

## **Another Copyright Amendment Bill draft unfit for future purpose?**

By Graeme Gilfillan  
13<sup>th</sup> July 2018

Like the EU, Kenya, Nigeria, Australia, Hong Kong and others who are challenged by the implementation of new or amended copyright law legislation, South Africa has been wrestling with its own Copyright Amendment Bill for several years now. On 20<sup>th</sup> June 2018, Parliament issued the latest draft of the Bill, giving stakeholders until 9<sup>th</sup> July 2018 to submit comments. Pursuant to feedback, Parliament announced to stakeholders on 28<sup>th</sup> June 2018 that *“Due to the number of requests received for an extension of the due date for further comments on only the specific clauses with respect to Copyright Amendment Bill, an extension is granted until 18 July 2018”*.

The extension itself is barely sufficient, however accepted and lived with by most stakeholders it appears. The standout in Parliament’s communication, which has elicited barely a murmur, is the reference to *“only the specific clauses with respect to Copyright Amendment Bill”* meaning that what is not addressed in the Bill is not up for comment or discussion consideration for inclusion. Some would opine that this is imprudent, given the import of the Bill being what it promises in its preamble to be, being *“to provide for management of digital rights”* and the over-riding critical need to be fit for future digital purpose.

What is not addressed and is omitted is the key to understanding whether the Bill is fit for future digital purpose or not, it being axiomatic that digitization and the internet are indelible part of the present and the future with the greatest impact upon the youth.

In a stunning display of qualified copyright law expertise missing in action, just when the need for copyright law development has never been greater, the drafters of the latest version South Africa’s Copyright Amendment Bill *“As introduced in the National Assembly (proposed section 75) and redrafted by the Portfolio Committee on Trade and Industry; explanatory summary of Bill published in Government Gazette No. 40121 of 5 July 2016”* fail with yet another unfit for future purpose draft Bill, certainly one that will never, in its current form *“provide for management of digital rights”* as the Preamble promises.

How fit in 2018 is amended copyright law legislation that:

- Makes one single mention in the preamble of *“digital rights”* only and never again to the extent that the term is undefined and unutilised?;
- Omits mention/definition of the following terms *“blocking”, “link/linking”, “platform”, “cloud”, “computing”, “online”, “data mining”, “text mining”, “video-on-demand”, “out-of-commerce”, “copyright-protected”*.....when all these terms have application and place in copyright law?;
- Has a single mention each, none a definition, of each of the terms *“website”, “intermediary”* and *“remuneration”*?;
- Mentions thrice the term *“internet”*, none a definition and all occurring in a new Section 22A (6) (a), (d) and (e) (iii) dealing with licences in respect of orphan works?;
- Uses, without definition, the term *“electronic”* followed by the following words once each respectively *“equipment”, “storage medium”, “course packs”, “form”* and *“equivalent”*; and

twice with “email” with the last two uses being references to the Electronic Communications and Transactions Act 25 of 2002 as regards technical protection measures?;

- Uses, without definition, the term “digital” followed by the following words once each respectively “rights”, “media”, “transmission”, “file”, “copy” and “communication”; and twice with “video disc”?;
- Makes 5 references to the term “publisher”, none with definition, in 4 new sections?;
- makes 4 references to the term “content”, none with definition, in 2 new sections?;
- Omits any reference to internet service platforms and digital service platforms?;
- Omits “safe harbour” provisions or any linkage with the most important section of the Electronic Communications and Transactions Act 25 of 2002 addressing “safe harbour” provisions?;
- Ignores the real relationship between “data” and “copyright works” being that all copyright works today, with few exceptions, are created, reproduced, communicated, distributed, paid for and enjoyed as “data”.
- Fails to regulate or speak to online contracts?

The Copyright Amendment Bill, as presented, is once again unfit for purpose, though its purpose must, as is, suit some narrow and myopic purpose known only to a few, to be presented so.

It is likely that every person involved in the drafting of the Copyright Amendment Bill has a smart phone and it is probable that every such person, all of whom are not fools and agreeably highly regarded professionals in their own respective rights, knows that the smart phone in their possession is *inter alia* a) the key to digital and internet interaction, b) able to legally and illegally record, film, copy, transfer and communicate data and c) globally ubiquitous and the same. Yet, with every key term and phrase used and requisite to “provide for management of digital rights” in most other copyright law challenged countries, missing entirely in action from South Africa’s Copyright Amendment Bill, either the Preamble is accidental or window dressing and thus meaningless or there is a decided attempt to see South Africa’s digital and data future of freedom as digital and data slavery or there is a lack of copyright law qualification application amongst those drafting or some other unknown reason. Hearing challenges at the highest level coupled with more than a dose of ill-informed, misled and misguided political interference are rumoured.

South Africa’s Parliament, its Copyright Amendment Bill drafters, advisors and stakeholders would be well advised to step back and reject the Bill outright, not for its content, but for its deliberate omission of relevant, requisite and critical definitions, terms and provisions that speak directly to a nationally emboldened digital future that the African child and those not yet born are able to thrive upon.