

ReCreate

Email: recreateza@gmail.com

Website: www.re-create.org

19 February 2019

To: Hon E Makue

Chairperson: Select Committee on Trade and International Relations

For attention: Mr. H. Mtileni at hmtileni@parliament.gov.co.za

Dear Honourable Makue

WRITTEN SUBMISSION BY RECREATE SOUTH AFRICA

COMMENT ON SPECIFIC CLAUSES OF FINAL VERSION OF THE COPYRIGHT AMENDMENT BILL

[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. For more on our membership and leadership see <https://www.re-createza.org/partners>

3. ReCreate exists to promote the interests of South African creators with regards to copyright legislation and other policy matters. We are an organization of creators -- with interests distinct from that of collective management organizations, publishers, or other intermediaries in the copyright system.
4. ReCreate commends the Department of Trade and Industry, National Assembly Portfolio Committee for Trade and Industry, and the National Council of Provinces on its public participation process in relation to the proposed Copyright Amendment Bill, and for affording our constituency an opportunity to comment. We understand that some who oppose the outcome of the process claim that the process itself was flawed. We disagree. All sides of this debate have been adequately heard.
5. 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. We support the proposed copyright reforms that promote our rights to create, own, and earn from our works.
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. ReCreate South Africa welcomes the Copyright Amendment Bill's clear guidelines and balance between the rights of creators and users. We applaud the promotion of three key rights to enable us to create the next generation of South African content for the world:
 1. THE RIGHT TO CREATE.
The Bill creates modern exceptions to copyright, including a balanced "fair use" right, that permit digital and other uses necessary to make original work and to exercise our freedom of expression.
 2. THE RIGHT TO OWN.
The Bill removes the Apartheid-era standard that made the commissioner of many works the default owner of our art.

3. THE RIGHT TO EARN.

The Bill improves the regulation of contracts and collective management organisations to ensure we are paid for our work and protected against abuse and exploitation. The Copyright Amendment Bill is a step in the right direction in that it brings South African legislation in line with its international treaty obligations. The hybrid system improves on the fair dealing system by introducing a fair use principle. Fair use provides a list of four criteria which will provide better access to information. The exceptions for uses such as research, education, libraries, archives, format shifting and for people living with disabilities are welcomed. These amendments are long overdue and provide the necessary clarity in our copyright law. ReCreate further welcomes the support of creators, teachers' unions, educators, authors, and student activists who look forward to the implementation of the fair use system and access to knowledge and information.

8. ReCreate commends the Bill for including a hybrid fair use right that combines a flexible general user right with a series of specific exceptions.

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 15 November 2018, or to issues that have changed in the Bill since its last public release. We suggest revisions where necessary or helpful.

11. **Clause 13: Section 12A : General exceptions from copyright protection**

Comment

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.

12. **Clause 19: Section 19B : General exceptions regarding protection of computer programs**

The final draft of the Copyright Amendment Bill Draft has reintroduced the exceptions for computer programs which were in the original 2017 Bill. We applaud this revision.

13. The exception for computer programs is a well-crafted exception modelled on EU law that has been in place since 1991. The exception clarifies 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 specific exception adds 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.

14. **Sections 6A, 7A, 8A : The minimum content of the agreement related to royalty percentages**

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.

15. **Clause 11: Section 9A(4): Failure to record acts or to report constituting an offence and the penalty for that offence**

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.

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

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.

(a) 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.

(a) 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.

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

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 ;*
- (i) 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;*
- (i) 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.*

(1) 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);

(a) 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

(a) 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*

(a) to add the funds to the rights revenue to be distributed in the end of that year.

20. Clause 27: Section 27(6): Increased penalties for infringement. Provision for fines when the convicted person is not a natural person

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.

(1) 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.

CONCLUDING REMARKS

ReCreate appreciates the opportunity to provide its input to the Select Committee on Trade and International Relations 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. If any additional information regarding these submissions is required, please contact ReCreate on recreateza@gmail.com.