



**COMMENTS BY WITS UNIVERSITY DEPARTMENT OF DIGITAL ARTS (WITS DIGITAL ARTS)
ON SPECIFIC CLAUSES OF THE COPYRIGHT AMENDMENT BILL [B13-2017]
17 JULY 2018**

To: Ms J Fubbs, Chairperson: PC on Trade and Industry, via email:

ahermans@parliament.gov.za

Copied to tmadima@parliament.gov.za; and ymanakaza@parliament.gov.za

Dear Honourable Ms. J. Fubbs,

The Wits Digital Arts is a flagship project within Wits University. It provides point of contact between the Science Technology Engineering and Maths (STEM) fields, the Humanities, and the Arts. We produce graduates with a deep understanding of the theories and practice of Technology Arts.

Digital Arts combines the disciplines of Software Engineering and Creative Arts, thus preparing students for careers not limited to:

- Software Development
- Data Visualization/ Sciences
- UX & UI
- Game Design
- Gamification
- Animation
- Experimental Storytelling/ Cybertexts
- Interactive Media Arts (VR/AR/MR/ AI)

The Game Design Programmes were the first of their kind in Africa, and Digital Arts is the leader in the field, creating the market, and ensuring its position as the benchmarking institute for years to come. In collaboration with The School of Electrical and Information Engineering, Wits Digital Arts developed joint Degrees of Bachelor of Engineering Science in Digital Arts as well as Bachelor of Arts in Digital Arts respectively.

As a division inside Wits University, which is a member of Universities South Africa (USAf), Wits Digital Arts endorses the progressive stance mentioned by our esteemed colleague, Denise Nicholson as she notes:

“Universities South Africa (USAf) is the national representative body for 26 public universities in South Africa. It acts as a voice of the sector and engages the state on policy reforms and policy changes. It plays an advocacy role as well. South Africa’s public universities are by far the largest producer of research and creative works and contribute significantly to the socio-economic and cultural development of South Africa. One of our key goals is to support South Africa’s universities to effectively



perform their core functions of teaching and learning, research and community engagement.

Without appropriate and balanced copyright legislation to facilitate access to knowledge, encourage creativity and innovation, and preserve knowledge for future generations, our goals cannot be achieved.

Since the current copyright exceptions for education and libraries are 40 years old, and totally outdated, USAf commends you and your Committee for agreeing to process one holistic Bill in 2018, and not a 2-phased Bill.”

Wits Digital Arts extols the initiatives taken by both the DTI and IESA (Interactive Entertainment Association of SA) in ensuring that **games** and **interactive entertainment** are properly classified in the DTI Act, as witnessed in the Emerging Black Filmmakers Fund programme. However, further engagement with the parliament is still outstanding since **games** (including **analogue** and **or board games**, **interactive stories**, **cybertexts**, **VR/ AR content**, and **video games**) are not explicitly classified in other statutes, including the Copyright Act. The current Copyright Act assumes that video games fall under the category of computer programmes. Such outdated legislation needs to be revised urgently, especially given that the new media and the vast techno-cultures convergence interface directly with a very broad spectrum of interdisciplinary creative content, and hold a great promise for future careers for the South African youth. Prominent voices in South Africa’s Higher Education all call for a decolonized education and inclusive opportunity, in which, without the advocacy for fair use, and other numerous progressive ideas postulated by Recreate SA and USAf in copyrighted material, the dream of a prosperous technology arts, nascent as it is, will be deferred.

Game Design and the Creative Technologies sectors are the fastest growing fields globally, and South Africa possesses an unlimited potential, coupled with an enviable opportunity of creating new types of jobs in the current digital revolution (Geysler, H, 2018; Hall, N, 2016; PwC Entertainment and Media Report, 2016-2019; Accenture Digital, 2017, Marwala, T, 2018). Pioneering Scholar and Head of Department at Wits Digital Arts, Mrs Hanli Geysler, in her research paper, speaks of a serious need to “systemically decolonize” games education so that “*future generations of industry professionals become critically engaged in their creative practice*” (Geysler, H 2018 Decolonising the Games Curriculum: Interventions in an Introductory Game Design Course. Open Library of Humanities, 4(1): 33, pp. 1–31, DOI: <https://doi.org/10.16995/olh.217>). Hanli Geysler’s views on transformation and innovative thinking in the Higher Education system confirm the urgency of our task in reviewing this Copyright Bill, from a decolonized perspective, as she further writes in her paper:

“Decolonisation requires the systematic investigation of the consumption and production of knowledge in order to achieve a recreation of the structures of knowledge themselves. Creative practice, including the making of games, is inherently a form of knowledge production, a position that is emphasised in decolonial theory.” (Ibid).



