

**WRITTEN SUBMISSION TO THE WESTERN CAPE LEGISLATURE IN SUPPORT
OF**

THE COPYRIGHT AMENDMENT BILL [B13D-2017]

BY RECREATE SOUTH AFRICA – 14 FEBRUARY 2023

ReCreate South Africa ('ReCreate') makes this submission on the Copyright Amendment Bill [B13D-2017] ('the Bill'), in response to the call for public comments by the Western Cape Legislature, deadline 10 March 2023.

The Western Cape is the fourth largest of the nine provinces and the third most populous, with an estimated 7 million inhabitants as per Stats SA in 2020. About two-thirds of these inhabitants live in the metropolitan area of Cape Town. All these people need access to information, use of copyright works for various purposes, including education, research, work and leisure, health, civic and other purposes, and to create, innovate or make derivative works. The Western Cape is the third largest provincial economy in South Africa in terms of contribution to national GVA. So it is extremely important that access to knowledge, education and training and other activities that grow our economy are facilitated, stimulated and enhanced. Currently, our 45-year-old apartheid era copyright law continues to be huge barrier for users, custodians, creators, and producers of information. The Western Cape is economically and technologically advanced, yet our outdated copyright law doesn't address the digital world, so it stymies creation, innovation and other activities that can stimulate socio-economic development. The tourism industry alone could benefit so much from the Copyright Amendment Bill, especially relating to use of others' works to share and educate others about the Western Cape province. The provisions for fair use and freedom of panorama would particularly benefit them. This would also apply to the wine, fruit and many other important industries in this province, that all depend on access to information and sharing of information for their livelihoods. The fires at the University of Cape Town and the House of Assembly are stark reminders how backward our copyright law is. Had the copyright law permitted digitisation, format-shifting and conversion from old to new technologies years ago, much of the terrible damage and losses suffered by both entities could have been mitigated. The Bill has very helpful provisions for digitisation and digital curation to assist libraries, archives, museums and galleries to preserve our historical records and cultural heritage for future generations.

Our submission endeavours to show the importance of the Copyright Amendment Bill B13D-2017 for the people of the Western Cape and other provinces. The Bill is progressive with many favourable limitations and exceptions that will enhance access to information and education, advance research and development, enable authors and creators to use and re-use other people's works fairly in order to recreate new works and inventions, etc., and enable the Western Cape tourism and related industries to use and share information, especially in the digital space.

A. WHO RECREATE IS

ReCreate is a non-profit association established in 2018 to promote the interests of South African creators and other stakeholders regarding copyright legislation and other policy matters. It also endeavours to keep our constituency and the general public informed about the copyright reform process through factual information, web resources, and educational workshops. ReCreate supports copyright reform that fully embraces human rights in accordance with our Constitution.

ReCreate is unique as it is a coalition of creators AND users, as well as custodians of copyrighted materials, all working together to promote a fair and balanced copyright law in a digital world.

- As **creators**, ReCreate includes writers, filmmakers, actors, poets, photographers, authors, musicians, software and video game developers, visual artists, technology entrepreneurs, producers of accessible format materials, open content creators and other creators.
- As **users** of copyrighted materials, ReCreate includes teachers, students and learners, academics, researchers and scholarly authors, library and information specialists, freedom of expression advocates, as well as disabled communities and disability rights activists.
- As **custodians** of copyrighted materials, ReCreate includes librarians and archivists.

Our biggest affiliates are the South African Democratic Teachers Union (SADTU) (a member of Education International), the South African Guild of Actors (SAGA) and Blind South Africa. We also work closely with SECTION 27, the Right to Know Campaign, Wikimedia, Blind SA, legal experts and many others, including international IP academics. All together we represent the views and interests of several hundred thousand South Africans from various stakeholder sectors around South Africa, who urgently require a fair and balanced copyright law that speaks to our Bill of Rights and aligns itself with other countries that already benefit from progressive copyright limitations and exceptions.

A. THE CURRENT COPYRIGHT LAW

Achieving an inclusive society and growing the digital economy requires access to knowledge, creativity, and innovation, but we are hampered by our current Copyright Act which will be 45 years old this year. It is an apartheid-era piece of legislation and is so outdated that it predates the birth of the Internet by five years.

