

ReCreate

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18 July 2018

To: Hon J Fubbs

Chairperson of the Portfolio Committee on Trade and Industry

And to: Hon LC Theko, Chair, Sub-Committee on the Copyright Amendment Bill

Parliament of the Republic of South Africa

For attention: Mr. A. Hermans at ahermans@parliament.gov.za

And: Mr T Madima at tmadima@parliament.gov.za

And: Ms Y Madikanza at ymanakaza@parliament.gov.za

Dear Honourable Fubbs and Honourable Theko

WRITTEN SUBMISSION BY RECREATE SOUTH AFRICA

COMMENT ON SPECIFIC CLAUSES OF WORKING DRAFT OF THE COPYRIGHT AMENDMENT BILL (2017) [B13-2017]

INTRODUCTION

1. ReCreate South Africa (“ReCreate”) is a non-profit association, established in 2018 to advocate for a balanced Copyright Act that includes modern creators’ rights.
2. ReCreate is a coalition of writers, filmmakers, photographers, educational content producers, software and video game developers, technology entrepreneurs, artists, poets, producers of accessible format materials, freedom of expression advocates, and other South African creators.
3. ReCreate exists to promote the interests of South African creators with regards to copyright legislation and other policy matters.

4. ReCreate commends the Portfolio Committee for Trade and Industry on its public participation process in relation to the proposed Copyright Amendment Bill, and for affording our constituency an opportunity to comment.
5. ReCreate believes that as much as we are creators, we are users of existing cultural products. Currently our work can be blocked through censorship by those who claim to own our culture. Moreover we often do not own the work we create. And many of us have been disadvantaged by an exploitative system which fails to pay us for our work.
6. Growing the digital economy requires innovation. South Africa is at a disadvantage to other those other countries which have flexible copyright laws that support creativity.
7. We call on Government to include in the ongoing copyright reform three key issues to enable us to create the next generation of South African content for the world. These issues are:
 - 7.1. **The right to create.** We support the enactment of the proposed fair use clause which would provide copyright exceptions we need to make original work and to exercise our freedom of expression. Fair use also would help assure that South Africa copyright can adapt smoothly to future social, economic, and cultural conditions. The fair use right would enable:
 - Adaption to the future
 - Creation of accessible copies for people with disabilities
 - Remixing, transforming and re-interpreting
 - Researching, including through data mining, indexing and search
 - Creating educational works
 - Digital archiving
 - Representing works located in public places
 - Incidentally using background content
 - Parody and satire

We call on government to enact all of the proposed creator rights, including the open fair use / fair dealing exception. The proposed fair use test will ensure that all uses of works are fair to the creator, including by prohibiting substitutional uses in the market. These provisions add certainty and predictability to our existing fair dealing regime.

- 7.2. **The right to own.** We support the proposed amendments, with some clarifications below, that would make the creator -- not the commissioner -- the default owner of our art. Existing law restricts the ability of many creators to distribute, re-mix and profit. The Act should be amended to make independent creators the default owners of copyright in all the works they create.
- 7.3. **The right to earn.** We support, with some clarifications below, the proposed amendments to protect us against abuses and exploitation by collective management organisations (CMOs). CMOs are monopolies that charge others for our work and claim to 'represent' us. But we lack power to act as members in their governance. CMOs should have a fiduciary duty to creators, be subject to member governance, and be subject to government oversight on the reasonableness of their expenditure and pay-outs.
8. ReCreate commends the Portfolio Committee of Trade and Industry for incorporating Flexible Dealing and the Fair Use test into the present draft of the Copyright Amendment Bill, in line with our views outlined above.
9. ReCreate further welcomes the opportunity afforded by the Portfolio Committee of Trade and Industry to make a written submission regarding specific clauses of the Copyright Amendment Bill [B13-2017] released for public comment.

RECREATE'S SUBMISSIONS ON SPECIFIC CLAUSES:

10. ReCreate limits the specific comments below to certain clauses of the Bill referred to in the call for submissions dated 18 June 2018, or to issues that have changed in the Bill since its last public release. We suggest revisions where necessary or helpful. We endorse the draft wording of the other clauses not specifically mentioned herein.
11. **Fair use**
- 12A. (1) (a) *In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:*
- (i) *Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;*
- (ii) *criticism or review of that work or of another work;*

- (iii) reporting current events;
 - (iv) scholarship, teaching and education;
 - (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
 - (vi) preservation of and access to the collections of libraries, archives and museums; and
 - (vii) ensuring proper performance of public administration.
- (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to —
- (i) the nature of the work in question;
 - (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
 - (iii) the purpose and character of the use, including whether—
 - (aa) such use serves a purpose different from that of the work affected; and
 - (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
 - (iv) the substitution effect of the act upon the potential market for the work in question.
- (c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author 18 shall be mentioned.

