
RESEARCH
ICT AFRICA

Written submissions on aspects of the Copyright Amendment Bill [B13B-2017]

Submissions requested on aspects of the Copyright Amendment Bill [B13B-2017] and the Performers' Protection Amendment Bill [B24B-2016] as requested by the Portfolio Committee on Trade and Industry on 4 June 2021.

To: Mr. D Nkosi, Chairperson

The Portfolio Committee on Trade and Industry

For attention: Mr A. Hermans, Ms M. Sheldon, Ms. Y. Manakaza, Mr. T. Madima

Per email: ahermans@parliament.gov.za ; tmadima@parliament.gov.za ; msheldon@parliament.gov.za and ymanakaza@parliament.gov.za

For further information please contact:
Dr. Andrew Rens

Senior Associate, Research ICT Africa

arens@researchictafrica.net

About Research ICT Africa

Research ICT Africa (RIA) is an African digital policy, regulation and governance think tank based in Cape Town. It conducts research on digital economy and society that facilitates evidence-based and informed policymaking for improved access, use and application of information and communication technologies (ICTs) for social development and economic growth. RIA seeks to support policy and governance that will reduce the uneven distribution of opportunities and the harms associated with the intensifying processes of digitalisation and datafication. It conducts research on digital economy and society that facilitates evidence-based and informed policymaking for improved access, use and the application of information and communication technologies (ICTs) for social development and economic growth. Through active participation in international, continental and national processes of digital governance, RIA undertakes research to provide evidence-based alternative strategies in the areas of intellectual property, internet governance, data governance, cybersecurity, algorithmic governance and innovation that will produce more equitable and just outcomes. Understanding the digital economy and how it can be the basis for innovation and entrepreneurship that serves the needs and challenges of marginalised communities – including women, youth, children, the elderly, and people in rural areas – is an integral part of RIA's work.

Acknowledgements and declaration

This submission was drafted and prepared by Dr. Andrew Rens, with valuable inputs, contributions, and revisions from other RIA staff members. Any errors or omissions remain the author's own.

The research informing this submission is made possible by a grant from Canada's International Development Research Centre (IDRC) to develop cyberpolicy capacity in Africa.

Availability

We confirm our availability to make oral representations based on this submission during the public hearings scheduled on 4 and 5 August 2021.

Overview

Research ICT Africa (RIA) welcomes this opportunity to submit written comments on clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) in relation to the Copyright Amendment Bill [B13B-2017], and the alignment of the Copyright Amendment Bill [B13B-2017] and the Performers' Protection Amendment Bill [B24B-2016] with the obligations set out in international treaties, including the World Intellectual Property Organisation (WIPO) Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

We make this public interest submission to help ensure that the intensifying global processes of digitalisation and datafication can be harnessed to contribute to the national project of reducing poverty, unemployment and inequality and that the benefits of advanced technologies and opportunities to innovate, improve lives and livelihoods by deploying them are more evenly spread. We acknowledge the extensive work on the Copyright Amendment Bill [B13B-2017] (CAB) and the Performers' Protection Amendment Bill [B24B-2016] (PPAB) by the Portfolio Committee on Trade and Industry and the work of both the National Assembly and the National Council of Provinces in multiple rounds of public consultation on the two Bills.

Research ICT Africa shares many of the same objectives as the Copyright Amendment Bill, not least enabling innovation, entrepreneurship, education, and research. This submission is made in the knowledge that unequal opportunities to innovate reflect the structural inequalities that characterise our economy and the need in policy formulation to actively redress historical injustices reflected in inequality today.

General comments and concerns

With this background in mind, and before submitting comments on specific aspects of the CAB and PPAB we highlight the following overarching concerns or considerations before delving into specific aspects of the proposed Bills.

The call for submissions stipulated that they must be limited to the President's reservations. However the President's reservations are on some issues so vague as to make assessment of exactly what the President's reservations are difficult, if not impossible. To the extent that the President's reservations cannot reasonably be ascertained, the Committee should reject speculations on the possible meanings of vague pronouncements since, to the extent that the reservations are unclear, they have not been competently referred back to the National Assembly.

