

9 July 2021

Mr. D Nkosi, Chairperson

The Parliamentary Portfolio Committee on Trade and Industry

For attention:

Mr A. Hermans, Ms M. Sheldon, Ms. Y. Manakaza, Mr. T. Madima

Per email: [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za); [tmadima@parliament.gov.za](mailto:tmadima@parliament.gov.za)

[msheldon@parliament.gov.za](mailto:msheldon@parliament.gov.za); [ymanakaza@parliament.gov.za](mailto:ymanakaza@parliament.gov.za)

Dear Honourable Member,

**Re: Submission on Copyright Amendment Bill [B13B-2017]**

Thank you for the opportunity to make written submissions on certain sections of the Copyright Amendment Bill [B13B-2017] and its alignment too with international treaties.

The [Health Justice Initiative \(HJI\)](https://www.healthjusticeinitiative.org.za) is a dedicated public health and law initiative addressing the intersection between racial and gender inequality with a special focus on access to life-saving diagnostics, treatment and vaccines for COVID-19, TB and HIV, drawing on the expertise of researchers in law, public policy, economics, and public health, as well as on universities and scientific experts in and outside of South Africa.

We make these submissions as a civil society organisation that is working towards equitable access to health care, focusing on inequity in access to life-saving medicines, which inequity, disproportionately harms marginalised communities in South Africa. The HJI also works to fully realise the 'right to health' care as guaranteed in Section 27(1) of the Bill of Rights.

We believe that the COVID-19 pandemic has reinforced these inequities and has showed the impact intellectual property rights (IP) and claims, including 'copyright' protections have on the ability of the world to access life-saving technologies.

In this respect, the South African government's efforts to address the IP constraints through its leadership with the government of India (now supported by 100 countries) in seeking a waiver on IP barriers (including copyright) to access all medical technologies in this pandemic is relevant. We attach the [HJI's TRIPS Waiver FAQ](#) which explains this in greater detail.

Given that the TRIPS waiver negotiations are still ongoing, there is an urgent need to also, domestically, remedy any legislative gaps or obstacles to expanding access. In July 2020, the South African government warned about this [here](#): *'WTO TRIPS Council: Submission on IP and the Public Interest – 'Beyond Access to Medicines and Medical Technologies towards a more Holistic Approach to TRIPS Flexibilities'*.

We are of the view that previous discussions about the Copyright Amendment Bill have not adequately acknowledged that 'copyright' is not only, or indeed primarily, an issue of the narrow or sectoral interests of book and music publishers only, but that it affects the health and well-being of all people in South Africa.

In finalising the Copyright Amendment Bill, we believe that Parliament must take into account the wide-reaching negative effects of, at times, excessive copyright protection in the context of accessing life-saving [health technologies](#).

There is thus an urgency - we need to pass this bill (so too, the Patent Amendment Bill, which was developed more than two years ago, but which has to the best of our knowledge, still not been tabled in Parliament, despite the pandemic that we face). Alternatively, provisions from this bill should (at a minimum) be read into the current regulations issued under the Disaster Management regulations for this pandemic.

Kindly note that our written submission is limited due to time constraints; which we are willing to supplement with an oral submission. Hence, we focus on the most immediate aspects requiring attention, in relation to the COVID-19 pandemic:

The current Copyright Act was developed during a time of apartheid, and before our democracy. We believe it constrains research and at times also prohibits the timely and live saving repair of essential medical equipment.

### **‘Right to Repair’**

During the initial phase of the COVID-19 pandemic many countries including South Africa experienced acute shortages of parts for medical ventilators that were needed to keep people alive, and still do.

Engineering experts who could ordinarily repair these machines cannot as they encounter both copyright and patent prohibitions or barriers. Making replacements of mechanical parts of ventilators via 3D printing or artisanal processes potentially infringes copyright protections since the parts are treated as three dimensional ‘artistic’ works.<sup>1</sup> Modifying the machine or its parts may also constitute an infringement.

The solution is a ‘right to repair’: the right of the owner/user of a machine to repair that machine to protect patients’ health when the manufacturer either cannot or will not supply spare parts timeously or affordably. Even countries such as the United Kingdom are currently considering a specific ‘right to repair’.

The proposed amendment does not contain a specific ‘right to repair’:

- Amending the Copyright Act with clause 13 (Section 12A) can provide a ‘right to repair’ and at least where the repairs serve an important purpose such as, ‘saving lives’.
- Because the exception in proposed Section 12A is flexible and open ended, through the use of the words ‘such as’, it is not necessary that the exception, nor the Copyright Amendment Act state ‘the specific purpose of repairing medical ventilators during a viral pandemic’.
- Instead, the section includes all uses that are sufficiently similar to the ‘listed uses’, and which are judged as fair, taking into account the four factors set out in the section.
- The nature of medical ventilators is that they are important medical equipment but not aesthetic works.
  - Making replacement parts of medical ventilators during a global pandemic serves the important purpose of saving lives.
  - It also does not unduly diminish ‘the potential market for the work in question’ because manufacturers have in many instances been unable to supply the parts themselves.