A Constitutional Court ruling¹ on 21 September 2021 confirmed that the Act is unconstitutional in relation to the rights of people with disabilities. However, it is arguably unconstitutional in other areas too, e.g. the absence of royalties for actors, performers, artists, musicians and writers, outdated and inadequate exceptions for education and research, no exceptions for museums and galleries etc., which negatively impacts on the constitutional rights of all South Africans.

The primary purpose of copyright law is to promote the progress of science and the useful arts, i.e. knowledge, through a temporary monopoly for authors and creators to protect their works from uses which might impact their livelihoods, as well as balancing rights for users to access and use their works. The Berne Convention and the TRIPS Agreement provide balancing mechanisms (or legal flexibilities) known as copyright limitations and exceptions. Most developed and many developing countries have flexible copyright laws which include many different limitations and exceptions to enable access to knowledge and support creativity and innovation in the digital space.

South Africa is at a serious disadvantage to these countries, as our copyright law negatively affects educational standards, research, and socio-economic development. Without a progressive and fair copyright law, creators and authors are prejudiced. They are not entitled to a fair share of the income from their works which increases the likelihood that they will be exploited by large corporations that wield financial power in the information and creative economy. Moreover, they have no option or are pressured into assigning their copyright completely to third parties. This means they often do not own the works they create, nor can they exploit them, nor receive fair royalties when their works become popular. They are also disadvantaged by unfair or biased contracts and exploitative systems that deprive them of fair income.

Educators, learners, researchers and especially those in marginalised communities in parts of the Western Cape are also prejudiced when the power of large corporations remains unchecked by our outdated copyright law. Within our many universities and schools, especially in the Western Cape, and more broadly within civil society right across the country, it's vital that we ensure access to knowledge, arts and culture for the widest section of the population. Where copyright protection leads to exclusion or profiteering, it fails in its primary goals of promoting and protecting the creation and dissemination of knowledge and art for the good of society.

Hence, ReCreate supports the objectives of the Copyright Amendment Bill and the Performers' Protection Amendment Bill wholeheartedly. That is, to introduce fair royalties and fair use in the interests of the widest possible section of the community in South Africa.

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<https://www.concourt.org.za/index.php/judgement/485-blind-sa-v-minister-of-trade-industry-and-competition-and-others-cct320-21>

C. THE PANDEMIC AND FAILURE OF THE EXISTING COPYRIGHT ACT

The COVID-19 pandemic lockdown provided further evidence of how the current copyright law is totally outdated and urgently needs to be amended. Inequality was exacerbated and constitutional rights of citizens were compromised. Many Western Cape schools and tertiary institutions experience challenges daily due to our outdated copyright law, but it was even worse during the pandemic lockdown as libraries and bookshops were closed and information suddenly had to be made available on digital platforms. This meant that educational institutions had to obtain copyright permission before making any materials available online. Many did not have the resources to do so, so had to use other material, that may not have been up to date or as relevant as the material they wanted to share with school children and students. Businesses, legal practices and most certainly your own Legislature offices would have experienced difficulties in accessing information and being able to share or reuse material, because of the lockdown and our restrictive copyright laws.

Had the Bill been passed before the pandemic arrived, education, research, and library and other information services would not have been so badly affected in the lockdown period. There is no doubt that Fair Use and the various exceptions in the Bill would have been extremely helpful to the educational, research and library sectors, as well as the public, during the pandemic lockdown. Creators, innovators, publishers, producers, and others would also have benefitted from them.

In the health sector, copyright exceptions and limitations also assist with accessing the knowledge required to produce treatments such as vaccines. This is why President Cyril Ramaphosa joined forces with the President of India during the pandemic to call for a more balanced approach to intellectual property in the interest of the developing world.

What the pandemic has taught us is that amendment of our current copyright law should be fast-tracked and passed as soon as possible.

The current copyright law does not address the digital environment, so all moves to online learning and access to information were restricted or prohibited, unless prior permission was obtained from rights-holders and copyright fees paid.

