Copyright Amendment Bill 2015

A submission presentation

To: Portfolio Committee on Trade and Industry
Parliament

By: Graeme Gilfillan
MA Copyright Law UK, EC & US (Kings College)
Nisa Global Entertainment (PTY) Ltd

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Thank you Honourable Chairperson Fubbs and Honourable members of the Portfolio Committee on Trade and Industry for the opportunity to present today.

After a brief introduction I will focus on 3 issues:

1. Some hard facts about copyright in South Africa
2. Submission detail
3. Where the Bill needs attention
Copyright Industries - examples

- Literary works – words – books etc
- Musical works – music
- Artistic works – photos, art, sculpture etc
- Dramatic works – musicals, plays, opera
- Sound recordings – CDs, music downloads, streaming
- Cinematographic films – DVDs, TV, film downloads, streaming and cinemas
- Broadcasts – broadcasters
- Computer programs – the code

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IP Rights - links to the copyright industries

Knowledge “Intellectual Property” (IP)

- Trademarks
- Designs
- Copyrights (including performer rights)
- Patents
- Geographical Indicators
- Trade Secrets
- 45 classes of trademarks
- Artistic Works – Sec 7
- Literary Works – Sec 6
- Musical Works – Sec 6
- Sound recordings Sec 9
- Broadcasts
- Cinematographic Films –Sec 8
- Published Editions
- Computer Programs
- Programme carrying signals
- Moral Rights
- Dramatic Works

IP at Minister/Cabinet level

Knowledge economies
Copyrights are movable property rights....assets and the rights therefore

Equals =

Revenue......in the form of ‘rental’ income arising from use of the assets and rights variously
The status quo under the current Copyright Act 98 of 1978 as amended

Some hard facts about copyright in South Africa
Author versus copyright owners

Authors, composer, arrangers, translators, in the main, never own rights...any rights except moral rights

At membership, SAMRO takes assignment of the performing right in musical works

On signature, a publisher takes assignment of all other rights in musical and literary works

Performers, artists, musicians, in the main never own rights...any rights except moral rights

On signature, a record company takes exclusive right to record the performer

At membership, SAMPRA/RISA takes exclusive right to licence sound recordings for public performance

writers, in the main never own rights...any rights except moral rights

At membership, DALRO takes assignment of the certain right in literary works

On signature, a publisher takes assignment of all other rights in literary works
Creators, writers and performers don’t own their rights unless they own the copyright owners (i.e. publishers and record labels) owning those rights)...which many have done.

With the Collection Societies those rights are never owned
So who are the “copyright owners” or “copyright holders”

Unpacking the stakeholders one finds:

3 Collection Society confederations

- CISAC (SAMRO)
- IFRRO (DALRO) *
- IFPI (RISA & SAMPRA)

3 multi-national Record Labels, 3 multi-national publishers + local publishers

- Sony, Universal Warner
- Sony, Universal Warner

As well as a 5 academic publishers....and book publishers
Royalties and license fees - A massive trade imbalance

2000
SA Royalties and license fees IMPORTS
US$ 245,896 million

2012
SA Royalties and license fees IMPORTS
US$ 2,016 million

2000
SA Royalties and license fees EXPORTS
US$ 49 million

2012
SA Royalties and license fees EXPORTS
US$ 67 million

Sourced from UNCTAD
Or seen in a graphic manner over time...
Comparative: South Africa Creative Service Royalty Imports v Exports showing the deficit growth in millions of US Dollars – 2000 to 2012

Data Sourced from UNCTAD
The straight line deficit growth can be explained in part by the market place.............and in part it bespeaks *inter alia* of the great cost to the country when the copyright law regime (the current Copyright Act 98 of 1978) is unfit for purpose of protecting and developing this country’s copyrights
South African works. Mechanics of global use. Licensing and assignment conduits – what is supposed to happen

Copyright licensing & Assignment Conduits:
1. CISAC/BIEM societies (SAMRO & DALRO)
2. Music Publishers
3. Individual authors
4. IFPI societies
5. Record labels
6. Independent artists
South African works use overseas. Reporting and payment – what is supposed to happen

