Copyright Amendment Bill, 2017 and Performers Protection Amendment Bill, 2016

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The Institute is made up of about 200 attorneys specialising in copyright, trade marks, patents and designs. Our interest in the Copyright Amendment Bill is not on behalf of any stakeholder or industry. We looked at the Copyright Bill from a purely legal perspective.

The Institute has been involved in this legislative process from the very beginning. We have answered calls for comments on the Draft Bill in 2015 and filed submissions on the Bills from 2017 to 2022. We have had insight into all the versions of the Bills and all the reasons the Bills were amended and referred back and forth. In this round we have again made comprehensive written submissions, where we have analysed, from a legal point of view, most of the provisions of the Bills.

It's quite a lengthy submission – it's about 100 pages long – but it is broken down into different subjects, so each stakeholder can have a look at the subject that is of interest to them.

We agree that the current Act need to be updated and it is overdue. The objects of the Bills are to improve the position of creators of copyright works and of performers and, on the other hand, to create fair access. These objects are desirable and generally supported. After having assessed the Bills, we have found that the Bills in their current format will not achieve these objects. The Bills, especially the Copyright Bill, have many shortcomings that range from non-compliance with international treaties, deprivation of property, through ill-considered solutions to very real problems and some perceived problems, down to simple, basic drafting errors.

As I mentioned, our submissions are quite lengthy, but I do invite you to read at least the sections that are of interest to you.

I would like to summarize the problems in the Bills in 5 points:

- first, expansive and dispossessive copyright exceptions which goes beyond what was likely intended to achieve;
- second, the insufficient protection of technological protection measures, which is extremely relevant and important in today's digital society;
- third, the statutory royalty entitlements of authors of literary, musical and artistic works and performers in audiovisual works, which are well intended, but poorly-framed and seemingly based on erroneous assumptions;
- fourth, a mis-cast clause that is meant to be a reversion of rights provision but is actually is a 25-year time limit on transfers of copyright in literary and musical works; and
- finally, limits placed on the freedom to contract, by an indiscriminate "contract override" clause and Ministerial powers to lay down compulsory contract terms.

We found in our analysis the reasons for these issues can be largely be reduced to two main causes:

- One, the mistake of extrapolating new rights and exceptions meant to apply to one class of works across all works in an arbitrary "one-size-fits-all" approach. What demonstrates this issue the best is listening to all the different viewpoints in this room tonight. Each stakeholder has a different way of creating copyright works and interacting with copyright works. They are interested in different types of works and different acts of copyright. What benefits some stakeholders, may prejudice others. A "one-size-fits-all" simply will not work.

- Two, the absence of proper socio-economic studies and impact assessments that should have been done at the start of the process. This is also demonstrated by the passionate way that everyone has participated in this process and the fact that there has been so many organizations coming forward to explain how the Bills are going to impact them.

We understand that the Department of Trade Industry and Competition say they rely on a couple of studies to support the Copyright Bill. Only one of those has been released publicly. Closer examination shows that these studies do **not** support fair use and many of the copyright exceptions.

The only study that has been published is the report of the Copyright Review Commission in 2011. That report is a forerunner of the Copyright Bill that contains researched proposals for legislative reform. It only recommends an extension of the exception for personal use.

The 2011 study "The Economic Contribution of Copyright-Based Industries in South Africa" by Professor Pouris of Pretoria University is part of a compilation of national studies made for the World Intellectual Property Organization. The study's purpose was to estimate the economic contribution of copyright-based industries. However, in its conclusion, the author of the study gratuitously gave his personal opinion on the desirability of new copyright exceptions, based on a recommendation of a committee in the United Kingdom that was never implemented there. The main body of the study itself contains no impact assessment of new exceptions.

Professor Pouris had written an earlier work for Trade & Industry in 2009, based on input only from the library community and focusing largely on published works. There he suggested an exception for visually-impaired persons, extension of the "personal use" exception, and an exception for format-shifting. None of these, in principle, are contentious, but we have found much in the Bill's drafting of these exceptions that can be improved.

In 2014, a company called Genesis Analytics did a Regulatory Impact Assessment on the abandoned Draft National Policy on Intellectual Property. It is important that one looks at the correct version of the study, that was submitted to the DTIC on 6 August 2014, to replace an earlier version it submitted the week before. The Genesis Analytics assessment makes three recommendations for copyright exceptions, namely expanding the existing exception for teaching, allowing parallel importation for educational purposes, and introducing statutory licences for reproductions and translations for developing countries under the Berne Convention. But it says that a sufficient case for 'fair use' has **not** been made out.

I have copies of the two studies here and would like to hand them to you.

None of these studies support the fair use clause and other contentious exceptions. All of these studies predate the Bill by between 3 and 8 years. None of them suggest text for the Bills. None of them can be described as impact assessments of the Bill.

It further undermines the claim that studies have been done that it seems to be pretty much accepted that Trade & Industry did not follow the inter-governmental Socio-Economic Impact Assessment System, or SEIAS, for the Copyright Bill.

There is also no underlying policy position for "fair use" or "hybrid fair use". We could not find any published policy document that backs this. The only information we have is that it was a policy statement adopted by the Portfolio Committee one year **after** the Bill had been introduced to Parliament.

For these reasons, the Institute came to the conclusion that the Bills run a high risk of being found unconstitutional and that they are not capable of being fixed. Because of what is possible and what is not in the current process before the NCOP, the Institute could only come to the conclusion that the Bills should be rejected and allowed to lapse.

The Institute has made some proposals for a legislative process based to get the legislative reform done.

Thank you.