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Re: DFA Submission - South African Copyright Act changes 2017

I. STATEMENT OF INTEREST

This statement is submitted on behalf of the Documentary Filmmakers Association (DFA).

The Documentary Filmmakers' Association (DFA) was established in 2006, to nurture and develop the interests of documentary filmmakers in South Africa.

The documentary film genre is unique. It stimulates public discourse, reflects on social, political, cultural and current events, explores history, commemorates heritage and unearths the mysteries of the universe and the planet. Documentaries tell stories of ordinary and extraordinary people and communities – they celebrate, question, investigate and reflect. The most accessible genre of filmmaking, it is often marginalised by the broadcast industry and by other sectors / genres within the film and video production industry. The DFA aims to unify documentary filmmakers and gain recognition for the genre.

The DFA is a key member of SASFED (The South African Screen Federation).

The DFA is a registered Non Profit Organisation (NPO) that is solely dependent on fundraising. Its mandate is governed by a constitution and a board. All activities are executed by the board members and those they appoint to tasks.

DFA supports balanced copyright law. As creators of film and television works, we have an interest in the ownership of copyright in the work we create. On the other side of the balance of copyright, all copyright Acts (including the South African one) also contain provisions, sometimes known as “user rights”, that allow those producing new work to use copyrighted material without permission or payment in some circumstances. For example, documentary filmmakers commonly utilise their rights to use quotations of copyrighted music, photographs, film footage and other material in order to comment on or criticise that work or to illustrate a point or argument. For documentary filmmakers and other media makers, these features of copyright law are often essential to promote free expression and ensure that copyright does not operate as a charter for censorship.

II. REQUEST TO DO AN ORAL SUPPLEMENTAL PRESENTATION

The Documentary Filmmakers' Association (DFA), recognising it did not have the capacity or ability to effectively canvass all the matters contained in this submission with its broader membership of 173 South African documentary filmmakers at the time of writing this submission, wishes to be afforded the opportunity to supplement this submission in oral presentations, which would allow it more time to canvas the consensus of its membership on these and other issues related to the proposed amendments to the copyright act.

III. SECTION BY SECTION COMMENTS

Overall, there is much in the 2017 bill that is supported by filmmakers. We strongly support the need to update the Copyright Act to fit our current uses and technologies as filmmakers. The Bill, however, falls short on two key points explained in more detail in the comments that follow:

- The 2017 bill (Sections 21(1)(C) and 5) fails to adequately protect the interests of filmmakers in owning copyright in the films they create.

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- Despite some notable improvements, the bill fails to adequately protect the rights of filmmakers to make fair uses of copyrighted works.

A. Ownership of Commissioned Works: Section 21(1)(c)

Section 21(1)(c) has long operated to deny South African filmmakers copyright in their works.

Section 21(1)(c) of the South African Copyright Act vests ownership of a commissioned “cinematographic film” in the commissioning entity, rather than the author of the film.

Section 21(1)(c) of the 1978 (current) Act states:

(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.

The 2017 bill amends Section 21(1)(c) to add language that clarifies that “the ownership of any copyright subsisting in the work shall be governed by contract.” But the bill retains the default position against that of the author, stating:

in the absence of valid contract, ownership shall vest in the person commissioning the work and the author of the work shall have a licence to exercise any right which by virtue of this Act would, apart from the licence, be exercisable exclusively by such author.

In the absence of contractual terms to the contrary, the default provision for other works is that copyright vests with the author who makes the creative decisions in the production of the work. This would be the rule that operated if section 21(1)(c) (and section 5, as discussed below) did not exist.

Many South African filmmakers – and especially documentary filmmakers -- do not own any copyright in the films they produce because section 21(c) gives ownership to the commissioning party as a default, and most films are commissioned by a funder.

The denial of copyright to filmmakers impacts their livelihoods as well as their ability to express themselves as artists. Commissioned films are often shown once on television, never to be seen again, because the filmmaker lacks the rights in the film to license it to others. They thus also lack the rights to continue profiting from their work, reducing the market potential of South African films.

Section 21(1)(c) should be struck from the bill.

B. Section 5: Ownership of “funded” works

It is proposed in the 2017 bill that the government would own the copyright in any work that is “funded by” the state:

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(2)(a) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by or under the direction or control of the state or [such] an international [organizations as may be prescribed] or local organisations.

(b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organisation in question.”

Nearly every movie made in South Africa is funded, at least in part, by a state entity -- either through the SABC, through the National Film and Video Foundation's production development grants of the Department of Arts and Culture, or through the DTI's Film and Television Production Incentives. Enacting the proposed change to Section 5 would thus deprive most filmmakers of the right to own their copyright.

Should any state entity require licence or ownership of copyright in any specific production contracted and intended for state use, a contract can be required which transfers such rights as part of the tender process. Such transfer could be structured to not affect the spirit of co-operation and rights generation for the works creator, who often receive funding from other sources.

We thus propose that Section 5(2) be deleted from the current act, allowing the same copyright defaults to operate for all works.

C. Section 12: Right of Quotation

Perhaps the most useful and flexible user right in the South African Copyright Act is its right of quotation.