Comment

12. As noted above, we strongly support the proposed fair use clause. The fair use clause adds a modern open general exception to our law that will allow user rights to evolve with technology and address new uses that cannot be envisioned today. It is a vital and necessary component of a just and balanced copyright regime.
13. Economic studies suggest that the presence of fair use, and more open limitations and exceptions more generally, will benefit South Africa while causing no harm to traditional copyright intensive industries. See, e.g., Deloitte, Copyright in the digital age: An economic assessment of fair use in New Zealand, <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf>; Sean Flynn and Mike Palmedo, The User Rights

Database: Measuring the Impact of Copyright Balance. PIJIP Working Paper 2017-03., <http://infojustice.org/flexible-use/research>

14. We oppose the positions of some that South Africa should add to its law the so-called “fifth factor” that was added to Singapore law in its 2006 revision, but which is now being removed by that country. The so-called fifth factor adds a second bite of the apple on traditional fourth factor of fair use and fair dealing laws. It thereby threatens to add undue weight to the economic interests of rights holders in the traditional fair use and fair dealing balance.
15. **Computer programs**
The new draft of the Copyright Amendment Bill Draft omits the exceptions for computer programs which were in the original 2017 Bill. We oppose this revision.
16. The prior draft contained a well-crafted exception modelled on EU law that has been in place since 1991. The exception would have clarified that copies of software code may be made to “achieve the interoperability of an independently created computer program with other programs.” Although one could interpret the proposed fair use clause to cover such actions, the proposed exception would have added clarity to the law. making such copies for software development is essential to the emerging software engineer industry in South Africa and causes no harm to any rights holder. The exception should be restored.

Proposed Revision

Restore 2017 Bill Section 19B, i.e.:

“General exceptions regarding protection of computer programs ”

19B. (1) A person having a right to use a copy of a computer program may, without the authorisation of the rights holder, observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if that person does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he or she is entitled to perform.

(2) The authorisation of the rights holder shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:

- (a) *The acts referred to in subsection (1) are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorised to do so;*
- (b) *the information necessary to achieve interoperability has not previously been readily available to the persons referred to in paragraph (a); and*
- (c) *those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.*
- (3) *The information obtained through the application of the provisions of subsection (2) may not be—*
- (a) *used for goals other than those to achieve the interoperability of the independently created computer program;*
- (b) *given to others except when necessary for the interoperability of the independently created computer program;*
- (c) *used for the development, production or marketing of a computer program substantially similar in its expression to the program contemplated in subsection (1); or*
- (d) *used for any other act which infringes copyright.*
- (4) *For the purposes of this section, “ ‘interoperability’ means the ability to exchange information and to use the information which has been exchanged.”*

17. **Clause 1, par (j): The definition of “visual artistic work”** reads in relevant part:

‘visual artistic work’—

(a) means an original artistic work that was created for the purpose of being appreciated by the visual sense and includes a painting, a sculpture, a drawing, engraving and a photograph; and

(b) excludes commercialised artistic work such as industrial design, works of architecture, engineering drawings, digital or graphic design, fashion design, interior design, circuit layouts, commercial logos and icons for applications;

Comments:

- 12.1. We support the definition in its intent to limit the resale right to works of visual graphic art. We also propose that the definition follow that of the European Union (EU), which makes clear that for the purposes of the resale right a copy of a work is *not to be regarded as a work unless the*

copy is one of a limited number which have been made by the author or under the artist's authority. e.g., a series of numbered prints.

- 12.2. We also suggest that the legislation incorporate a value floor, so that common craft works not become subject to a resale royalty right. In the EU and in Australia, the royalty does not apply to any art work with a value less than €1,000 in the EU or AU\$1,000 in Australia. A similar exclusion should be incorporated in South African law, e.g. limiting the right to works with a value of less than R10,000. In addition, in the EU the resale right is not applicable where the seller has acquired the work directly from the artist less than 3 years before the resale and where the resale price does not exceed €10,000. A similar provision should be incorporated in local law.

