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NCOP Select Committee on Trade and International Relations
Attention Mr Hlupheka Mtileni [hmtileni@parliament.gov.za]

Submission on the Copyright Amendment Bill [B13B - 2017]

I note my appreciation to the Committee for the opportunity to submit comments on the Copyright Amendment Bill. The revision of copyright law is of great significance from a national innovation and development perspective. It is a major research focus of the work which we undertake at the University of Cape Town under the auspices of the DST/NRF SARChI Research Chair: Intellectual Property, Innovation & Development, the Intellectual Property Unit¹ and our affiliated research networks such as the Open African Innovation Research Partnership.² I have read the meeting summary of the committee's session on the Bill held on 13 February 2019 and the DTI's briefing presentation made at that session.³ The committee deliberated on the following areas: [1] tagging of the Bill; [2] fines for juristic persons (clause 11), [3] the digital environment, [4] royalties, [5] retrospective effect of some provisions, [6] the significance of incorporating provisions which South Africa is not yet bound by and [7] performers' protection.

Considerable work has been done on the Bill since the first draft was published several years ago. Many submissions and some legal opinions have been placed before the National Assembly's Portfolio Committee (PC) on Trade and Industry which has held public hearings and other consultations. It is not possible, nor desirable, to rehash all the arguments made in previous submissions to that PC. This submission will address some aspects of issues 3 and 6 above. It gives a high level overview of the issues at stake from a public interest perspective. Detailed clause by clause commentary can be sourced, upon request, for the committee's consideration.

Regards

A handwritten signature in blue ink, appearing to be 'CN'.

Caroline Ncube

¹ <http://ip-unit.org/>

² <http://www.openair.org.za>

³ Parliamentary Monitoring Group, NCOP Trade and International Relations National Credit Amendment Bill: negotiating mandates; Copyright Amendment & Performers' Protection Amendment Bills: briefing, 13 February 2019

Brokering an equitable copyright law in the Public Interest

Intellectual property, including copyright, is a highly contested area because there are several stakeholders with contesting interests. The key stakeholders are authors who create or make works and have exclusive rights in them; intermediaries who commercialise and distribute works (e.g. publishers, recording companies) ; users of the work who consume it for various purposes including educational and recreational uses (e.g. educational institutions and individuals respectively) and other authors who may use existing works as inspiration for their own new works. The innovation and socio-economic context is also of critical concern and differing view points are held about the relationship between innovation and IP and the economic impact of legislative reforms. It is important for unbiased, correct and up to date evidence to be placed before law and policy makers to enable them to craft evidence based law and policy.

Copyright law reform debates therefore need to take the innovation and socio-economic context, the imperative of the protection of the rights of authors and other stakeholder interests into account. An equitable approach to this consideration would include reliance on sound evidence; a consideration of constitutional rights (e.g. the right to education) and the public interest. These considerations are not easily weighed and debates tend to get heated. At such times there is a rise in the use of political rhetoric, and in regrettable instances, the personification of arguments that vilify other participants in the debate. I would urge the committee to make every effort to cut through such phenomena so that a truly principled consideration of the legal and public interest aspects can be conducted.

References:

On nuancing IP frameworks:

Caroline B Ncube 'Calibrating Copyright for Creators and Consumers: Promoting Distributive Justice and Ubuntu' in R. Giblin & K. Weatherall (eds.), *What if We Could Reimagine Copyright?*, Canberra: ANU Press, (2017) 253 – 280 – [SSRN](#) – [Publisher's version](#)

Jeremy de Beer '[Evidence-based Intellectual Property Policymaking An Integrating Review of Methods and Conclusions](#)' OpenAIR Working Paper 1 Published: 2 January 2017 -

Caroline B Ncube '[Harnessing Intellectual Property for Development: Some Thoughts On An Appropriate Theoretical Framework](#)' (2013) 16(4) *Potchefstroom Electronic Law Journal* 370 – 396

On discourse of IP:

Caroline B Ncube 'The politics of national intellectual property policy design and the provision of health services in South Africa' (2015) 3 *South African Intellectual Property Journal* 15 – 39

