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Promoting human rights and democracy through the media since 1993

18 July 2018

TO: MS J. FUBBS | CHAIRPERSON
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**COPYRIGHT AMENDMENT BILL [B13-2017]:
FURTHER WRITTEN SUBMISSIONS BY MEDIA MONITORING AFRICA,
ENDORSED BY MEDIA24, CAXTON MEDIA AND THE SOUTH AFRICAN NATIONAL EDITORS'
FORUM**

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LIST OF ACRONYMS

CAB	Copyright Amendment Bill [B13-2017]
CCB	Cybercrimes and Cybersecurity Bill [B6 – 2017]
DTI	Department of Trade and Industry
ECA	Electronic Communications Act 36 of 2005
ECTA	Electronic Communication and Transactions Act 25 of 2002
FPB	Films and Publications Amendment Bill [B37-2015]
ICTs	Information and communications technologies
ISC	Inter-departmental Steering Committee
MMA	Media Monitoring Africa
PCTI	Portfolio Committee on Trade and Industry
POPIA	Protection of Personal Information Act 4 of 2014

INTRODUCTION

1. Media Monitoring Africa¹ (MMA) submits this further written submission on the Copyright Amendment Bill B13-2017 (CAB) following the call for further written submissions published by the Portfolio Committee on Trade and Industry (PCTI). This submission is further endorsed by Media24, Caxton Media and the South African National Editors' Forum.
2. MMA has previously engaged in the public participation process relating to the CAB as follows:
 - 2.1. Providing written submissions to the PCTI, dated 7 July 2017, in terms of which MMA highlighted concerns with 17 provisions of the Copyright Act² and the CAB, and, where appropriate, suggested specific textual amendments to the provisions. For ease of reference, the submission is annexed marked "A".
 - 2.2. Presenting oral submissions to the PCTI on 3 August 2017, on behalf of MMA, the South African National Editors' Forum and Caxton Media, which focused in particular on the challenges with the CAB in relation to news media in the digital age, including the provisions on fair use. For ease of reference, the presentation to the PCTI is annexed marked "B".
3. MMA has previously recognised the important strides that have been made in the amendments to the CAB since it was first published. However, MMA is concerned at the PCTI's current approach to limit the present call for submissions to only selected provisions of the CAB – which ignore some of the more contested aspects of the CAB, such as the provisions on fair use – while failing to engage with and address key submissions that have been raised by MMA and others in the past.
4. Accordingly, while acknowledging the limitation imposed by the PCTI to only call for submissions on selected provisions of the CAB, MMA seeks to highlight the following overarching concerns that apply to the CAB and the process of public participation as a whole:
 - 4.1. First, we highlight the need for further public participation on the CAB.
 - 4.2. Second, we reiterate the need to ensure that the language in the CAB is cognisant of and appropriate for digital media, and is rationalised with other

¹ MMA was assisted in the drafting of these written submissions by ALT Advisory: <https://altadvisory.africa>.

² Act 98 of 1978.

South African legal frameworks that apply to information and communications technologies (ICTs) and internet governance.

- 4.3. Third, we briefly address the PCTI's approach to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty).

5. This is dealt with in turn below.

NEED FOR FURTHER PUBLIC PARTICIPATION

6. As mentioned in MMA's submission dated 7 July 2017, we raised concerns with various aspects of the Copyright Act and the CAB, in respect of 17 provisions and the applicable sub-sections thereof. This was set out in detail in Appendix A of the submission dated 7 July 2017, and addressed the following provisions: sections 1, 2, 4, 5, 6, 7, 8, 9, 9B, 9E, 12, 12A, 13A, 15, 20, 22 and 39B.
7. Thereafter, this was further augmented during the oral presentation to the PCTI, which *inter alia* emphasised the following concerns:
 - 7.1. The gaps in the CAB mean that it fails to deal with emerging challenges, and is already at risk of being outdated in the digital era.
 - 7.2. The need to review the self-regulatory method of take-down notices contained in the Electronic Communications and Transactions Act³ (ECTA), particularly in respect of the unauthorised reproduction of news articles.
 - 7.3. The need for the rights of the media to report unhindered on newsworthy events to be protected, and for due regard to be had in respect of universal access and distribution for pictures, videos and other multimedia content.
 - 7.4. The need for mechanisms to protect fair use rights, such as guaranteed visual news extraction rights.
 - 7.5. The lack of clarity on cross-border violations and the interpretation of the first point of publication.
 - 7.6. The need for free access to state-held information without copyright restrictions, taking into account the public investment in the state's intellectual property and the public's right of access to information.

³ Act 25 of 2002.

8. However, notwithstanding the detailed submissions that MMA made to the PCTI, this is summarised in the “Summary of submissions on the [CAB]” only as follows:

“- Welcome new fair a practical limitation, supports the Marrakesh Treaty. Application of copyright in digital social platforms. Take down notices are not sufficient.

- Definition of computer programme is problematic the Bill should be technologically neutral. Fair use supported, fair use supports journalism. Welcome the changes in the Bill, the Bill has made great strides.”

9. The response from the PCTI goes on to read as follows:

“- [The DTI] welcomes support for the ratification of the Marrakesh Treaty. Support the technological neutral approach.

- MMA supports fair use approach.”

10. This response is of concern to MMA for at least the following reasons:

10.1. First, it fails to adequately address the range of concerns raised by MMA in its written and oral submissions. As one example, while MMA does indeed support the need for fair use provisions, we also raised concerns in this regard that needed to be addressed. This included, for instance, the need for appropriate and practical mechanisms to protect fair use rights.