Specific comments specified exceptions

Innovation exceptions

The CAB includes a number of exceptions that are necessary for technological innovation; namely sections 12A, 12C and 19B (innovation exceptions). Paragraph 12 of the referral from the President reads:

> 15. The Copyright Bill introduces copyright exceptions in the new sections 12A to 12D, 19B, and 19C. From my reading of the various submissions and advice, a number of issues arise from these provisions which may constitute reasonable grounds for constitutional challenges for the following reasons:
>
> 15.1. Sections 12 and 19 include exceptions and limitations that seek to align the Bill with the Marrakesh Treaty. However, sections 12A, 12B (1) (a) (i), 12B (1) (c), 12B (1) (e) (i), 12B (1) (f), 12D, 19C 93), 19C (4), 19 (c)
>
> (5) (b) and 19 (9) may constitute arbitrary deprivation of property.
>
> Section 12A and 12D may further run the risk of violating the right to freedom of trade, occupation and profession;
>
> 15.2. It is also clear that these sections may be in conflict with the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty both of which have been signed by South Africa, although they are yet to be acceded to. If these exceptions and limitations run the risk of constitutional challenges, they require reconsideration by the National Assembly.

However the section does not specify in what respects the exceptions referred to may constitute arbitrary deprivation of property. The referral also does not clarify in what way the exceptions may conflict with the WCT and the WPPT. Nor does it offer an explanation of why

compliance with two treaties which South Africa has not acceded to and which are therefore not binding, is relevant to the issue of constitutional reservations.

Deprivation of Constitutional Property

The question of whether copyright is covered by the right not to be arbitrarily deprived of property under s25 has not been definitively settled in South African law (Samtani, 2021). See *Laugh It Off Promotions CC v South African Breweries* [2005] ZACC 7) (deciding that free expression rights apply to use of parody in trademarks without deciding whether trademarks are property protected by section 25); *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41 (characterising patents as a statutory system creating an 'artificial monopoly' rather than property for the purposes of s 25); *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26. at 75 (holding that there was no defect in the final Constitution on the basis that it did not contain an explicit right to intellectual property in the Bill of Rights).

It thus cannot be assumed that exceptions to copyright are arbitrary deprivations of property because it is not clear whether copyright is property for the purposes of section 25 of the Bill of Rights. If copyright were found to be property for the purposes of Section 25 of the Bill of Rights, it does not follow that there would be arbitrary deprivation. The listed sections meet the Section 25 (1) requirement that interference with property may only be through law of general application, since the exceptions are laws of general application. There would need to be a specific and substantial interference with the ownership rights of the property owner for a deprivation to be established (see for instance *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* [2017] ZACC 26). Merely limiting some instance of ownership does not suffice. In addition, the innovation exceptions are not arbitrary. As will be seen in the discussion of the individual exceptions below, each is justified by an important purpose and is carefully crafted to balance the rights and interests of the various actors concerned.

Response re: Section 12A

Section 12A has already been the subject of much discussion in the committee and of prior submissions. Although much more could be said about this important exception this

submission will discuss the importance of the exception for innovation and that it is not arbitrary, and that it complies with the international treaties referred to in the President's referral.

Section 12A is essential to the future of innovation in South Africa since it is a flexible provision that enables the law to keep pace with rapid changes in technology. Section 12A is modelled on United States law, specifically 17 U.S.C. §107, but with important changes to adapt it to South Africa's socio-economic challenges and commitment to development. One can see this, for instance, in the fair use exception relating to the proper performance of public administration. In the United States §107 has repeatedly enabled innovative new technologies that could not have been predicted by the legislature.

Section 12A serves important purposes including enabling the activities listed in the section such as research, private study, reporting, scholarship, teaching and education, amongst others. However, the section is not confined to those activities. Because it is flexible it can be applied to new activities that are required for new technologies to develop. This flexibility that allows the law to adapt to changing technology is itself an important purpose. The ambit of the exception is constrained by the analysis required by s 12A (b) which requires consideration of all relevant factors including those listed in (i) to (iv) of the sub-section. Crucially the factor in (iv) "the substitution effect of the act upon the potential market for the work in question" protects the interests of the copyright holder. The section achieves an internal balance between the different interests involved and as a consequence it is unnecessary for it to be 'balanced' by some other provision.

