

Dear Linda Ensor, Business Live,

Email: ensorl@businesslive.co.za

Re: Article entitled 'Ramaphosa sends 'atrocious' copyright bill to Constitutional Court' published on 15 October 2024

It is unfortunate that it took the civil society organisations, Blind SA, assisted by Section 27, to 'force' the President to take action, choosing to refer the Copyright Amendment Bill to the Constitutional Court instead of signing it into law. Those desperately calling for copyright reform can at least take solace that the process is still in motion for a resolution to what has been a long-drawn out legislative process. The genesis of the Bill was in 2009 – 15 years ago. The Bill is now in the hands of the Constitutional Court and we believe it should not take too long to finalise this urgent matter of copyright reform.

We would, however, like to respond to some of the comments made in the above article. For ease of reading, we have quoted the relevant extracts from the article, and have then responded in bold text, as below.

1. *Expert in SA copyright law and author of a textbook on the subject, Stellenbosch University emeritus professor of intellectual property law Owen Dean, welcomed Ramaphosa's decision as the right thing to do. He described the Copyright Amendment Bill as "atrocious and should be scrapped and go back to the drawing board." He argues that it was badly drafted with a lot of inconsistencies and wrong principles.*

This description of the Bill is part of a broader narrative that fails to account for a very long democratic legislative process that has seen the Bill evolve many times since its 2015 version. The CAB has been thoroughly reviewed by Parliament and voted on in the provincial legislatures.

It is at least dismissive, and at most inimical of all the intellectual property experts, stakeholders, organisations, and Parliamentary officials and legislators who worked hard for 7 years to make submissions, public presentations, and positive contributions to updates and revisions from 2017 until the final Bill was passed on 29 February 2024. This failure to engage with those that have democratically engaged with the Bills passage since its inception is not a new occurrence. It is unfortunate that the CAB is not being acknowledged as

the work of extensive civil society and other stakeholder engagement, as it should be.

2. What was particularly objectionable was the introduction of the concept of fair use, which undermined the rights of copyright holders. One of the many reasons the Copyright Amendment Bill was unconstitutional, Dean said, was that the introduction of fair use violated the provisions of the Berne Convention for the Protection of Literary and Artistic Works, which SA subscribed to and which governed copyright worldwide. The SA constitution requires SA to observe the terms of conventions to which it belongs.

This claim is unfounded and inaccurate. Fair Use has to date not been found to violate the Berne Convention or any other international intellectual property agreements. The U.S. has enjoyed fair use for centuries, but it was only codified in its Copyright Act in 1976. None of the countries with fair use have been subjected to WIPO or WTO Dispute Resolution Mechanisms to date, so why should South Africa be any different? Fair use has proved to be [positive for society and creatives at large](#). The [Fair Use economy contributed 16%](#) to the GDP in 2017 and has most likely increased since then. Also see: [Commonly Asked Questions about Fair Use](#), which shows that in paragraph 9.2.3, on page 1-96, of the Handbook of South African Copyright Law, author Owen H. Dean, himself, posits that “the American and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts”.

Many IP experts have provided Legal Opinions on Fair Use for South Africa, as below:

- [Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill\[B13B-2017\] \(2022\)](#)
- [Legal Opinion on Copyright Amendment Bill \(Prof. T. Hoeren\) \(2022\)](#)
- [S. Cowen SC et al. Opinion on constitutionality of the Bill \(2019\)](#)
- [Third Joint Academic Opinion on the SA CAB \(2023\)](#)

3. Another objection, he said, was the Bill aimed to curtail the freedom of the copyright holder to decide on the period in which their rights would be transferred to another party, for example a publisher in the case of an author. In terms of the Bill, copyright can only be assigned for a maximum 25 years, which will affect the value of the product at the time of the contract. This was an erosion of the freedom to trade.

Owen said no such provision existed anywhere else in the world. A possible rationale was to give the copyright holder a second chance of negotiating a more favourable contract if the work proved to be a success.

The U.S. copyright does have the right of reversion. Any transfer or license of copyright can be terminated 35 years after the transfer or license was made or, in some cases, 35 years after the work was published, so long as the work was not made for hire. It is also a feature of German and French copyright law. There are other countries also that have a reversion right for authors and creators. The positive outcomes for rights holders and creativity, are highlighted in [Paul Heald's address](#) at a seminar at Stellenbosch University in 2018.

The provisions in the Bill will not curtail the freedom of the copyright holder. Conversely, it will empower authors and creators to make better choices about their works, especially those who were prejudiced by unfair contracts in the past. They will be able to renegotiate fairer contracts or elect to exploit their works elsewhere. It empowers them to take control of their works, something they particularly need to do in the digital world, as there are so many alternative routes to exploit their works lawfully.

Perhaps the biggest travesty of the push against these reforms, is the continuous framing that the CAB is against the interests of creatives, when in fact the Bill and its linked Performers' Protection Amendment Bill have intentionally set out to empower creatives in the context of South Africa's historically exploitative creative industries, that are largely unregulated. Intermediaries, such as royalty collecting societies, frame their interests as the same as "Artist" interests, when this is not always the case. Better regulation of intermediaries represents fairer and more transparent payment of royalties, for example.

- 4. While the bill might be an attempt to balance the rights of the community to get more access to copyright works, Owen said it swung the scales too far in that direction.*

The 1978 Copyright Act is outdated, restrictive, biased, and discriminatory. The Bill provides a far more balanced set of provisions and limitations and exceptions that will benefit all stakeholders across the spectrum. It also is aligned with the Constitution and its Bill of Rights, the National Development Programme and SDGs. Most of the exceptions in the Bill come from progressive copyright laws in developed countries, as well as from the Electronic Information for

Libraries (EIFL) Model Copyright Law and as many research studies, including WIPO Studies and Treaties. The exceptions do not go beyond international IP agreements. In fact, many developed countries have enjoyed many of these exceptions for decades and the dozen or so countries that adopted fair use into their copyright law are able to access, use and re-use South African publications and creations under fair use, but South Africans cannot benefit from reciprocal use because fair dealing is so restrictive. The Bill essentially balances the playing fields and aligns South Africa with progressive copyright laws around the world. It gives South Africa, a developing country, the chance to access, share and advance knowledge and finally [take South Africa into the 21st century](#).

We would appreciate it if you could publish this response to the article at your earliest convenience.

Thank you

Kyla McNulty, [ReCreate SA](#)

Denise Nicholson, [Scholarly Horizons](#)