

# CONTROVERSIAL LEGISLATION DERAILED



## SOUTH AFRICA'S COPYRIGHT REFORM

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On 22 June 2020, with the announcement of President Ramaphosa's decision to refer the Copyright Amendment Bill (the "Bill") and the Performers' Protection Amendment Bill back to Parliament, a highly controversial legislative package that was railroaded through Parliament came to a screeching halt.

The President raised a broad range of constitutional reservations which could be summarized in the following categories:

- **Incorrect Parliamentary process** followed, because, with its impacts on cultural matters and trade, the Bill should have been processed with the participation of the Provinces under Section 76 of the Constitution (called "mis-tagging"). Mis-tagging would render the legislation invalid, as held in the 2010 decision of the Constitutional Court, *Tongoane v Minister of Agriculture and Land Affairs*.

An earlier bill that amended the Copyright Act, the Intellectual Property Laws Amendment Bill, suffered the same fate of being referred back to Parliament by then-President Zuma to be re-processed under Section 76. Since the Bill will impact on specific provisions of the Copyright Act introduced by the Intellectual Property Laws Amendment Act, 2013, the President's raising of mis-tagging was inevitable.

- **Arbitrary deprivation of property** in the retrospective parts of the statutory unwaivable royalty sharing provisions, in conflict with the Constitution's Bill of Rights. Arbitrary deprivation of property by the bulk of copyright exceptions, in conflict with the Bill of Rights and with

South Africa's obligations under the Berne Convention and the WIPO Copyright Treaty, to which he should have added the Trade-Related Aspects of Intellectual Property Rights Agreement (the "Treaties"). The Treaties provide for the multilateral recognition of copyright across all their member states.

Also mentioned was the **lack of proper consultation** on a substantial broadening of the 'fair use' copyright exception by the National Assembly, that was not open for public comment.

The concerns raised by the President have some gaps:

- The Bill's provisions for the protection of technological protection measures that are not compliant with the WIPO Copyright Treaty.
- The Bill's omission to introduce new exclusive rights of copyright for computer programs that are required by the WIPO Copyright Treaty.
- The arbitrary exclusion of computer software interface specifications from copyright protection.
- Elements of the copyright exception in favour of the disabled that go beyond what is allowed by the Treaties and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the "Marrakesh Treaty"). South Africa has not yet resolved to accede to the Marrakesh Treaty.

Not mentioned in the President's notice were numerous provisions that would prove to be unworkable or would irreparably damage investment in copyright products.

These include the 25-year time limitation on any assignment (transfer) of copyright of literary and musical works (an incorrect implementation of a recommendation to introduce a right of reversion for musicians), statutorily implied terms for all licences of copyright that include a right to sublicense, unwaivable royalty sharing provisions tied to the exclusive rights of copyright, and a contract override clause that has a blanket, across-the-board, effect. These provisions have no equivalent in any other country. However, the Constitution unfortunately does not prevent Parliament from passing bad laws.

## What next?

The President's reasons for referring the Bill back will now be considered by the National Assembly's Portfolio Committee on Trade, Industry and Competition. The Committee must confine itself to the President's reservations. However, even if the Committee were somehow to be able to correct the flaws listed in the President's referral, it would still leave the Bill open to attack for unconstitutionality for the deficiencies pointed out earlier and also on other grounds.

It is possible that the National Assembly might not agree with the reservations raised by the President and it could refer the Bill back to the President for signature. In this case, the President could raise his reservations with the Constitutional Court.

The deficiencies of the Bill, both in its conceptualisation and drafting as well as its

processing, are so material that it would be irrational for the National Assembly to countermand the President's reservations.

We considered other options that the National Assembly, and by extension the Portfolio Committee, could have at its disposal.

The National Assembly could take the President's reservations at face value and attempt to fix the deficiencies in the Bill that he raised. That would mean taking legal opinion and undertaking socio-economic impact assessments on the six clauses' worth of copyright exceptions raised by the President – since no such assessments were conducted before the Bill was introduced – and substantially altering or even scrapping those copyright exceptions that are not found to pass muster. They would have to call a public consultation on at least the 'fair use' copyright exception that was extended by the National Assembly in the last Parliament, and re-conceptualise the set of royalty-sharing provisions that are attached to the exclusive rights of copyright in literary, musical, artistic and audio-visual works. Then they would have to send the Bill, so revised, for the approval of the Provinces under the auspices of the National Council of Provinces in terms of Section 76 of the Constitution.