The following documents highlight the many challenges and barriers caused by intellectual property, including copyright, during the pandemic, many of which persist in South Africa due to our outdated copyright law.

- WIPO's report on '*The impact of the COVID-19 pandemic on creative industries, cultural institutions, education and research*'.²

² https://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_covid_19_ge_22/wipo_cr_covid_19_ge_22_study.pdf

- *International Copyright Flexibilities for Prevention, Treatment and Containment of COVID-19.*³
- *Intellectual property barriers to access to COVID-19 health products in South Africa.*⁴
- *Non-Patent Intellectual Property Barriers to COVID-19 Vaccines, Treatment and Containment*⁵
- *Why intellectual property and pandemic don't mix.*⁶
- *Covid Lessons - Copyright and Online Learning*⁷

Just as the public was outraged at the cost of vaccines produced by 'Big Pharma' during the ongoing Covid-19 pandemic, so too should we be outraged at the exorbitant cost of access to education and learning materials and copyright charges for the conversion of materials to digital formats. Moreover, we should be concerned about the disinformation and delaying tactics being used by opponents of copyright reform since the Copyright Amendment Bill was first introduced to parliament back in 2017. See point J below.

D. REVIEW PROCESS OF COPYRIGHT AMENDMENT BILL

ReCreate was concerned about the return of the Bill for review by the President in 2020 and the pursuant delays in the Parliamentary process. Regrettably we felt that the lobbying against copyright reform in South Africa by large corporations with vested interests in the creative sector (and their lobbying of governments in the EU and US to in turn pressure our government) amounted to interference in our domestic legislative process. Ironically the USA and most EU countries have fair royalties and fair use provisions and/or other exceptions in their laws. So, it is hypocritical in the extreme for them to be drawn into lobbying on behalf of large corporations in their jurisdictions to oppose such provisions in South Africa.

The review process was unnecessarily long and drawn out, but ReCreate was reassured that after much deliberation, more public contributions, and empirical evidence produced, Parliament finally passed the Bill on 1 September 2022.

E. RETAGGING OF THE BILL

Because the Bill was not a new Bill, but an amendment of the current Copyright Act, which was a section 75 Bill, ReCreate initially thought that the retagging of the Bill was not necessary. However, we have since agreed that retagging the Bill as a Section 76 Bill meets the provincial competencies of requirements of Section 4 of the Constitution, as it embraces relevant issues for stakeholders nationally,

³ <https://ajic.wits.ac.za/article/view/13985/18728>

⁴ <https://journals.co.za/doi/pdf/10.10520/ejc-health-v2021-n1-a28>

⁵ <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1073&context=research>

⁶ <https://www.brookings.edu/blog/up-front/2021/06/03/why-intellectual-property-and-pandemics-dont-mix>

⁷ <https://www.eifl.net/blogs/covid-lessons-copyright-and-online-learning>

but also provincially, e.g. basic education, trade (as it would relate to exploitation of works and fair royalties), cultural matters, traditional leadership (as it would relate to the protection, management and exploitation of traditional knowledge, and disaster management) (as it would relate to preservation, archiving and accessibility of historical records and cultural heritage in libraries, archives and museums).

By opening up the Bill as a Section 76 Bill, we believe that the process will reach far more people in the Western Cape and the other provinces, especially authors and creators who may not have been aware of the Bill or missed the chance to contribute before. Their contributions will be welcomed going forward. The merits of the Bill will also be looked at with a fresh perspective by members of each Provincial Legislature, considering the importance, urgency and benefits of the Bill in their specific provincial context and circumstances.

What is promising about the Bill is that it will positively impact people's lives in the Western Cape and elsewhere, whether they live in rich or poor areas, cities, suburbs, or in farming or rural areas, or informal settlements. The provisions for authors and creators (including those who create traditional knowledge and other cultural works) will give them more control over their works and protect their moral rights but also enable them to earn fair royalties. The section relating to retrospective royalties was removed from an earlier version of the Bill, as it was arguably unconstitutional. However, ReCreate believes that the provisions in the Bill for royalties give authors, creators, artists and performers the benefit of earning future income from old contracts. Residual payments for their work are not only fair, but they are an investment in the creative economy. Currently, they do not earn any royalties from syndication packages or re-runs of their works. Also, the provisions relating to unenforceable contracts will also protect them from unfair contracts in the future.

