

SUBMISSION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY**COMMENT ON THE COPYRIGHT AMENDMENT BILL (B13-2017)**

SUBMITTED BY DR LEE-ANN TONG

7 JULY 2017

1. ABOUT THIS SUBMISSION

I am currently a senior lecturer in the Faculty of Law at the University of Cape Town. I convene the postgraduate intellectual property law programme and as well as the undergraduate LLB intellectual property law courses. I co-edit the *South African Intellectual Property Law Journal*. This submission is in my personal capacity as an academic whose teaching and research is focused on South African intellectual property law.

This submission is not intended to advance the agenda of any particular group affected by the proposed Copyright Amendment Bill of 2017 ('Bill'). My concern is that the Bill, which defies logic in places, could actually become law. The result would be copyright legislation which is incoherent, illogical, and unworkable – an embarrassment to all concerned.

The Bill not only amends existing provisions of the Copyright Act 98 of 1978 ('Act'), it also introduces new rights into South African copyright law. Some of these are obviously borrowed from other jurisdictions or international instruments. The absence of a detailed memorandum to explain the rationale for these major changes means that it is not possible to determine whether the incoherence throughout the Bill is simply the result of careless drafting or whether it is in fact a reflection of the lack of understanding of basic copyright law.

This submission considers only a sample of three of the new provisions. Unfortunately, there is little to suggest that the level of drafting and understanding of the law are any better in any of the other provisions of the Bill. The commentary is limited to (A) the state's right to ownership of copyright, (B) the right to royalties, and (C) the resale royalty right.

2. COMMENTARY ON THE BILL

(A) State's right to ownership of copyright (s 3 of the Bill)

Section 3 of the Bill amends s 5 of the Copyright Act by substituting the following provision for subsection (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 [such] an international [organizations as may be prescribed] or local organisations.

(b) Copyright conferred in terms of paragraph (a) shall be owned by the state or organisation in question.'

The concern here is that the amendment vests all work 'funded by' the state in the state. The potentially disastrous effect of vesting ownership of copyright under these circumstances in the state, should not be underestimated. It is of particular concern that there is no apparent reference to:

- the relationship between this vesting of ownership of copyright in state-funded works and the Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 which deals specifically with publicly financed intellectual property (That Act was passed after lengthy consultation and debate, much of which included issues of whether copyright should be factored into the framework. It must be assumed that the Dti is aware of that legislation.);
- how the state will deal with the practicalities of being the copyright owner of thousands of works authored by an untold number of authors; and
- what would constitute funding for the purposes of this provision.

By way of example: If an employee of an institution which is partly state-funded writes a textbook on copyright law, will the state own copyright? Does it make a difference if it is written at home on a personal computer? Does the fact that one's salary is in part directly or indirectly derived from state funds mean that the copyright in any works one creates is owned by the state? Assuming that the state owns copyright in an article written by an academic, would that author need the state's permission to have it published in a journal? Would the publishers of scholarly, peer-reviewed journals be obliged to enter into a licensing agreement with the state for every article they publish from authors affiliated to state-funded institutions?

Since the state cannot assign its copyright (see the proposed amendment to s 21 of the Act), the provision can only take effect if the state is in a position to fully engage with each individual request by authors and publishers for a licence to reproduce the work.

Furthermore, even if one were to introduce such a rule, it is inconsistent (and lazy drafting) to introduce an ownership rule into s 5 when s 21 of the Act deals specifically with ownership, including ownership of works made under the direction of the state.

Ultimately, the question is whether the Dti has actually considered the rationale and practicalities of this provision. References to state funds in this provision must be removed.

B. Right to Royalties (Sections 4, 5, 6, of the Bill)

Sections 6, 7 and 8 of the Act set out the exclusive rights which make up copyright in literary works, artistic works, musical works and cinematographic films. The Bill creates a right to royalties through a proviso to each of these sections. The general form of the proviso is 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 the right to claim an equal portion of the royalty payable for the use of such copyright work’.

In the absence of a number of assumptions (for example that this provision is related to the distribution of royalties by collecting societies), the proviso is nonsensical. This is clear if one appreciates that ownership of copyright is transferred by assignment and that it is only the owner of copyright who is able to do that. It is a basic legal principle that one cannot transfer more rights than what one has.

Consequently, vesting this right to a royalty in the ‘user, performer, owner, producer or author’ is illogical. It fails to reflect the relationship between authorship and ownership which is fundamental to the vesting of copyright. On what basis would one want to vest a right to a royalty in someone who has simply ‘used’ or ‘performed’ a work?

Even if we pretend that the drafters had meant to refer to ‘owner’ of copyright and not to the ‘user, performer, owner, producer or author’, the provision remains absurd. It implies that even though the copyright owner has divested herself of copyright, she nonetheless has a separate right to a portion of a royalty. In the absence of any reference to what this other

royalty is and from whom it may be claimed, this provision, makes absolutely no sense. If the owner assigns copyright, it would usually be in exchange for compensation. If the provision means that the assignee is liable for this ongoing royalty, it begs the question: What happens when the assignee assigns the copyright? Does the first owner have a claim to an 'equal portion' of the second owner's claim to a similar royalty from the person to whom the copyright was next assigned? Does the first owner's right to the royalty fall away? The provision is really too ludicrous to contemplate.

