30 June 2017

Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Parliament Street, Cape Town

PO Box 15
Cape Town
8000

**Attention**: Mr A Hermans

Email: ahermans@parliament.gov.za

Dear Mr Hermans

**SASOL COMMENTS ON THE COPYRIGHT AMENDMENT BILL 2017 [B13-2017]**

Sasol supports the intention of the Copyright Amendment Bill to address important issues which require attention in South African law and welcomes the opportunity to comment on the Bill.

Very few copyright cases appear before South African courts, so there is little opportunity for the South African courts to bring clarity to the Copyright Act, 1978. Furthermore, intellectual property legislation in general and the Copyright Act in particular are not frequently amended. This makes any ambiguous or unclear drafting in the Act problematic, as any deficiencies in drafting are likely to remain in place for a long period of time before being noticed.

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On this amendment bill Sasol has made commentary in four areas of concern which are particular relevance to Sasol's operations and business practices. In particular, we have highlighted potential issues arising in respect of: (i) ownership of funded copyright and state-owned copyright, (ii) artist resale royalty, (iii) the intellectual property tribunal, and (iv) the introduction of the concept of fair use. Our detailed responses are included in Annexure A.

Sasol supports initiatives seeking to support South African artists and welcomes the intention of the Bill. Many of the proposed changes, in aiming to close certain gaps in the law, will unlock the potential of the country's creative industry and increase contributions to GDP by copyright-based industries.

As outlined in our commentary, the proposed wording of some of the sections of the Bill does not support standard business operating practices. Furthermore, these sections are likely to have a negative impact on Sasol's and other industry's ability to operate and maintain their local and global competiveness.

Sasol remains committed to being involved in the development of South Africa's intellectual property laws and supports the streamlining of intellectual property laws that align those laws with international best practices and South Africa's international commitments.

Sasol believes that it can play a constructive role in the finalisation of the Bill and would welcome the opportunity for further engagements with government and all stakeholders on the matters raised herein. We hope that our comments will be duly considered and assist in the Bill achieving its intended outcomes.

Sincerely,

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# ANNXURE A

## Comments by Sasol Limited on the South African Copyright Amendment Bill, 2017 [B13-2017]

June 2017

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**Contents**

## 1 INTRODUCTION

Sasol supports the intention of the Copyright Amendment Bill as introduced in the National Assembly (proposed section 75) and the explanatory summary thereof published in the Government Gazette No. 40121 of 5 July 2016 (hereinafter referred to as "the Bill") to seek alignment of the copyright law with the digital era and with international treaty developments.

Sasol also fully supports the objectives of the Bill to alleviate the plight of the creative industry and to protect the economic interests of artists and composers. The comments which follow are accordingly not directed at the principles or objectives of the Bill. It is Sasol's intention only to highlight certain negative consequences, probably unintended, surrounding the current wording of the Bill.

## 2 COMMENTS

### 2.1 OWNERSHIP OF FUNDED COPYRIGHT (SECTION 3) AND ASSIGNMENT OF COPYRIGHT OWNED BY THE STATE (SECTION 21)

Sasol's recommendations around ownership of funded copyright (section 3 of the Bill) and assignment of copyright owned by the State (section 21 of the Bill) are similar. Accordingly, our comments on these two sections are grouped together.

Section 3 of the Bill amends section 5 of the principal Act (the Copyright Act No. 98 of 1978, hereinafter referred to as "the Act") by the substitution for subsection (2) of the Act as follows:

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

It is not entirely clear if the term "local organisations" could be interpreted to also include a "recipient" as defined in the Intellectual Property Rights from Publicly Financed Research and Development Act No. 51 of 2008 (hereinafter referred to as

"the IPR Act"). In terms of the IPR Act a "recipient" means any person, juristic or non-juristic, that undertakes research and development using funding from a funding agency and includes an institution. Furthermore, in terms of the IPR Act an institution means:

> (a) any higher education institution contemplated in the definition of "higher education institution" contained in section I of the Higher Education Act, 1997 (Act No. 101 of 1997);
> (b) any statutory institution listed in Schedule 1 [of the IPR Act]; and
> (c) any institution identified as such by the Minister under section 3(2) [of the IPR Act].

In particular, the ordinary meaning of "organisation" in the Bill excludes a non-juristic (natural) person and thus leads to an interpretation that is not fully aligned with the definition of a "recipient" in terms of the IPR Act.

Attention is drawn to the fact that, if the term "local organisations" is not interpreted in the broad sense to include a "recipient" in terms of the IPR Act, the provisions of the Bill may contradict the copyright ownership provisions provided for in the IPR Act.

A further concern with the proposed amendment of section 5(2)(a) of the Act is the inclusion of the wording "funded by". According to the proposed wording, the state will own any copyrightable works produced using state funds. This directly contradicts section 4(1) of the IPR Act which provides that intellectual property (including copyright) which emanates from publicly financed research and development is to be owned by the recipient of state funds. Private funding entities, such as Sasol, collaborating with South African research institutions, require clarity on intellectual property ownership under both the IPR Act and other intellectual property legislation.