API's

One of the many innovations that fair use has enabled involves API's. API's are application programming interfaces, that allow a computer program to interoperate with another program whether on the same device or another device. These frequently, although by no means always, require that some of the computer code in one program or device is the same as the code in another program or device. API's are essential for software to inter-operate. They are also essential for enabling innovators to access platform markets. However, since the implementation of API's frequently includes reproduction of portions of computer programs

it may sometimes involve acts which require the authorisation of the author or her successor. Interoperability is essential both for innovation, and for competition.

The Copyright Amendment Bill includes an express exception for interoperability in Section 19B, discussed below. However, whether the exception permits all the acts necessary for the implementation of API's is not clear due to the detailed limitations in the exception. While section 19B is essential to innovation it may not be sufficient to enable implementation of API's in certain important cases. However, the flexible provisions of §107 in the United States have already been found to enable implementation of API's. In a recent case, *Google LLC v. Oracle America, Inc.*,No. 18–956 decided 5 April 2021, the United Supreme Court held that implementing an API that involved copying code is permitted under §107. Section 12A would therefore assure South African software developers that they have the same legal authorisation to implement APIs as software developers in the global leader in software innovation.

Artificial Intelligence

Another innovation that requires fair use is machine learning. Artificial Intelligence is an emerging general purpose technology. Machine Learning is an important AI technique. Machine Learning requires vast data sets. While this data is often not subject to copyright, for example factual weather data, for some machine learning systems the 'input data' is texts, images, video or computer code, which are copyright works. Machine learning systems often require the reproduction and adaptation of vast numbers of thousands, or even tens or hundreds of thousands of works. However, these works are used by the system rather than a human, and for the novel purpose of machine learning. Some machine learning systems appear to make use of copyright works in ways that require permission of the copyright holder of each work, however given the vast numbers of works involved this is simply impractical and requiring it would amount to prohibiting South Africans from developing machine learning systems in important areas. Therefore, it is essential that copyright law permits use for machine learning. The European Union has attempted to develop a stand-alone exception, however this exception is regarded as unworkable (Geiger, 2021) while at the same time there is widespread agreement that most machine learning in the United States

is authorised by §107 but that the provision is sufficiently flexible to prohibit exploitive practises (USPTO Report 2020).

S12A would authorise use of copyright works for machine learning, provided that the machine learning in question is considered fair in view of the balancing exercise required by S12A(2). Where machine learning is used to produce competing works that would have an adverse effect on the market for the original, then it likely would not be regarded as fair, but where it produces some other output, such as an algorithm that could recognise a cow as a cow then it likely would be regarded as fair. The internal balance in section 12A enables appropriate outcomes even when applied to novel technologies.

Section 12C, Transient Copies

Section 12C is concerned with transient copies, that is temporary copies that are made by digital technologies in the course of their normal operation. For example, for a person to read a page on the World Wide Web her service provider requests a copy of the webpage from the Internet Service Provider hosting the website. Multiple copies of the various components of the webpage may be made during the transmission of the copy to the reader, whose own Internet Service Provider makes a copy which it transmits to the reader whose PC, tablet or phone then makes a copy to be able display the website.

Section 12C is substantially similar to Article 5 of *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.* A side by side comparison of the sections is instructive, the words and phrases in bold in the table below are shared by both enactments.

Section 12C CAB	Article 5(1) of Directive 2001/29
12C. Any person may make t**ransient or incidental** copies or adaptations of a work, including reformatting, where such copies or adaptations are a**n integral and essential part of a technical process and the purpose** of those copies or adaptations **is**—	1. Temporary acts of reproduction referred to in Article 2, which are **transient or incidental** [and] **an integral and essential part of a technological process** and whose sole purpose **is to enable:**
(a) **to enable the transmission** of the work **in a network between third parties by an intermediary** or any othe**r lawful us**e of the work; **or**	(a) a **transmission in a network between third parties by an intermediary**, **or**
(b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is n**o independent, economic significance** to these acts.	(b) a **lawful use** of a work or other subject-matter to be made, and which have n**o independent economic significance**, shall be exempted from the reproduction right provided for in Article 2.