10.2. Second, although it identifies the concerns raised by MMA in respect of the application of copyright to social media platforms and the concerns with take-down notices, no response is provided to this.

10.3. Third, seemingly in response to MMA’s submission that the definition of “computer program” should be technologically neutral, the PCTI’s response states that it supports the technologically neutral approach. However, the revised version of the CAB still does not amend the definition of “computer program” in line with its stated support.

11. MMA is aware that the views expressed by the public through the process of public participation does not bind the legislature if they are in conflict with the views of the government.⁴ However, no indication has been provided to MMA of any such conflict. Indeed, what the constitutionally-required public participation process does require is

⁴ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC) at para 50.

that “a genuine and objectively satisfactory effort must be made” to obtain the views of industry or sector role-players and the public, and to enable a policy-maker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration.⁵ As the Constitutional Court has stated, “[i]nterested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions”.⁶ The requirement of public participation comprises both procedural and substantive elements, and as further stated by the Constitutional Court, “[t]he facilitation or genuineness of any public participation process is of course subject to judicial scrutiny”.⁷

12. Having been privy to many of the submissions presented to the PCTI, MMA is concerned with the present approach to limit the call for further submissions to only limited provisions of the CAB. In MMA’s view, there is no rational basis to call for further submissions on these provisions, whilst ignoring some of the more contested provisions of the CAB, such as the fair use provisions.
13. MMA therefore urges the PCTI to continue to engage in a public participation process on the CAB as a whole, and to continue to review the provisions of the CAB holistically. The need to consider the CAB holistically is well-illustrated by, for instance, the need for technologically neutral / appropriate terminology in the CAB that adequately caters for the application of copyright to digital media, which we address further below.

NEED TO ADEQUATELY CONSIDER THE APPLICATION OF COPYRIGHT TO DIGITAL MEDIA

14. MMA remains concerned that the CAB as a whole does not adequately address the application of copyright in the digital age, in particular to digital media. This is an overarching concern that needs to be addressed holistically in the CAB as it permeates throughout the CAB. There are a number of distinct but interrelated concerns in this regard. We highlight several of the most pertinent concerns below.
15. First, the need for technologically appropriate / neutral terminology. This in itself raises a plethora of concerns, including for instance:
 - 15.1. The need to define “computer program” to provide a technologically neutral interpretation, and provide clarity on whether it includes websites, software applications website applications and / or social media platforms.

⁵ *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) at para 38.

⁶ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 171.

⁷ *City of Tshwane Metropolitan Municipality v AfriForum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC); at para 66.

- 15.2. The use of terminology such as “devices” fails to account for the distribution and reproduction of works on social media.
- 15.3. The inconsistent, and sometimes incorrect, use of terminology such as “telecommunications service of transmissions”, “communication by wireless means”, and “internet access”, that does not cohere with other legislation dealing with electronic communications and ICTs.
16. Second, and directly linked to the submission above, the need to rationalise the CAB with existing or proposed legislation that also relies on technology-related terminology. There are a number of pieces of legislation that rely on terminology or concepts that are also considered in the CAB, including ECTA, the Electronic Communications Act⁸ (ECA), the Protection of Personal Information Act⁹ (POPIA), the Films and Publications Amendment Bill¹⁰ (FPB), and the Cybercrimes and Cybersecurity Bill¹¹ (CCB).
17. An example of this can be found in section 13A of the CAB, which provides in part to “the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work”. Notably, the CAB does not define the terms “network” or “intermediary”, opts for the term “network” whereas it uses the term “wire or wireless means” elsewhere in the CAB, and does not explain how this provision should be read with Chapter XI of ECTA in respect of the limitation of liability of service providers.
18. In sum, all the pieces of legislation referred to above contain provisions relevant to internet governance and ICT policy, but do not provide any indication of how they align or how interdepartmental cooperation will occur for the purposes of overall internet governance policy within the state. Taking into consideration the rapid technological developments, as well as the duty on the state that “[a]ll spheres of government and all organs of state within each sphere must provide effective, transparent, accountable, and coherent government for the Republic as a whole”¹² and must “co-operate with one another in mutual trust and good faith by coordinating their actions and legislation with one another”,¹³ there is an urgent need for an overarching internet governance policy and a central node within the state to be established to manage internet governance.

⁸ Act 36 of 2005.

⁹ Act 4 of 2013.

¹⁰ B37-2015.

¹¹ B16-2017.

¹² Section 41(1)(c) of the Constitution.

¹³ Section 41(1)(h)(iv) of the Constitution.

