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16 September, 2015

Attention: Meshendri Padayachy
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WRITTEN SUBMISSIONS BY THE FREEDOM OF EXPRESSION INSTITUTE ON THE COPYRIGHT AMENDMENT BILL (2015)

INTRODUCTION

1. The Freedom of Expression Institute (FXI) is a not for profit non-governmental organisation which was established in 1994 primarily to promote and advance freedom of expression and associated rights. The FXI envisions a society where everyone enjoys freedom of expression and the right to access and disseminate information and knowledge. Our mission is to fight for freedom of expression and eliminate inequalities in accessing and disseminating information as well as knowledge in South Africa and beyond.
2. In fulfilling our mandate, the FXI undertakes to achieve the following objectives:
 - to promote and defend freedom of expression,
 - to oppose censorship,
 - to advocate the right of equal access to information and knowledge, and
 - to promote access to media and a free press.

3. The FXI provides litigation and legal support services, research and monitoring of trends in the exercise of expression, awareness and civil education programs as well as policy advocacy on related issues. Our work targets vulnerable marginalized and excluded groups and benefits a diverse range of individuals and entities including community based organizations, social movements, other civil society organizations, academia and various national and local government organizations in all 9 provinces of South Africa.
4. The FXI welcomes this opportunity availed by the Department of Trade and Industry to make written submissions towards the Copyright Amendment Bill which was released for public comment on 27 July 2015.

SCOPE OF SUBMISSION

5. The FXI limits its comments to those sections of the Bill which impact freedom of expression and freedom of the media specifically, since those are the elements that fall within FXI's mission. There are other provisions which would otherwise deserve FXI's comment; however we shall leave comment on this to others with a direct interest and expertise in such areas.
6. At the outset, the FXI believes that copyright law and free speech are fundamentally in conflict. It should come as no surprise, at all, that both governments and the private sector use copyright law to suppress speech and dissent. In a country like South Africa which is trying to expand access to education, knowledge should not be confined to an elitist domain which can afford to pay for it. Public interest demands that the law favour the previously disadvantaged – the ones who seek knowledge, but without the means to pay licence fees, royalties and the like.

THE FXI HEREIN SUBMITS THE FOLLOWING:

7. The FXI has the following comments on the Bill and suggests improvements where necessary:
 - 7.1 Section 1: a definition of “commercial” should be added. This is appropriate for the modern era in which user-generated content created with no intent for financial gain of the user has become common.
 - 7.2 Section 2: Works eligible for copyright should delete references to “broadcast” and “programme carrying signals”. The present version restricts freedom of expression because the mode of transmission - rather than the creative work itself – is protected.
 - 7.3 Section 12 A (3) and (4): The fair dealing exception for “illustration” should be expanded beyond the limited confines of teaching. An expanded exception is vital for encouraging public discourse without unreasonable interference from copyright law. Whether in the context of political discussion, or cultural commentary, or educational programming, the ability to illustrate an argument with appropriate examples is close to the heart of free expression. The expansion of the exception for informatory uses is appropriate to the present situation in South Africa, where the ability of the media to cover public events and public debates comprehensively is so critical to the democratic political process.
 - 7.4 Section 13 B: This section is laudable in its aim to allow for reproduction for educational activities. This will contribute towards alleviating the access to knowledge divide that is holding back disadvantaged South African students from achieving their fullest potential. However, we suggest that the requirement to receive permission for fair use copying be deleted. If permission is required, then rightsholders will have no incentive to give it unless they are paid—which renders the subsection pointless.
 - 7.5 Section 19 C: A similar problem exists regarding archival uses. The current wording requires archives to request permission before shifting the format of

copyright works. 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 accordingly suggest that the requirement for permission be deleted.

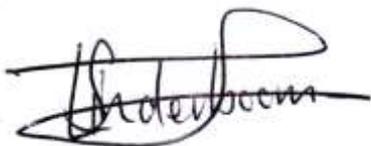
- 7.6 Section 20: We are concerned about the extension of the existing protection for moral rights. The right of a creator “not to have their work treated in a derogatory manner”, is problematic due to the chilling effect that this may have on parody and criticism. This wording should be deleted. The author's reputation is already protected by the current wording of the section and no justification for more extensive protection has been made out.
- 7.7 Section 20 (4) Institutes a moral right to receive royalty payments for repeats of broadcasts. First, it makes no sense for such rights to be described as “moral rights”, as royalty payments are economic 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.
- 7.8 Section 21: This provision makes commissioners of certain works the automatic owner of that work, even where all the creative choices are performed by the author rather than the commissioning party. The practical results have been that films, photographs and other works in South Africa have been reported to be locked away in the archives of commissioning entities with the result that enjoyment by the public, as well as benefits to the authors, is curtailed. The FXI has represented several frustrated filmmakers commissioned by the SABC to produce documentaries it then refuses to flight. An example is that of Broad Daylight saga in 2006, when the SABC attempted to interdict Broad Daylight, the producers of a documentary on ex-President Mbeki, from screening the documentary elsewhere, while the SABC itself refused to screen the documentary. The section should be amended to the effect that ownership vests in the author and the commissioning party holds a non-exclusive license to use all copyright rights as may subsist in the work.

7.9 Section 27 (5) (a): The complete ban on publication of works circumventing copyright, even when lawful/justified, is a threat to investigative journalism and conflicts with the right to freedom of expression, which includes the freedom to receive or impart information or ideas, academic freedom and freedom of scientific research.

7.10 Section 28 of the proposed Bill criminalises large swathes of behaviour that should be the subject of civil actions. For example, the failure to pay royalties should be a civil rather than criminal matter. Criminalisation has a chilling effect on freedom of expression.

CONCLUDING REMARKS

8. The proposed changes to the law are not in line with international practices. The FXI reaffirms that the purpose of copyright is to protect the interests of artists and to ensure that produced works derive benefit as intended by their creator. Such protection should not outweigh the right to freedom of expression, as this right is a fundamental tenet to a constitutional democracy.
9. The FXI appreciates the opportunity to make these representations to the Department of Trade and Industry and stresses that the comments above are made in the spirit of contributing to strengthening the exercise of the right to freedom of expression in South African.
10. If any additional information is required on the submissions made, please contact the FXI using the details provided below.

A handwritten signature in black ink, appearing to read 'Sheniece Linderboom', is written over a light blue horizontal line.

Sheniece Linderboom
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