Where the wording of Section 12C differs from Article 5 it is because it refers to more recent technological developments such as mobile devices. Section 12C thus allows purely technical copies and adaptations for very specific technological purposes to enable Information and Communications Technologies (ICT's) to function. This is an important purpose. The uses are limited by their specific technical purpose. The provision for lawful technological uses is further limited by the requirement that they have no independent economic significance. The section is thus not arbitrary.

Response re: Section 19B, Reverse Engineering

Section 19B is substantially similar to Articles 5 and 6 of *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs,* commonly referred to as the Software Directive*.* A side by side comparison of the sections is instructive, the words and phrases in bold are shared by both enactments.

Section 19B of the CAB	Articles 5 and 6 of the Software Directive
19B. General exceptions regarding protection of computer programs (1) A person **having a right to use a copy of a computer program** may, **without the authorization of the** copyright owner, **observe, study or test the functioning of the program in order to determine the ideas and principles, which underlie any element of the program if** that person **does so while performing any of the acts of loading, displaying,** executing, **transmitting or storing the program, which he** or she **is entitled to** perform.	Article 5 Exceptions to the restricted acts 3. The **person having a right to use a copy of a computer program** shall be entitled, without the authorisation of the rightholder, to **observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if** he **does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled t**o do.
Section 19B (2) to (4) (2) **The authorization of the** copyright owner **shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:** (a) **The acts** referred to in subsection (1) **are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorized to do so;** **(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in paragraph (a);** and (c) t**hose acts are confined to the parts of the original program which are necessary in order to achieve interoperability**.	Article 6 Decompilation 1. **The authorisation of the** rightholder **shall not be required where reproduction of the code and translation of its form** within the meaning of points (a) and (b) of Article 4(1) **are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:** **(a) those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;** **(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and** **(c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.**

(3) **The information obtained** through the application of the provisions of subsection (2) may not be—	2. The provisions of paragraph 1 shall not permit **the information obtained** through its application:
(a) used for **goals other than** those **to achieve the interoperability of the independently created computer program**;	(a) to be **used for goals other than to achieve the interoperability of the independently created computer program**;
(b) **given to others except when necessary for the interoperability of the independently created computer program**;	(b) to be g**iven to others, except when necessary for the interoperability of the independently created computer program**; or
(c) **used for the development, production or marketing of a computer program substantially similar in its expression** to the program contemplated in subsection (1); **or**	(c) **to be used for the development, production or marketing of a computer program substantially similar in its expression**,
(d) **used for any other act which infringes copyright.**	**or for any other act which infringes copyright.**

Section 19B serves two key purposes that enable innovation. Section 19B (1) authorises acts that are essential for understanding how software is functioning, which is vital for performing security audits on software, detecting malfunctions of software and determining how software is functioning. It thus serves an important purpose. It is also narrowly limited, not only must the person have a lawful right to use the program but she may only study the program while operating the software in the ways she is authorised to operate it.

Section 19B (2) authorises decompilation in order to achieve interoperability. Interoperability is essential for digital technologies. Without interoperability current ICT's would simply not be possible. For example, interoperability is required for an app made by one developer, such as a bank, to work on a mobile phone running an operating system made by someone else such as IOS, Apple's mobile phone operating system. The permitted acts are limited by the technical requirements of subsection (2) (a) to (c) and then further limited by the exclusion of acts detailed in subsection (3).

Section 19B (4) - contains a definition of interoperability that closely follows a definition in the EU Software Directive. Section 19B thus serves important purposes, and its provisions are narrowly tailored with two tiers of limitations on the reach of the exceptions. Section 19B is thus not arbitrary.

Response re: Compliance with International Treaties

The referral states that the CAB has been referred back to the National Assembly “so that it may consider the Bills against South Africa's International Law obligations”. This does not accord with section 79(1) of the Constitution which authorises the President to refer Bills back to the National Assembly only for constitutional concerns. Mere non-compliance with a treaty is not necessarily a constitutional concern, although there are situations in which non-compliance with a treaty might give rise to a constitutional concern, for example, acceding to and implementing the Marrakesh Agreement, will respect, protect and fulfil the right to equality in the Bill of Rights insofar as it upholds the rights of the blind and visually impaired persons to enjoy the same right to reading as a sighted person. The referral does not advise the National Assembly in what ways CAB and PPAB may not comply with international law in the president’s view, nor does it say how such non-compliance would amount to a constitutional issue.

