COMMENTS AND RECOMMENDATIONS ON THE COPYRIGHT AMENDMENT BILL 2017

Denise R. Nicholson (in my personal capacity)

On a personal and institutional level at my employer, University of the Witwatersrand, I have been lobbying for fair and balanced copyright laws since 1998. My brief biography is attached for your information.

Our current Copyright law dates back to 1978, and is completely inadequate, outdated and irrelevant in a digital world. I am therefore commend the Department of Trade and Industry for publishing the first draft of the Copyright Amendment Bill in 2015 and now the recent 2017 Bill. I am pleased to see the Bill includes limitations and exceptions for libraries (including legal deposit libraries), archives, museums and galleries. These flexibilities will enable these key institutions in the chain of knowledge collection, sharing and preservation, to carry out their statutory mandates and provide their services efficiently and effectively to our nation. The limitations and exceptions relating to education and academic activities are also very welcome and will help to transform teaching and learning at the school and tertiary levels. I also applaud the DTI for including provisions for people with various disabilities, something that our current law has failed to do. I encourage the DTI to ratify the Marrakesh Treaty as soon as possible, so that these benefits can include reciprocal sharing of accessible formats across borders. These provisions will bring South Africa in line with copyright laws in many developed countries and will serve as a precedent for other African countries and other developing countries too.

There are some issues that need to be reviewed, added, and/or amended:-

1. **Clear definitions of terms used in the current Act and Bill are needed for:-**
    - **a.** ***The public*** **–** what exactly does this mean? A few people, a crowd, unlimited numbers (e.g. via Internet)?
    - **b.** ***Publish*** **-** e.g. is it published if placed on the Web, or does it have to be published in a book, periodical or other media?
    - **c.** ***Publication*** **–** Is a web blog, article on Linkedin, thesis on an institutional repository a publication?
    - ***d. Data***
    - ***e. Computer***
    - ***f. Computer program –*** *current Act's definition is wordy and not clear.*
    - ***g. Terms of service***
    - ***h. Fixation***
    - ***i. Broadcast*** *(needs to be consistent with other relevant legislation)*
    - ***j. Hosting***
    - ***k. Digital device***
    - ***l. Diffusion service –*** *does this include electronic communication?*

2. **Definitions to be amended:**
    - **a.** ***Technological protection measure(s)*** should be used or anti-circumvention device(s) but not technological protection measure circumvention device.
    - **b.** ***Persons with Disabilities*** **–** the definition is somewhat complex and I would recommend that the clear definition in the first Draft of the Bill in 2015 should be used instead.
    - **c.** ***Orphan Works*** – could be better defined as ''works that are protected by copyright, but the rights-owners cannot be identified or found''.
    - **d.** ***Person with a disability*** **–** shouldn't the word 'perceived' be 'perceptual'?

3. **Section 5(2) (a) grants copyright to the State for all works 'funded by' the State.**
This contradicts the Intellectual Property from Public Financed Research and Development Act of 2008 (see http://www.gov.za/sites/www.gov.za/files/35978_gon1047.pdf) which provides for intellectual property ownership by research institutions, not the State.
Recommend: This section needs to be amended so that the State only has copyright ownership on works created by State employees. Ideally, all State created works funded by taxpayers should be in the public domain and accessible by the nation. Exclusions could be listed, e.g. safety and security issues and other confidential issues.

4. **Section 12(1)(a) – Fair Use**
I commend the DTI for including provisions for ''fair use'' in the Bill. Fair use has been enjoyed by a number of developed countries for many years and it is time that South Africa, a developing country, has the benefit of such flexibility in its copyright law. The only problem is that the provisions in Section 12(1) (a) are closed and limited to a short list of activities. This is very short-sighted as it fails to permit transformative uses, text and data mining (which is crucial for research, technological innovation and knowledge-creation), unforeseen uses, and future uses (as technology creates new media and knowledge-sharing opportunities).
Recommend: Fair use provisions need to be open. Open Fair use has shown to have great benefits for economic development.[1] The 2015 Bill had the words 'such as', but this Bill omitted them. To rectify the situation, the words 'such as' need to be inserted again, as follows:-

> *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 purposes, does not infringe copyright in that work: …*
> **Alternatively,** 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.*

It is noteworthy that the Department of Arts and Culture favours open fair use too. At the briefing meeting at Parliament on 16 May 2017, 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". She stressed that "Fair Use provisions needed to be open-ended rather than itemising specific uses of material" and that "rather than have orphan works controlled indefinitely by the State, it would be best to deal with them under Fair Use provisions."