Proposed Revisions:

- 12.4. The addition of a new section 7A(6): :

(6) There shall be no resale royalty right on the commercial resale of a visual artistic work:

(a) if the resale price is less than R10,000 or, if the sale price is paid in a foreign currency, the amount worked out using the exchange rate applicable at the time of the commercial resale that is equivalent to R10,000; or

(b) where where the seller has acquired the work directly from the artist less than 3 years before the resale and where the resale price does not exceed R100,000; or

(c) if the resale price of the work is less than an amount prescribed by the regulations - that higher amount.

18. **Sections 6A, : The minimum content of the agreement related to royalty percentages** reads in relevant part:

(1) Notwithstanding the assignment of the copyright in a literary or musical work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 6.

(2) (a) *The royalty percentage contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the author and the person to whom the author is assigning copyright, or between their representative collecting societies.*

(b) *Any subsequent assignment of the copyright in that work is subject to the agreement between the author and the assignee, contemplated in 7 paragraph (a), or the order contemplated in subsection (3), as the case may be.*

(3) *Where the author and assignee contemplated in subsection (2)(a) cannot agree on the royalty percentage, the author or assignee may refer the matter to the Tribunal for an order determining the percentage.*

(4) *The agreement contemplated in subsection (2)(a) must include the following:*

(a) *The rights and obligations of the author and the assignee;*

(b) *the royalty percentage agreed on, or ordered by the Tribunal, as the case may be;*

(c) *the method and period within which the amount must be paid by the assignee to the author;*

(d) *a cooling off period; and*

(e) *a dispute resolution mechanism.*

(5) (a) *A person who obtained the copyright in a literary or musical work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement negotiate a percentage of royalty as contemplated in subsection (1) with the author of the copyrighted literary or musical work in question.*

(b) *Subsections (2), (3) and (4) apply to the negotiation contemplated in paragraph (a).*

(c) *Section 22A, with the necessary changes, applies where the author cannot be found.*

(d) *This subsection does not apply—*

(i) *to a copyright owner who commissioned, or who is the author of, the copyrighted literary or musical work in question; or*

(ii) *where the term of copyright in the copyrighted literary or musical work has ended.*

Sections 7A and 8A contain identical provisions.

Comments:

Several provisions have similar wording, requiring royalties to be paid on works after the “assignment” of copyright. As creators of work that rely on selling our works to others, we are weary of provisions of law that encumber sales with additional duties.

Often, photographers, filmmakers and others rely on our ability to sell works, not on continued royalty streams, for our income. We are not aware of other laws with similar provisions. We are unclear how the provision might affect the sale of our works. We call for this issue to be deleted from the present bill.

Proposed Revision:

Delete sections 6A, 7A and 8A in their entirety.

19. **Clause 7: Section 7A(5): The issue of retrospective application** reads in relevant part:

(5)(a) A person who obtained the copyright in an artistic work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement negotiate a percentage of royalty as contemplated in subsection (1) with the author of the copyrighted artistic work in question.

(b) Subsections (2), (3) and (4) apply to the negotiation contemplated in paragraph (a).

(c) Section 22A, with the necessary changes, applies where the author cannot be found.

(d) This subsection does not apply—

(i) to a copyright owner who commissioned, or who is the author of, the copyrighted artistic work in question; or

(ii) where the term of copyright in the copyrighted artistic work has ended.

Comments:

Retroactive application of laws can raise serious constitutional and moral issues. A person who bought an artistic work expecting to hold its title free and clear should not be required to go back and pay a perpetual royalty for it after the fact. Sales made under the terms of the law at the time of the sale should remain final so as to not disrupt markets for creative works.

Proposed Revision:

Delete section 7A(5) in its entirety.

20. **Clause 7: Section 7B(3)(a)(i) read with section 7B(5): Reciprocal application of the resale royalty right** reads in relevant part:

(3) *royalty if—*

(a) *at the time when the resale is concluded—*

(i) *the author is a South African citizen or is legally domiciled or resident in the Republic or is a citizen of a designated country; and*

Comments:

The bill proposes that the resale royalty right is only applicable to citizens of the Republic and other “designated” countries. The Berne Convention requires that a resale royalty right, where provided, “may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.” The provision of the rights in South Africa must conform to this provision.

Proposed Revision:

(3) *royalty if—*

(a) *at the time when the resale is concluded—*

(i) *the author is a South African citizen or is legally domiciled or resident in the Republic or is a citizen of another country if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed*

21. **Clause 7: Section 7B(6): Retrospective application of an artist’s resale right** reads in relevant part:

(6) *Sections 7B, 7C, 7D and 7E apply to a visual artistic work that was made before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic work falls within the application of this Act.*

Comments:

The clause should make clear that the bill only applies to future (post-enactment) sales of existing works.

