**LIBRARY AND INFORMATION ASSOCIATION OF SOUTH AFRICA**
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6 July 2017

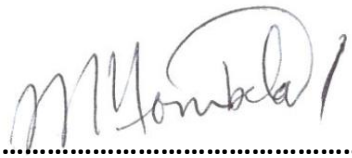
Ms Joanmariae L. Fubbs
Chairperson: Portfolio Committee on Trade and Industry

**COPYRIGHT AMENDMENT BILL [B13-2007]: SUBMISSION FROM THE LIBRARY AND INFORMATION ASSOCIATION OF SOUTH AFRICA (LIASA)**

Dear Ms Fubbs

Following the invitation by the Portfolio Committee on Trade & Industry to interested parties to submit comments on the Copyright Amendment Bill [B13-2017] I would like to submit the document below on behalf of the Library and Information Association of South Africa (LIASA), the Professional Body for librarians in South Africa as recognized by the South African Qualifications Authority (SAQA) for the Purposes of the National Qualifications Framework Act, Act 67 of 2008.

Your kind consideration of the Association's submission would be appreciated.



**…….**
**President – Mr. Mandla Ntombela**

Ms Joanmariae L. Fubbs
Chairperson: Portfolio Committee on Trade and Industry

For attention: Mr. A. Hermans
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**SUBMISSION FROM THE LIBRARY AND INFORMATION ASSOCIATION OF SOUTH AFRICA (LIASA)**

**Introduction and Purpose of LIASA:**

LIASA was founded on 10 July 1997, a representation of the unification of a politically divided Library and Information Services (LIS) profession. The Association continues its mission to focus on integration and social inclusion by connecting the LIS sector and, promoting the development of South Africa through access to information.

It is guided by the vision of a "Dynamic Association of excellence for the Library and Information Services (LIS) sector". Progress in this regard is marked with the 2014 milestone of recognition by the South African Qualifications Authority (SAQA) of LIASA as a Professional Body for the Purposes of the National Qualifications Framework Act, Act 67 of 2008. This award recognizes LIASA's key role in professional skills development in the LIS sector and, in the service delivery of library and information services to our country.

The Associations' Core Values guide and inform its beliefs, conduct, ethical and philosophical standpoints of:

- Providing leadership excellence to the LIS profession, nationally and internationally;
- Engaging in the highest ethical practice;
- Ensuring professional conduct;
- Acknowledging and respecting the diversity and individuality of all people;
- Promote freedom of access to information as enshrined in the Constitution of South Africa;
- Leading the development and growth of the LIS profession through excellence;
- Championing the culture of reading and life-long learning to build an informed nation; and
- Committing to the development and growth of South Africa through excellence in librarianship.

LIASA commends the Minister of Arts and Culture (together with Ministers from 12 other African countries) for signing the Cape Town Declaration in August 2015[1], which, amongst others, includes the following important sentences:

> ***Encourage the implementation of fair and balanced copyright laws to facilitate access to information for all;***

[1] https://www.ifla.org/files/assets/wlic/2015/documents/cape-town-declaration-of-ministers.pdf

***Encourage the use of e-books and virtual libraries more effectively to facilitate cultural and scientific exchange and encourage a culture of reading in the continent;***

***Promote library policies on access to information as part of a universal human rights approach as well as rights of people to knowledge;***

In light of the above, LIASA, the library and information services practitioners and the citizens they serve need fair and balanced copyright laws to enable them to carry out the above commitments and their professional mandates in the interests of all South Africans and all other users of their print and digital resources. LIASA is pleased that the Department of Trade and Industry has included new, fair and practical limitations and exceptions in the Bill in line with international treaties and practices. Notwithstanding the aforementioned advances, LIASA would like to see more open fair use and quotation provisions.

Provisions for libraries and other libraries, archives and museums, as well as for research, education, civic and many other uses are welcomed, especially in the context of a developing country and in a digital world. These will enable, among others, libraries to make progress in digitisation programmes and knowledge-sharing, and carry out their very important roles and mandates in a more efficient manner.

