



Wes-Kaapse Provinsiale Parlement
Western Cape Provincial Parliament
IPalamente yePhondo leNtshona Koloni

RAADSTEUN
PLENARY SUPPORT

INKXASO YOKUHLALA KWENDLU

Navrae
Enquiries
Imibuzo Jason Cleophas

Tel
Umxeba +27 (0)21 487 1680

Epos
Email
i-imeyile jason.cleophas@wcpp.gov.za

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NEGOTIATING MANDATE


To: Hon. Mr MI Rayi
Chairperson SC Trade

Name of Bill: Copyright Amendment Bill

Number of Bill: [B 13D - 2017] (NCOP)(S76)

Date of deliberation: 11 May 2023

Vote of Legislature: The Standing Committee on Finance, Economic Opportunities and Tourism, having considered the subject of the Copyright Amendment Bill [B 13D - 2017] (NCOP)(S76) referred to it in terms of Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill in its current form, and calls for the Bill to be redrafted in its entirety and undergo the full legislative process which includes public participation and a comprehensive socio-economic impact assessment.


Signature

Date: 18 May 2023

COMMITTEE REPORT

(Negotiating mandate stage) Report of the Standing Committee on Finance, Economic Opportunities and Tourism on the Copyright Amendment Bill [B 13D - 2017] (NCOP)(S76), dated 11 May 2023, as follows:

The Standing Committee on Finance, Economic Opportunities and Tourism, having considered the subject of the Copyright Amendment Bill [B 13D - 2017] (NCOP)(S76) referred to it in terms of Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill in its current form, and calls for the Bill to be redrafted in its entirety and undergo the full legislative process which includes public participation and a comprehensive socio-economic impact assessment for the following reasons:

1. Procedural Issues:

1.1 Lack of Availability of a Socio-economic Impact Assessment:

- The absence of an impact assessment on affected industries, as per the article in the Daily Maverick, was a significant oversight. This meant that we were legislating without a full understanding of the potential effects.¹
- The Department of Trade, Industry and Competition (DTIC) conducted research on which to base its Intellectual Property Policy favouring 'fair use,' but none of the studies provided by the DTIC contained textual proposals for legislative amendments to the Copyright Act.
- The DTIC did not provide the final version of the Genesis Analytics report, which is not publicly available. If the Copyright Amendment Bill (the Bill) is passed without proper consideration of its socio-economic impact, legal action could be taken against the South African government.
- The Socio-economic Impact Assessment System (SEIAS), which was only provided to the Committee upon request and not shared with the public, further omitted crucial elements needed to reassure the industry. The SEIAS analysed the effects of the proposed Bill on a range of socio-economic factors. However, these assessments did not consider the impact of the Bill on specific industries.
- This was a significant limitation, as the impact of a Bill on a particular industry could be vastly different from its impact on the broader economy – resulting in unintended consequences. Therefore, it was important for socio-economic impact assessments to take a detailed, industry-specific approach, to provide a more accurate and comprehensive understanding of the Bill's impact.

1.2 Poor Drafting:

- The quality of the drafting of the Bill was criticised for having a lack of clarity, having provisions that contradict each other, being a patchwork of different provisions that have been hastily put together, and having been drafted without adequate consultation with stakeholders, including copyright owners, creators, and users.

¹ <https://www.dailymaverick.co.za/article/2023-03-09-wc-standing-committee-prioritises-transparency-and-accountability-in-public-participation-on-bills/>

1.3 Lack of Public Participation:

- The process of drafting the Bill has lacked adequate public participation, leading to potential disparities in the perception and application of the law as highlighted in the Daily Maverick article.²
- The public participation process was criticized for lacking transparency, engagement, and inclusivity. These issues have raised concerns about the legitimacy of the Bill and its ability to adequately address the needs and concerns of all stakeholders.