As they also use, reuse, remix and share information whilst creating new works, or for other purposes, authors and creators will also benefit from the fair use provisions and separate exceptions and limitations for education, academic activities, libraries and other information and custodial entities. The exceptions for people with disabilities will also enable authors, creators, and others with visual, aural or other disabilities to access information via accessible formats.

To ensure socio-economic development and enable citizens to be educated, employed and fully active in the economy, they need efficient and effective library services and resources, especially in the provinces. Many libraries servicing poor and informal settlements in areas of the Western Cape lack infrastructure, technology, and basic collections. Others have technological capabilities but are restricted or prohibited by the current copyright law to share works or to digitise them for the benefit of those who do not have access to them. Public libraries serve a key role in the provinces by providing information, teaching and learning resources, literacy programmes, study facilities, use of computers, Wi-Fi and other equipment and services to the general public. In some rural areas, public libraries have joined up with schools to expand and offer their users a more

holistic services, e.g. services for learners during the school day and then for the general public in the late afternoons. However, the current copyright law continues to restrict them in many of their functions. The exceptions for libraries (including legal deposit libraries) in the Bill will positively enhance their services to their users and enable libraries to assist each other in providing digital content to the broader community in the Western Cape and further afield. The National Library of South Africa and Parliamentary Information Centre, both in Cape Town, are important legal deposit libraries and are responsible not only for collecting South African publications, but also preserving them and making them accessible now and for future generations.

G. OBJECTION TO PROPOSALS IN COPYRIGHT AMENDMENT BILL B13B-2017

ReCreate, together with many other stakeholders, strongly objected to the proposed amendments included in Bill B13B-2017 at the end of December 2021. Many of the proposals were impractical, overly restrictive, and/or unconstitutional. ReCreate is satisfied that those proposals have now been removed or amended, and that Bill B13D-2017 reflects a far more balanced piece of legislation.

H. SUPPORT FOR COPYRIGHT AMENDMENT BILL B13D-2017

In his Heritage Day speech ⁸on 24 September 2022, President Ramaphosa stated:

“The new Copyright Amendment Bill passed by the National Assembly at the beginning of this Heritage Month will go a long way in protecting our artists and towards addressing their concerns about the collection and distribution of royalties. We are determined to use the law where necessary to preserve our cultural heritage”.

Minister Nathi Mthethwa of the DSAC also stated: *“As South Africa marks Heritage Month the National Assembly has passed the Copyright Amendment Bill and the Performers Protection Amendment Bill to assist in improving the lives of those working in the creative industry”. He said: “this will go a long way towards addressing some legacy issues like royalties for repeat programmers on television”.*⁹

ReCreate is aware of the strong support the Bill has received from international, regional and local organisations, institutions, NGOs and others. We are equally aware of those who are more concerned about profit margins than human rights and prefer to favour the status quo. No piece of legislation is 100% acceptable to all stakeholders, but the Copyright Amendment Bill is a huge improvement and positive upgrading of the current copyright law. Instead of the Bill being delayed

⁸ <https://www.thepresidency.gov.za/speeches/address-president-cyril-ramaphosa-occasion-heritage-day>

⁹

<https://www.sabcnews.com/sabcnews/two-bills-related-to-the-arts-industry-will-address-legacy-issues-mthethwa/>

any longer, some issues can still be dealt with in draft Regulations once the Bill has been passed.

Several countries that have been keenly monitoring developments in the South African copyright reform process have hailed the Bill as very 'impressive' and a 'model' for other countries. South Africa should be proud that we are trendsetters in modern copyright law and that many developed countries are impressed with the final Copyright Amendment Bill B13D-2017. We, therefore, urge Parliament to speed up the process so that everyone in South Africa can start benefitting from the limitations and exceptions and other provisions in the Bill.

