

Dear Ms Fubbs, MP:

I am writing to commend you on the drafted, revised Copyright Amendment Bill 2017. The Amended Bill is a vast improvement on the prior Bill. In particular, there must be commendation for changes such as state ownership in orphan works, perpetual state ownership, and so on. There are however, some problematic areas regarding the Bill. What follows will be a brief overview of some of the areas I think the Bill could be improved upon.

In section 1, the following definition of accessible format copy is stated:

*[A] copy of a work in an alternative manner or form which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without disability.*

The definition of a person with a disability for said purposes is:

*[A] person who has a perceived or actual physical, intellectual, neurological or sensory impairment which, as a result of communication, physical or information barriers, requires an accessible format copy in order to access and use a work.*

These provisions are highly commendable indeed. The broad nature of the definition, whereby it encompasses disability of all types (e.g. visual impairment as well as hearing loss, similar to the case in Israel), means that the most marginalised sections of society shall be able to benefit from the Amended Bill regardless of the nature of their disability. Thus, unlike the case whereby the political weight preceding the Marrakesh Treaty limited its application to those with visual impairments, South Africa's decision to broaden the scope and be more inclusive is surely a hallmark of distinction.

Section 5 of the Amendment Bill proposes the following: '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' [underline added]. This is deeply problematic. The Amendment Bill does not define what is meant by 'state funding'. This provision appears similar to the Intellectual Property from Publicly Financed Research and Development Act 2008 (IPR Act), which expressly excludes works such as thesis, articles and similar publications (i.e. works which would be considered such for the purposes of copyright). Is the inclusion of 'funded by' in the Amended Bill to be taken as expanding the spirit of the IPR Act to include such works where the creator is publicly financed, thereby amending said legislation? How are the IPR Act and Amendment Bill be read together? For example, will the preliminary research that leads up to an invention be owned by the state as copyright owner, whereas the final invention resulting from said research is to be patented by the publicly financed institution? How would this work in practice? In addition, would the prospect of joint ownership apply between a university and the state the same as it does between a university and private industry per the IPR Act (i.e. would the Amendment Bill imply that any recourse to state funds would render the copyright owned by the state and not the university? Or would there be the option of joint ownership?). What would the funding implications for publicly funded universities be given they are by nature largely reliant on state funding as a means of affording research? Would there be a stress toward the privatisation of universities? Additionally, if the state were to own such copyright, there would be no opportunity to deal with the work as freely as a university could in light of the limited rights of the state as copyright owner set out in the Amendment Bill (e.g. inability to assign state owned copyright), being of detriment to the academic, scientific, and wider community as a whole. One has not even begun to consider the infringement on the autonomy of institutions of higher learning that may be violated by such a proposal. As is evident from this brief discussion, the use of 'funded by' is quite alarming. If it means that essentially all publicly funded universities will no longer own their research outputs, with said copyright vesting in the state, this is most undesirable. It is therefore respectfully and urgently recommended that the term 'funded by' be removed from the said section of the Amendment Bill.

A significant issue with the Amendment Bill is incorrect terminology, most notably found in section 12A. The interchangeable use of 'fair dealing' and 'fair use' shows a lack of understanding of basic intellectual property law. In addition, there is the unheard of term 'fair practice' used at e.g. s12A(b), which is a meaningless misnomer in the legal profession where only the systems of 'fair dealing' and 'fair use' broadly exist. Fair use and fair dealing are fundamentally different concepts, and cannot be conflated with one another as is purported to be done in section 12A. South Africa, like the United Kingdom, uses a system of 'fair dealing'. 'Fair use' – which is a different thing altogether – is used by jurisdictions such as the United States. The concept of fair dealing supposes that use of the copyright protected works are not permitted save for listed exceptions given in legislation. With fair dealing, the presumption is different: The courts apply a set of factors against the facts before it to determine whether or not the use of the copyright protected work is to be considered 'fair'. As this is a case by case basis, there is an emphasis on the courts creating precedent. Fair use is far broader than the exception of fair dealing. Fair use is a common law concept open to interpretation by the courts, which is wholly unsuited to a jurisdiction like South Africa, where access to justice is a significant impediment on people's constitutional right to access the court system. In South Africa, it is clear that the system adopted is one of fair dealing, which is also clear from the phraseology of the Amendment Bill. Utilising a system of fair use would, it is proposed, lead to a host of socio-political issues given the realities of South Africa. The use of the term fair use ought to be omitted and replaced with the correct, appropriate term of 'fair dealing' throughout the Amendment Bill.

Lastly, in various portions of the Amendment Bill, reference is made to the 'author' of the work. For example, in Section 19D(1) of the Bill it states that:

*Any person may, without the authorisation of the author, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met.*

In section 19D(2) this is done once again, where it states that:

*A person with a disability to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the author of the copyright work, reproduce the work for personal use.*

It is important to note the difference between an author and a copyright owner. It is the copyright owner who is vested with the ownership rights in the work, and as such it is the copyright owner whose permission ought to be acquired in such instances save for exceptions such as the ones previously mentioned. This is distinct from the author of a work, who may not be the same person as the copyright owner (e.g. authors working under a contract of employment as per *King v SA Weather Services*). This oversight is noticed across the entirety of the Amendment Bill, and must be remedied.

I thank you for the opportunity to comment on the Amendment Bill. I would like to offer my assistance in this ongoing process in any way that might be of use going forward as an intellectual property law expert.

Signed,

Miss Jade Kouletakis

Lecturer in Law, University of Abertay Dundee

PhD Candidate in Law, University of Cape Town