19. Previously, in a submission made by MMA to the Portfolio Committee on Justice and Correctional Services on the CCB, dated 1 August 2017, MMA called for the establishment of an Inter-departmental Steering Committee (ISC) on Internet Governance that would be responsible for coordinating internet governance and ICT policy in the state in line with Constitutional and international best practice. MMA repeats this submission here and is willing, at the invitation of the PCTI, to make further submissions in this regard.
20. Third, the CAB does not adequately address the issue of jurisdiction and the cross-border nature of publication and copyright enforcement in the digital age. This is particularly exacerbated by the prevalence of social media platforms, and the ease and rapidity with which information can be shared online. Importantly, the distribution of information systems, the hosting of information systems, and the hosting of websites globally presents technical challenges in controlling the first rendering of a work and where it was first published. It is crucial for the CAB to resolve how traditional criteria for copyright should be adapted to accommodate current ICT processes giving rise to copyright works.
21. Bearing in mind the complexities in respect of jurisdiction and the cross-border nature of publication, it is all the more important that the CAB provides for mechanisms to address the currency of digital works and its economic value where copyright infringements occur. This includes in respect of online press reports and news articles. Importantly, MMA reiterates its request for a review of the effectiveness of the self-regulatory relief provided through take-down notices in terms of ECTA, as the existing remedies do not address economic losses or offer an adequate deterrent for online copyright infringements. Again, MMA requests that this process regarding the CAB be used to ensure that measures for urgent and effective relief for the unlawful reproduction and adaptation of digital works are introduced, and done in a manner that respects and protects constitutional rights (including the right to freedom of expression), and contemplates the exigencies of the digital context and the lack of specific geographic location when publishing online.
22. A failure to address these concerns – holistically and duly cognisant of their application to the CAB as a whole – will render the CAB vague and unclear, inapplicable to the practicalities in the digital context, and already outdated before it has even been passed. It is therefore essential that the PCTI ensures that the terminology in the CAB is technologically neutral / appropriate, that it is rationalised with other applicable legislation, and that it can be adaptable and applicable both for current uses in the digital age as well as for future uses that may not as yet be foreseen.

APPROACH TO THE MARRAKESH TREATY

23. Lastly, we note that MMA has expressed its support for the ratification of the Marrakesh Treaty in its written and oral submissions. In the PCTI's document titled "Summary of submissions on the [CAB]", it indicates that even though there is a policy decision to ratify, amongst others, the Marrakesh Treaty, the ratification will follow a separate process only once the process on the CAB has been finalised.
24. In this regard, MMA would urge the DTI and the Department of International Relations and Cooperation to ratify the Marrakesh Treaty without delay, even while the process on the CAB is ongoing. MMA notes that while various amendments in the CAB are necessary to give domestic effect to the Marrakesh Treaty, the ratification of the Marrakesh Treaty itself also provides important rights and duties at the international level.
25. Given the policy decision that has already been taken to ratify the Marrakesh Treaty, and the length of time that the parliamentary processes can take – in this instance, both as it applies to the CAB and to the ratification of the Marrakesh Treaty – it would be remiss to occasion any further undue delay by prolonging the ratification of the Marrakesh Treaty to the detriment of those who fall within its remit.

CONCLUSION

26. As a final note, and flowing directly from the complexities of the CAB and the ease with which members of the public can cause materials that may be subject to copyright to be shared, for instance via social media platforms, it is imperative that the PCTI engages in a public education and awareness campaign in respect of the provisions of the CAB, particularly for children.
27. MMA remains available to assist the PCTI and the DTI in any ongoing efforts to develop an appropriate and responsive copyright framework. Given the complexities involved in this area of the law, and particularly as it finds application in the digital era, MMA urges the PCTI to continue to engage in public participation in a holistic manner on the CAB. Please do not hesitate to contact us should there be any further information that we can provide.

MEDIA MONITORING AFRICA
Johannesburg, 18 July 2018



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Promoting human rights and democracy through the media since 1993

MS JOANMARIAE L. FUBBS

CHAIRPERSON: PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

FOR ATTENTION: MR. A. HERMANS

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07 July 2017

Dear Ms Fubbs,

COPYRIGHT AMENDMENT BILL 2017 / SUBMISSIONS BY MEDIA MONITORING AFRICA

1. INTRODUCTION

- 1.1 Media Monitoring Africa ("MMA") is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.
- 1.2 In the last 24 years we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has, and continues to challenge media on a range of issues always with the overt objective of promoting human rights and democracy through the media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law making processes.
- 1.3 MMA has made submissions relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the National Council of Provinces. In addition, MMA has made submissions to Broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa (ICASA). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding

media accountable through the various means available – all of which can be found on MMA's website. (www.mediamonitoringafrica.org)

- 1.4 A further unique element of MMA's work is focused on improving the portrayal and participation of Children and the media. Children, i.e. Citizens under 18, account for 35% of our population, yet only 6%¹ of our news. We also know that children are afforded special protection under our Constitution where section 28(2) states,

"A child's best interests are of paramount importance in every matter concerning the child."

- 1.5 We appreciate the opportunity to provide you, as we hereby do, our submissions on the Copyright Amendment Bill [2017].
- 1.6 We welcome the amendments in the Bill that clarify the rights or exploitation of copyright works over electronic communications (albeit that greater clarity and consistency in terminology is required.)
- 1.7 Furthermore, we welcome the fair use provisions, provisions for the rights of disabled and the amendments pertaining to the IP Rights Tribunal.

2 GENERAL ISSUES AND RECOMMENDATIONS

- 2.1 MMA welcomes the amendments to the new, fair and practical limitations and exceptions in the Bill in line with international treaties and practices. Provisions for media, research, education, civic and many other uses are welcomed, especially in the context of a developing country and in a digital world. The limitations and exceptions for people with various disabilities are also very welcome. In this regard and to further strengthen the commitment to fair and practical limitations, we urge and recommend that the Marrakesh Treaty is ratified by South Africa as an urgent step.
- 2.2 Despite the intention to render copyright law relevant to the use and exploitation of works in a digital era, MMA submits that Copyright Bill in its current form does not adequately consider the application of copyright to digital media.
- 2.2.1 The tendency to use terminology such as "devices" in the existing law and the Bill fails to account for the distribution and reproduction of works on social media.
- 2.2.2 The Copyright Act defines a "computer programme" which associates with the use of instructions on a computer. The term computer has not been amended to provide a technology neutral

interpretation. Does a “computer programme” include websites, software applications, website applications or social platforms?