ReCreate supports the Copyright Amendment Bill [B13D-2017] as a progressive piece of legislation that will finally bring South Africa's copyright law in line with many countries around the world and bring South Africa into the 21st century.

It is the first time, since 1998, that the copyright law will introduce balance, fairness, and accountability, and first-time rights for some stakeholders, such as people with disabilities, museums and galleries, and performers to earn royalties.

It is appalling that it took 37 years (21 years in our democracy) before such rights, as well as improved exceptions for education, research, and libraries and other custodians of our cultural heritage were considered for inclusion in our copyright amendment process. Also, it is the first time that the needs of people with disabilities have been considered since 1978. Another 7½ years have passed since the first version of the Copyright Amendment Bill was published in 2015, and we are still waiting for an amended Copyright Act! **It is also unfortunate that human rights and the socio-economic development of people in South Africa have been side-lined by the protection of profit-margins and politics. Some parties are quick to condemn the Bill but are very slow to provide constructive solutions so that the Bill can progress rather than be delayed year after year.**

I. COPYRIGHT AMENDMENT BILL ALIGNS WITH RECREATE'S THREE KEY PRINCIPLES

a. THE RIGHT TO CREATE:

Currently access to knowledge is restricted which negatively affects teaching and learning, research, freedom of expression, creativity and innovation and other important human activities. We support the provisions in S.12A-D, S.15(1)(a), S19B-D, S22A, S39B and others that will improve the lives of South Africans.

The Fair Use provisions in Section 12A are welcomed. They will increase access to information and provide lawful flexibilities to use, re-use and make original and transformative works, and to exercise our freedom of expression and right to create. Fair Use will help ensure that South Africa's copyright law can adapt smoothly to future social, economic, and cultural conditions.

Fair Use and the various exceptions in the Bill will also enable South Africa to embrace Fourth Revolution (4IR) technologies, such as artificial intelligence (AI), machine learning, 3D printing and applications, robots, the Internet of things, genetic engineering, quantum computing and other technologies and advancements in the digital space. Some South African tertiary institutions are already involved in AI and other 4IR programmes and new developments. There are also growing AI agricultural start-ups¹⁰ and financial, security and engineering AI projects, amongst others, that are spurring the technological revolution. We cannot allow an outdated copyright law to continue to stymie these initiatives and developments.

The Fair Use right will enable: -

- Adaptation to future developments without having to keep updating the copyright law;
- Creation of accessible copies for people with disabilities;
- Reusing, re-mixing, transforming and re-interpreting;
- Research (academic and general) to be conducted, including through text and data mining, indexing, and searching;
- Creation of educational works, including open learning resources;
- Open licensing, open science and other open content programmes;
- Digital preservation and archiving;
- Reproduction of works located in public places and incidental use of background content;
- Parody and satire, pastiche, etc.
- Use of extracts of works for commentary, critical analysis, assessment and examination.
- Quick access and use of abandoned or anonymous orphan works for educational, research and other purposes.

The Fair Use right has 4 conditional criteria or factors, which determine if an act is fair or not fair. Not every reproduction is Fair Use. These factors must be applied before a work is reproduced. These factors/criteria would ensure that all uses of copyrighted works are fair to the creator and prohibit substitutional uses in the market. These factors will provide certainty and predictability which our existing fair dealing regime lacks.

Fair Use is a flexible and lawful approach in copyright law enjoyed by at least 13 other countries. The words 'such as' provide flexibility to include other acts and unforeseen new acts in the future. The words 'such as' seem to have been problematic for some people. This is somewhat surprising because 'such as' also means - like, namely, for example, for instance, or including. Most countries with fair use have the words 'such as' in their copyright laws, but Malaysia is one that uses 'including' instead of 'such as'. All these words basically mean the same thing, providing flexibility in copyright law. **Also,**

¹⁰ <https://futuorology.life/18-most-innovative-south-africa-based-agriculture-technology-companies-startups/>

some stakeholders have objected to a hybrid form of fair use and fair dealing, saying South Africa's clause is much broader than other fair use countries. On examination of other fair use regimes, some of these countries do embrace a hybrid form of fair use, which also gives flexibility and more clarity to users of copyright works.

