

Copyright Amendment Bill discrepancies could lead to costly litigation

The public hearings on the proposed amendments to the South African Copyright Act of 1978 have indicted that considerable thought is needed before the proposed Bill can become workable and enforceable in a modern digital economy, as there are clear inconsistencies and contradictions.



Herman Blignaut

According to Herman Blignaut, partner at intellectual property law firm Spoor & Fisher, “More expert input is needed and I will not be surprised if it goes back to the drawing board for a substantial overhaul, followed by a third round of public hearings at some point in the future.”

The Bill was first published back in 2015 and, while it met with some praise for attempting to move with the times by introducing aspects such as temporary copying and fair use exceptions, plenty of criticism was meted out. Confusion reigned in the face of new provisions that, for instance, introduced new works that were already receiving adequate protection as ‘artistic works’.

“Copyright litigation is prohibitively technical and expensive and it is important more thought is given to what can be done to make it both easier and cheaper for copyright owners to enforce their rights. At the moment, there is too much uncertainty that will only muddy the waters and lead to drawn-out and unnecessary litigation,” says Blignaut.

Follow Cinematograph Films Act

One possible solution, proposed by Spoor & Fisher, would be to follow the example set by the Copyright in Cinematograph Films Act of 1977 that makes provision for a system whereby copyright in films can be registered. The firm told the hearing that consideration could be given to introduce similar measures to copyrighted works across the board.

“The registration of copyright in the Cinematograph Films Act has effectively set a precedent that the system of registration of copyright in South Africa can work. It is thus not a matter of breaking new ground, but simply extending a system which is already in place.”

User cannot transfer copyright

Repeated reference to ‘user performer, owner, producer or author’ of a copyright protected work are troubling, as the reference suggests that copyright in a work can be transferred by the ‘user’ or ‘performer’ of the work.

“However, you cannot assign rights which you do not own – this therefore requires serious reconsideration and revision, as it is simply wrong in law. As it stands you could, for example, have a composer of a song sharing royalties with someone who merely performs a cover version of his song on YouTube.”

Furthermore, a failure in the Bill to limit scope of the right to royalties on the commercial resale of artistic works could have the effect that every time a house/building is sold, a resale royalty would be payable in respect of its transfer. Some narrowing down of this right is needed.

Academic copying

Among other concerns is the plight of authors if Section 13B of the Bill allows any person to copy works for the purpose of education / academic activities.

“It is problematic if the rights of authors are limited to permit blanket copying of their works without compensation – especially if this means major wealthy private educational institutions benefit at the expense of someone who did all the work.”

Orphan work needs revising

When it comes to obtaining a licence to perform a restricted act in relation to an orphan work - whose owner is unknown or cannot be located the firm believes the requirements seem unnecessarily onerous, in that it will likely take too long and be prohibitively expensive to comply with process. “The relevant sections could be reconsidered and revised for a less stringent process that is quicker and cheaper.”

Protection against downloading

South Africa is already behind the times when it comes to protecting copyright in the digital age and it is now crucial proper amendments are made to protect against all new types of infringements. Unlawful sharing of unauthorised, copyright protected material via streaming and linking sites and peer-to-peer networks are just some of the ways artists are losing hard-earned royalties.

“Issues such as how you address an offender who is illegally downloading material in South Africa, Botswana or the US – wherever - is crucial. There should be good steps you can take to address those issues immediately. Measures to improve online enforcement are needed as at the moment there are so many infringements taking place that many copyright holders just feel it is not viable to do anything about it.

As long as discrepancies and vague terms remain, there will be a need for interpretation by courts and most artists would not be able to afford that. “The last thing they want is to land up in court and face protracted litigation over interpreting rights and obligations. However, in its current form, the bill is only likely to lead to more litigation,” concludes Blignaut.

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