Furthermore, a decolonized legislation will serve to promote the envisioned innovative, and relevant higher education system and game production value chain necessary for the South African creative technology sector. The South African Copyright Act, as you must be aware, Honourable members of the Portfolio Committee, subscribes to the Berne Convention as well as the TRIPS agreement (Marrakesh Agreement), which we fully endorse, and also being cognizant of our responsibility to ensure its effectiveness in our prosperity.

This submission, Honorable Fubbs, is not limited to the impact of the said Copyright Act in Higher Education, but also to the tech entrepreneurship ecosystem. The games/ interactive entertainment value chain in South Africa is yet to be defined or redefined, so that black entrants in the space have access to business opportunities. IESA reported in 2016 that, out of the 35 games companies in South Africa, only four are black owned. With the increasing number of black students enrolling in the Wits Digital Arts Degree programme, it goes without saying that adequate assistance is required for black companies operating in the space, to ensure their sustainability. The Tech innovation ecosystem in South Africa, coupled with the business incubation programmes, continue to perpetuate the problematic cultural imperialism agenda, in which black (and white South African) content developers in the digital value chain seem to imitate the colonial legacy of the global north. The ethnographic and anthropological outlook informing the tech ecosystem's multiple programmes on digital innovation, game development, and techno-culture deployment needs a very honest and deep assessment. Indigenous knowledge systems, orphan works, and various artefacts of South Africa's cultural legacy will, in future, find their rightful place in the domain of the digital interactive content field. This is but one of the countless complications that Wits Digital Arts seeks to eradicate through its vision of a decolonized education. All of this is however, constrained through the problems existing in the current Copyright Act.

In some of our previous engagements with you, particularly on May 22nd 2018, Filmmaker and colleague at Recreate SA, Rehad Desai asks "How does the global fight over who owns content, copyright and programmes perpetuate the divide between developed nations and developing ones?". The very same questions do apply in the games and interactive entertainment value chain in South Africa and globally.

In helping to urgently address these matters, and to ensure balance and transparency in the Portfolio Committee's technical team nominated to review the Bill in the near future, Wits Digital Arts sincerely requests that Wits Digital Arts' Researcher on IP/ Video Games Economics/ Industry Evangelist/ Game Developer, Lulamile Mohapi be included on the team. Lulamile's Master's Degree research focuses on Envisioning a Sustainable Video Game Industry in South Africa. He is currently developing "Mother of the Nation" a video game tribute to the late Mrs Winnie Madikizela Mandela -a perfect example of procedural rhetoric (*in which the artist uses technology to make a creative, innovative and persuasive statement*). He is also the creator of "Jozi Violentine" -South Africa's answer to Grand Theft Auto (Jozi Violentine is a narrative driven premise on cash in transit heists, love and redemption). Furthermore, Lulamile, as part of his research work, passionately and persistently studies various international government interventions related to sustainability of the video games sector.



Wits Digital Arts would like to thank you and your Portfolio Committee for the opportunity to comment on the specific clauses sent to us on 20th June 2018 and for extending the deadline to 18 JULY 2018.

Wits Digital Arts has noticed that the exceptions for computer programs which were in the original 2017 Bill (Section 19B) have been omitted in toto from the Draft No. 2 Bill. We hereby recommend that they are re-inserted into the Bill. There is no reason why they should be removed.

KINDLY CONSIDER THE FOLLOWING COMMENTS AND RECOMMENDATIONS:-

- Computer programs.

Wits Digital Arts calls for the reinstatement of the exceptions for computer programs which were in the original 2017 Bill. The exception clarified software may be used to “achieve the interoperability of an independently created computer program, or video game/ VR or AR application with other programs.” This exception is critical to create locally produced modifications (or “mods”) to video games and other interactive media products. It is also necessary for reverse engineering and “porting” for different platforms (e.g. consoles, mobile phones, etc.), which may be protected by copyrighted software. Making such copies is critically important for interactive content development and the emerging games and interactive entertainment industry in South Africa.

- **Clause 1, par (i): The definition of “visual artistic work”.**

This definition is acceptable.