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<sup>1</sup>Section 15 (3A) (ii) of the 1978 Act allows reproduction of a “three dimensional artwork” for utilitarian purposes but is so narrow and inflexible that it does not assure anyone creating a replacement part for a medical ventilator that they can do so without risking copyright infringement litigation. Reproduction is only allowed if the parts have been distributed to the public which is inapplicable to medical ventilators. Reproduction may only be from copying the part, using design files or diagrams is prohibited, and it must be through an industrial process, according to the case law that requires it takes place in a factory, excluding 3D printing and artisanal reproduction that does not take place in a factory. Section 15 (3A) demonstrates why a flexible and balanced exception is preferable to a detailed but narrow exception.

- That manufacturers may eventually be able to supply parts after many months or even years should not outweigh the crucial importance of saving lives.
- As it currently reads in the Copyright Amendment proposed Section 12A provides a justifiable, balanced ‘right to repair’ that enables improved and timely access to health-care services, in our view.

### **‘Right to Research’**

South Africa needs to expand its academic and non-academic research capacity to respond to the COVID-19, and for other pandemics in the future too. However, often, South African researchers also face a number of copyright protection barriers in accessing, for example, much needed literature on COVID-19. These include: inaccessibly priced academic journals, a very narrow ‘research’ exception, and [copyright obstacles to using new technology that enable different research techniques](#).

Section 12 of the Copyright Act as it stands, contains a narrow exception for research, but this does not apply to all types and kinds of works:

- It excludes video, sound recordings and software.
- It does not authorise the reproduction and modification of the whole of a work - such as an article - required for new technologically enabled techniques such as content mining.
- While a few publishers offered to make a narrow selection of [health and medical](#) related literature openly available for a short time, this was and is largely confined to literature on virology, whereas responding to the pandemic also requires access to literature on for example, epidemiology, public health measures, pharmaceutical and medical devices, treatment options, and vaccine development information and data.
- Limited access granted during the pandemic precludes new content mining techniques.

Clause 13 (Section 12A) instead, proposes to authorise new research techniques such as content mining. It also authorises the use of all works in research (unlike the current Section 12). Section 12D (1) also proposes to authorise copying the whole of a work for academic activities which includes research.

These vital and necessary exceptions will greatly assist researchers responding to the COVID 19 pandemic.

### **The TRIPS Waiver at the WTO**

In October 2020, South Africa, together with India, jointly proposed, with at least 61 other co-sponsors, that Intellectual Property (IP) protections be temporarily waived for all health technologies for the duration of the COVID-19 pandemic. The SA-India draft proposal text is available [here](#). A handful of

developed countries have resisted this call despite the consequent loss of life and health by millions of people around the world, with at least [4 million deaths](#) globally, by 8 July 2021.

*While* the waiver is being pursued, it is essential that South Africa also acts to reform its own domestically applicable legislation too, that *inter alia* deals with copyright and patents to address some of the IP barriers faced by countries such as ours, in responding both timely and meaningfully, to all pandemics, including COVID-19.

These reforms are also consistent with the obligations that South Africa has under the *Agreement of Trade Related Aspects of Intellectual Property Rights* (TRIPS) contained in Article 31 and Article 31 bis, which allows countries to set out the processes for permitting compulsory licencing when confronted by a national emergency.

Parliament can play its part by urgently passing the Copyright Amendment Bill and tabling the Patent Amendment Bill too. There is no justification for delaying implementation.

### **Conclusion**

The Copyright Amendment Bill, specifically clause 13 (Sections 12A, 12B, 12C and 12D), clause 19 (Section 19B) and clause 20 (Section 19C) is urgently needed to remove unjustified barriers to equitable access to health care imposed by the current Copyright Act.

In our view, the amendments proposed accords with international law, and it should be approved by Parliament and signed into law by the President without further delay.

In the event that your office wishes to invite the HJI to provide further information and/or make an oral submission, kindly email us using: [althea@healthjusticeinitiative.org.za](mailto:althea@healthjusticeinitiative.org.za)

Sincerely,

*(submitted electronically)*

**Fatima Hassan, Director HJI**

**Rafeyah Akram, Consultant to HJI**

**Dr. Andrew Rens, Advisor to HJI**