5. **Section 12A.(1)(a) - Quotation**
Both the Copyright Act No. 98 of 1978, and the 2015 Copyright Amendment Bill allowed quotation in a broad sense. This is crucial for written expression, particularly for authors and other creators. Unfortunately, in the 2017 Bill, by the addition of a comma before 'a summary of that work', the meaning has changed and is now restrictive to anyone who writes and needs to use third party material. In the process innovation and creation for most stakeholders is stymied.
Recommend: The comma after 'periodical' and before 'that' should 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 ….*

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

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

6. **Section 9 - Authors' Resale Right**:
   This correct term is ''Artist's Resale Right". This section is impractical, too broad in scope and will include many orphan works. The right should only apply to commercial galleries, exhibitions and auction houses, as is the case abroad. A list of specific artworks covered under this right should be included in this section. Should the DTI want this right to extend to all artworks, then a formal registration process should be introduced, as is required with films, otherwise it will be too difficult to manage. Indigenous artworks should be dealt with in the TK legislation.

7. **Section 19C(7) – Format-shifting or conversion of works:** This provision is welcomed as it is essential for libraries and archives to ensure access to information and preservation for perpetuity. Lack of such provisions in our current copyright law has created serious problems for libraries and archives, due to obsolescent technologies. To remedy this situation, this provision should be retrospective, otherwise large collections, many priceless and/or cultural heritage works will be inaccessible and impossible to preserve for future generations. Legal deposit libraries will not be able to carry out their statutory mandates in preserving our cultural heritage. Researchers, educators, authors, and other information-users will not be able to use these works to create new knowledge, if they are not converted to accessible technologies.

8. **Section 22 (3) – Assignment:** This provision seems to be ambiguous. Does this mean that 25 years is the minimum period of assignment but can be longer; or does it mean that the maximum period is 25 years and then copyright reverts back to the author/creator? This needs to be clarified.

9. **Section 22A – Orphan Works**
   These provisions are expensive, cumbersome and impractical. They are restrictive and create a barrier to accessing information that is no longer exploited by rights-owners. Introducing a whole process to advertise, apply for copyright clearance and pay fees exacerbates access and essentially locks those works away indefinitely. Setting up a fund to collect fees is also impractical, as rights-owners who are not exploiting their works anymore are not likely to know that royalties are accumulating in a State Fund. The setting up of a fund, personnel and administration costs, etc. will be extremely costly and frankly, are unnecessary, when fair use can address this issue far more effectively.
   Recommend: Fair Use provisions should apply to all orphan works. It is the fairest way to deal with such works.

10. **Section 27 – Technological Protection Measure (correct term)**
    This section needs to be refined for clarity. The grammar is incorrect and the whole section is not easy to understand as the language does not flow easily.

11. **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'.*
12. **Section 28P. (4) –** This section should provide indemnity from prosecution or liability to anyone who assists another person in circumventing a technological protection measure, in order to exercise an exception permitted in the Act. A right to repair should also be included, to enable

legitimate reverse engineering, repairs to printers, computers and other equipment, where circumvention may be necessary to carry out such repairs.

13. **Term 'Author':** In many sections of the Bill, including those relevant to people with disabilities, the word ''author'' is used, sometimes with a list of others (including user, which should be deleted), instead of the term ''rights-owner'' being used. Where copyright is most likely to have been assigned to a third party, the correct term to use would be 'rights-owner''.

14. **Assignments revert after 25 years** – Does this apply to all works, e.g. an assignment to a publisher for a journal article; or does it only apply to commissioned works?

I also support the attached NCLIS document, including the provisions for text and data mining; perpetual copyright on unpublished works; incidental capture and right of panorama.

It is important that the Regulatory Impact Assessment (RIA) is made public before the public hearings in early August 2017. Please can the DTI make it available as a matter of urgency?

Dated 5th JULY 2017

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