Related to this, LIASA requests the Department's consideration in the Bill of the provision for format-shifting which will help libraries migrate old, unusable and inaccessible material to new technologies, which is not permitted under the current copyright law. In addition, the Association recommends to the Department that in the case where a work undergoes a format change such as in a digitization project, that the rights to the work remain with original copyright owner and is not transferred to or appropriated by other parties involved in the project.

The Association is glad that the Department has adopted some of the excellent provisions from the eIFL Model Copyright law which have been tested and approved against international copyright standards and treaties. The limitations and exceptions for people with various disabilities are also very welcome. However, until the Marrakesh Treaty is ratified by South Africa, allowing reciprocal cross-border sharing, these provisions in the Bill may not be fully effective. We recommend ratification at the first opportunity.

On 16 May 2017, at the Parliamentary briefing meeting, Ms Monica Newton, Deputy Director-General: Arts and Culture Promotion and Development, DAC, stated that the Department was very pleased with the planned copyright amendments and that it had also been involved as a strategic partner.

There are some pertinent issues emanating from the Meeting Summary dated 16 May 2017[2]:-

[2] Copyright & Performers Protection Bills: sectoral impact briefing, Arts and Culture, 16 May 2017

**Of major concern to the DAC is the issue of limitations and exceptions for libraries and archives and persons with disabilities in the Copyright Amendment Bill:**

- **Libraries and archives play a more crucial role than ever before, and current copyright law has severely hampered the services that libraries and archives are able to provide;**
- **There was no provision in the current copyright law for persons with disabilities, which means that copyright permission had to be sought every time a blind person needed information to be converted into Braille or other accessible formats, or a more visual format for deaf people.**
- **Fair Use provisions needed to be open-ended rather than itemising specific uses of material;**
- **The provisions in the Copyright Amendment Bill for orphan works are problematic and impractical. Rather than have orphan works controlled indefinitely by the State, it would be best to deal with them under Fair Use provisions.**
- **The new Bill needed to support provisions for digitisation, preservation and digital curation for libraries and archives and for legal deposit. Many library projects have been hampered by restrictive copyright laws.**

**In conclusion, DAC regarded IP as a cross-cutting issue that impacted largely on arts and culture. This policy should not just understand IP in the narrow confines of copyright regulation but should also understand that culture has as dual character of being an economic commodity as well as a public good and social asset that defined the cultural expression of being South African. DAC believed that the copyright legislation should be part of investment measures to support the growth of South African cultural industries. The use of copyrights to achieve development goals should be at the centre of the legislation. This therefore raised the importance of balancing the needs of content creators and of content using the applicable limitations and exceptions as information by international frameworks. IP should be an asset that was safeguarded to largely benefit local people who are empowered to fully exploit these assets for economic, social and cultural benefit, and whose rights are effectively protected.**

The library and educational sectors have been calling for the aforementioned provisions since 1998. LIASA therefore requests the Portfolio Committee on Trade and Industry and the Department of Trade and Industry to seriously consider their inclusion in the final version of the Bill, and also to include the following recommendations:-

## LIASA RECOMMENDATIONS

### A. Definitions to be amended:

'technological protection measure circumvention device' –

**We recommend this term be deleted and wherever it is used in the Bill that it be changed to 'anti-circumvention device'.**

**B. Sections to be amended:**

**1. Section 5(2)a)**

This section grants copyright to the state for all works "funded by" the State. This section is in direct conflict with the Intellectual Property from Public Financed and Research Development Act No. 51 of 2008, which grants ownership of intellectual property in State funded works to research institutions. State ownership should be limited to works where the State is the true author, i.e. where it controls the actual creation of the work, not where it merely provides the funding for it.

**We recommend that the section be amended to read as follows:-**

***"Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, or made and funded under the direction or control of, the State. . ."***

**Alternatively, we recommend that, such works should rather form part of the public domain so they are free for use by all, and can be collected and preserved by Legal Deposit libraries. This should be limited to works made by, or made and funded under the direction or control, of the State, and not in cases where the State merely funds them, for example, at research institutes or higher education organisations.**

The above recommendation(s) would assist Legal Deposit libraries and other libraries with State created documents, collections and other works, to make State material openly available to the nation, but also allowing information users and researchers to access and use the material without having to seek copyright permission.

