ReCreate

Submission on the Copyright Amendment Bill (B-13B of 2017)

9 July 2021

A. Introduction

1. ReCreate is a non-profit organization established to advocate for a balanced Copyright Act that protects modern creators' rights. 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 and other South African creators. ReCreate is a coalition of creators of copyrighted materials and users of copyrighted materials. As creators we include writers, filmmakers, actors and musicians. As user of copyrighted materials we include teachers, students and learners, librarians, activists and disabled communities. We are unique in that we are both creators and users of copyrighted material. Our biggest affiliates are the Democratic Teachers Union (SADTU) and the South African Guild of Actors (SAGA). All together we represent the views and interests of several hundred thousand South Africans.

2. ReCreate makes this submission in response to the call by the Portfolio Committee on Trade and Industry, opened on 4 June 2021, to submit written submissions on sections 12A, 12B, 12C and 12D, section 19B and section 19C of the Copyright Amendment Bill [B 13B—2017] ("Bill"). We respectfully request the opportunity for two of our leaders to make oral submissions given that we represent diverse but united constituencies.

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B. 12A – 12D, 19B and 19C, fair use and the property clause

3. In light of the inclusion of the widened purposes in section 12A(a)(iv) to (vi), we address the question of whether the widened exceptions introduced in the Bill are an arbitrary deprivation of property within the meaning of section 25(1) of the Constitution. We also consider the introduction of the words 'such as' in section 12A(a), which is said to convert the fair dealings clause to an open ended fair use clause.

4. Section 25(1) provides: *"No law may permit arbitrary deprivation of property."* In order to constitute an arbitrary deprivation of property, the thing concerned must be constitutionally-protected property, there must be a deprivation, and the deprivation must be arbitrary.

5. In our view the Constitutional Court has not decided the question of whether copyright, as intellectual property, is constitutionally-protected property in terms of section 25 of the Constitution.

6. Nevertheless because of the view we take on the question of arbitrariness, we shall assume for present purposes that copyright is constitutionally-protected property.

7. The Constitutional Court has given meaning to the concept of 'deprivation'. It did so first in the *FNB* case.[1] Put simply, 'deprivation' means a substantial interference with a property right, one that has a legally significant impact on the rights of the affected party.[2] The question whether the widened clauses constitute deprivations of property is not simple to answer. Again, because of the view we take on the question of arbitrariness, we shall assume for present purposes that there is a deprivation.

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[1] *First National Bank of South Africa Limited trading as Wesbank v Commissioner, South African Revenue Service and another; National Bank of South Africa Limited trading as Wesbank v Minister of Finance* 2002(4) SA 768 (CC) at paragraph 100.

[2] *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) at para 59; *South African Diamond Producers* at para 48.

8. The pivotal question that arises in respect of section 25(1) is whether any alleged deprivation is *arbitrary.* If the answer to this is no, as we believe it is, then the same reasoning will apply in respect of certain other arguments advanced that we consider below.[3] Put differently, if the limitations and exceptions pass muster under the test for arbitrary deprivation in terms of section 25(1), they will pass muster for these other purposes too. This is because the test for arbitrariness in section 25(1) is relatively broad.

9. How is a court to determine whether a deprivation of property is arbitrary? In short, the test is whether there is a sufficient purpose for the deprivation. As the Constitutional Court explained in *FNB*:[4]

> *"(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question;*
> *(b) A complexity of relationships has to be considered;*
> *(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected;*
> *(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property;*
> *(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.*
> *(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more*

[3] These grounds include an alleged breach of section 1 of the Constitution and section 22 of the Constitution

[4] At para 100. Although the judgment specifically states that it is not concerned with incorporeal property, we consider this test because if it is met, then it is likely that any different test for incorporeal property would probably also be met.

compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution."

