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**Submission
to the
Department of Trade and Industry
on the
Copyright Amendment Bill, 2017**

ATTN: Mr A Hermans, Department of Trade and Industry

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1. Executive Summary

On 16 May 2017 the Department of Trade and Industry (DTI) introduced the revised Copyright Amendment Bill, the original version of which was introduced in July 2015. The Bill intends, among other things “to provide for the protection of copyright in artistic work”, “to allow fair use of copyright work” and “to provide for the protection of authorship of orphan works by the State”. This submission explains property rights and the Rule of Law, both part of the Constitution, and will draw attention to various concerns throughout the Bill.

The major concern with the Bill is its violation of the principle of the Rule of Law found in section 1(c) of the Constitution. The Rule of Law requires law to be unambiguous. The Copyright Amendment Bill, unfortunately, seems poorly drafted and has caused intellectual property lawyers and academics, and industry participants much confusion. This uncertainty and confusion is likely to scare away investment in various industries due to the intellectual property environment proposed by the Bill. This will hamper innovation and stifle what little economic growth South Africa is currently experiencing

The Department of Trade and Industry is enjoined to reconsider the entirety of Bill in light of South Africans’ constitutional right to property as well as the nature of copyright law as a protective instrument, rather than a property rights-limiting instrument.

Copyright law and intellectual property law more broadly are by their nature meant to protect intangible ideas, which have been reduced to material form, from violation by private persons as well as governments. The Copyright Amendment Bill, unfortunately, does not live up to its nature as a part of copyright law.

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2. The Free Market Foundation & Rule of Law Project

The Free Market Foundation (FMF)¹ is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws and, where feasible, advocating rectification.

3. Introduction

The Constitution of the Republic of South Africa, 1996,² and the interim Constitution³ before it, was a break from the previous constitutional dispensation wherein the legislature – Parliament – was sovereign, and could pass whatever laws it deemed appropriate.⁴ Indeed, in the case of *Sachs v Minister of Justice*⁵ the Appellate Division of the Supreme Court said “Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and... it is the function of courts of law to enforce its will”.⁶ This was the bedrock upon which the previous regime was able to construct Apartheid, as no court of law or civil rights association could challenge the rightfulness or legality of that system according to a set of principles which regulate governance.

The characterising feature of Apartheid was its denial of property rights to black South Africans. The 1993 (interim) Constitution and the 1996 (current) Constitution were a significant break from this era of tyranny, in that both recognised private property rights for all South Africans, regardless of their race. These constitutions also brought an end to parliamentary sovereignty, and brought about the beginning of constitutional supremacy. This means that all law and legal conduct must be in line with the text, spirit, and purport of the Constitution, and especially the Bill of Rights.⁷

Section 1(c) of the Constitution provides that the Constitution itself, as well as the Rule of Law, is what the non-racial and non-sexist South African state shall be founded upon. The Rule of Law comprehends a society governed according to legal principles instead of arbitrary political considerations, and excludes law which is ambiguous, arbitrary, retrospective, unpredictable, value-subjective, applies unequally, violates the separation of powers, or violates basic human rights.

¹ www.freemarketfoundation.com

² Henceforth “the Constitution”.

³ Constitution of the Republic of South Africa Act (200 of 1993).

⁴ This is made clear by the remarks of Didcott J in *Nxasana v Minister of Justice and Another* 1976 3 All SA 57 (D), where the Court said “under a constitution like ours, Parliament is sovereign, and the Courts can no more assume a power which it has decreed that they shall lack, or set its enactments at naught, than can anyone else.”

⁵ *Sachs v Minister of Justice* 1934 AD 11.

⁶ At par 37.

⁷ Chapter 2 of the Constitution.

On 16 May 2017 the Department of Trade and Industry (DTI) released the revised Copyright Amendment Bill,⁸ the original version of which was introduced in July 2015.⁹ The Bill intends *inter alia* “to provide for the protection of copyright in artistic work”, “to allow fair use of copyright work” and “to provide for the protection of authorship of orphan works by the State”. This submission explains property rights and the Rule of Law, both part of the Constitution, and will draw attention to various concerns throughout the Bill.

4. The Constitutional Right to Property

The Bill contains no preamble, nor does it recognise the applicability of section 25 of the Constitution (the right to property). Indeed, the Bill’s intellectual property-violating provisions appear to operate on the assumption that section 25 is not applicable to intellectual property.

In the case of *S v Makwanyane*,¹⁰ Chaskalson J held¹¹ for a majority of the Constitutional Court, that a provision of the Constitution “must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular” other provisions in the chapter of which it is a part. This supports the construction that the Constitution must be read holistically, bearing in mind the values and purpose of the entire text as well as the particular provisions.

Section 25 must therefore be construed holistically. Section 25(1), which provides that no person’s property will be unreasonably be deprived without compensation, cannot therefore be disregarded or treated as an afterthought.

Section 25(1) provides:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

This is a ‘negative’ right, in that it protects individuals from government interference in their proprietary affairs. Sections 25(2) to 25(9) are mostly ‘positive’ in nature, meaning that they oblige the government to do something, rather than refrain from doing something. By these latter sections’ nature, however, they depend upon section 25(1). Without the first subsection, none of the others would make sense or be enforceable.

Section 25(4)(b) provides:

“For the purposes of this section, property is not limited to land.”