Payout:
1. CISAC/BIEM societies (SAMRO & DALRO)
2. Music Publishers
3. Individual authors
4. IFPI societies (RISA/SAMPRA)
5. Record labels
6. Independent artists
Instead

We find a practice ongoing since apartheid
Assignment to the UK

Assignment of rights: SA co to UK co

Money flow: to UK co
With the stroke of a silent confidential pen, nor further income ever comes to South Africa again
Assignment to Spain

Assignment of rights: SA co to Spanish co

Money flow: to Spanish co
We find this state of affairs present and represented in South African databases
And viewed all over the world as viewed the lens of the National Anthem

(the authorship and ownership claims as viewed in the Brazilian database)
In the Spanish, Italian and French databases
Reflects a disturbing state of current affairs.
Enter the stage the new Copyright Amendment Bill which for the first time in the history of South African copyright law properly (though some will disagree) introduces (forces some would say) the State into the fray
My submission addresses certain disinformation alleged to represent the views of creators, author and performers.

Such disinformation instead was concocted by copyright owners through their representative organizations.......as views, without consultation or notice to members
Extension users’ “rights” at the expense of creator’s rights (*Users as copyrightholders*)

- Owners have been “users” for decades and will remain so e.g. SABC, Lalela Music, DSD and every department of state and parastatal – nothing to do with the Bill.

- The value gap is a phenomenon of the digital age speaking to the disintegration of the reproduction right and the rise of the share of advertising/subscription revenue – nothing to do with the Bill.

- Local creators have clarity with the introduction of the provision clause in Sect 4,5,6 and 8 ref 50% regardless who owns.

- All creators started at the same place…..learning…..and thus most creator support access to music education having the noose of profit before access removed. Copyright owners see things differently.
Automatic usurpation of copyright where composers and authors are commissioned or funded to create musical or literary works

- Sec 5 (2) is critically important to legal certainty with the insertion of two words “funded by” alongside “made by” - Speaks to works commissioned by the State and the ownership thereof

- Brings the State into being a “copyright owner” and having to take responsibility thereof which should have occurred decades back

- Disrupts a decade old status quo that has only benefitted the few and has obstructed transformation where it matters i.e. the money

- Section 21 (1) (c) remains unchanged and the automatic right for creators to be remunerated is detail in the provided that clause in Sec 4,5,6 and 8 – legal certainty where there was none
Introduction of the US doctrine of Fair Use without holistic consideration of the case law imperatives of that doctrine

- The need to engage “fair use” is a matter of the future not the past. The US copyright law arise from the UK common law in the same way SA does

- Without some aspect of “fair use” ubiquitous platforms and media used today would be (are) infringing

- Approaches of more than 10 (fair dealing) countries that incorporate fair use provisions and fair dealing provisions advise that this is the path to choose
Widening the Gap

• As advised above the value gap is a phenomenon of the digital age speaking to the disintegration of the reproduction right and the rise of the share of advertising/subscription revenue – nothing to do with the Bill

• Bringing in fair use provisions brings those at the coalface of the “value gap”.....Google, You Tube and others into having to deal with copyright owners, it does not shield them

• The EU is the current domain legislatively where the “value gap” is being addressed
Local content

• It must be in the scope of the Ministers responsibilities to address this matter of local content at any time

• The counterfactual confirms that this is a sensitive local, national and international issue

• What we know is that if is there is a strong commitment to local culture there are strong local industries (e.g. the US)

• English is not the only language in South Africa therefore tipping the scale in favour of those who export only English to South Africa is not good policy
The Copyright Amendment Bill.....is it ready?

we’ll....not yet...but nearly
All present including those with contrarian view to this presentation would probably concur with the view that some tweaks are needed where challenges remain respectively.

At the heart of these challenges is the need for improved, not diminished, legal certainty.
Issues remaining with the Bill

• No clause giving the State access to Collection Society and Copyright owner work, authorship and ownership data

• Too many terms remaining undefined – not good for legal certainty

• A important need to widen reference to the Electronic Communications and Transactions Act 25 of 2002 beyond technical measures to as regards the safe harbour provisions and the rules governing data transactions. Almost all culture is digitized traded and paid for via data on the internet

• Including a “dramatic work” as a work eligible for copyright
Thank you