Furthermore, the wording proposed for section 5(2) of the Act in the Bill has the unintended consequence of denying the ability of all recipients of research grants to retain ownership of rights in their work. A specific unintended consequence of the Bill is that all copyright in laboratory notebooks will be owned by the state, which will require the state needing to approve publications emanating from such notebooks.

Section 21 of the Bill amends section 22 of the Act (assignment and licenses in respect of copyright) and provides that copyright owned by the state may not be assigned. The prohibition on the assignment of copyright owned by the state, when read with the proposed amendments to section 5(2) of the Act, is concerning since it interferes with the state's freedom of contract without any apparent reason. This may, for instance, hinder cooperation between government and private enterprises if the parties cannot freely assign copyright to each other as they might do in the course of usual business transactions.

Copyright is a property right. Preventing assignment of copyright by the state is analogous to preventing the sale of state-owned property, such as a government owned building or vehicle. It is neither clear what benefit would be achieved, nor who the beneficiaries would be if the state is prevented from disposing of its own property, such as the assignment of copyright. To aid in understanding the rationale behind such a provision, Sasol conducted cursory research to find equivalent concepts in other jurisdictions, but was unable to locate same.

For example, Sasol, the Department of Basic Education in the Free State, the Department of Water Affairs (DWA) and the Water Research Commission (WRC) have cooperated to find new technologies and opportunities to conserve water in South Africa. Sasol Technology offers the use of some of their Research and Development (R&D) Piloting facilities in Sasolburg and Secunda to researchers and academics from the WRC for research in conjunction with Sasol Technology teams. It is important for this nature of research that the parties are allowed to contract freely. Such freedom of contract includes the ability to assign copyright between the parties.

Sasol also engages with state-owned or state-funded research organisations, such as the CSIR, for contract research. Preventing Sasol (or indeed any private entity or individual) from retaining ownership in intellectual property arising from such contract research, would likely lead to an unintended consequence of discouraging investment by Sasol (or any private entity or individual) in research and development or collaboration with these organisations.

A further unintended consequence of limiting the state's freedom to assign its copyright could be that the state is unable to capitalise on opportunities presented,

for example, by the changing dynamics of the creative industry, technological innovation, and digital advancements, as a result of a legislated limitation.

**Recommendation**

(a) It is thus recommended to align the wording proposed in the Bill with the wording in the IPR Act and to allow for the freedom of parties to contractually agree differently on intellectual property ownership. Alternative wording for section 5(2) of the Act may read as follows:

> "(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 <u>any person, juristic or non-juristic, including</u> the state or an international or local organisations.
> (b) <u>Ownership of</u> copyright conferred in terms of paragraph (a) shall be <u>governed by contract</u>, <u>provided that in the absence of a valid contract</u>, ownership shall vest in the <u>juristic or non-juristic person</u> ~~state or organisation~~ in question."

(b) It is also proposed that there be no prohibition on the state's ability to assign copyright.

## 2.2 ARTIST RESALE ROYALTY

Sasol is a strong supporter of South African art and the promotion of young artists and our support is evident through the "Sasol New Signatures" campaign that we have been sponsoring for the last 26 years. The intent of the campaign is to unearth new talent and provide a platform from which emerging artists can launch their careers. In addition, we also have one of the most extensive contemporary art collections in the country.

Within this context, Sasol believes that the intention of insertions proposed in sections 4(c), 5(c) and 9 of the Bill, are to safeguard the interests of artists, such as sculptors or painters, and writers, who are usually self-employed. Insofar as the new artists resale right applies to the sales of paintings, sculptures, lithographs and the

like which are sold through art dealers, art experts or art critics, Sasol supports its intent. However, the wording of the Bill is considerably wider and is concerning.

The Act does not distinguish between a masterpiece (or work of art) and an engineering drawing or a process flow diagram: both constitute artistic works. The Act also does not distinguish between a painter and an engineer or draftsman: both are authors of artistic works.

Sasol ensures that it acquires all intellectual property rights, including copyright, to the works of all its employees which are created during the course and scope of their employment. This is standard practice in any workforce, and is even dealt with in section 21(d) of the Act.

Sasol is an owner/proprietor of a number of technologies, but does not own all the technologies which it makes use of. It is accordingly typical in Sasol's business both to acquire licences from technology providers and to grant licenses to third parties. Such licences consist of a bundle of diverse intellectual property rights, for example the right to use a body of confidential technical know-how, an undertaking on the part of the licensor not to assert any patent rights against the licensee and the licensee's customers, as well as a copyright licence to a multitude of documents such as design manuals, process flow diagrams and engineering drawings, all of which constitute either literary or artistic works. The copyright licence that is granted is ancillary to the other rights, but it is also an essential part of the licence. The royalty amount and the terms of payment are then negotiated between the licensor and licensee, taking into account the bundle of rights licensed. It is essential that the licensee acquires all the necessary rights in all the subject matter in order to carry out their business, without the encumbrance of needing to pay additional fees to authors who are the licensor's employees. It is often impossible to know which individual engineer or technician created a drawing or a manual and it would be impossible to reward the author every time a royalty payment becomes due. Furthermore, it would appear that all such licence agreements would also fall foul of the proposed new sections 9E (assignment or waiver) and 39B (unenforceable contractual term) in the Act, as inserted by sections 9 and 33 of the Bill.

