ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

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Dear Ms Padayachy,

Copyright Amendment Bill

The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, the Electronic Frontier Foundation champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

We appreciate the opportunity to give our views on the Copyright Amendment Bill which was released for public comment on 27 July 2015. The reform of South Africa's Copyright Act is long overdue, and in this regard there are many aspects of this Bill that we warmly welcome, including its evinced intention to address the orphan works problem, to add a flexible "fair use" right, to better facilitate the mission of libraries, archives and educators, and to uphold the rights of those with disabilities.

On the other hand, there are also some very serious flaws in the present draft to which we must draw your attention. In this regard, we limit our comments to those sections of the Bill which bear on the digital and online environment, since those are the elements that fall within our mission. There are other provisions which would otherwise deserve our comment; in particular the new rights granted over "craft works", which are very problematic—however we leave comment on this to others.

Orphan works and copyright term

We applaud the Bill's intention to address the orphan works problem. However we are very worried by the way that it is proposed to do this, in the proposed amendments to section 21(3) and section 3. Namely, the act vests ownership of orphan works in the state, *and makes the term of that copyright perpetual*. The provision even purports to extend to the works of copyright owners who are dead—notwithstanding that their estates would

otherwise continue to enjoy the copyright for 50 years after their death.

Granting perpetual copyright in orphan works to the state is unprecedented, and extremely ill-advised. The approach of vesting copyright in orphan works in the state may be valid, but after the original copyright term expires, the works should enter the public domain, as they usually would.

Once in the public domain, there is no longer any justification for the management of the lapsed copyrights by the state, as this would simply create friction that would impede the free and unfettered use of public domain works. We therefore recommend, in the strongest possible terms, that this provision should not perpetually extend copyright in orphan works.

Fair use

We strongly support the introduction of a new fair use right in new section 12A, although there are some major areas of concern in the way that it is expressed here.

The factors to be considered in making a fair use determination in subsection (5) are more extensive than those under U.S. law or under the Berne or TRIPS three-step test, and we do not believe that sub-paragraph (5)(d) ("whether the use of the copyrighted work is fair and proportionate") is a good fit with the other factors. To analyze whether the use of the work is "fair" is redundant (because the fairness of the use is a holistic analysis involving consideration of all the factors), and whether it is "proportionate" adds nothing to (c) on the "amount and substantiality of the portion used".

Working backwards to subsection (3), we have a serious concern with this subsection, which states that "use of digitised copyright material published in [sic] the internet … shall be restricted for educational purposes, unless covered by an explicit notice for request for licence to use the digitised material". We do not see the justification for carving out educational purposes from the new fair use right, just because a less flexible and more costly alternative procedure is available under the old Act. We recommend that the whole provision be deleted, and that educational uses be treated on the same basis as any other uses when considering the application of the new fair use right.

Subsection (4) is ambiguously drafted, since it is unclear whether it is intended to just be merely illustrative of a set of examples of fair use, or whether it is intended to constrain the definition of fair use. Whilst we assume the former, this should be clarified by deleting "for purposes of cartoon, parody or pastiche work in songs, films, photographs, video clips, literature, electronic research reports or visual art for non-commercial use" or moving that to a separate point (d). Otherwise, if read literally, this language seems to constrain fair uses in (4) which fall clearly outside that description (such as "transferring of purchased compact discs"), as well as creating an inconsistency with (5) (eg. the prescription "for non-commercial use").

Even then, the enumeration of so few examples of fair use in (4) might still be read as limiting the generality of what follows, following the *ejusdem generis* principle of statutory interpretation. The example "transferring of purchased compact discs onto the user's MP3 format player", for instance, is very technologically specific, to the extent that it is almost already obsolete. Similarly, "making copies of eBooks or compact discs

purchased by the user". We suggest that these examples should be phrased more generally, such as "making copies of purchased copyright works for personal use".

Subsection (6) is another oddity, in apparently limiting the uses earlier expressed in subsections (1) and (2) to be exercised not for commercial gain. Apart from the fact that this condition could have simply been included in subsections (1) and (2) directly, it doesn't make sense for all of the fair use purposes set out in those subsections to be exercised non-commercially. For example, it is relatively unusual that "news reporting" or "professional advice" will be carried out non-commercially. We recommend that this section be deleted.

Finally, we cannot decipher the intended meaning of subsection (8) ("Encryption of computer-generated data is allowed to an extent that it is necessary to decrypt data in a protected state without resulting into incrimination.") If it is intended to be an exception for DRM circumvention for fair use purposes (which it should be, consistent with 28P(1) following), then the language is far too obscure to communicate that intent. The language could be improved as follows:

"The circumvention of encryption of computer-generated data is allowed to the extent that it is necessary to decrypt data in a protected state ~~without resulting in incrimination~~ in order to make fair use of a copyright work".

Educational and library exceptions

We generally support section 13B in allowing reproduction for educational activities, believing that this will go far towards alleviating the access to knowledge divide that is holding back disadvantaged South African students from achieving their fullest potential. However, there are once again some problems with the way that this provision has been drafted.

In subsection (1), copies of works are allowed "provided that the copying is for fair use and has received permission". (We assume that this refers to permission sought from the rightsholder, not a license sought from the Intellectual Property Tribunal.) This is contradictory. If the copying is fair use, then by definition, no permission is required. If permission is required, then rightsholders will have no incentive to give it unless they are paid—which renders the subsection pointless. We strongly suggest that "and has received permission" be deleted.