Section 12(3) currently states:

The copyright [...] shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

This right allows the use of quotations from any work, for any purpose, and by any user – as long as the quotation is consistent with fair practice. Many of the most common uses of copyrighted content in a documentary film – such as the inclusion of historical footage to illustrate a point or as the subject of commentary – may fall with this broadly worded exception.

The 2017 Act proposes to rephrase the quotation right in a way that would eliminate its openness to quotations for any purpose. It would read:

(a) 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 the quotation shall be compatible with fair use in that the extent thereof shall not exceed the extent reasonably justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation; (emphasis added)

The effect would be that only quotations "in the form of a summary of that work" would be protected by the exception.

To protect the current scope of the quotation right, the bill should delete the comma after the word "periodical" to read:

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

D. Section 12: General Exception

Filmmakers support the added detail that the 2017 bill gives to what is currently a "fair dealing" exception, now proposed to be called "fair use."

Much that is in the proposed fair use standard is useful to filmmakers. We are particularly supportive of the

Bill's proposed clarifications that uses can be made for the purpose of "illustration" – an important and frequent use in documentary film.

We note that the 2017 Bill fails to precede the list of authorized purposes by the words "such as", as does the US and other fair use countries. Thus, the clause would only be applicable to the listed purposes. We take no position on this aspect of the clause.

Assuming that a closed list is retained, we propose two additional purposes to add to the list that are permitted under US law and that would be helpful to many South African filmmakers. Specifically, the bill should protect otherwise fair uses of works for:

- **transformative uses** of works, such that the new work serves a different audience with a different purpose as the original, such as a "mash up" video;
- **non-expressive uses** of works, i.e. technological uses that merely "read" or use a work in a way that does not express it to the public, such as uses through data mining, search, storage, machine-reading, and transmission.

Protection of transformative uses is needed to ensure that filmmakers do not have to receive permission to create new art that in no way competes in the same market as the original. Examples include the kind of mash up videos that are sometimes created through user generated content but can as well occur in the creation of non-fiction and fiction films. The standard proposed above is similar to that endorsed by the US Supreme Court – which finds uses fair where the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message" (*Campbell v. Acuff-Rose Music*, p. 579).

Protection of non-expressive uses is needed by filmmakers to enable them to use technologies in the digital age that make our films possible. This is the standard in the US that has led courts to uphold technological uses needed for transmission, internet search and other common uses today.

E. Incidental Capture

Many copyright laws provide exceptions that permit copyrighted material to be used when it is incidentally captured in the background of a film sequence. It is common, for example, to capture copyrighted music or television playing in the background while shooting documentaries. Indeed, such an exception is one of the most commonly identified by South African filmmakers as an exception that they "know" exists and that they believe is a core attribute of a fair system, even though in fact South Africa's Copyright law lacks such a right. (Flynn & Jaszi, 2009, pp. 17, 25).

The current incidental use exception in Section 15(1) states:

15(1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.

This user right is limited to the capture of "an artistic work", and Section 1 of the Act defines "artistic work." It thus fails to permit the common filmmaker practice of capturing audio-visual works or public art and buildings in the background of their films.

We propose that section 15(1) be expanded to apply to all works, e.g.

15(1) The copyright in an artistic work shall not be infringed by its inclusion in a another work if
(a) such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work, or

(b) the included work is situated in a public street, square or other public place

F. Orphan Works

Filmmakers often seek access to historical materials where the authors of the works are difficult to determine or contact. Works that are subject to copyright but whose rights owners cannot be identified or who no longer exist are known as “orphan works.” Without rights to use such works without a license, the works may cease to be available to the public.

The 2017 Bill proposes an unduly complicated and onerous process to clarify rights to use orphan works. We do not believe the provision will be of use to filmmakers. A better solution would be to add the use of orphan works as one of the purposes for which the fair use factors in Section 12 apply.

A simple model of an orphan works clause exists in Jamaica’s Copyright Act of 1993, Article 71, clarifying that copyright

is not infringed by an act done at a time when, or under arrangements made at a time when — it was not possible by reasonable inquiry to ascertain the identity of the author; and it was reasonable to assume — that copyright had expired; or that the author had died fifty years or more before the beginning of the year in which the act was done or the arrangements were made.

G. Unenforceable Contractual Restrictions

The draft Bill includes a provision on unenforceable contracts that would be beneficial to filmmakers. Section 39(B)(2) clarifies that copyright owners cannot use “shrink wrap” licenses or other contractual terms to deny user rights. For example, the section would prevent a DVD term of sale that forbids its copying for any purpose – including to use rights to shift the content to another format for editing or storage purposes, which filmmakers often do.

We believe there should be an inquiry into the impact of the 2017 bill’s prohibition on a right holder to “renounce a right or protection afforded by this Act.” On its face, this phrasing would appear to make any sale of copyright to another unenforceable, making the right much less marketable.

We would recommend that the Bill consider adopting the wording of UK law, which does not refer to renouncement of rights:

(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

Written submission, signed on behalf of the Documentary Filmmakers Association of South Africa on this the 6th of July 2017 at Johannesburg.



Lesedi Oluko Moche
2016/17 Chairperson - DFA