Proposed revision:

Substitute for section 7B(6):

(6) Sections 7B, 7C, 7D and 7E apply to future sales of a visual artistic work that were made before the commencement date of the Copyright Amendment Act, 2019, if that visual artistic work falls within the application of this Act, and only to the extent of sales of the work after the date of commencement of this Act and before the expiry of the right.

22. Clause 11: Section 9A(4): Failure to record acts or to report constituting an offence and the penalty for that offence reads in relevant part:

(4) (a) Any person who intentionally fails to register an act as contemplated in subsection (1)(aA)(i), or who intentionally fails to submit a report as contemplated in subsection 9A(1)(aA)(ii), shall be guilty of an offence.

(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.

(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the year immediately preceding the calculation, under all transactions to which this Act applies.

Comment:

Making the violation of the clause an offense puts the onus of enforcement on Government. Enforcement should rather continue to be the duty of collective management organizations through civil law.

Proposed revision:

Delete section 9A(4) in its entirety.

23. Clause 12: Section 11 - Nature of copyright in programme-carrying signals reads in relevant part:

(1) Copyright in programme carrying signals vest the exclusive right to undertake, or to authorize, the—

(a) direct or indirect distribution of such signals by any distributor to the general public

or any section thereof in the Republic, or from the Republic;

(b) communication of the work to the public by wire or wireless means;
(c) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person.

Comment:

It is important to limit the exclusive rights in programme-carrying signals to whatever rights may exist (if any), under general copyright principles, to the signals themselves. They should extend to the works carried over those signals (which are owned by someone else). Section 11 of the Act grants rights only with respect to signals, not underlying works. Proposed Sections 11(b) and (c) alter this basic principle -- giving broadcasters rights with respect to works they did not create. As creators, we oppose giving broadcasters rights to communicate or make available to the public our works. Their rights must be limited to works that they themselves create.

Proposed Revision:

Delete sections 11 (b) and (c).

24. **Clause 15: Section 15: Panorama rights and incidental use** reads in relevant part:

(1) (a) The copyright in an artistic work shall not be infringed by its [inclusion] use in [a cinematograph film or a television broadcast or transmission in a diffusion service] another work, if—

(i) such [inclusion] use is merely by way of background, or incidental, to the principal matters represented in [the film, broadcast or transmission] that other work; or

(ii) the artistic work so used, is situated in a public place.

(b) The copyright in an artistic work shall not be infringed by the issue to the public of copies, or the communication to the public of anything, whose making was by virtue of this subsection not an infringement of the copyright.

Comment:

The proposed amendment would usefully apply the incidental use provision to all works and enact a right to make use of works situated in public spaces. This provision will improve the ability of creators to make fair uses of works in ways that

are protected in many other countries and that are fair to the creators of the original works. We therefore support the enactment of this section.

25. **Clause 22: Section 21(1)(c) and section 21(3): New process for commissioned work aimed at giving the author more rights** reads in relevant part:

(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] an audiovisual work 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 ownership of any copyright subsisting in the work shall, subject to subsection (3), be governed by agreement between the parties.;

(b) by the substitution for subsection (2) of the following subsection: "(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international or local [organization] organisation concerned, and not in the author."; and

(3) (a) The agreement contemplated in subsection (1)(c) may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission.

(b) Where the agreement contemplated in subsection (1)(c) does not specify who the copyright owner is, limited ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to such rights as may be necessary for the purpose of the commission.

(c) The author of a work contemplated in subsection (1)(c) may approach the Tribunal for an order—

- (i) where the work is not used by the copyright owner for the purpose commissioned, licencing the author to use that work for such purpose, subject to a tariff determined by the Tribunal payable to the copyright owner; or*
- (ii) where the work is used for a purpose other than that for which it was commissioned, ordering the copyright owner to make payment of royalties to the author for such other use.*

(d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the following:

- (i) The nature of the work;*
- (ii) the reason why, and period for which, the copyright right owner did not use the work; and*
- (iii) public interest.*

(e) Where the work contemplated in subsection (1)(c) is of a personal nature to the copyright owner, the Tribunal may not licence the author to use that work.