This year the United States celebrates its 47th year of Fair Use as encoded in its copyright law (although it has been applied for at least two centuries). The US boasts the largest and wealthiest publishing, entertainment, and IT industries in the world. Fair use contributes trillions to the US economy as indicated in the *CCIA report 2017*.¹¹ Also read: *The User Rights Database: Measuring the Impact of Copyright Balance. PIJIP Working Paper 2017-03*.¹²

During 2023, Israel will celebrate its 17th year and South Korea its 11th year of Fair Use. Some countries like Malaysia and Singapore call it Fair Dealing, but it is in fact Fair Use with the same 4 criteria/factors. In recent years, Kenya¹³ 'quietly shifted' from Fair Dealing to Fair Use, and Nigeria¹⁴ has recently passed its Copyright Bill that includes the four Fair Use factors, although it is still referred to as Fair Dealing.

Countries that benefit from Fair Use provisions in their copyright laws can lawfully access, use, re-use or make transformative works from South African copyrighted works. But, because South Africa does not have Fair Use in its current copyright law, we are prejudiced - we cannot enjoy reciprocal benefits. To use their works lawfully, we must apply for copyright permission and pay copyright fees. Fair Use in the Bill will level the playing field with such countries. In the process, it will vastly increase access to copyright treasures around the world.

Fair Use has been confirmed to be compliant by the Parliamentary Legal Team, led by Adv. Charmaine van der Merwe, as well as opinions submitted to Parliament by Susannah Cowen¹⁵, SC, Professor Thomas Hoeren¹⁶, academic and former Judge from Münster University, Germany, and a well-recognised group of international and South African IP experts and academics.¹⁷

No country that has Fair Use in its copyright law has ever been subjected to WIPO or WTO Dispute Resolution Mechanisms or any other action that disputes its legality or compliance with international IP agreements.

Fair Use is not carte blanche for piracy or a mechanism whereby rights-holders' works will be infringed, or that their markets will be destroyed,

¹¹ <https://www.cciagnet.org/fairusestudy/>

¹² <http://infojustice.org/flexible-use/research>

¹³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929252

¹⁴ <https://guardian.ng/features/national-assembly-passes-copyright-bill/>

¹⁵ https://libguides.wits.ac.za/Copyright_and_Related_Issues/Opinion

¹⁶ https://scholarlyhorizons.co.za/wp-content/uploads/2022/04/Prof-Hoeren-final-Legal_Opinion_CAB-2022.pdf

¹⁷ <https://infojustice.org/wp-content/uploads/2021/05/South-Africa-CAB-Academic-Opinion-05102021.pdf>

as many opponents of the Bill would like the public to believe. In fact, proper application of Fair Use should increase creativity and innovation, as well as encourage better compliance when using copyrighted works.

Academic research and economic studies suggest that the presence of Fair Use, and more open limitations and exceptions more generally, will benefit South Africa while causing no harm to traditional copyright intensive industries.

The following reports highlight the benefits of a flexible copyright law and recommend Fair Use: -

International:

- *The Australian Productivity Commission report into Intellectual Property Arrangements (2016)* recommends fair use, as does the Australian Government in its response to the Productivity Commission Inquiry.¹⁸
- *The Ernst & Young Cost Benefit Analysis of the ALRC's proposed Copyright Reform.*¹⁹
- *What is Fair?* by Deputy Chair of the Australian Productivity Commission, Karen Chester (debunks many of the myths about Fair Use and provides a positive finding in favour on Fair Use).²⁰
- *The Australian Law Reform Commission's Report 122 (2014) entitled "Copyright and the Digital Economy"* supports fair use and confirms that it is compliant with Berne and TRIPS Agreements.²¹
- *A 2018 Study by Deloitte in March 2018, entitled "Copyright in the digital age: An economic assessment of fair use in New Zealand"* recommends fair use for New Zealand.²²

South Africa:

- In 2011, the DTI commissioned a *WIPO Study on "The Economic Contribution of Copyright-Based Industries in South Africa"*.²³ WIPO's report clearly states (with reference to the Gowers Review of 2006), that:
"The existence of a general fair use exception that can adapt to new technical environments may explain why search engines were first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement".

