

10 May 2022

The Chair: Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
Cape Town

Attention: the Honourable J. Hermans

By email only to the Portfolio Committee Chair and Secretariat: jhermans@parliament.gov.za;
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Dear Honourable Chair

SUBMISSIONS ON THE COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 BY THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAWYERS (SAIPL)

We refer to the reports by the DTIC and the CLSO on the stakeholders' submissions made on 6 May 2022. Considering the recommendations made in those reports, we feel obliged to repeat the Institute's primary submission that the copyright exceptions need proper impact assessment before the National Assembly can proceed with the Bill.

The Institute's placing on record that there has been no socio-economic impact assessment of the Bill, as required by Government's own internal rules, was "noted" by the DTIC. All parties concerned therefore recognise that this essential work was never carried out.

We note that the reports recommend the retraction of virtually all the earlier proposals in the December 2021 consultation document for improvements to the 'fair use' and exceptions clauses to meet constitutionality and treaty compliance. The CLSO report also recommends that the "fair use purposes" be expanded by adding "computational analysis".

The earlier proposal to limit the existing ephemeral exception using the wording of the Canadian legislation is to be retracted for further consideration because it might not be "ideal for South African copyright law." The same kind of consideration has never been applied in respect of the 'fair use' clause that has its origin in the legislation of the United States, and is not now being applied in respect of its further expansion. On the other hand, the recommendation for the further expansion of the 'fair use' clause - in a way that does not appear in any of the 'fair use' provisions of the few countries that have it - was made without impact assessment.

The different approaches underlying these recommendations are, with respect, confusing, contradictory, and bring your Committee no closer to resolving the President's reservations about these provisions' constitutionality and treaty compliance.

We therefore restate our submission that the National Assembly must, for the reasons fully set out in the Institute's written submission of 28 January 2022:

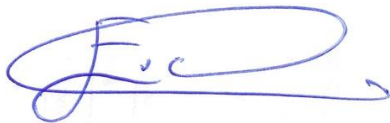
- Undertake a socio-economic impact assessment of the copyright exceptions and the provisions in the Bill that supplement and implement them.
- Engage independent Senior Counsel experienced in constitutional law and intellectual property law to assess the constitutionality and treaty compliance of these provisions.

The outcome of these assessments has to be applied before the Bill can again be passed by the National Assembly. Not doing so will carry a significant risk of key provisions, if not the whole Bill, being subject to challenge by creators of copyright works and copyright owners for unconstitutionality.

We respectfully encourage the Portfolio Committee to take the initiative to reconsider the further processing of the Bill and that this letter be distributed to members of your Committee in advance of its next meeting that will deliberate on the Bill.

Yours faithfully

SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW



ÉRIK VAN DER VYVER
President



DEBBIE MARRIOTT
Convenor: Copyright Committee

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