Comment:

As creators, we have strong interest in the rights to own the works we we create and to have those rights assigned to others only through contract. We support proposed section 21(c) to the extent that it restores the default that creators own the works they create absent contract. But Section 21(3) of the present Act takes away that right - giving commissioners the right to “own” copyright in our works. In addition, section 21(2) gives the state rights to own works we create under government commission. We oppose these provisions. The default for ALL works not created by employees should be that the creator owns copyright absent contract.

Proposed Section 21(3) contains limited redress. it proposes a very complicated and litigation-oriented process for providing authors’ rights in respect of commissioned works where they are not used. Creators should not have to approach the Tribunal to use rights in their works where the commissioning party does not use the commissioned work. Creators should be able to act more proactively. Only if there is a dispute with the rights holder should the Tribunal, and its expenses, be engaged.

The Bill does not address the common situation in which a creator seeks to use a work, or the source material to create the work, for purposes other than that for which it is commissioned. A filmmaker, for example, should retain rights to show a work internationally that was commissioned only for the local market.

Proposed Revision:

Substitute for section 21(3):

(a) Where the agreement contemplated in subsection (1)(c) does not specify who the copyright owner is, the author of the work shall be the owner of copyright and a license to the copyright shall vest in the person commissioning the work to enable those uses necessary for the purpose of the commission.

(b) The author of a commissioned work may terminate the assignment of copyright if, after one year from the date of assignment, the work is not used by the copyright owner for the purpose commissioned.

(c) Where the work is used for a purpose other than that for which it was commissioned, and outside the scope of any contract regarding the work, the user of the work shall be liable to the author for a fair royalty, which may be determined by the Tribunal.

(d) In the absence of an express contractual provision to the contrary, the author of the commissioned work shall retain the right to use the commissioned work, and the source material created in furtherance of the commission, for purposes other than those for the purpose commissioned.

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

(3) A collecting society may—

. . .

(c) only make payment of royalties to a collecting society outside the Republic, if there is a reciprocal agreement regarding royalties in place between that country and the Republic.

Comment:

This is a fair provision that ensures that copyright is not a means only of exporting royalty payments from South African consumers to foreign jurisdictions.

27. Clause 25: Section 22D. How Collecting Societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer reads in relevant part:

Control of collecting society by performers or copyright owners 22D.

(1) A collecting society is subject to the control of the performers or copyright owners whose rights that collecting society administers, and the collecting society shall, in such manner as may be prescribed—

(a) collect and distribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) and subsection (2);

- (b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the purpose of distribution of the royalties to the performers or copyright owners; and*
- (c) provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner.*
- (2) Royalties distributed among the performers or copyright owners shall—*
 - (a) as far as may be possible, be distributed in proportion to the actual use of their works; and*
 - (b) be distributed to the performer or copyright owner as soon as possible after receipt thereof, but no later than three years from the date on which the royalties were collected.*
- (3) Where the collecting society, for whatever reason, is unable to distribute the royalties within three years from the date on which the royalties were collected, that collecting society shall—*
 - (a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and*
 - (b) upon demand by the performer or copyright owner, or their authorised representatives, pay over the royalties together with the interest earned on the investment contemplated in paragraph (a)*

Comment:

In general, the model proposed seeks to protect the author interests through accreditation. Although the law requires that CMOs be controlled by their members, it lacks specific requirements in this regard. The duties of CMOs to the creators they represent could be affected by making creators the members of the corporation under the terms of the Companies Act or Cooperatives Act.

CMOs should lack any ability to profit from their activities. Thus, the law should require that they be formed as either non-profit corporations or cooperatives under South African law.

There is little oversight in the Act over the amounts that are distributed to creators rather than spent on administration. In Brazil, for example, the law requires that at least 85% of the income received is paid out to creators, rather than spent on administration.

We propose that, consistent with the Company Act, the officers and directors of all CMO have a fiduciary duty to exercise their powers in good faith and in the best interest of the creators/members of the organization.

Proposed Revision:

Control of collecting society by performers or copyright owners 22D.