**Recommendation**

It is proposed that the scope of the artist resale royalty be narrowed to cover only the categories of artists who are intended to be covered by the Bill. This could be done by creating a subcategory of artistic works such as "works of art" or "masterpieces" so that more mundane artistic works, such as engineering drawings and process flow diagrams, are not affected. Similarly, it is proposed that the literary works which are referred to in section 4(c) exclude more commonplace literary works such as memoranda and reports, which hardly ever rely on publication to be commercialised.

## 2.3 INTELLECTUAL PROPERTY TRIBUNAL

It is critical to the success of both the private and public sectors in South Africa to have a sound, efficiently functioning intellectual property system. Very few patent, design or copyright matters reach the courts in South Africa, meaning that the jurisprudence develops very slowly in the field of intellectual property law. In trade mark matters, where litigation is far more common, the law is more dynamic.

In general, Sasol recognises that there is a vital need for specialised intellectual property high court judges to preside over what are often highly complex and technical intellectual property matters.

Sasol supports the introduction of an Intellectual Property Tribunal (the "Tribunal") where presiding officers have extensive experience in intellectual property matters. However, Sasol does not support the creation of such a tribunal in the context of an amendment to the Copyright Act, when the Tribunal has powers which extend far wider than copyright law alone. Furthermore, the introduction of the Tribunal in the Copyright Act creates confusion, as there is a Commissioner of Patents and a Registrar of Patents provided for in the Patents Act, 1978, a Registrar of Designs provided for in the Designs Act 1993 and a Registrar of Trade Marks provided for in the Trade Marks Act, 1993, all of whom already perform functions which would potentially overlap with the Tribunal.

The members of the Tribunal are defined as "persons who have adequate and appropriate qualifications and experience in economics, law, commerce or public affairs" (section 29B(1) of the Bill). There is no mention of technically qualified persons, such as scientists or engineers. Such an omission appears to convey the

intention that the Tribunal will not have the authority to hear all intellectual property rights matters in any event (e.g. matters relating to patent or design rights).

**Recommendation**

It is recommended that no amendment is made to Chapter 3 of the Act at this stage. Rather, it is proposed that all forms of intellectual property legislation be considered holistically. Insofar as similar concerns may exist within the context of copyright, patent, trade mark or design rights, similar solutions should be applied. However, there are obvious differences: a patent or functional design infringement matter, for example, should require the presence of a relevant technical expert as a member of the tribunal. Sasol requests and recommends that the functions of the patents, trade mark and design registrars be considered carefully *vis-à-vis* the function of the Intellectual Property Tribunal so that there is no confusion around the competency of each of the fora provided for in the respective legislation.

## 2.4 INTRODUCTION OF THE CONCEPT OF FAIR USE

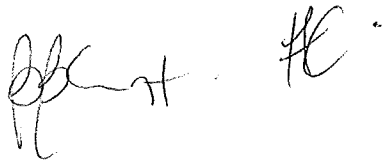
Fair use is a concept more familiar in United States copyright jurisprudence, while the Copyright Act of 1978 uses the concept of "fair dealing". The jurisprudence around fair dealing is more mature in South Africa; by introducing a different but related concept of "fair use", confusion is introduced without any apparent reason for doing so. It would be helpful to understand from the drafters how the existing exceptions in section 12 of the Act (termed "fair dealing") differ from the proposed exceptions introduced under the banner of "fair use" by section 10 of the Bill.

**Recommendation**

Sasol has considered the Joint Academic Comments[1] on the South African Copyright Amendment Bill, 2015 made by various local and US-based academics in relation to the 2015 bill. Although the current Bill differs slightly from the 2015 bill, the authors make a valid argument that the current structure of the Act and the 2015 mix specific

[1] Joint Academic Comments on the South African Copyright Amendment Bill, 2015 made by South African academic authors Coenraad Visser, University of South Africa; Caroline Ncube and Tobias Schonwetter, University of Cape Town; Denise Nicholson, University of the Witwatersrand, Library; Andrew Rens, Duke University Law School and United States academic authors Peter Jaszi, Sean Flynn and Brandon Butler, American University Washington College of Law; Rebecca Tushnet, Georgetown University and Jonathan Band, Policy Bandwidth; http://infojustice.org/archives/35003, accessed 21 June 2017.

exceptions with flexible standards. This argument is fully applicable to the present Bill. Sasol thus fully supports their recommendation, in the context this time of the 2017 Bill, that the new "fair use" sections 12(1) be merged with the existing "fair dealing" standard in section 12(1) of the Act and that the specific exceptions within both the existing section of the Act and new sections proposed in the Bill be relocated, e.g. as a new section 12A. In the table attached to the Joint Academic Comments[2], the authors propose alternative wording for sections 12(1) and 12(A), which Sasol believes to be convincing and practical.



[2] ibid.