2. **Substantive Issues:**

2.1 Negative Economic Impact:

- Without a proper Socio-economic Impact Assessment, one cannot predict the Bill's economic impact. However, the clauses relating to fair use and resale royalties (Clauses 12A and 7(c)) may negatively impact creators and industries.
- Clause 12 A reads: “(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: (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; (ii) criticism or review of that work or of another work; (iii) reporting current events; (iv) scholarship, teaching and education; (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche; (vi) preservation of and access to the collections of libraries, archives and museums; and (vii) ensuring proper performance of public administration.”
- Clause 7 (c) reads: “(1) Where a mark or name purporting to identify a person as the author of a visual artistic work appears on such work, that person is, in the absence of evidence to the contrary, presumed to be the author of such work. (2) If a visual artistic work— (a) is a work of more than one author, the presumption in subsection (1) applies to each co-author of such visual artistic work; or (b) includes indigenous cultural expressions or knowledge, the relevant indigenous community is entitled to an equitable share in the resale royalty payable.”
- In 2019, the International Intellectual Property Alliance (IIPA) requested the US government to reconsider South Africa's trade access due to the Copyright Amendment Bill, arguing that it failed to provide adequate protection for US copyrighted works. This could cause South Africa to lose up to 16% of its exports, resulting in a loss of approximately R12 billion. A PricewaterhouseCoopers (PwC) assessment found that the Bill could cause the loss of 1 250 jobs in the publishing industry in South Africa.

2.2 Retrospective and Arbitrary Deprivations of Property:

- The Bill has been criticised for having a retrospective application to copyright assigned before the new sections come into operation and may be unconstitutional on the ground that they constitute an arbitrary deprivation of property under Section 25 of the Constitution. The Bill also proposed to reduce the protection that a copyright owner has

² <https://www.dailymaverick.co.za/opinionista/2023-03-06-the-copyright-amendment-bill-process-may-have-been-scuppered-by-a-procedural-blunder-in-the-provinces-but-it-limps-on-regardless>

over their copyright by introducing new purposes for which works may be used without constituting copyright infringement.

- Sections 12A and 12D would represent disproportionate, and arbitrary, deprivations of the intellectual property rights.
- Section 12 A reads: “(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: (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; (ii) criticism or review of that work or of another work; (iii) reporting current events; (iv) scholarship, teaching and education; (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche; (vi) preservation of and access to the collections of libraries, archives and museums; and (vii) ensuring proper performance of public administration. (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account...”.
- Section 12D reads: “Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities...”.
- Proposed Section 19C(3) provides for a library, archive, museum and gallery to provide “temporary access” to a copyright work to a user or another library. It was not clear from this what was meant by “access”. It was therefore submitted that proposed Section 19C needed to be reassessed.
- Section 19C(3) reads: “A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.”

2.3 Impermissible Delegation of Legislative Power to the Minister:

- The Bill may provide an impermissible delegation of legislative power to the Minister as it confers substantial discretionary powers on the Minister without any oversight from the NCOP. The Bill also includes a blanket contract override clause and grants the Minister powers to lay down compulsory contract terms, limiting the freedom to contract, which is unworkable.
- The Bill grants extensive powers to the Minister, such as Clause 7B, which could lead to arbitrary and subjective decision-making.
- Section 7B reads: (1) “The author of a visual artistic work in which copyright subsists or their heirs, as may be applicable, must be paid royalties on the commercial resale within the art market of that work. (2) (a) Royalties in respect of visual artistic works shall be payable at the rate prescribed by the Minister, after consultation with the Minister responsible for arts and culture. (b) The Minister must, before prescribing the rate referred to in paragraph (a), publish the rate proposed in the *Gazette* and call for written comments by any interested party to be provided within 30 days after publication. (c) The Minister may from time to time in the manner contemplated in paragraph (b), amend the prescribed rate contemplated in paragraph (a). (3) The seller and the art market professional concerned are jointly and severally liable to pay the royalties contemplated in subsection (1) to the author or their heirs, as may be applicable. (4) The author of a visual artistic work or their heirs, as may be applicable, shall be entitled to receive a resale

royalty if— (a) at the time when the resale is concluded— (i) the author is a South African citizen or is domiciled or resident in the Republic or is a citizen of, or domiciled in, a designated country specified by the Minister in accordance with section 37; and (ii) the term of validity of the resale royalty right has not expired; (b) in the case of a deceased author, the deceased was at the time of death a South African citizen or was domiciled or resident in the Republic or was a citizen of, or domiciled in, a country specified by the Minister in accordance with section 37; (c) the resale or any part of the transaction takes place in the Republic or in any country specified by the Minister in accordance with section 37; and (d) the resale of the work is recognisable after the commencement of section 7 of the Copyright Amendment Act, 2017.”