In the Section 76 proceedings, all of the issues raised by the Bill will be on the table before the Provinces, not only the ones cited by the President. All the points we have listed as having been omitted by the President, and others, can be expected to be argued in Provincial forums. Many of the omitted points happen to have a severe impact on the sustainability of film production, so intense resistance can be expected from Provinces that host vibrant film industries.

We expect that persisting with this fundamentally flawed Bill will take years to complete, already adding to the nine years wasted since the Copyright Review Commission issued its report in 2011.

## Muddying the waters

For reasons that remain unclear, the Government has been wedded to the Bill as the instrument for copyright reform, despite its defects having been laid bare for all to see by the legal fraternity, industry stakeholders, and even the experts appointed by the National Assembly in the last Parliament.

The Government has been egged on in its commitment to the Bill by individual activists, including some academics, whose fringe views on copyright have moved to center stage. In order to argue that the President's rejection of the Bill is unlawful, they have to take the position that the Bill is constitutional, in compliance with the Treaties and otherwise good law, contentions that are clearly nonsense. These same activists habitually misrepresent the Bill's 'fair use' copyright exception as being something that already exists in United States law and they write the President's rejection off to foreign interference.

However, even a superficial examination shows that the Bill's 'fair use' clause and the codification of 'fair use' in the United States are materially different from one another.

Also, it was to be expected that foreign governments would be concerned by the Bill's expropriation of copyright, since it impacts on the rights that their citizens have under the Treaties in South Africa.

It is possible that the Department of Trade, Industry and Competition might have prepared a replacement bill in anticipation of the President's action. However, their deafening silence since indicates that they have not experienced a Damascene revelation that they have been on the wrong path all along.

## Where to from here for the Bill?

Government, Parliament, creators of copyright works and all other stakeholders in the copyright industry agree that reform of South Africa's copyright law is long overdue. There are solutions to fast-track at least some of the key necessary reforms, but then it has to be accepted from the outset that the Bill has no redeeming features. The National Assembly should therefore reject the Bill and refer it back to Government.

Parliament has the power to develop its own legislation, as the last Parliament did with the National Credit Amendment Act, 2019, that was processed by the Portfolio Committee at the same time as the Bill. Although logistics dictate that one cannot expect legislation developed within Parliament to cover too much ground, it should be possible to develop legislation that at least brings the Copyright Act in line with the WIPO Copyright Treaty by the addition of the new exclusive rights and enforcement measures needed for the digital world, as well as the corresponding copyright exceptions.

It should also be possible, within a short timeframe, for Government to propose and Parliament to agree to South Africa's accession to the Marrakesh Treaty.

If that happens, legislation developed by Parliament could introduce the necessary, and generally supported, copyright exception and enabling provisions for the benefit of the visually impaired.

Where an impact assessment can identify the need and justification for copyright exceptions in addition to those that are already in the Act, new exceptions that comply with the requirements of the Treaties can be introduced by Ministerial regulation in terms of Section 13 of the Act. The existing copyright regulations that include some exceptions for libraries and educational institutions are crying out for a total revamp.

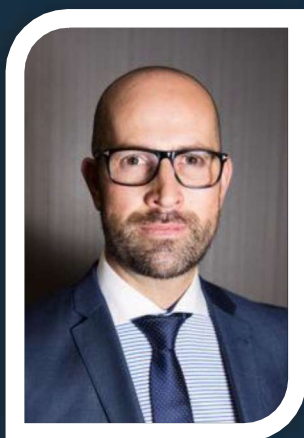
Government's misadventure with the Bill has cost the country dearly, if only in the nine years of lost time while it dabbled with the ill-

fated Draft Intellectual Property Policy of 2013 and the Draft Copyright Bill of 2015 after the Copyright Review Commission had issued its clear recommendations.

Our suggestions for fast-tracking some provisions are limited by what we consider to be the art of the possible, and must not detract from the other pressing needs for reform raised in the Commission's report and in the public consultation process, notably the fair remuneration and protection of authors, musicians, artists, film producers and performers, and the proper and effective regulation of collecting societies.

The experience with the Bill, however, shows how not to go about it, and Government and Parliament should take the President's lead in consigning the Bill to history.

*The authors compiled the submission to the President raising the constitutional flaws of the Bill on behalf of the Copyright Coalition and its members.*



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