A similar problem exists in section 19C on archival uses. The current form of 19C(2) requires archives to request permission before shifting the format of copyright works. Given that the section itself acknowledges that it may be impossible to use or preserve such works due to outmoded technologies, there is no justification for requiring archives to request permission to carry out their mission to preserve copyright works that are in outdated formats. We strongly suggest that the section be amended by changing "must" to "may" and deleting "request permission to". If that is done, then subsection (5) becomes redundant.

We also support the new non-commercial translation right, but have some suggestions for improvement of the language. In this regard the new subsection 12(14) limits the right to translate to a person or public body "giving or receiving instruction". This limitation

seems to serve no purpose, given that the following clauses set out the permissible purposes for which translations can be made. It is incongruous that a translation could only be made “for private purposes” or “research” (under paragraph (b)) if the translator was “giving or receiving instruction”. We suggest that the phrase “giving or receiving instruction” be deleted.

Although we support the e-learning rights added to section 12, clarification could be given to subsection (15) which requires that the material be communicated “through a secure network”, a term which is not defined. We suggest that a definition be added to clarify that a secure network is not the same as a private network, but includes a password-protected resource on the public Internet. The same suggestion applies to new section 13B(2).

We also support section 13C on inter-library document supply, 19D on exceptions for persons with disabilities, and the temporary reproduction right in paragraph 13A, all of which are absolutely necessary to bring South African copyright law into the digital age. We also support new section 39A which precludes user rights under the Copyright Act from being overriden by contract. Furthermore, we have no particular suggestions for improvement of the way in which these sections are drafted.

Moral rights

We are concerned about the extension of the existing protection for moral rights in South African copyright law. In particular the right of integrity, here expressed as the right of a creator “not to have their work treated in a derogatory manner”, as introduced in proposed amendments to section 20 and new 20A, is problematic due to the chilling effect that this may have on parody and criticism. The author's reputation is already protected by the current form of section 20 (itself more extensive than we would like), and no justification for more extensive protection has been made out.

Section 20A gives performers an exclusive right of authorizing the reproduction of their performances, along with their own right of integrity. Although we realize that this is intended to implement the Beijing Treaty on Audiovisual Performances, the additional layer of rights created here can be misused by performers against producers and users, to inhibit the creation of parodies, mash-ups or new versions of their performances. In our view, the rights of performers can be more satisfactorily protected by contractual arrangements between producer and performer.

We have some concerns about section 20(4) which institutes a “moral right to receive royalty payments” for repeats of broadcasts (or, confusingly, of photography or art work —though it is quite unclear what a “repeat” of those works might be). First, it makes no sense for such rights to be described as “moral rights”, as royalty payments are economic rights. As such rights prevail over contractual arrangements and assignments, they are actually akin to resale rights. Second, care needs to be taken that this provision does not inhibit creators from offering their work under free licenses, by forcing users to pay for works that their creators intended to be available for free.

DRM

We note that South Africa is obliged, under the WIPO Copyright Treaty, to provide a

level of legal support for technological protection mechanisms or DRM. In this context, South Africans are best served by ensuring the narrowest implementation of this obligations as possible.

In this context we applaud the fact that the circumvention of DRM for purposes covered by existing copyright exceptions and limitations is authorized by 28P(1), however we note that the new fair use section 12P is not included in this list of authorized uses, and should certainly be added.

We oppose the new section 27(5A) and 28O, which extends further rights against trafficking in circumvention devices. Firstly, the two provisions mentioned above duplicate each other, for no apparent reason. Secondly, the rights go far beyond the requirements of Article 11 the WIPO Copyright Treaty, which only require measures against circumvention, not against the supply of circumvention devices. We note that the prohibition even extends to "publish[ing] information enabling or assisting another person to circumvent an effective technological protection measure", which is a sweeping curtailment of freedom of expression.

We also note that although the new trafficking offenses (under 27(5A)(a) and (b), and 28O(1)-(3)) are limited to cases where the circumvention devices are supplied for purpose of copyright infringement of the work protected, paragraphs 27(5A)(c) and 28O(4) that make the actual circumvention an offense are not so limited. This may be a drafting error as these provisions do contain the words "knowingly or having reasonable grounds to know", but without specifying what knowledge is being referring to. We recommend that the circumvention provisions be amended to specify the required knowledge "that the circumvention is for the purpose of infringing copyright".

Finally, section 20F speaks to a library that supplies digital copies of works to its patrons, establishing a duty of "ensuring that the digital copy is communicated to the user in a form that cannot be altered or modified". This is remarkable in that it requires the library not merely to pass on a DRM-protected work, but to add DRM to any DRM-free works. This is not the responsibility of a library, and we strongly oppose the imposition of any such duty on librarians. It is also largely unnecessary, given the requirement of communicating such works over a "secure network" in sections 12(15) and 13B(2).

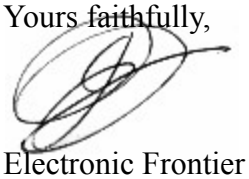
Conclusion

South Africa has taken an admirable and world-leading step in securing better access to knowledge for South Africans through measures in the draft bill such as the new "fair use" right, the new limitations and exceptions for libraries, archives and educators, and the establishment of an orphan works regime.

However, the bill also demonstrates some alarming flaws that must be addressed with urgency. Foremost amongst these are the—completely unnecessary—extension of perpetual copyright in works that are managed as part of the orphan works regime, the so-called "moral right to receive royalty payments" to the extent that this could threaten creators' freedom to license their works for free use, the requirement to seek permission of the rightsholder before availing of certain copyright exceptions, and the duty imposed upon libraries to add DRM to DRM-free works.

We would be very pleased to provide any further information that you may require to assist you in the finalization of the bill.

Yours faithfully,



Electronic Frontier Foundation
per Jeremy Malcolm
Senior Global Policy Analyst