- 2.2.3 The currency of digital works for instance online press reports and news articles and its economic value associated with time is not accounted for in contemplating relief for infringement of copyright. What is the urgent relief to counter the unauthorised reproduction of news articles online or the adaptation of news articles culminating in so called fake news? Digital works are economically related to website visits for instance. We urge a review of the effectiveness of the self-regulatory relief provided for in the Electronic Communications and Transactions Act, 2002 through so-called take down notices to remove copyright infringing material. It is our submission that the remedies offered neither address economic losses nor provide the swiftness of action to deter online copyright infringement. We request, through this process that measures for urgent and effective relief for the unlawful reproduction and adaptation of digital works are introduced.
- 2.2.4 The geographical nature of copyright protection and implementation is problematic for the following reason: when publishing online, this publishing does not take place within a specific geographic location. Publishing on the internet cannot purport to be done within a specific geographic location.
- 2.2.5 The inclusion in certain instances that copyright works be “intended for reception by the public” presents regulatory uncertainty concerning the copyright status of works directed at private, closed communities. To account for subscription based models of copyright exploitation for instance online news services, we request that “public” is defined and clarified.

3 SPECIFIC ISSUES AND RECOMMENDATIONS

Please see Annexure A.

4 CONCLUSION

- 4.1 MMA is of the view that the Bill is an excellent step to improving on the outdated copyright law in the country. However, there is no doubt that the Bill, as it currently stands, is fundamentally flawed in its approach to digital works. The mere extension of copyright into electronic media does not adequately provide for the interests of rights holders of digital works.
- 4.2 MMA formally requests the opportunity of making oral submissions at any hearings to be held in respect of the Bill.

Please do not hesitate to contact us should you have any queries or require any further information.

Yours faithfully

A handwritten signature in black ink, appearing to read "WB".

WILLIAM BIRD
DIRECTOR
MEDIA MONITORING AFRICA

APPENDIX A: SPECIFIC PROPOSALS

SECTION OF 1978 ACT	PROVISION	COMMENTS	PROPOSED ALTERNATIVE (WHERE APPLICABLE)
1	<p>'broadcast', when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which(</p> <ul style="list-style-type: none"> a) takes place by means of electromagnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and (b) is intended for reception by the public or sections of the public, and includes the emitting of programme carrying signals to a satellite, and, when used as a verb, shall be construed accordingly; <p>'broadcaster' means a person who undertakes a broadcast;</p>	<p>We note our concern with the treatment of broadcasting in the Copyright Act and emphasise the importance of re-examining whether the regulation of broadcasts as contemplated in Copyright Act is well placed.</p> <p>Notwithstanding, other countries that have opted to retain issues of broadcasting in the Copyright Act have opted to align the definition of broadcast and broadcaster with existing definitions in other legislation. In order to promote regulatory certainty and legislation that considers a digital converged economy, we recommend that this approach is adopted in the Copyright Act.</p>	

1	<p>'person with a disability' includes 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;"</p>	<p>Section 19D(5) of the 2015 Bill contained a simpler definition of a person with a disability - "a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability."</p> <p>The South African Employment Equity Act 55 of 1998 defines disability in similarly broad terms -- "people with disabilities means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment".</p> <p>The 2017 definition appears complex. The first part of the definition requires a "physical, intellectual, neurological or sensory impairment" -- the second part of the same sentence refers to "communication, physical or information barriers." Courts may apply interpretive rules to require that the two different sets of criteria be read as having different meanings with unclear impacts.</p>	<p>A simpler definition that would be more likely to cover all those who need it may be one that returns to the definition of disability from Section 19D of the 2015 bill or crafts a new definition based on the Employment Equity Act, e.g.:</p> <p>"People with disabilities" means people who have a long-term or recurring physical or mental impairment which substantially limits their ability to access and use a work without an accessible format."</p>
General Terminology	<p>"telecommunications service of transmissions"</p> <p>"communication by wireless means"</p> <p>"internet access"</p>	<p>The terminology which, by inference relate to the use of electronic communications are used inconsistently and at times incorrectly.</p>	<p>Technology neutral definitions that correspond with existing legislation should be introduced to effectively deal with the application of copyright in a digital era.</p>