In its concluding recommendations, WIPO states:

¹⁸ <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

¹⁹ <https://www.infrastructure.gov.au/media-centre/publications/cost-benefit-analysis-changes-copyright-act-1968>

²⁰ <https://www.pc.gov.au/media-speeches/speeches/fair>

²¹ https://www.pc.gov.au/_data/assets/pdf_file/0017/201563/subdr536-intellectual-property-attachment.pdf

²² <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf>

²³

https://www.researchgate.net/publication/321369655_The_contribution_of_copyright-based_industries_to_the_South_African_economy

“The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary”.

- In paragraph 9.2.3, on page 1-96, of the *Handbook on South African Copyright Law*, the author, Owen H. Dean, posits that *“the American and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts”.*

The Fair Use provisions or other sections of the Bill do not negatively affect the AGOA or other GSP trade agreements with the United States. In fact, the Bill incorporates the Fair Use provisions from the US and similar provisions for education, disabilities, etc. Fair and equitable protection and national treatment will be given to US copyrighted works and other Berne Convention signatories. Adequate mechanisms to protect all copyright works and their markets are also included in the Bill.

b. THE RIGHT TO OWN

We support the proposed amendments in S.22B-D and S.28S that will protect and enhance the rights of creators, authors, musicians, photographers, and others. The Bill will empower them to have more control over their works and benefit more from their works. S.22(3) provides them with an assignment period of 25 years, which they can either renew or exploit on their own in the future. They can benefit from improved contracts and contractual protection in S.12D(7)(3), S.22D and S.39B. S.20(1)-(2) will give creators and others better protection of their moral rights and S.12A-D will increase access to others' works.

The Bill will enable visual artists to benefit from a resale right in S.7A-F. The Bill's intrinsic link to the Performers' Protection Bill will give actors and performers certain protections, and for the first time, the right to earn fair royalties in S.22B-D.

Nationally and provincially, authors, creators, musicians, producers, and publishers also engage in research, studies, teaching and learning,

resource-sharing, employment, leisure, AI, quotation, and other activities that require unrestricted access to a wide range of other copyright works. They will benefit from various provisions, including S.12A-D, S.15(1)(a), S.19B-D, S.22A, and S.19D (if they have disabilities).

c. **THE RIGHT TO EARN**

In 2011, the DTI established a Copyright Review Commission²⁴, led by Judge Ian Farlam, to address artists' concerns that royalties were not being properly distributed to the rightful owners of copyright, by collecting societies or collection management organisations (CMOs). There have been several scandals in recent years relating to mismanagement, misappropriation, or diversion of funds by South African CMOs²⁵, or refusal to provide information to creators. Scandals about SAMRO²⁶ highlight some of the ongoing problems in the collection management sector.

CMOs are unregulated monopolies whose well-known lack of transparency and accountability has been a problem going back to at least 1999, when the first request to regulate CMOs was made at a DTI stakeholder workshop in Pretoria by a librarian at the National Library of South Africa. This was never followed up until 2015 when a section to address CMOs was included in the Bill.

CMOs charge many creators and authors in our constituency for use of their works, and claim to 'represent' them, but fail to compensate them for such use, or they pay them inadequate royalties. Unfortunately, we lack power to act as members in their governance.

ReCreate believes that CMOs should have a fiduciary duty to creators, be subject to member governance, and be subject to government oversight on the reasonableness of their expenditure and pay-outs. We, therefore, strongly support the proposed amendments in S.6A(1) -11B) and S. 22B - 22D that will help to protect authors, creators and others against unfair practices, abuses and/or exploitation by employers, contractors, producers, publishers, or collective management organisations.