Although the President’s referral expressed a view that sections 12A, 12D and 19B may not comply with the “Three Step Test” it does not specify in what way any of the sections do not comply. The so called "three step test" despite the name does not require three steps but holistic assessment of three factors (Max Planck Declaration, 2008). The three factor test originates in Article 9(2) of the Berne Convention which stipulates: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Certain special cases simply means that the exception must not be overly broad, "not conflict with normal exploitation" requires that the exception must not deprive the author or her successor of a substantive source of income for that type of work and "not unreasonably prejudice the legitimate interests of the author" requires that the exception must not

disproportionately affect the author. It is significant that 9(2) begins with "it shall be a matter for legislation" since this signals that countries have a wide latitude. So, for example, it is not necessary for legislation to quote the three factor test and suggesting that it is required is a misunderstanding of the relationship between international treaties and national law.

As demonstrated in the analysis of the sections above, each of these sections serves an important specific public interest, is confined to specific cases, and is carefully crafted to limit the ambit of the exception and protect the interests of the copyright holder. Each of the sections thus complies with the 'Three Step Test'.

Section 12A has an internal balancing mechanism that requires that the interests of copyright holders be balanced with those of innovators, entrepreneurs, software developers, researchers and the public who rely on ICTs. The United States enacted section 17 U.S.C. §107, on which Section 12A is based, in 1976. Moreover, the United States has been a party to the Berne Convention since November 16, 1988, and the World Trade Organisation's Trade Related Aspects of Intellectual Property Agreement (WTO-TRIPS), which requires compliance with the "three step test" since 17 December 2005. Members of WTO may make use of the WTO dispute resolution mechanism to challenge legislation of other members that they do not comply with the WTO agreements. However, no member has challenged §107 as not compliant with the "three step test". The United States is also party to the WCT, WPPT and Marakesh Agreement but no member of those agreements has challenged §107.

As detailed above, Section 12C is drawn almost verbatim from the Article 5 of Directive 2001/29. No member of the WCT has challenged Article 5(1) of the Copyright Directive as not compliant with the WCT. No member of the WPPT or Marrakesh Agreements has challenged Article 5(1) of Directive 2001/29 as not compliant with either of them, which is unsurprising since these treaties are not as relevant to transient copies.

As detailed above Section 19B is drawn almost verbatim from the Articles 5 and 6 of the European Software Directive. No member of the WCT has challenged Articles 5 and 6 of the Software Directive as not compliant with the WCT. No member of the WPPT or Marrakesh Agreements has challenged Articles 5 and 6 of the Software Directive as not compliant with

either of them which is again unsurprising since these treaties are not as relevant to interoperability.

The absence of challenges to the foreign laws that are analogous to the innovation sections in the CAB does prove beyond doubt that those sections are compliant with the international agreements. But it does place a burden of persuasion on any claim that the innovations sections are not compliant. A simple assertion that the sections do not comply will not suffice.

Recommendation:

The exceptions set out in Clause 13 (sections 12A, 12B, 12C and 12D), Clause 19 (section 19B) and Clause 20 (section 19C) of the Copyright Amendment Bill should be unchanged and the Copyright Amendment Bill and Performers Protection Amendment Bill should be passed without delay.

References:

Geiger, Christophe, *The Missing Goal-Scorers in the Artificial Intelligence Team: Of Big Data, the Fundamental Right to Research and the failed Text and Data Mining limitations in the CSDM Directive* (2021) PIJIP/TLS Research Paper Series no. 66.
https://digitalcommons.wcl.american.edu/research/66

Max Planck Institute for Innovation and Competition 'A Balanced Interpretation of the "Three-Step Test" in Copyright Law' September 1, 2008

Sanya Samtani, Chapter 5: 'Legislating Access to Educational Materials: South Africa' in 'The Right of Access to Educational Materials and Copyright: International and Domestic Law', (2021) University of Oxford, unpublished doctoral thesis on file with author.

United States Patent and Trademark Office *Public Views on Artificial Intelligence and Intellectual Property Policy,* October 6 2020,
https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf