

COUNCIL OF PROVINCES

COMMENTS ON THE COPYRIGHT AMENDMENT BILL

PROFESSOR OWEN DEAN

LOCUS STANDI

1 I am a practising attorney, specializing in copyright law, and have so practiced for the past fifty years. I am also an academic, being an Emeritus Professor of law at the University of Stellenbosch, and I continue to be associated with it and more particularly with the Anton Mostert Chair of Intellectual Property Law, which I founded and of which I am currently a Research Fellow. My curriculum vitae is annexed, marked "OHD 1". This document is an extract from an affidavit that I filed in the case of *Blind SA v The Minister of Trade and Industry and Competition*, case number CCT320/21 in the Constitutional Court, in which I participated as an amicus curiae, having been accepted by the court as an expert on copyright Law.

2 It will be apparent from my CV that over the past half-century I have been intimately and actively involved in copyright law in a variety of capacities, including as a practitioner, litigator, adviser, writer, legislation draftsman, lecturer, presenter and activist. I have been described by an eminent former judge of the Constitutional Court as the "doyen of copyright law in South Africa".

3 Throughout my career I have striven tirelessly to uphold, and protect and enhance the integrity and efficacy of our copyright law, and to have it take its place amongst the best copyright regimes in the world. It is in this context that I submit these comments. I do so in my personal capacity but the views that I advance are shared by the foremost champions and experts of our copyright law with whom I am in constant communication. As a group we are seriously concerned about the poor quality of the Copyright Amendment Bill and the damage that it will do to our Law of Copyright if it is passed.

NATURE AND AMBIT OF COMMENTS

4 Ever since the Bill first entered the public domain I have spoken critically of it. I have done so widely from a variety of public platforms including in appearances before the Trade and Industries Portfolio Committee of the House of Assembly, seminars, workshops, in the media and in an address to the Legal Committee of the ANC. I have expressed the view that the Copyright Act is in dire need of updating, particularly in the digital area and on the question of exceptions to copyright protection, and that there is in principle merit in many of the provisions of the Bill. There are, however, many problematical provisions and technical defects, and the standard of draftsmanship of the Bill is poor, with the result that the Bill as a whole is bad law. I have urged that a small drafting committee comprising true experts in copyright law should be appointed with the mandate of redrafting the Bill with a view to making it a coherent, sensible and high quality piece of legislation appropriate for a country that has traditionally been in the top drawer of copyright nations. This remains my message and mission and is the primary objective of these representations.

5 It is submitted that the proposed expert drafting committee should primarily comprise persons who have expertise and experience in the practical application of the copyright law through conducting or being involved with litigation, drafting or implementing contracts and in general in actively working with the law. Copyright law is a complex and technical subject and in my experience one only derives true knowledge and understanding of it by working it and applying it in practice to the myriad of factual situations that come to the fore.

6 In essence the defects in the Bill can be divided into two broad categories, namely questionable ideological or substantive provisions, and provisions that have legal/technical flaws. In this submission I am confining myself to dealing with the latter. The Anton Mostert Chair of Intellectual Property Law will be submitting representations dealing primarily with the former. I have participated in compiling those representations and the views expressed therein conform with mine. Likewise, the South African Institute of Intellectual Property Law, of which I am a Fellow (having served as its President in the past), will also be submitting representations with which I am in full agreement. The views expressed in these documents can thus be considered as my own. I have, however, already made available to the Select Committee of the National Council of Provinces copies of my published booklet entitled *A Gift of Multiplication*, in which there is comment on certain substantive issues

in the Bill, as well as a paper on exceptions to copyright protection. I will be happy to provide further copies of this material if required. This material may be instructive on the substantive issues they address.

TECHNICAL DEFECTS

7 I have raised the issue of the technical flaws in the Bill with Adv Charmaine Van der Merwe, the Parliamentary legal adviser. I requested an opportunity of meeting with her to discuss them with her. However, she advised me that this would be procedurally inappropriate, and she suggested that I should address my concerns in comments made on the Bill to the National Council of Provinces, whereupon she could consider them in this context. I believe that by virtue of her position as the person who must certify the suitability and competence of the Bill before it can become law, she has a particular responsibility to ensure that it contains no technical defects. This responsibility is, however, naturally shared by Parliament, and in the present context, especially by the National Council of Provinces. I respectfully submit that all these persons would be failing in their duty to the nation if they were to allow a Bill with known technical defects to pass through to law. It is therefore essential that the technical defects should be properly addressed and not be allowed to be perpetuated in the Bill. With all due respect this is a task that is best addressed by an expert drafting committee such as I have propounded.

8 I am annexing, marked OHD2, a Word version of the Bill against which I have annotated my comments on specific technical issues in the Bill. Converting the printed Bill to a Word format has given rise to certain aberrations in the text. I apologize for the imperfect adaptation, but I do not believe that it materially alters the expression of my comments. These comments are the substance of my submission and should be treated as such.

9 The flawed provisions of the Bill on which I comment are not necessarily exhaustive of all the technical defects in the Bill but are rather exemplary of the main thrust of my submission, namely that there are a multitude of technical flaws in the Bill that cannot be ignored or left unchanged. There are areas of the Bill, for instance those dealing with electronic or digital issues, in respect of which other experts have greater knowledge of, or insight into, the subject matter than I do, and I believe that they would identify further technical flaws in the text of the Bill in those areas. The benefit of the expert

drafting committee that I have proposed would be that input could be obtained from such experts, who ought to be represented on the committee.

CONCLUSION

10 The Bill is currently in an unacceptable state that is not fit for purpose. It can be likened to the first draft of a document. It requires to be re-processed and refined in order to make it a coherent, complete and satisfactory instrument that can serve our copyright law well and of which we as a country can be proud.

11 I have not specifically addressed the Performers Protection Amendment Bill, but my comments apply equally *mutatis mutandis* to it. It too is permeated with substantive and technical flaws and, being likewise unfit for purpose, it should be referred to the proposed expert drafting committee for re-drafting as well.

12 In the event that any further information or elucidation in respect of my comments is required, I will be happy to provide it. I further request that I be afforded the opportunity to address the appropriate Western Cape body and/or other appropriate bodies or persons on my comments on the Bill.

12 In summary, I say that, apart from its numerous substantive defects, shortcomings and flaws, on which I am not commenting in this submission, the Bill is riddled with legal/technical flaws which require correction. The Bill is unfit to be passed into law in its present state and It requires to be substantially redrafted by a committee of true copyright experts who are experienced in working copyright law and in its practical implementation. Mere theoretical knowledge of copyright is insufficient to qualify a person properly to serve on the proposed committee.

Prof OH Dean,

3 March 2023.