10. In our view, the limitations and exceptions would pass scrutiny under this test. We have considered a range of issues:

10.1. First, the new purposes contemplated by the limitations and exceptions are, without question, legitimate, indeed crucial public purposes. These relate most centrally to equality, facilitating access to knowledge for persons with disabilities, access to education, freedom of expression and access to information and ideas. In a country with the wealth disparity and development needs of South Africa, it is crucial that the legislature adopts measures to achieve these purposes. South Africans are calling out for development and demanding greater access to knowledge. Importantly, the objects of the Bill are centrally to advance the values and rights in the Bill of Rights.

10.2. As regards the right of access to education in particular, the lack of access to educational materials is a dire problem in South Africa. For the most part, people who will be able to benefit from the new and expanded exceptions are likely to be those who are currently not receiving access at all, and who will never be able to pay for it, not those who do and can.

10.3. Second, the "property" is incorporeal in nature. It is not fixed in place or quantity and is not depleted through use. On the contrary, it can be enhanced through greater use.

10.4. Third, the Bill carefully seeks to balance the nature and extent of a creator's copyright protection (which in some respects is enhanced

under the Bill) with exceptions and limitations in the public interest. In our view, it does so carefully, and in a justifiable way, having regard to the following:

10.4.1. There is no unbridled or open 'licence' to copy or use without permission. On the contrary, the limitations and exceptions are framed fundamentally by the principle of *fair* use, which in turn is determined by the application of the four-factor test in section 12A(b). Fairness is a flexible but well-worn and well-understood concept in multiple contexts in South African law.

10.4.2. Moreover, the four-factor test introduces important principles that yield a proportionate relation between the copyright holder and the user. They include the nature of the work in question, the amount and substantiality of the part of the work affected in relation to the whole of the work, the purpose and character of the use (including if it is of a commercial nature or for non-profit purposes), and the substitution effect of the act upon the potential market for the work in question.

10.4.3. Proportionality is expressly infused in some of the more specific exceptions. For example, quotations do not infringe copyright provided, amongst other things, their extent does not exceed what is reasonably justified by the purpose.[5] Similar constraints apply to other specific exceptions. Importantly, it constrains the making of copies for educational and academic activities.[6] It is not permissible to make copies of a whole textbook unless it is out of print, the owner cannot be found, or it is not possible to purchase the book in South Africa or at a reasonable price.

[5] See section 12B(1)(a)(i)
[6] See section 12D(1)

10.4.4. Avoiding undue commercial prejudice is built into the test for fairness via the four-factor test. Moreover, some exceptions apply only when use is for a non-commercial purpose, such as translating a work.[7] Avoiding commercial prejudice is also built into the section dealing with copying for educational purposes, in that the right to make copies does not extend to reproductions for commercial purposes. 'Commercial' is defined to mean 'the obtaining of economic advantage or financial gain in connection with a business or trade.'[8]

10.4.5. The use of the words 'such as' to introduce the new and expended purposes in section 12A does not open the door widely, without constraint, to new purposes; the language itself does not introduce any element of real uncertainty. On the contrary, the terms will be interpreted restrictively, in line with the *eiusdem generis* maxim and the Three-Step Test.

10.4.6. In countries where there are fair dealings clauses, such as Canada, courts may, at times, interpret the purposes very broadly and flexibly to accommodate new developments. The same result is thus achieved through different legislative means. The inclusion of the term 'such as' arguably precludes artificial reasoning to accommodate analogous purposes necessary to achieve the legitimate purposes of the Bill.[9]

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[7] See section 12B(f)

[8] Section 1

[9] In both the Canadian and UK jurisdictions, although the words "fair dealing" are used, the effect given to the provisions is similar to that of "fair use" . In *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 at para 60, the Supreme Court of Canada found that six non-exhaustive factors were determinative of the fairness of an intended use: purpose, character, amount, alternatives, nature, and effect. This decision was upheld, subsequently in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326, 2012 SCC 36. See too *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright),* [2012] 2 S.C.R. 345, 2012 SCC 37. See also, Section 30 1ZA of the UK's Copyright, Designs and Patents Act 1988.

11. Some of those opposed to the Bill have suggested that to the extent that any of the exceptions constitute deprivations of property, such deprivations are arbitrary because they do not make use of less – or the least – restrictive means to achieve the same result. Such an approach is out of kilter with our law for two reasons:

    11.1. First, considerations regarding less restrictive means are only relevant to the reasonableness analysis conducted under section 36(1) of the Constitution, and not the less strict test used to determine whether a deprivation is arbitrary.