ReCreate supports the accreditation and regulation of CMOs provided for in the Bill. This will also help implement many of the recommendations made by the Copyright Review Commission in 2011. This will finally give creators and others the right to earn fair remuneration or royalties for their work, and obtain distribution statements, without having to take legal or other action to obtain information about their royalties. The *2022 Investigation Report of the Information Regulator* in the complaint lodged by Clive Hardwick obo Hardwick Trading (Pty) Ltd. confirms the lack of transparency and accountability of the CMO, RISA Audio Visual Licensing NPC

²⁴ https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf

²⁵ <https://www.groundup.org.za/article/sa-music-industry-exposed-money-not-going-artists>

²⁶ <https://www.news24.com/Fin24/samros-dubai-scandal-deepens-20180902-2>

(RAV).²⁷ There have also been several scandals in the media relating to CMOs, and a Competition Commission investigation into price-fixing of textbooks and other material from 2018 to 2021 by members of the Publishers' Association of South Africa (report has not been made public), which indicate that intermediaries in the copyright chain need to be better regulated and audited to ensure such practices do not happen again. Many of these stakeholders continue to oppose the Copyright Amendment Bill, probably because they have been the main beneficiaries of the current Act for decades. The Bill should level the playing fields so that authors and creators have more control over their works and enable them to get their fair share of royalties.

J. DISINFORMATION ABOUT THE BILL

Since the Bill was placed before the Portfolio Committee on Trade and Industry in 2017, there has been a concerted effort or strategy by some stakeholders to circulate disinformation and myths about the Bill in the media, publications and blogs, but also at copyright workshops and meetings. In the Western Cape, and in other provinces, creators at grassroots level who deserve fair royalties and would benefit from the Bill, have been misled or misinformed by vested interests that stand to benefit most from the status quo. The spread of disinformation about the purpose and content of the Bills persists. Claims that fair use will cause 'catastrophic damage' in the creative industries and that the research and education economy are at risk are false. There is no evidence at all that indicates that fair use has caused damage in any industry, including the creative industries. On the contrary, it has helped to grow the creative industries. One example is the US which boasts the largest and wealthiest creative industries in the world. Fair use contributes trillions to its economy each year and creates millions of jobs.²⁸ In other countries that have fair use, their creative industries continue to flourish.

One of the reasons for the establishment of ReCreate was to provide a balanced perspective on the Bill and debunk myths and disinformation and provide factual information about the Bill, where possible. Useful Q & A documents²⁹ were compiled by a senior librarian at the University of Witwatersrand some years ago to provide facts and information about the Bill. The content is still relevant.

K. OUR RECOMMENDATIONS

We fully support Bill B13D-2017, but we notice that -

- Section 22A relating to orphan works needs to be revised. The process is impractical and costly, and few if any rightholders who have in fact abandoned their works, are likely to know to claim from the proposed fund. We recommend that the use of orphan works that are anonymous, under pseudonyms or where rightholders are untraceable, should be permitted in

²⁷ <https://www.groundup.org.za/article/information-regulator-bears-its-teeth-in-music-royalties-investigation/>

²⁸ <https://infojustice.org/archives/38282>

²⁹ https://libguides.wits.ac.za/Copyright_and_Related_Issues/FAQs_CAB.

Section 22A, under fair practice, and/or addressed under fair use in Section 12A.

- Section 28P(2) conflicts with the Constitutional Court ruling of 21 September 2022 relating to people with disabilities and should be deleted from the Bill.

L. APPRECIATION

ReCreate has previously made submissions on different versions of the Bill. We appreciate and thank the Western Cape Legislature for this opportunity to make the above comments in support of the final Bill B13D-2017.

We submit this in the spirit of recognising the role of authors and creators in the creation of knowledge (including traditional knowledge), and their right to earn royalties for works that are copyrightable, but also the importance of these works being accessible for education, research, libraries and other information services, civic and other purposes, and especially for the benefit of society. Should you have any queries, or require additional information, please contact ReCreate at recreateza@gmail.com.

M. PUBLIC HEARINGS

We would appreciate it if you could grant ReCreate the opportunity to present at the public hearings that will be held in the Western Cape soon. If possible, could we please present online, due to other provinces also holding hearings on similar dates?

ReCreate represents a large constituency of stakeholders from various sectors and would like to be kept informed of dates and places where hearings will be held.

We await to hear from you in this regard.

Thank you,

Sincerely,

Ben Cashdan – Chairperson: ReCreate SA