‘**audiovisual work**’ means embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which either can be perceived, reproduced or communicated or **played** through a device, and includes a cinematographic film; **video game; interactive narrative; virtual reality; augmented reality; and mixed reality applications.**

- **Clause 5: Section 6A(4); Clause 7: Section 7A(4) and Clause 9: Section 8A(4) – SHOULD ALL BE DELETED.**

Wits Digital Arts duly supports both USAf, Recreate SA and IESA’s position on these clauses.

- **Clause 5: Section 6A(5); Clause 7: Section 7A(5), Clause 7: Section 7B(3)(a)(i) read with section 7B(5); Clause 7: Section 7B(6) and Clause 9: Section 8A(5). Reciprocal application of the resale royalty right – SHOULD ALL BE DELETED.**

Wits Digital Arts endorses both USAf, Recreate SA and IESA’s position on these clauses.

- **Clause 9: Section 8A(4): The minimum content of the agreement related to royalty percentages.**



This clause provides adequate contractual protection for authors. Recreate SA, IESA as well as USAf's comments are fully supported.

- **Clause 11: Section 9A(4): Failure to record acts or to report constituting an offence and the penalty for that offence. SHOULD BE DELETED.**

Wits Digital Arts endorses both USAf, Recreate SA and IESA's position on these clauses.

- **Clause 11: Section 9A(1)(aA): Log Sheets.**

This clause seems realistic in ensuring that relevant information is recorded and royalties are paid accordingly.

Wits Digital Arts endorses both USAf, Recreate SA and IESA's position on these clauses.

- **Clause 12: Section 11 - Nature of copyright in programme-carrying signals.**

Wits Digital Arts endorses both USAf, Recreate SA and IESA's position on these clauses.

- **Section 12, Fair use.**

We strongly support the proposed fair use clause. The fair use properly balances the interests of creators in both the protection of their works from market substitution and in the right to use other works to create new content. The openness of the right to all works and all purposes ensures that future uses not foreseen today can still be lawful as long as they meet the fairness test. This will create a key aspect of the enabling environment for technology growth and innovation in South Africa.

- **Clause 15: Section 15: Panorama rights and incidental use.**

We fully support the positions taken by IESA, Recreate SA and USAf on this matter.

We agree that this clause should remain in the Bill and should not be restricted only to incidental use. We support its broadening to all panorama works such as public historical buildings, sites, statues, sculptures, landmarks, etc. in their new creations, e.g. in photographs, films, **games and interactive entertainment**, videos, articles, exhibitions, posters, or in printed or electronic educational material, or on educational websites. This will enhance creativity and improve the ability of creators to use material fairly, without infringing the rights of the original creators or rights-holders. It will also allow important public buildings and statues, etc. in the post-1994 era to be photographed and/or promoted for educational, research, historical and tourism purposes. Our current Act does not permit this type of use without prior permission from rights-owners.

- **Clause 22: Section 21(3): New process for commissioned work aimed at giving the author more rights.**

We propose deleting Section 2



1(3). Authors and creators should have rights to use their own works for purposes other than for the commissioned purposes.

For instance game developers are sometimes commissioned to develop games for corporate or other clients. Absent contract transferring the copyright in such a game, the author should own the rights to build on that work and the commissioner should have a license to use - not own – the underlying rights. If a commissioned work has not been used within a 3 year period from date of signing of the commission, then the copyright should revert to the creator. The Act should not create ownership rights in the commissioner of the work by default. The Commissioner should only receive a licence to use the work for the purpose of the Commission.

- **Clause 25: Section 22C(3)(c): Reciprocity applying to pay-outs of royalties by Collecting Societies to foreign countries.**

We support the USAf position on this clause.

- **Clause 25: Section 22B(7): Transitional provisions to provide for existing Collecting Societies.**

We support the USAf position on this clause

- **Clause 25: Section 22D(2)(b) and 22D(3): How Collecting Societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer.**

We support the USAf position on this clause.

- **Clause 27: Section 27(6): Increased penalties for infringement. Provision for fines when the convicted person is not a natural person.**

We support the USAf position on this clause.

- **Clauses 29 and 30: Copyright Tribunal:**

We support the USAf position on this clause

- **Clause 37: Transitional provision.**

We support the USAf position on this clause.

Wits Digital Arts trusts that these comments and recommendations will be seriously considered for amendment and/or incorporation in the Copyright Amendment Bill, as the case may be.

Yours sincerely,

Hanli Geyser
HOD, Wits Digital Arts

This document was drafted by Lulamile Mohapi (Teaching Assistant/ Researcher/ Evangelist: Wits Digital Arts) under mandate from Wits Digital Arts on 17 July 2018.