Copyright and the digital environment

The digital environment poses a lot of challenges for copyright policy and regulation and to be both relevant and responsive copyright law needs to address these challenges. However the statutory provisions need to be broadly phrased so that they do not hinge on specific technologies because if it does so, the law would soon be outstripped by changes in technology (this is the so-called 'technological neutrality' approach). The interests of those who make works (technically referred to as "authoring a work"), commercialise and use or enjoy copyright protected works in the digital environment have to be addressed. This approach is clearly encapsulated in the Preamble of the WIPO Copyright Treaty as follows:

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,
Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,
Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,
Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,
Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

The key challenges that the digital environment poses for copyright regulation are the following:

- a) the scope of rights in digital content. New ways of distribution (e.g. streaming) may require a new articulation of rights to ensure adequate protection. Specifically, the introduction of the right to communicate to the public (article 8 WCT).
- b) An appropriate set of exceptions and limitations that complies with the Three Step Test and maintains a balance between rightholders' protection and access to the protected work in the public interest. The key exceptions and limitations that one would expect to see in a copyright updated to cater for the digital environment would include those that cater for :
 - a. purposes to which people typically put works to use in the digital environment e.g. parody; non-commercial user generated content
 - b. education and research e.g. institutional repositories
 - c. persons with disabilities e.g. access to digital content for persons with visual, aural, physical and cognitive disabilities
 - d. libraries, archives, museums and galleries (GLAM) e.g. with regard to digitization
- c) ease of infringement and the distribution of infringing copies.
- d) The enforcement of copyright: This usually requires a multi-faceted approach that engages a number of strategies and raises access in the public interest concerns. For example:
 - a. the appropriate regulation of new means/mechanisms to secure copyright protected works to eliminate or, at least reduce, infringement. For example the use of technological protection measures relies on anti-circumvention provisions which provide sanctions against those who bypass or disable (technically referred to as "circumventing ") these protection measures. However, these provisions need to be equitably crafted so that exceptions and limitations are available and applicable.
 - b. the use of graduated response schemes which create a role for Internet Service Providers in an enforcement scheme. This raises privacy, access to justice and other issues.

Recommendation: enact equitable provisions that equitably protect rightholders' rights, facilitate enforcement and enable access and creativity in the digital age.

Legislative Solutions in South Africa

Currently, there are limited provisions drafted to deal primarily with copyright in the digital environment in South Africa. There are provisions in the Electronic Communications and Transactions Act (ECTA) 25 of 2002 which provide for:

1. Anti-circumvention (s86)
2. Safe harbours (ss 70 - 79)

Section 86 may be used for the prosecution of persons who circumvent technological protection mechanisms but it was not crafted specifically for copyright and the main shortcoming of this provision is that it does not incorporate existing copyright exceptions and limitations which upsets the balance that has already been achieved.

Recommendation: The Copyright Amendment Bill introduces copyright-specific anti-circumvention provisions that are accompanied by exceptions and limitations (new sections 28O and 28P). These provisions have to be appropriately balanced, as argued above.

Sections 77 - 79 of the ECTA contain safe harbour provisions which limit the liability of intermediaries, such as Internet Service Providers, for copyright infringement in certain specific instances. These structure of these sections is follows:

70. Definition
71. Recognition of representative body
72. Conditions for eligibility
73. Mere conduit
74. Caching
75. Hosting
76. Information location tools
77. Take-down notification
78. No general obligation to monitor
79. Savings

These provisions have come under some justifiable critique and it is hoped amendments of the ECTA will follow in due course. An example of the critique is that the take down notification process would be more equitable if it provided for a right of reply and if the decision to take down material should be made by an independent impartial party (not the ISP).

Recommendation: The Copyright Amendment Bill does not have to contain safe harbour provisions as these are already in the ECTA, albeit requiring some revision.

References

On exceptions and limitations:

Caroline B Ncube 'The Creative Industry and South African Intellectual Property Law' (2018) 11(2) Law and Development Review **Published Online:** 2018-04-24 |

Caroline B Ncube 'Online copyright infringement, techno-cultural creations and the copyright–technology nexus', (2018) Int. J. Private Law, Vol. 9, Nos. 1/2, 19–31.