    11.2. Second, even when considered as part of the section 36(1) analysis, courts recognise that a range of legislative options may be reasonable in the circumstances; legislatures are not required to choose what a court views as the best option. The mere existence of less restrictive means does not mean that a legislative measure is unreasonable.

12. We have noted that when considering the issue of rationality, an argument has been advanced that there has not been any assessment of the economic impact of the new exceptions, and that the need for the measures has not been ascertained. We are of the view that this objection is simply not factually grounded.

    12.1. First, it neglects to mention the extensive policy making process that preceded the tabling of the Bill including on these issues.[10]

    12.2. Second, it neglects to mention the extensive public participation engagements on these issues both prior to and following the tabling of the Bill.

[10] We have already described the lengthy policy-development process. In addition to that, we are advised that the DTI commissioned a report by WIPO in 2011, which recommends fair use. See WIPO, "The Economic Contribution of Copyright-Based Industries in South Africa", available at https://www.thedti.gov.za/industrial_development/docs/Economic_Contribution.pdf. Moreover, together with 12 other countries, the Minister of Arts and Culture committed to fair and balanced copyright laws in the Cape Town Declaration 2015. In this regard, see https://www.ifla.org/files/assets/wlic/2015/documents/cape-town-declaration-of-ministers.pdf

12.3. Third, it neglects to mention two impact assessment procedures that, to our knowledge, were conducted.

13. The first impact assessment took place in 2014. As mentioned above, after the draft IP policy was published for public comment in September 2013, a Regulatory Impact Assessment was undertaken by the DTI in 2014 under the then extant procedures. This assessment was conducted by an independent third party, Genesis Analytics, a economics consultancy firm, who produced the report titled "Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa", dated 31 July 2014. The specific impacts were assessed at least at a high level.

14. The second impact assessment took place after the introduction in July 2015 of the Socio-Economic Impact Assessment System. Further to this, a Socio-Economic Impact Assessment Report was undertaken and certified by the Department of Monitoring and Evaluation on 29 May 2017. The Phase 2 report was presented to the Portfolio Committee on 30 May 2017.

C. 12A and 12D, fair use and freedom of trade

15. Section 22 of the Constitution protects the right to freedom of trade, occupation or profession. Section 22 encompasses two elements, namely the right of citizens to choose a trade, occupation or profession, and that the practice of a trade, occupation or profession may be regulated by law. For present purposes, we assume that all South Africans currently engaged in the industries affected by the Bill are protected by the first element of the right.[11]

[11] Courts will protect the rights of citizens whether as individuals or through corporate structures. There are multiple ways in which citizens are affected, from the act of creation, through intermediaries to public distribution. We assume each will be regarded as a 'trade, occupation or profession'.

16. The two elements are subject to different levels of judicial scrutiny.[12] Where there is a limitation on the choice of trade, occupation or profession, it must be tested by way of the test developed under section 36 of the Constitution. Where the regulation of the practice of a trade, occupation or profession is scrutinised, then the test is a rationality test. The Constitutional Court has confirmed that the rationality test in context of section 22 is weaker than the test for arbitrariness in section 25 of the Constitution.[13] In view of our conclusions regarding section 25 of the Constitution, we do not reconsider the arguments in context of the second element.[14] Suffice to state that the test would in our view be met.

17. A different argument is however raised in respect of the first element, being that the fair use provision in section 12A has a negative impact on the choice of trade, occupation or profession. Although there are no formal impediments imposed by the Bill, the argument is that there is an *effective* impediment because any activity that relies on the commercial exploitation of copyright will be made uncertain, and therefore illusory, and potentially unprofitable.

18. Reliance is placed on *Diamond Producers*,[15] where the Constitutional Court held that legislation limits the choice of trade, occupation or profession if it "*in effect, [makes] the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter it is in fact limited*." The argument proceeds that there is no adequate justification that meets section 36 limitations test. Moreover, it is argued that there is no adequate reason for the limitation in view of the absence of research on the economic impact of the provisions, (a matter we have already dealt with above).

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[12] See *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* 2017 (6) SA 331 (CC) at para 65 and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 93.
[13] *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others 2018 (5) SA 349 (CC) at para 55.*
[14] *Ibid* at para 58.
[15] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* 2017 (6) SA 331 (CC) at para 68

19. A similar argument is raised in respect of section 12D of the Bill. The impact is said to be particularly severe for authors of academic texts. It is argued that the business of providing academic literature shall become highly unprofitable, and this is neither rational nor justified under section 36 of the Constitution. A further objection is raised: the provision provides a disincentive for authors to write, and for publishers to publish, which means that it would have the opposite effect to the intended goal of improving access to the works.

20. On the information to hand, we are unable to agree with the conclusion that the Bill would have this effect, and thereby limit the section 22 right.

21. The first difficulty is that the arguments are based on the partial and wholly unsubstantiated view of those opposed to the Bill – that these disastrous effects will ensue. However, the Constitutional Court, in *Diamond Producers*, set a high bar for establishing the negative impact that the legislation must cause in order to be considered an infringement of section 22. There is no evidence of any such an effect.

22. Even if those opposed to the Bill, and some in some industries, may be able to establish that the profitability of their businesses will decrease, it is a different matter altogether to establish support for the further claim that the effect will be of such a degree so as to make their businesses so undesirable, difficult or unprofitable that the choice to enter that line of business will effectively be taken away.

23. Such a claim would moreover be difficult to establish in light of the fact that the opportunities provided by the Bill will likely generate new trade, occupational and professional opportunities. The fair use provisions are designed to promote creative efforts, and there is no reason why they should not do so. There is also some scope for new industry, for example, for dealings in orphan works, and non-profit ventures specifically to facilitate production of accessible format materials for people with disabilities.

24. The claims about academic authors do not bear scrutiny, either as a matter of logic or fact. They appear to be based on an assumption that works currently paid for, to the benefit of academic authors, will be copied wholesale without compensation, and to authors' financial detriment.

25. First, there is no entitlement to copy books wholesale under the Bill. Furthermore, we are instructed that academic authors do not currently benefit financially, either from copying materials, or substantially from writing. Academic authors are, we are informed, in general employed by an educational institution or research institute, and write in the course and scope of their employment. For many, it is a requirement of tenure to publish. The motivations for academic authors to publish are predominantly reputational rather than directly financial. There are also benefits that result from the Bill to academic authors in that the more access they have to other works, the more work is ultimately generated and cited. Restricting access thus has a limiting effect of creativity and productivity.

26. Second, there is a clear intention in the Bill to secure more financial benefits for the originators of works covered by copyright, in other words, to give them a greater slice of the pie. This intention is achieved by the same provisions that are said to make the copyright-based businesses unprofitable, presumably for those who currently receive the greater slice of the pie. Ready examples are the right to a fair royalty and the artists' resale rights.

27. The net effect of the Bill as a whole would, in part, be a shifting of some profits from the intermediate levels of the production chain to the originators of the works at the primary level. The Bill thus entails a conscious attempt to realign the sharing of profits to prevent exploitative practices. While this will entail a sharing of profits, the clear intention is that the sharing be 'fair'. There is no reason why it should not be.

28. In any event, we are of the view that if there is a limitation of right to choose a trade, occupation or profession, it will be regarded by a court to be reasonable and justifiable, satisfying the test contained in section 36(1) of the

Constitution.[16] Only a cursory account has been taken of the limitations analysis under section 36 of the Constitution by those objecting to the Bill. In light of the considerations we refer to when dealing with section 25, we are of the view that the fair use provisions are probably readily justified under this test.

29. It is important, moreover, to keep in mind that when conducting the limitations analysis, courts will have regard to and balance competing rights. We have explained above what rights are advanced by the provisions of the Bill. The limitations analysis, therefore, is one that seeks to find an appropriate balance between rights that may conflict with the Bill.