(1) A collecting society shall be incorporated as a non-profit public corporation under Chapter 3 and Schedule 1 of the COMPANIES ACT 71 OF 2008, or as a Cooperative under CO-OPERATIVES ACT 14 OF 2005, as amended. In particular, the articles of incorporation of the Society must provide the following :

- (a) The society must must apply all of its assets and income, however derived, to advance its objects of collecting and distributing copyright royalties to creators and copyright owners as the members of the society.*
- (b) In no case should the administrative costs of the CMO exceed 15% of its gross revenue.*
- (c) The society must have its annual financial statements audited every year.*
- (d) The society shall adhere to the Enhanced Accountability and Transparency rules of Chapter 3 of the Companies Act applicable to public corporations.*
- (e) The society shall be subject to the control of the performers or copyright owners whose rights that collecting society administers. The South African resident members of the organization shall be the organisation's voting members reflected on a membership register.*
- (f) The rights of control of the members over the society shall include:*
 - (i) Rights to access to company records consistent with Sections 26 and 31 of the Companies Act ;*
 - (ii) Rights to participate in the governance of companies consistent with part F of the Companies Act for a person who is entitled to exercise any voting rights in relation to a company;*
 - (iii) Rights to participate in the annual general meeting of the Society, which shall be the highest decision-making structure of the society, consistent with Chapter 4 of the Cooperatives Act.*

(2) The collecting society shall, in such manner as may be prescribed—

- (a) collect and distribute royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) and subsection (2);*
- (b) utilise amounts collected as royalties in accordance with the constitution of the collecting society contemplated in section 22B(4)(c) only for the*

purpose of distribution of the royalties to the performers or copyright owners; and

- (c) provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner.*
- (3) Royalties distributed among the performers or copyright owners shall—*
- (a) as far as may be possible, be distributed in proportion to the actual use of their works; and*
 - (b) be distributed to the performer or copyright owner as soon as possible after receipt thereof, but no later than one year from the date on which the royalties were collected where the performer or copyright owner can be ascertained with exercise of due diligence.*
- (4) Where the collecting society, after exercise of due diligence, is unable to distribute the royalties within three years from the date on which the royalties were collected, that collecting society shall, with approval of its membership at the Annual General Meeting, distribute the funds:*
- (a) to support social and cultural funds that operate for the benefit of creators; or*
 - (b) to add the funds to the rights revenue to be distributed in the end of that year.*

28. Clause 27: Section 27(6): Increased penalties for infringement. Provision for fines when the convicted person is not a natural person reads in relevant part:

- (6) A person convicted of an offence under this section shall be liable—*
- (a) in the case of a first conviction, to a fine [not exceeding five thousand rand] or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates; or*
 - (b) in any [other] case other than those contemplated in paragraph (a), to a fine [not exceeding ten thousand rand] or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.*

Comment:

This section proposes the removal of the current caps on damages and to add fines of a *minimum* of 5% or 10% of the turnover of an organization.

Fines of 5% or 10% of revenue may be excessively disproportionate to any harm caused by copyright infringement. For example, the current provision could allow a fine of 10% of the annual turnover of a university for the second time it shares a copyrighted work in excess of its fair use rights, even if such use was a reasonable interpretation of the school's rights. Alternatively a filmmaker could sacrifice 10% of the budget of their entire production company. Such penalties are excessive.

There should be protections for liability from non-commercial uses for public interest purposes - such as for educational, research and library uses -- in reasonable reliance on fair use.

Proposed Revision:

(6) A person convicted of an offence under this section shall be liable to pay a fine in an amount proportionate to the infringements and the financial harm caused to the copyright holder.

(7) Any person using a work for an educational or research purposes, for library use, to provide access for a person with a disability, or for another private or public interest purpose shall not be guilty of an offence where such person reasonably believes that the work is in the public domain, operating under an open content licence, or that such use is otherwise permitted by law.

29. Section 29A(3): No power to review administrative action by the Commission
reads in relevant part:

(3) The Tribunal does not have the power to review any administrative action by the Commission that does not relate to Copyright.

Comment:

This provision prevents the tribunal from ruling on administrative justice claims that may be brought against the Commission. Other courts would presumably retain jurisdiction over such matters.

CONCLUDING REMARKS

30. ReCreate reiterates its support for the Flexible Fair Use provisions envisaged in the present amendments to the Copyright Act.
31. ReCreate believes that the proposed amendments could be further improved based on our submissions. Copyright law plays an important role in South Africa for promoting creativity and benefiting creators of an original work. However, ReCreate also believes that copyright protection should not outweigh the right to create, own and earn.
32. ReCreate appreciates the opportunity to provide its input to the Portfolio Committee on Trade and Industry and stresses that the above comments are made in the spirit of balancing the rights of the creators of original works and the commissioners of such works in South Africa.
33. If any additional information regarding these submissions is required, please contact ReCreate on recreateza@gmail.com.