Caroline B Ncube 'Using Human Rights to Move Beyond Reformism to Radicalism: A2K for Schools, Libraries and Archives' in Matthew Callahan and Jim Rogers (eds) [A Critical Guide to Intellectual Property](#) (2017) Zed Books 117- 143

Tobias Schonwetter and Caroline B Ncube 2011. New hope for Africa? Copyright and access to knowledge in the digital age. *Info* 13(3):64 – 74.

On enforcement:

Caroline B Ncube 'Copyright Enforcement: The Graduated Response Takes Centre Stage' (2012) 24(2) SA *Mercantile Law Journal* 133 – 147.

Proposed amendments to address the digital environment in the CAB

This is a considerable task which may be best implemented incrementally, that is to say the Bill may be passed with some amendments, and that outstanding issues can be addressed in further revisions of the legislation.

The influence of International Agreements

The NCOP Committee noted that some sections in the Bill were informed by, or based on, international agreements that are not currently binding on South Africa. The response given by the DTI to this observation was that once the legislative provisions have been enacted, the country will ratify the relevant agreements as indicated in the IP Policy. The section that follows summarises and then tabulates the amendments in the Bill that are informed by international agreements that South Africa is yet to join either by ratification or accession. It only considers treaties that are in force. Therefore it excludes the Beijing Treaty on Audiovisual Performances which was adopted on June 24, 2012 but has not yet come into force.

1. *WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*

These two treaties were adopted to address challenges posed by the digital environment. They were adopted in 1996 and came into force in 2002. The objectives of the WCT have been quoted above, where it is argued that the same objectives should inform the provisions in the Copyright Amendment Bill that address the digital environment. The WPPT has similar objectives in relation to performers and producers of phonograms. South Africa has not ratified the WCT and WPPT but intends to do so. Section 86 of the ECTA is based on article 11 of the WCT. **Several clauses in the Copyright Amendment Bill are informed by the WCT as depicted in the table below.**

2. *The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*

The Treaty was signed in Marrakesh on June 27, 2013, and came into force on September 30, 2016. It is an important treaty that created exceptions and limitations to foster access to works by persons who are blind, visually impaired or have other print disabilities. South Africa is not yet a party but intends to become one. In preparation, some clauses have already been included in the Copyright Amendment Bill as depicted in the table below. WIPO is currently considering how to best address access to other works (beyond published print works) for persons with other disabilities, such as aural, intellectual/cognitive and physical. The Bill is worded broadly enough to encompass other disabilities and this is commendable.

International Agreement	Relevant clause	CAB	Comment
WCT article 8	Without prejudice to the provisions of Articles 11(1) (ii), 11bis(1)(i) and (ii), 11ter(1) (ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such way that members of the public may access these works from a place and at a time individually chosen by them.	_amends s6 to include_a definition of_communicating the work to the public by wire or wireless means; amends s 7 to extend to artistic works; new s8 extends this right to cinematograph films (audiovisual works)	
WCT article 11	Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law	Adds definitions of 'technologically protected work'; 'technological protection measure'; 'technological protection measure circumvention device' Amends s27 : offences Adds section 28O Prohibited conduct in respect of technological protection measures and 28P. Exceptions in respect of technological protection measures	Should not be unduly restrictive Should be checked to eliminate references to repealed statutes
WCT article 12	(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that	Adds definition of 'copyright management information' Amends section 23: to provide that the following constitutes infringement: tampering with copyright management information kept by any other person in order to administer copyright;	

	<p>electronic rights management information has been removed or altered without authority.</p> <p>(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public</p>	<p>abusing copyright or technological protection measures in order to constitute a defence to any claim of copyright liability or any cause of action that may be pursued either as a counterclaim in an action for infringement or instituted independently</p>	
Exceptions and Limitations			
WCT article 10	<p>(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.</p> <p>(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.</p>	<p>General: New sections 12A,12B,12C,12D, 19B (computer programs); 19C (GLAM)</p> <p><u>Digital environment specific: 12C</u> Temporary reproduction and adaptation Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—</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; or (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as</p>	New exception and limitations

		there is no independent, economic significance to these acts.	
Marrakesh VIP treaty		Adds definition of 'accessible format copy'; 'person with a disability' New section 19D: General exceptions regarding protection of copyright work for persons with disability	Highly commendable, caters for physical, intellectual, neurological, or sensory impairment

C NCUBE 22 Feb. 2019