**2. Section 12(1)(a)- Fair Use**

The provisions of fair use are limited and exclusive, which means that unforeseen, transformative uses, and/or future unknown or not-yet-thought-of uses are not considered or permitted. This will have grave implications for writers, artists, scholarly researchers, educators, students, librarians, filmmakers, journalists, scriptwriters, speech writers, lawyers, technology innovators, Government officials, etc. Virtually every user of information who quotes from other works and/or creates new works will be restricted or prohibited. It also means that our copyright law will have to be changed as and when new uses and technologies become applicable, which is not practical.

Fair Use provisions in the Bill need to be as ***open*** as possible, much like fair use provisions in the USA, Singapore, Israel, Korea and other countries. The 2017 report by the CCIA in the USA, entitled "*Study Shows Fair Use Industries Make Up One Sixth of the Economy*" [3] confirms the importance of an ***open*** fair use regime. It is hoped this will also happen in South Africa. The 2017 Bill's current provisions will stymie this.

**We recommend this section read as follows:**

[3] http://www.ccianet.org/2017/06/study-shows-fair-use-industries-make-up-one-sixth-of-the-economy/

***In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes <u>such as</u> the following purposes, does not infringe copyright in that work: …***

**<u>Alternatively,</u> a more open purpose could be included in the list of permitted purposes, *e.g. (ix) using a work in a manner that does not serve the same market or purpose as the original work, including for a use that does not express that work to the public, for example for uses in computational analysis.***

3. **<u>Section 12A.(1)(a) - Quotation</u>**

The provision for quotation is far stricter than the Copyright Act No. 98 of 1978, and the 2015 Copyright Amendment Bill. Just by the addition of a comma before 'a summary of that work', the meaning has changed and the provision is now only applicable to 'a summary of that work', and not to all quotations, as has historically been permitted. It now creates an unfair and serious restriction on innovation and creativity. It will have serious implications for anyone who needs to quote from other works, e.g. researchers, students, educators, authors, creators, script/screenwriters, journalists, government officials, lawyers, etc. [4]

**<u>We recommend</u> that this comma be deleted, so that this section reads as follows:**

***Any quotation, including a quotation from articles in a newspaper or periodical that is in the form of a summary of that work: Provided that ….***

4. **<u>Section 9 - Authors' Resale Right</u>**:

The provisions for authors' resale rights are impractical, too broad in scope and will include many orphan works. This right should be restricted to commercial galleries, exhibitions and auction houses. Otherwise they are likely to have negative implications for the sale of artwork emanating from deceased estates, divorce settlements, insolvencies, executions of property, takeovers or mergers, insurance claims, etc. In many instances the artists are unknown and cannot be traced (i.e. orphan works), especially artworks, images, posters, etc. created by foreigners in South Africa, or those created in Apartheid days when artists did not record their names on their works for obvious reasons. This will hamper or prevent the sale of artworks, and thereby affect people's rights to resell artworks they have purchased.

There should be a condition that only if authors have provided their names and contact details in writing to the first buyer when selling their artworks, will they be entitled to any royalties when their works are resold.

**<u>We recommend</u>**:

[4] We support the reasonable and necessary requests relating to fair use and quotation provisions to the Chair of the Portfolio Committee on Trade and Industry, Honourable Ms Fubbs (see: http://infojustice.org/archives/38242) and https://www.linkedin.com/pulse/sa-copyright-amendment-bill-2017-inadequate-fair-use-nicholson

- **that the correct term for this right be used wherever applicable in the Bill, i.e. 'Artist's Resale Right', not 'Resale of royalty right' or 'royalty resale right'.**
- **for purposes of this right, the types of art/artworks (and any excluded works) need to be defined and/or listed in this section;**
- **As is the case in other countries, this right should only apply to commercial art galleries, auction houses and formal exhibitions. This will enable auditable and formal collection of fees by a reputable collection society or other responsible entity.**
- **Should the DTI want this to right to apply to all artworks, then a formal process of copyright registration, like films, will be necessary.**

**5. Section 22 – Orphan Works**

These provisions are expensive, cumbersome and impractical. The use or reuse of applied works for research, educational and/or non-commercial purposes do not complete with the exploitation of the work, since the rights-owners have abandoned or ceased to exploit such works, hence the term 'orphan works'. In some instances, heirs in a deceased estate, do not even know they own copyright in some works. Many orphan works are older works, not well used but still in copyright and still valuable for research, education and other non-commercial purposes.

Section 19C(9) and/or Section 12 fair use provisions would facilitate, not hinder or prevent, access to information. It is very difficult and expensive for libraries (including Legal Deposit libraries), museums and archives, as well as educational institutions, NGOs, and/or individuals to pay for advertisements in two newspapers and the Government Gazette and then to wait some weeks before permission can be obtained to reproduce an article, or extracts from a book or other orphan works. In most cases, the need to use the material is immediate or required in a short period of time. Having to go through this long process, will mean that the information cannot be used. This has serious implications for access to information for research, educational, library and other non-commercial purposes. It also has serious implications for digitisation projects for libraries and archives, and could result in gaps in library digital collections (including Legal Deposit libraries), which could make special, priceless and/or cultural heritage collections inaccessible to future generations.

Section 22 provides for a State fund to which owners of orphan works can submit claims. The problem, however, is that in most instances those rights-owners no longer exploit those works and/or have abandoned them. There will be no way for them to know that monies have been collected by the State on their behalf. Administration of the fund will therefore be problematic, with the possibility of large amounts of money remaining indefinitely in the State fund.

**We recommend:**

**Section 19C (9) is practical and positive for archives, libraries, museums and galleries. Similar provisions and/or Section 12 Fair Use provisions would provide access to information to a much broader user community. They would allow digitisation and preservation projects to proceed in libraries and archives without lengthy delays. They would allow authors, publishers, song/script/screenwriters, researchers and educators, etc. to access and use material, within the**

**framework of fair use criteria, without delay and when required. These provisions would generally be far more practical than Section 22 provisions for orphan works.**

**If these recommendations cannot be applied to orphan works, then we recommend –**

**that requirements in Section 22A be streamlined, made less expensive and the State copyright ownership should not exceed 50 years from the date of publication, or 10 years from the date that an application is first made to the Commission to reproduce the work. Thereafter, it should be released into the public domain. Rights-owners only have 5 years within which to claim any royalties that have accumulated.**

6. **Section 27 – Technological Protection Measure**

This section needs to be refined for clarity and the grammar corrected.

**We recommend the following:**

- **The correct term 'technological protection measure' (or measures) should be used in Section 27, wherever applicable, and other incorrect terms be deleted.**

- **Section 27 needs to be drafted more clearly, as follows:-**

  - ***Section 27 of the principal Act is hereby amended by the addition of the following subsection:***
    ***(7) Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the owner of the copyright, shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment, if such person -***

    ***(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure, if—***
    ***(i) such person knows, or has reason to believe, that that device will or is likely to be used to infringe copyright in a work protected by a technological protection measure;***
    ***(ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or***
    ***(iii) such person knows or has reason to believe that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by a technological protection measure;***
    ***(b) publishes information enabling or assisting any other person to circumvent a technological protection measure with the intention of inciting another person to unlawfully circumvent a technological protection measure in the Republic; or***
    ***(c) circumvents such technological protection measure when he or she is not authorised to do so.***

7. **Section 28P – Exceptions in respect of technological measure**
   The word 'measure' should in the plural, and correctly read as '**Exceptions in respect of technological measures'.**

8. **Term 'Author' vs 'Rightsowner'**
   In many sections of the Bill, including those relevant to people with disabilities, the word ''author'' is used instead of rights-owner. In most instances, authors assign their rights to third parties, e.g. editors, publishers, etc.

   **We recommend:**
   **Where reference is made to author instead of rights-owner, it should read as follows: 'rights-owner', or 'rights-owner and/or author, as the case may be'.**

**FURTHER RECOMMENDATIONS:**

**We also recommend the following necessary additional Amendments and New Sections for the Bill:**

1. **Text and data mining provisions** were recommended in submissions by the educational and library sectors in 2015, but we note, with surprise, that they have not been embraced within the proposed amendments to Sec. 12, nor elsewhere in the 2017 Bill. These provisions are imperative for research, education, scientific analysis, libraries, forensics, technological innovation, and many other activities conducted in a digital world. These provisions are included in proposals for a Treaty on Limitations and Exceptions for Libraries and Archives at WIPO, which SA, as part of the Africa Group, supports. Unless this issue is dealt with, South Africa will be at a permanent disadvantage in the international marketplace.

2. **Perpetual copyright on unpublished works** should be removed so that all works fall within the copyright period of the author's life plus 50 years, with proper acknowledgement when the source is known. This would open up manuscripts, archives, artworks, posters, historical papers, diaries, letters, Apartheid and anti-Apartheid documents, and other cultural heritage (including many orphan works and works from the Apartheid period) that are 'locked up', 'hidden', or 'inaccessible', particularly for libraries, education, and research (including historical and cultural studies). In many instances, the copyright owners are unknown or untraceable, which means access to these works (much of which are part of our cultural heritage) are virtually impossible. This creates great difficulties for libraries, archives and other cultural institutions that are unable to share old unpublished works with the nation.[5]

3. **Section 15(1) of the principal Act of 1978 – Incidental Capture**
   An amended version of Section 15(1) needs to be included in the Bill. The current provision in Section 15(1) of the principal Act of 1978 is unduly restrictive. It does not permit the incidental capture of audio-visual works (radio or TV in the background), or performances (e.g. a street carnival

[5] On 15 June 2017, Australia's Copyright Amendment (Disability and Other Measures) Bill 2017 was introduced into Parliament. This provision and has a transition period until 2019, where any unpublished work may be published and receive the standard copyright term from publication. Any copyright material that remains unpublished at 1 January 2019 will be subject to the same copyright term as a published work.

or band) of the kind commonly captured in cinematographic films. The exception also excludes important works that commonly and incidentally capture background material, such as photographs, posters and paintings. This provision needs to be amended to allow incidental inclusion of a work or other subject matter in other material, as the 2001 EU Copyright Directive on Copyright (Art. 3) permits.

**We recommend that Section 15(1) of the principal Act should be changed to apply to all works, as follows:-**

***15 General exceptions from protection of artistic, literary and other works***

***(1) The copyright in a work shall not be infringed by its inclusion in another work if such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work.***

4. **Section 15 (3) of the principal Act of 1978 – Right of Panorama**

An amended version of Section 15(3) needs to be included in the Bill. The right of panorama provision in 15(3) is unduly restrictive. Access to photographs of public buildings and public art is restricted. This will negatively impact on exhibitions and other activities done by libraries, archives and museums. This will also negatively affect makers of films, documentaries, advertisements, graph designers, web designers and bloggers, and many others.

**We recommend that the scope of Section 15(3) be expanded to include photographs, and other images (such as paintings and posters). We suggest the following amended wording:-**

***(3) The copyright in a work permanently situated in a street, square or a similar public place shall not be infringed by its reproduction or inclusion in another work."***

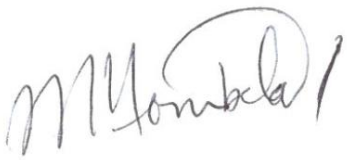
5. **Section 28P. (4) should be added**

**We recommend that Section 28P. (4) be added as follows:**

***28P. (4) Anyone who assists and/or enables another person to circumvent a technological protection measure for the purpose of exercising an exception as provided in this Act, is indemnified from any prosecution or liability in relation thereto.***

**In addition, a right to repair provision should be added. This is crucial, otherwise legitimate re-engineering or other technical activities will be prohibited, e.g. circumvention of software to repair a printer, scanner or other computerised equipment could not be done without authorisation from the manufacturer.**

**Signed on behalf of the Library and Information Association of South Africa (LIASA) on the 6TH day of JULY 2017**



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**President – Mr. Mandla Ntombela**