



THE AMERICAN CHAMBER OF COMMERCE IN SOUTH AFRICA^{NPC}

COMMENT ON THE COPYRIGHT AMENDMENT BILL, 2017

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1. BACKGROUND ON THE AMERICAN CHAMBER OF COMMERCE IN SOUTH AFRICA (AMCHAM)

The American Chamber of Commerce in South Africa (Amcham) consists of 250 American companies. A survey was completed of just 89 of these companies in 2013 and found that the companies contributed a combined annual revenue of R278 billion to South Africa, and employed 221 000 South Africans, both directly and indirectly. These companies contributed more than R400 million to skills and development, spent R144 million on training, and more than R350 million on corporate social investment.

American investment is quality investment and the figures provided above are a clear indication that American business is committed to growing the South African economy by uplifting its people and increasing investment in South Africa.

2. INTRODUCTION

On 27 July 2015, the Department of Trade and Industry first introduced the Copyright Amendment Bill, 2015. It has since been replaced by the current version¹ of the Bill (henceforth “the Bill” or “the Amendment Bill”) which, unfortunately, still creates cause for concern.

Copyright is “that right which vests in the author of every original literary or artistic work and enables him to prevent the unauthorized copying of his work”.² Works are created by authors, and, as a default

rule, the copyright vests in them. However, the author and the owner of the copyright need not be the same individual. Copyright is a branch of intellectual property law.

The Copyright Act (98 of 1978) is the principal statute in South Africa regulating copyright. South Africa is also party to the Berne Convention of 1886, and signed, but has not yet ratified, the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Amendment Bill proposes to amend the Copyright Act.

This submission will make extensive use of the detailed commentary made by the Anton Mostert Chair of Intellectual Property Law at Stellenbosch University (henceforth "the CIP"), authored by Prof Sadulla Karjiker and Mr Cobus Jooste.³

3. CONSTITUTIONAL PROTECTION

The inclusion of a property rights provision in the Constitution of the Republic of South Africa, 1996 (henceforth "the Constitution"), was a break from South Africa's apartheid past which was characterized by a distinct lack of property rights protection for a majority of the population.

With the entrenchment of property rights in South African law, property owners were given certainty that their investments would be protected against arbitrary expropriation. This is especially important for intellectual property.

Section 25(1) of the Constitution provides:

- "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."
- Section 25(4)(b), furthermore, provides:

"For the purposes of this section, property is not limited to land."

Article 27(2) of the Universal Declaration of Human Rights, 1948, to which South Africa is a party, provides:

- "Everyone has a right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author."

² A Copeling. http://hdl.handle.net/10520/AJA00104051_1319. Accessed: 20 June 2017.

³ Anton Mostert Chair of Intellectual Property Law, Stellenbosch University. "[Commentary on the Copyright Amendment Bill 2017.](#)" (henceforth "CIP Commentary").

This is echoed in article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966, to which South Africa is similarly a party. The Declaration is not directly enforceable; however, the International Covenant is.⁴

Section 39(1)(b) of the Constitution provides:

- “When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.”

It is clear, thus, that the Constitution protects intellectual property rights in the same way it protects other, tangible, private property.

The rule of law is established as a co-equal to the Constitution itself in section 1(c), stating that both the Constitution and the rule of law are what South Africa is founded upon. The rule of law requires government according to just legal principles and protects South Africans against arbitrariness and ambiguous law.

4. THE IMPORTANCE OF COPYRIGHT

Copyright is a branch of intellectual property law. All branches of intellectual property law, including the law of patents, trademarks, and designs, serve fundamentally to protect ideas.⁵ Intellectual property law does this to foster innovation, by incentivizing further development and to protect the private interest of the person concerned.

According to the CIP, intellectual property law “performs a dual function: the legal status it affords to intellectual property allows for its commercial application while the limited duration of IP rights stimulate further innovation in pursuit of a similar or greater reward”.

The CIP continues, writing that IP law “facilitates the expansion of the knowledge economy, enriches our cultural environment, promotes all forms of intellectual science, provides self-employment, maintains the foundation for economic growth, encourages pioneering work and continues to serve the public interest”.⁶

Fostering innovation -

⁴ O Dean. <http://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/>. Accessed: 28 June 2017.

⁵ Ideas, as thoughts, are in and of themselves not copyrightable, but IP law does protect ideas which have been reduced to material form. See HB Klopper and P de W van der Spuy. *The Law of Intellectual Property*. (2012). 14.

⁶ CIP. <http://blogs.sun.ac.za/iplaw/2010/02/06/study-ip/>. Accessed: 26 June 2017.

For any society to prosper, research and development of new ideas, technologies, and products must continuously occur. This means that innovation must be encouraged.

Innovation requires incentive. Entrepreneurs must be convinced that the benefit they will draw from their work is greater than the time, effort, and money they expend to actualize their ideas. These incentives must usually, but not always, be of material benefit to the entrepreneur, and not collective altruistic aspirations.

The economic principle of value subjectivity dictates that only the entrepreneurs themselves can decide whether the presented incentive is worth their effort.

When the intellectual property environment of a particular country is structured in such a way that the entrepreneurs do not consider it worth their time, effort, and money to develop new ideas, technologies, or products, they will not innovate.

With South Africa's lackluster economic growth, it is of the utmost importance for the intellectual property environment to be accommodating rather than offsetting. Intellectual property is intended to protect entrepreneurs' property rights in intangibles. This protection is necessary for economic growth.