C. Resale of Royalty Right [sic] (Section 9 of the Bill)

The fixation with the 'user, performer, owner, producer or author' continues in the provisions on the 'resale of royalty right' [sic]. The proposed s 9B(1) provides that the

'author of an artistic work shall enjoy an inalienable right to receive royalties on the commercial resale of his or her work subsequent to the first transfer by the user of that work (in this Chapter referred to as the "resale royalty right")'.

It is assumed that the 'Resale of Royalty Right' which is being attempted here is a reference to a resale royalty right which is not copyright per se but rather a mechanism to ensure that the authors of works share in the profit of subsequent sales of the original work. It is most commonly applied to works of fine art which may have been originally sold by the artist at a price which does not reflect its future value. It is derived from Article 14ter of the Berne Convention for the Protection of Literary and Artistic Works which states that:

'The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work'.

In order to understand the concept it is necessary to appreciate the difference between the ownership of copyright in a work and ownership of the actual material manifestation of the work. The concept is relatively simple: An artist paints a picture. The picture is painted on canvas. For the purposes of copyright, the painting is classified as an 'artistic' work and the artist is recognised as the 'author'. Ownership of copyright (the right to reproduce the painting, amongst other things) vests in the author. Copyright may be assigned in which case the artist (author) would no longer be able to control others making reproductions. The new copyright owner has that power. However, the artist (author) nevertheless still owns the

actual painting (the canvas with the 'original' work). He or she cannot make copies but can sell that canvas. It is the sale of the original canvas that the resale royalty speaks to.

Where the canvas leaves the ownership of the artist, he or she is not entitled to any further payments if the new owner sells it on for a profit. Such original works of art may appreciate in value and be sold for large sums on auction or in galleries. The resale royalty right gives the artist a claim to any profit derived from the sale of the artwork by subsequent owners.

If we assume that the above is what is intended then the following six issues at least must be resolved.

(i) Section 9B(1) refers to an author's right to the royalty on resale of the work subsequent to the first transfer by the 'user' of that work. Once more the fixation with the term 'user' creates a legal mess. A simple removal of this reference would be an improvement. A 'user' is not necessarily the owner of the work who is in a position to transfer the work.

(ii) There is no escape from the 'user, performer, owner, producer or author'! Section 9B(3) vests the right to the resale royalty in the 'user, performer, owner, producer or author of an artistic work'. Why are parties other than the 'author' given the right? Is this an expanded version of the resale royalty right? Surely not. Even if it were the intention to vest this right in the whole group, how does one become the 'performer' of an artistic work given the definition of 'artistic work' in the Act? It would be interesting to see how a person can 'perform' a drawing, sculpture, painting, work of craftsmanship, etc. In light of the explanation above about the nature of the resale royalty, it is clear that the reference must be limited to 'author'. A failure to understand even this fundamental aspect of the resale royalty right cannot bode well for any hope of actually implementing it successfully.

(iii) Section 9B(4) provides that a 'resale royalty right applies whether or not the author— (a) is or was the first user, performer, owner, producer or author of any copyright in the work'. It is evident again that the basic relationship between authorship of a work and ownership of copyright is not understood. It is not possible to 'perform', 'produce', or even 'author' copyright.

(iv) Section 9F(2) refers to 'a bequest of an artistic work by an author who did not transfer authorship of that work in his or her lifetime'. It is trite that under copyright law one cannot transfer authorship. Since this is the third iteration of the Bill, it must be assumed that this was not simply a typographical error.

(v) In light of the comments about the 'user, performer, owner, producer or author of an artistic work', s 9C is obviously illogical.

(vi) Who is responsible for paying the royalty and how will the system be administered?

In short, a failure to understand the basics has rendered the attempt to introduce a resale royalty useless.

3. CONCLUSION

The Bill has attracted much criticism. It may be said that one ought not to criticise without also offering solutions. However, we must distinguish between finding solutions to copyright deficiencies and finding solutions to the threat of the Bill becoming law in its current form.

True concern for copyright reform would have started with consultations to find out what the real issues are from those who are most affected. Instead, a predetermined agenda was foisted upon the public in a manner which limited public participation to damage control. Unfortunately, the result has been that an enormous amount of time, energy and skill that could have been applied to true copyright reform, has been wasted on responses to the various iterations of the Bill.

The best solution is to abandon this Bill, take the necessary time to fully understand the problems associated with copyright in South Africa and then legislate responsibly. If, however, there is no will to stop this Bill, then at the very least there ought to be an acknowledgement that the current process cannot continue in the same inept manner. A failure to prevent this Bill from becoming law in its current form will ultimately result in the judiciary having to try clean up the mess, but only when and if an affected person has the luxury of litigation.

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