General Terminology	“user”	<p>The term “user” is often included in the classes of rights holders when pronouncing the rights afforded to rights holders.</p> <p>Does a user refer to licensed users?</p> <p>The rationale for attributing copyright to users of work in legislation is unclear and a departure from copyright legislation norms.</p>	<p>Consolidate the use of various classes of rights holders (at times inconsistently) to rights holders.</p> <p>Introduce a definition of rights holders.</p>
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1	<p>'technological protection measure'</p> <p>(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is designed to prevent or restrict infringement of work; and</p> <p>(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that it controls any access to a work for non-infringing purposes;</p> <p>'technological protection measure circumvention device' means a device primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure;</p>	<p>The definition of the technological protection measure circumvention device adds a degree of complexity to the subject of anti-circumvention of lawful measures to safeguard copyright.</p>	<p>Consolidate the definitions and consult international norms on copyright anti-circumvention provisions.</p>
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2	<p>Works eligible for copyright</p> <p>(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright-</p> <ul style="list-style-type: none"> (a) literary works; (b) musical works; (c) artistic works; (d) cinematograph films; (e) sound recordings; (f) broadcasts; (g) programme-carrying signals; (h) published editions; (i) computer programs. 	<p>The clear international trend in copyright law is to move away from providing copyright protection for productions that do not reflect creative activity but merely represent the outcome of skill and effort.</p> <p>Protection for “broadcasts” and “programme- carrying signals” belongs, if anywhere, in broadcasting legislation, rather than in copyright. No modern copyright law recognizes these as categories of copyrightable subject matter, though some national laws do provide limited protection under other rubrics.</p>	<p>Works eligible for copyright</p> <p>(1) Subject to the provisions of this Act, the following works, if they reflect original authorship and are fixed in tangible form, shall be eligible for copyright- . . .</p> <p>Delete references to “broadcast” and “programme carrying signals” in the entire section.</p>
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4	<p>(1) Copyright shall be conferred by this section on every work which is eligible for copyright and which -</p> <ul style="list-style-type: none"> (a) being a literary, musical or artistic work or a sound recording is first published in the Republic; (e) being a cinematograph film, is first published or made in the Republic; (e) being a published edition, is first published in the Republic; (f) being a computer program, is first published or made in the Republic 	<p>The concern relates to the strict requirement of first publication in the Republic for the conferring of copyright.</p> <p>The distribution of information systems, the hosting of information systems, the hosting of websites globally presents a technical difficulty in controlling the first rendering of a work and ultimately where it is first published. Furthermore, business models of outsourcing particularly to further intellectual endeavour in economic terms present a concern that works may be made outside the Republic.</p> <p>Beyond the mere recognition of copyright in digital forms of works, or when communicated digitally, the Act must resolve how traditional criteria for copyright subsistence may be adapted to accommodate current ICT processes giving rise to copyright works.</p>	
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5	<p>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 an international or local organisations.</p>	<p>The international and local organisations to which this automatic conferring of copyright is granted is unclear. Furthermore, the conferring of copyright to state funded, or (unknown) international or local organisation funded works is a concerning departure from the norm of grants designed to stimulate economic endeavour and not for the purposes of ownership by the state or such organisations of the works resulting from the intellectual property of grantees. The local organisations contemplated by this section and rationale for inclusion of local organisations in this clause - are unclear.</p>	<p>Delete “funded by”. Delete “local organisations”. Ensure that the rights granted to international organisations are restricted to prescribed international organisations in accordance with the Copyright Act in force.</p> <p>This section appears to conflict with the Intellectual Property from Public Financed and Research Development Act No. 51 of 2008, which grants ownership of intellectual property in state funded works to research institutions.</p> <p>The goals of promoting public access to government funded research can be effected through open access policies for government funded research. control, i.e.:</p>
6,7,8,9	<p>6(eA) 7(dA) 8(dA) 9(e)</p>	<p>The extension of copyright to provide for the electronic communication, as intended is welcomed. The terminology “wire or wireless means” “internet access” and the proviso “whether interactively or non-interactively” renders the provisions vague.</p>	

<p>6, 7, 8</p>	<p>6 ...Provided that, notwithstanding the transfer of copyright in a literary or musical work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have a right to claim an equal portion of the royalty payable for the use of such copyright work.</p> <p>7 ... Provided that, notwithstanding the transfer of copyright in an artistic work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have a right to claim an equal portion of the royalty payable for the use of such copyright work.</p> <p>8 Provided that, notwithstanding the transfer of copyright in a cinematograph film or audiovisual fixation by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have a right to claim an equal portion of the royalty payable for the use of the copyright film or fixation.</p>	<p>The issue of whether to have an ongoing royalty payment post transfer of copyright is complex one that merits a close, empirical study to determine the administrative costs and administrative oversight of the necessary system to realise such right.</p> <p>The application of the right of royalty to digital media and enforcement on digital media is a second critical consideration.</p> <p>How does this provision apply to copywriters or graphic designers or music used in viral advertising campaigns?</p> <p>What is the process of due diligence to determine the royalties payable and to whom when using literary or musical works?</p> <p>Particularly in creative industries this could deter existing business models of outsourcing creative, design, artistic work and ultimately prejudice the creators themselves who rely on such outsourced work.</p> <p>This section negates contractual arrangements between a creator and owner of copyright work following transfer of copyright. This section has the effect of denying business models premised on the transfer of copyright. Furthermore,</p>	<p>Where resale rights exist, they are generally limited to works of fine art that cause a particular problem with later sales being made at very high levels with no benefit to the artist. This same problem does not generally occur in other markets. Of course, every new expression of a copyrighted work (such as of music for a ring tone or on an advertisement) is subject to licensing. But resales of copyrighted goods (books, CDs) are generally not - in part to permit and encourage used goods markets.</p> <p>CN: The introduction of the 'communication to the public' right first featured in 2015 and whilst it is not bad of itself, the number of cases that have reached the CJEU on the interpretation of art 3(1) of the InfoSoc Directive tells us that this is a complex matter, particularly in the digital environment.</p>
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		<p>there is a potential duplicity in obligations that must be reviewed. What for instance will the user's obligations be to the owner of the copyright to whom the copyright is transferred?</p>	
9B	Resale Royalty Rights	<p>The section creates a significant burden to manage over time with extensive liabilities to creators of artistic works. If Artists' Resale Royalty provisions are retained in the final version of the Copyright Amendment Act, digital works should be exempt. Granting resale rights for all images, including on the internet, could lead to unforeseen consequences for the functioning of the internet and digital media in South Africa.</p>	<p>It is not clear from the provision who will pay the royalty and how. One model is to restrict the application of the right to sales over a certain amount and to require the payment of the royalty by the gallery or auction house. This would avoid every sale at a craft market being subject to a resale royalty.</p>