According to Watson, "In all countries where men and women of talent are free to exercise their skills in the knowledge that wrongs against them or their property will be prevented and punished... prosperity will flourish." He continues, "only where disputes are settled according to well understood and regulated principles of law and settled free of corrupt or totalitarian influence will investment flow and individual and corporate prosperity follows".⁷

Lubna Hasan of the Pakistan Institute of Development Economics continues this line of thought, writing that foreign investors will assess the risk of investment in a particular country based on the protection of their property from potential expropriation.⁸

Protecting private interests -

While section 25(1) of the Constitution plays a vital (indeed, requisite) role in the prosperity and development of the entire South African society, it exists primarily for the protection of individual rights against government overreach. This is the fundamental nature and original role of a constitution.

⁷ P Watson. "The Rule of Law and Economic Prosperity." (2003).

⁸ L Hasan. "Rule of Law, Legal Development and Economic Growth: Perspectives for Pakistan." (2010). 7.

The most important function of property rights is conflict avoidance. Once ownership over property is established, there can be no question about the owner's rightful use, enjoyment, and alienation of the property.

In times past, this guarded against self-help, whereby people would take what they want from each other without cooperation, and hurt one another if necessary. Property rights were an inevitable consequence of human nature.

Intellectual property law protects the intangible property of South Africans from violations by both other persons and government so as to ensure ordinary people can live freely without fear of their interests being violated.

5. COPYRIGHT AMENDMENT BILL

The Copyright Amendment Bill is to be faulted in various respects, the most pertinent of which is the apparent unconsidered legislative drafting which went into the Bill.

As it currently stands, the Bill is ambiguous, and in the face of ambiguous law the rule of law principle found in section 1(c) of the Constitution is violated.

- The Bill *inter alia* includes language not known to South African copyright law and provides for matters already dealt with in other legislation.

5.1 Authors and owners

- The Bill fails to appreciate the fact that in South African copyright law the authors and the owners are the only two relevant parties.
- In section 9B(3), the Bill states that the “user, performer, owner, producer or author” is entitled to receive royalties. This mistake is made at various junctures.⁹

5.2 State funding

- The Bill provides in section 3 (amending section 5 of the Act) that copyright for works “funded” by the State will vest in the State. The Bill, however, does not define “funded” and this is cause for much uncertainty.

The Intellectual Property Rights from Publicly Financed Research and Development Act (51 of 2008) is the primary legislation dealing with State funded works, and “excludes conventional academic works

which would enjoy copyright protection..." These works "will currently, almost inevitably, be owned by an institution, such as a university, because the author is an employee of such institution or because of contractual rights..."

- The proposed section 5(2)(a) upsets this position, however. "Due to the uncertainty of what 'funded' potentially means, it may be arguable that the copyright in such works now belongs to the state".¹⁰

5.3 Fair dealing exception

South African copyright law has a "fair dealing" exception to copyright protection, which like the Copyright Act, is based on the British experience.

- The Bill, however, confuses "fair dealing" and the uniquely American concept of "fair use" in its section 10.

The fair use approach is an "open-ended system of exceptions as a particular act has to be measured against a set of factors in order to determine whether it will constitute copyright infringement." In contrast, in South Africa's fair dealing approach, there are "specified forms of exceptions, namely, acts for particular exempted purposes".

- The Bill in section 10 proposes section 12(1)(b) read *inter alia* "fair dealing or fair use", which indicates clearly a misunderstanding of the difference between the two jurisdictional concepts.
- It is possible for a hybrid system in South Africa which uses both fair dealing and fair use, however, such an intention is not clear from the Bill.¹¹
- In the absence of this, the Bill should remove any reference to "fair use" and ensure the amendments to the Copyright Act accord with the South African law understanding of fair dealing.

The fair dealing exception in and of itself is overly broad in certain respects.

- For instance, in the proposed section 12(1)(a)(iv) the Bill proposes to add "scholarship, teaching and education" to the fair dealing exception. This implies that persons may now use educational textbooks without permission and without remuneration to the copyright holders.

¹⁰

CIP Commentary 10.

¹¹

CIP Commentary 18.

- Writes the CIP: "... there is no evidence to suggest that copyright law is a material impediment to education. If government would like to provide cheaper textbooks without having to negotiate with copyright owners, it is quite at liberty to commission, and print, its own material. Again, if there is a desperate need for translations of copyright works into other languages, why is government not entering into arrangements with the relevant copyright owners in getting the required works translated".¹²

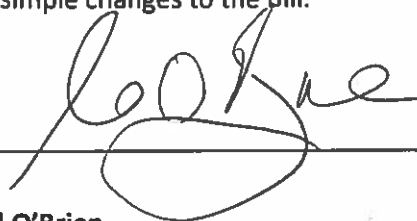
Furthermore, proposed section 13B(1) read with section 13B(6) "clearly allows for the copying of entire textbooks, on the basis that, inter alia, that [sic] the particular textbook was not 'priced reasonably' in relation to the price 'normally charged' in the country for 'comparable works'".¹³

- This is illogical. If there are "comparable works" which are more "reasonably" priced, it follows that the comparable work, rather than the work in question, should be used for the purpose being pursued.
- These provisions undermine intellectual property law as it is understood in South Africa, as well as South Africans' section 25(1) right to property.

6. CONCLUSION

It is true that intellectual property law is supposed to be flexible in order to stay in touch with the technological development of the day. There are, however, certain principles underlying the whole body of IP law which should not be abrogated. The most important of these is that IP law, first and foremost, is meant to protect the intellectual property of innovators, not violate it.

Unfortunately, the ambiguity as well as the content of the Copyright Amendment Bill does just that. It proposes to effectively expropriate the legitimate intellectual property of innovators and universities. It also introduces unnecessary confusion into South African copyright law which can be avoided with simple changes to the Bill.



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¹²

CIP Commentary 20.

¹³

CIP Commentary 28.