2.4 Negative Impact of Fair Use, Resale Royalties, and Copyright Exceptions:

- As per the News24 article, these provisions could significantly disadvantage creators, providing too broad exceptions and potentially undermining the incentive to create.³
- The introduction of fair use could result in an overly broad interpretation of what constituted fair use, which could lead to copyright infringement, making it difficult for copyright holders to enforce their rights.
- The Bill's introduction of resale royalties for visual artists could discourage investment in the art industry, leading to a decrease in revenue.
- The Bill's introduction of copyright exceptions could lead to the infringement of copyrighted works without the necessary compensation to the copyright holder.

2.5 Lack of Adherence with International Treaties:

- The Bill has been criticised for failing to adhere to international treaties, which could have implications for South Africa's international trade relationships. The Bill may also result in a loss of foreign investment in South Africa's creative industries.
- Section 12A introduces the principle of 'Fair Use', which is contrary to South African law. Fair use is also not a widely used approach globally and it does not comply with the 'Three Step Test' set out in the Berne Convention and the TRIPS Agreement. Section 12 would breach these conventions and would be unconstitutional.

3. **General concerns and proposed amendments**

- a) The definition of “orphan work” should add the word “cannot **reasonably** be identified”. The risks of the amendments on the industry should have been studied by means of a socio-economic study.
- b) The Bill is too prescriptive in terms of the contents of agreements between parties, the fixing of prescribed royalties, etc. This seems to remove some freedoms protected under the Bill of Rights in the Constitution and may result in this Bill being successfully challenged in the relevant court.

³ <https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-owen-dean-rationale-of-copyright-exceptions-20230426>

- c) The fact that this Bill refers to the Intellectual Property Laws Amendment Act (Act 28 of 2013), which has still not been signed by the President, is problematic for the implementation of this Bill, should it be adopted.
- d) Section 7 refers to (1) royalties on resale; (2) payable at the rate prescribed...; (3) the seller and the art market professional concerned are jointly and severally liable... to pay the royalties... to the author or their heirs... all allows too little scope for unique circumstances, such as when the seller may be the artist him/herself, etc.
- e) Clause 9 dealing with section 8A: This section should be scrapped, and relevant amendments made to 6A.
- f) Furthermore: Section 8A(6)(a) which requires that it be proved that someone “intentionally” failed to register an act as per (5)(a) and (5)(b) may be problematic in its application.
- g) Section 9A (Clause 11 in the Bill): As speed is important and action should be taken soon: How will one be able to determine what year was the year in which the majority of offences were committed, if a) the offences were not yet found to be “offences”, and if the trend of “offending” could still be on the increase?

The DTIC has not adequately addressed these issues, necessitating a comprehensive redrafting of the entire Bill.

Minority View

In terms of Standing Rule 90, the African National Congress expressed its minority view to support the Bill but asked that the DTIC effect the concerns raised by the stakeholders during the public participation, which included the disappointment raised in respect of the delays in the legislative process, with “new committees, and demonstration of lack of familiarity with complexities of the Bill nor its urgency” (quoted from SADTU’s submission). Furthermore, consideration should be given to other submissions made at the public hearings, such as Denise Nicholson from Scholarly Horizons, who raised the concern of ample scientific evidence made that includes studies on the evolution of “fair use”. Ms Nicholson advised on appreciating the real benefits of fair use and claimed that it is a “permit to increase access to knowledge” for all South Africans. Further we must be weary of elongated practices of collection management organizations, CMOs that are not regulated resulting to furtherance of exploitation of local users, and artists.

In terms of Standing Rule 90, Al Jama-ah expressed its minority view to support the Bill, requesting that consideration be given to the concerns raised by stakeholders during the public participation process.

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MS CAT MURRAY, MPP
CHAIRPERSON: STANDING COMMITTEE ON FINANCE, ECONOMIC OPPORTUNITIES
AND TOURISM