12	Inadequate fair use and quotation provisions	<p>Add the words “such as” to the introductory language in the new proposed general exception in Section 12 of the Act, so that it reads: “In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work: . . .”</p> <p>This change would follow the examples of the U.S., Israel, Korea and many other countries in enabling the general exception for fair uses to be potentially applicable to fair uses of copyrighted content for any SA Copyright Amendment Bill 2 purpose, including those future uses that cannot be foreseen by the legislature at present.</p> <p>2. Delete the second comma in Section 12A (a), the addition of which makes the provision only applicable to “a summary of that work,” instead of to all quotations as the provision has historically operated.</p>	

12A(c)	<p>...is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work:</p> <p>Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work.</p>	<p>The rationale for the destruction after six months as opposed to 14 days or 30 days for instance is unclear.</p> <p>Destruction must be defined to specifically require that the work cannot be reconstituted using technical means i.e. permanent destruction.</p> <p>Furthermore, the subjective test of what would constitute work of an exceptional documentary nature is problematic.</p>	
	(8) Encryption of computer-generated data is allowed to an extent that it is necessary to decrypt data in a protected state without resulting into incrimination.		Delete

13A	<p>Temporary reproduction and adaptation</p> <p>(a)to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work;</p> <p>(b)to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.</p>	<p>The assurance for internet service providers is welcomed. The assurance is however limited in scope and conflicts with the provisions of the Electronic Communications and Transactions Act. Should a broader limitation of liability not be introduced, then the clause itself may be improved.</p> <p>Adding to the inconsistency in referring to digital communications across the Act, the use of the word “network” is another case in point.</p> <p>The ambiguity in this clause is borne from the reference to “independent economic significance”. Furthermore, it is unclear as to who is contemplated by the term “intermediary” and this should be clarified.</p> <p>.</p>	<p>For recent modern examples of transient copy exceptions, see New Zealand Copyright Act 1994 (amended 2011) Section 43A; Switzerland, Federal Law on Copyright and Related Rights (2008), Ch. 5, Art 24; Poland Act 2/4/94 Art 75(1); Denmark Copyright Act of 2010; Australia Copyright Act of 1968 (Amended 2012), Sections 43A and 43B</p> <p>Ensure consistent terminology when referring to digital communications and associated terminology.</p>
15	<p>Special exceptions from protection of artistic works</p> <p>(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.</p>	<p>The incidental use exception in 15(1) is unduly restricted. It fails, for example, to authorize the incidental capture of audiovisual works (a television or radio in the background), photographs, or performances (e.g. a street band) of the kind commonly captured in cinematographic film. The exception also leaves out key works that commonly incidentally capture background material, such as photographs, paintings, etc.</p>	<p>Special exceptions for incidental copying and with relation to works in public spaces.</p> <p>(1) The copyright in a work shall not be infringed by its inclusion in another work if such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work.</p>

15	<p>(3) The copyright in an artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such work is permanently situated in a street, square or a similar public place.</p>	<p>The right of panorama in 15(3) is unduly limited. It should be expanded to include photographs and other images (such as paintings). The 2001 EU Directive on Copyright (Art. 3), for example, broadly applies to any “work” included in “any material” -- permitting “incidental inclusion of a work or other subject-matter in other material. The language proposed for 2 is adapted from the German Copyright Act Art 59</p>	<p>(2) It shall be permissible to reproduce, distribute and make available to the public works located permanently in public roads and ways or public open spaces. In the case of buildings, this authorisation shall only extend to the façades thereof.</p>
20	<p>(3) Notwithstanding the transfer of the copyright work in a television, film, radio, photography or crafts work to the owner, the creator of the copyright work has the moral right to –</p> <ul style="list-style-type: none"> (a) be attributed as the creator; (b) not to be falsely attributed; and (c) not to have their work treated in a derogatory manner. 	<p>The vagueness of sub-section (c) of this section is problematic, particularly as “derogatory manner” is open to subjective interpretation. The clause wording must be improved to clarify what restrictions are contemplated “a derogatory manner.”</p>	

20	<p>(4) Notwithstanding the transfer of the copyright work in a television, film, radio, photography or crafts work to the owner, the creator of the copyright work or the performer has, exclusive of contractual arrangements, the moral right to receive royalty payments –</p> <p>(a) when repeats of the film, television, radio, photography or art work is used as prescribed by the Minister.”</p>	<p>Any general notion that contributors enjoy a continued, non-contractual right to receive royalties/residuals will seriously limit the usefulness of fair use for filmmakers. Even if the language is limited to TV rerun, its implications could be undesirable. In general, so-called “residual payments” are provided for in individual or group contracts, rather than in national law.</p>	<p>Delete (and perhaps consider incorporate in SA’ Performers Protection Act.)</p>
22	<p>(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicence, the exclusive sublicenser, as stipulated in the Schedule hereto or as the case may be: Provided that such assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment</p>	<p>We submit that a contract should permit perpetual assignment.</p> <p>Problematically, this language requires hardcopy signatures. This is not conducive in a digital economy. Electronic approval and signatures should be permitted in addition.</p>	<p>(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing and signed, including in electronic form, by or on behalf of, the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub-licensor, as stipulated in the Schedule hereto or as the case may be: Provided that such assignment of copyright shall, unless expressly agreed otherwise in writing, be valid for a period of 25 years from the date of agreement of such assignment.</p>