30. A proper balancing of rights does not seek to achieve a "*winner-take-all*" result, but rather one that recognises each right, and places no more limits than are reasonable with regard to the factors enumerated in section 36.[17] This has been the consistent approach of the Constitutional Court, which has emphasised that it "*must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list*".[18] The approach of the Court "*is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case*."[19]

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[16] Section 36 provides that the rights in the Bill of Rights 'may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.

[17] *Khumalo and Others v Holomisa* 2002 (5) SA 401 at para 43.

[18] *S v Manamela and Another (Director-General of Justice intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32. *S v Makwanyane and another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104

[19] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 23

D. International law concerns

31. The President's letter states that the President refers the Bill back to Parliament "so that it may consider the Bills against South Africa's International Law obligations". However section 79(1) of the Constitution permits referral back to Parliament only for constitutional issues.

32. Because the international law concerns are not framed in a manner that forms any valid basis for objecting to the Bill's assent, Parliament ought not revisit these issues. Importantly however, the reservation that the exceptions may be in breach of the *"Three-Step test [first established under Article 9(2) of the Berne Convention] binding South Africa under international law"*, in our view, lacks foundation. The courts will interpret the exceptions having regard to and in light of international law. There is nothing in the Bill that precludes the courts from doing so.

33. We nevertheless examine each of the President's reservations regarding compliance with international law in turn.[20]

19D, Marrakesh Treaty

34. The President's letter asserts that the Bill may not be in compliance with the Marrakesh Treaty, without giving any detail. It has been claimed by some commentators that the Bill does not adequately authorise cross border trade in accessible format copies of works, as intended by the Marrakesh Treaty. We disagree.[21]

35. It is claimed that the Bill does not establish a mechanism for the cross border trade in accessible format copies of works by so-called "authorised entities" -- a term used in Article 5 of the Marrakesh Treaty. Article 5.1 of the Marrakesh Treaty requires that member countries "*shall provide*" that accessible format copies of works "*may be distributed or made available by an authorised entity to a beneficiary person or an authorised entity in another Contracting Party*"

[20] In this regard we include verbatim extracts from the Joint Academic Opinion Re: Copyright Amendment Bill authored by M Forere *et al* dated 10 May 2021.
[21] *ibid p 14*

(emphasis added). Article 5.2 provides that parties "may" meet this obligation through a specific provision of law for authorised entities. But Article 5.3 makes clear that countries do not need such a provision: "*A Contracting Party may fulfil Article 5(1) by providing other limitations or exceptions in its national copyright law*".[22]

36. Section 19D(3) of the Bill promotes cross-border trade of accessible formatted works, including through authorised entities. Section 19D(3) is adequate to implement the cross border provision of the Marrakesh Treaty. By authorising cross border trade by "a person that serves persons with disabilities," the section clearly authorises cross border trade by legal persons, including authorised entities.[23]

WIPO Copyright Treaty

37. In our view no amendments to the Bill are needed for South Africa to accede to the WIPO Copyright Treaty ("WCT"), including in its definition of a technological protection measure. But, as with the Marrakesh Treaty, South Africa is not a party to the Treaty, so compliance with it cannot raise a constitutional concern. Rather, an intent of the Bill is to allow South Africa to accede to the WCT.[24]

38. The President states that the WCT requires "*legal remedies against the circumvention of technological measures used by authors to protect their works*," implying that the Bill does not provide such protection. The Bill provides protections against circumventing technological protection measures, defined in Section 1(i)(a) as "*any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work*." This definition is consistent with the WIPO Copyright Treaty Art. 11, which requires "*adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used ... in connection with the exercise of their rights*." There is no requirement in the WIPO Copyright Treaty to protect

[22] *ibid*
[23] *Ibid p 15*
[24] *ibid*

measures that control access to work for a non-infringing purpose. Accordingly, we find no amendment is needed in response to the President's objections.[25]

39. We thank the Portfolio Committee on Trade and Industry for the opportunity to make this written submission and commend Parliament for its progressive work on the Copyright Amendment Bill.

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[25] *ibid*