperability.

The entire computer program must, and will usually, be decompiled in order to find all the relevant parts. Thus, in order to give the decompilation exception practical relevance, this subsection should be deleted.

Section 19B(4)

While section 19B permits decompilation to achieve “interoperability” with another program, it defines this concept by limiting it to the exchange of *information* and the use of that information. This is inappropriate, as it unduly restricts the decompilation right. Computer programs are intended to perform particular functions. Therefore, interoperability should be defined as the ability to perform its function in relation to the decompiled program or another program.

Clause 20 “Insertion of section 19C in Act 98 of 1978”

While it is right that the exceptions are confined to non-commercial purposes (subject to the earlier remarks concerning the definition of “commercial”), there should probably also be an exception for “art market professionals” to be able to market or advertise the artworks that they are selling. For example, they should be able to show photographs of these artworks on their websites or other marketing material. This is particularly the case now that it is proposed that a resale royalty right be introduced (see section 7B).

Section 19C(2)

What is the purpose of this section? If one of the listed institutions owns a tangible article embodying a copy of copyright work (such as, a book), this activity is not restricted by copyright, and, consequently, no exception is required. In fact, that is what the listed institutions, such as, libraries, have been doing for centuries! Accordingly, the subsection should be deleted.

Section 19C(4)

Again, this activity is not restricted by copyright, and, consequently, no exception is required. Accordingly, the provision should be deleted.

Section 19C(7)

The passage “without the consent of the copyright owner” is redundant and should be deleted as it may cause confusion. First, the point has already been made in subsection (1) and does not need to be repeated. Second, the phrase is not repeated in the other relevant subsections, and this makes the current subsection different for no good reason. This may give rise to serious issues of interpretation of the section.

Section 19C(9)

The Act makes no reference to “indigenous communities”, nor does it confer any right on such groups. This is a consequence of the IPLAA not being in force. The phrase should be deleted.

Section 19C(10)

The opening words, namely, “Notwithstanding any other section” is most inelegant, and unusual drafting. The conventional, and better, expression would be to substitute it with “Notwithstanding the provisions of this Act”.

Section 19C(13)

The subsection creates a necessary exception in favour of the despatching library: it is authorised to make a reproduction of a work. However, the receiving library also makes a reproduction of the work and requires a similar exception in its favour. This should be provided. Also, the way the subsection currently reads is that it seems to place an obligation on the despatching library to ensure that the receiving library carries out the requirements of paragraph (b) and that the despatching library’s right

to rely on the exemption is conditional upon this being done. If this is the intention, it should be stated more clearly.

Section 19C(14)

The phrase “protected from any claim for damages, from criminal liability and from copyright infringement” is contorted and should be simplified. It can simply be provided that those persons are “absolved from [or, have immunity against] any claims of copyright infringement”. If they are absolved from any claims of copyright infringement, there can be no question of damages or criminal liability being incurred.

As for paragraph (b), if the work is in the public domain, there is no copyright protection, and it is incorrect to make reference to “the copyright work”. In addition, the Act only protects copyright and not “related rights” (whatever this may mean) and such reference is inappropriate and should be deleted. Accordingly, the phrase “the copyright work, or material protected by related rights” should simply be replaced by “the work”.

Anton Mostert Chair of Intellectual Property Law

Faculty of Law

Stellenbosch University

24 June 2021