9E	<p>9E. Assignment or waiver</p> <p>(1) Assignment or waiver of a resale royalty right is unlawful.</p> <p>(2) Any term of an agreement which purports to assign or waive a resale royalty right is unenforceable.</p>	<p>This provision would prohibit an author from selling or assigning a resale royalty right.</p> <p>Particularly for the commissioning of digital works that are reproduced by the rights holder (post assignment, distributed and adapted in various forms, assignment is a necessary legal risk mitigation step. Prohibiting the assignment of copyright works goes against ordinary trade or the waiver of the resale royalty right unreasonably interferes with ordinary trade with the result that South African procurers may prefer works that are not subject to South African copyright law.</p>	<p>Delete section.</p>
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13A	<p>13A Temporary reproduction and adaptation</p> <p>(1) Anyone is permitted to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process, provided that the purpose of such copies or adaptations is-</p> <ul style="list-style-type: none"> (a) to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work; or (b) to adapt the work to allow use on different technological devices, such as mobile devices, provided there is no independent economic significance to these acts. 	<p>There is no current exception in the Bill for permanent copies that are nevertheless incidental to uses of works for technological processes. For example, Internet search relies on making copies of content on the Internet and searching that copy. Machine learning and artificial intelligence rely on massive amounts of incidental copying. To authorize such uses, this provision could be re-written to state:</p> <p>13A Technological reproduction and adaptation</p> <p>(1) Anyone is permitted to make transient or incidental copies of a work, including reformatting, where such copies are an integral and essential part of a technical process and have no independent economic significance, including acts such as:</p> <ul style="list-style-type: none"> (a) to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work; or (b) to adapt the work to allow use on different technological devices, (c) to undertake computational analysis, indexing, search, data mining or to enable other uses of works that do not express the work or otherwise compete with the work in the same market as the original. 	
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22	<p>(8) Where the doing of anything is authorized by the grantee of a licence or a person deriving title from the grantee, and it is within the terms, including any implied terms, of the licence for him to authorize it, it shall for the purpose of this Act be deemed to be done with the licence of the grantor and of every person, if any, upon whom the licence is binding.</p>	<p>The proposed revision (see recommendation) suggests a simpler way of saying that sub-licensees are permitted to act without the consent of the original licensor, while eliminating the troublesome notion that one can “derive title” from a licensee.</p>	<p>Unless otherwise prohibited from doing so, a licensee may grant a sub-licence or sub-licences for the doing of acts that fall within the terms of the licence, including its implied term, without the consent of the original licensor.</p>
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39B	<p>39B. Unenforceable contractual term</p> <p>(1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.</p> <p>(2) This section does not prohibit or otherwise interfere with public and open licences to do any act which is subject to copyright or moral rights, settlement agreements, terms of service licences and the voluntary dedication of a work to the public domain."</p>	<p>39B (1) contains important protections ensuring that contractual terms cannot negate the user rights in the act. Some terms of service or sales agreements, for example, attempt to prohibit making private copies even where that right is clearly one of the user under copyright.</p> <p>The first part of the clause is taken from UK law, which states in reference to parody rights:</p> <p>"(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."</p> <p>Note that the UK version does not ban any "renouncement" of rights. The inclusion of this term raises difficult issues as to how authors may contract out their rights in order to profit from them. It would be better to delete this aspect for the section.</p> <p>39B(2) has been added, making clear that the last clause, forbidding the renunciation of rights, does not interfere with the effectiveness of public and open licences (CC, FLOSS, etc.). The clause needs to be re-written however, as it seems to provide "this section does not prohibit . . . open licences to do any act which is subject to . . . settlement agreements,</p>	<p>It should read:</p> <p>"(2) This section does not prohibit or otherwise interfere with public and open licences or voluntary dedications of a work to the public domain."</p> <p>Unenforceable contractual terms that contain unlawful terms of service particularly in online terms of services for websites, portals and the like that house copyright information should not be merely excluded from the application of 39B(1).</p> <p>Unenforceable licence terms should similarly be dealt with separately.</p> <p>The term "terms of service licences" is ambiguous and vague.</p>
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		terms of service licences and the voluntary dedication of a work to the public domain.” That does not grammatically make sense.	
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Copyright Amendment Bill

Presentation to Portfolio Committee on Trade & Industry
For MMA, SANEF & Caxton Media

3 August 2017
[2017/CR.AB/65- 65EE]



Overview of Presentation

- A bit about who we are
- General issues on the CAB
- New(s) Challenges for Copyright & Digital Media
- Fair Use & Media
- Conclusion

About Media Monitoring Africa

- MMA is a registered non benefit trust operating since 1993;
- MMA's vision is a just and fair society empowered by a free, responsible and quality media;
- Through a human rights-based approach, MMA aims to promote the development of:
 - Media that is transparent, diverse, ethical and accountable to its audiences;
 - Critical and constructive communications by the powerful, and;
 - Informed, engaged and connected citizenry.
- Funded by range of local & international donors – audits – high levels of accountability.

About MMA

- MMA has presented to Parliament on a range of issues, including:
 - Transformation in Advertising
 - POSIB Bill
 - Broadcasting Amendment Bill
 - Film & Publications Amendment Bill.
 - SABC Ad-Hoc inquiry into SABC Board

About SANEF

- The South African National Editors' Forum (Sanef) is a non-profit organisation whose members are editors, senior journalists and journalism trainers from all areas of the South African media, chaired by Mahlatse Gallens and her deputy Katy Katopodis.
- Sanef is committed to media freedom, diversity in newsrooms and reporting as well as ethical and independent journalism of the highest quality.
- Sanef also campaigns for the elimination of legislation and commercial pressures that restrict media.

About Caxton Media

- We are involved in publishing more than 120 regional community newspapers, The Citizen daily newspaper and 13 major magazines, as well as commercial printing, packaging, stationery manufacture and book printing.
- We have more than 100 websites, including Local Newspapers, Magazines, The Citizen, and Moneyweb. We serve in excess of 5 million unique visitors every month on the Local Newspaper sites alone. Our social media is one of the biggest in South Africa, topping one million on Facebook.
- Caxton are committed to provide fair, honest, and unbiased reporting on all its platforms. We are committed to transformation and ethical publishing principles.

General comments

1. We welcome the new, fair and practical limitations and exceptions in line with international practice - we urge and recommend the ratification of the **Marrakech Treaty**.
2. The issue that the current draft does not adequately consider the application of copyright to digital media
3. Current draft fails to account of the distribution and reproduction of work on social media.
4. Definition of computer programme is problematic - we need a technology neutral approach.

General comments

5. Issue of unauthorized reproduction of news articles needs to be addressed. We urge a review of the self - regulatory method of take down notices as provided for in the ECA. The remedies offered do not adequately address the economic losses nor swiftness in action.
6. Geographic nature of copyright protection is an issue.
7. The issue of "public" versus "private, closed communities" is of concern. We need "public" to be defined and clarified.
8. Rights of media should be protected to report unhindered on newsworthy events - by ensuring universal access and distribution for pictures, videos and other multimedia content (as traditional media)



New(s) Challenges for Copyright & Digital Media

- Bill in need of a "software upgrade"
- We note need to use more up to date technology neutral terms
- Gaps in the Bill mean we fail to deal with emerging challenges
- While fully support Fair Use – what about plagiarism, and repeated use of content?
 - Impacts bottom line, quality & undermines trust
 - Have Moneyweb Case but need new solutions

News Media in a Digital Age

- Cross border violations how do we deal with these?
 - In digital media where is first point of publication? If using WhatsApp working on US based servers?
 - What do we do about sites registered in other nations but using our content?
 - How do we deal with the speed of how fast information spreads and redress?

Fair Use

- Add the words “such as” to introductory language in the new proposed general exception in Section 12 of the Act, so that it reads: “In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work: . . .”
- Delete the second comma in Section 12A (a), the addition of which makes the provision only applicable to “a summary of that work,” instead of to all quotations as the provision has historically operated.

Fair Use

- MMA & Sanef welcome the acknowledgement that “fair use” is the life blood of the news media
- The Fair Use clauses also aligns copyright use with the freedom of expression and freedom of the media clauses in the constitution
- The implementation of the fair use principle in news and current affairs reporting supports and promotes the creative industries

Set of Principles in Fair Use for Journalism

- Published by the US Center for Media and Social Impact – but applied universally in online, print and broadcast newsrooms to guide:
 - acceptable re-use of content
 - with the necessary attribution or acknowledgement
 - <http://cmsimpact.org/code/set-principles-fair-use-journalism/>
- In reading the Bill we think that these 7 fair use instances are mostly captured in the intent and text:

Set of Principles in Fair Use for Journalism

- Use of copyrighted material as proof or substantiation in news reporting or analysis
- Use of copyrighted material in cultural reporting and criticism, for instance on entertainment reporting
- Use of copyrighted material as illustration in news reporting or analysis
- When copyrighted material is used as historical reference in news reporting or analysis

Set of Principles in Fair Use for Journalism

- Using copyrighted material for the specific purpose of starting or expanding a public discussion of news
- Quoting from copyrighted material to add value and knowledge to evolving news
- Incorporation of copyrighted material captured incidentally and fortuitously in the process of recording and disseminating news

Protection of the news media's fair use rights

- Intellectual Property protection measures at major events of public interest often threaten legitimate news-gathering and news-distribution practices
- International sports bodies, entertainment promoters and event sponsors often put restrictions on the coverage of newsworthy events under the guise of copyright protection
- This is often enforced with accreditation conditions which makes it very difficult for non rights-holders to provide fair and balanced coverage
- Mechanisms are required to protect fair use rights – such as guaranteed visual news extraction rights

Protection of the news media's fair use rights

- The rights of news media should be protected to report unhindered by commercial and copyright provisions on newsworthy events, by ensuring universal news access and distribution rights for pictures, video and other multimedia content by print, broadcast and online media.

Free and unlimited access to information held by the state

- The Bill states that the copyright on information produced and held by the state vests in the state.
- Since this information was gathered and compiled with taxpayers' money, it should be in the public domain for free use without copyright restrictions.
- The public investment in the state's intellectual property and the public's right to know should result in free access to state held information without copyright restrictions, as is the practice in some other jurisdictions.

Conclusion & Requests

- Thank you for the opportunity
- Welcome many changes – taking big strides forward
- Need to make some key changes on Fair Use
- Need a “software upgrade” for the bill – we might need a further process to achieve this with key stakeholders and experts
- Our other practical changes are included in the Annex to our submission.
- Happy to engage and answer any further questions

Thank You

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And thanks also from:

SANEF & Caxton Media