Article 27(2) of the Universal Declaration of Human Rights, 1948, to which South Africa is a party, provides:

⁸ Copyright Amendment Bill (B13-2017).

⁹ Werina Griffiths and Lisa van Zuydam. “Copyright Amendment Bill 2017.” (2017). GoLegal. <http://www.golegal.co.za/copyright-amendment-bill/>. Accessed: 30 June 2017.

¹⁰ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹¹ At par 10.

“Everyone has a right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.”

Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966, to which South Africa is also a party, provides the same.

Section 39(1)(b) of the Constitution provides:

“When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.”

In this context, while interpreting the right to property in the Constitution, international law must be considered and the right of property may not be construed in isolation from the rest of that section or the rest of the Constitution. It is clear, thus, that the Constitution protects intellectual property rights in the same way it protects other, tangible, private property.

The ‘general limitations’ provision found in section 36 empowers the state to limit any right in the Bill of Rights if the limitation adheres to the criteria set out in that section. Section 36 provides as follows:

“36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

While the courts may take into account factors other than those listed in section 36(1)(a) to 36(1)(e), it has been customary for the courts to limit themselves to these five factors which appear in the text.

Laws which limit rights must be “reasonable and justifiable in an open and democratic society”.

The FMF was instrumental in having this portion of section 36 added to the Constitution, and thus we write with confidence when we say that the ‘open society’ is a concept developed by Karl Popper in his work *The Open Society and Its Enemies*.¹² The ‘open society’, according to Dr Alan Haworth, “is a society characterised by institutions which make it possible to exercise the same virtues in the pragmatic pursuit of solutions to social and political problems”. These ‘virtues’ which must be possible to exercise are “creativity and imagination in the formulation of theories and hypotheses, as well as in devising

¹² Karl Popper. *The Open Society and Its Enemies*. (1945).

experiments with which to test them; critical rationality in the assessment of theories and other claims; the toleration required to recognise that other peoples' theories could be rivals to your own".¹³

Therefore, for a limitation to be justifiable in an open society, the limitation must *still* allow individuals to exercise these aforementioned virtues in their daily lives. In other words, they must have the freedom to express themselves and manifest their own 'experiments' to arrive at certain conclusions.

The Constitution's provision could have stopped at "open and democratic society", but it goes further, and says "an open and democratic society based on human dignity, equality and freedom". These values of dignity, equality, and freedom also appear in section 1 of the Constitution, meaning these are founding values for South Africa, and not simply filler text. These values also complement one another, in that no individual's dignity is truly being respected if he has no substantive freedom. A dignified existence implies enjoying the fruits of one's labour and being able to leave a proprietary legacy for one's descendants, without the State micromanaging one's affairs as if one were a perpetual child.

Furthermore, the factors listed in section 36(1)(a) to 36(1)(e) further narrow the scope of the limitation of rights, and allow the courts to take other, unlisted factors into account, to decide whether or not the limitation is justifiable in an open and democratic society which is committed to the values of human dignity, equality, and freedom.

5. The Rule of Law, Discretionary Power & Good Law

5.1 The Rule of Law

Chapter 1 of the Constitution is known as the 'founding provisions', and can be considered the very basis upon which this nation is founded. Indeed, section 1 is entitled 'Republic of South Africa', and what follows under that section is what the Constitution envisages will characterise this state.

Section 1 reads as follows:

"1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

This section explicitly states that the Republic *per se*, i.e. by virtue of its existence, by default, *is* founded on the values that are listed. Unlike other provisions which are found in the Bill of Rights, which obligate the State to 'progressively realise' the content of the provision, the State has no choice or discretion *vis-à-vis* these values.

¹³ Alan Haworth. "'The Open Society' Revisited." (2002). Philosophy Now. https://philosophynow.org/issues/38/The_Open_Society_Revisited. Accessed: 4 July 2017.

Section 1(a) says that the State is founded on “the advancement of human rights and freedoms”; section 1(c) says the State is founded on the “Supremacy of the constitution and the rule of law”; and section 1(d) says the State is founded on “a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

It would be improper to overlook section 2 of the Constitution. On the face of it, this might appear to be a redundant provision, because it essentially repeats what has already been said in section 1(c) above. However, in light of the fact that this repetition does appear in the constitutional text, it stands to reason that the constitutional drafters considered this to be a provision of paramount importance.

Section 2 of the Constitution, entitled ‘Supremacy of Constitution’, reads as follows:

“2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

This section has the effect of strengthening not only section 1 above, but the Constitution as a whole. Laws which are passed by any level of government which are inconsistent with the constitutional text are *invalid* by default.¹⁴ Any law thus which violates the Rule of Law is, by virtue of its inclusion in the constitutional text in section 1(c), invalid.

Section 1(c) of the Constitution provides that the supremacy of Constitution, *as well as* the Rule of Law, are what the South African state is founded upon. This provision elevates the principles of the Rule of Law to a status higher than any statutory law, secondary only to the text of the Constitution itself.

In light of this provision, it is pertinent to ask “what is the Rule of Law?” Let us consider the jurisprudence surrounding this constitutional principle.

In the Constitutional Court case of *Van der Walt v Metcash Trading Ltd*¹⁵ Madala J said¹⁶ the following:

“[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
3. the legal protection of certain basic human rights.

[66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:

¹⁴ It is trite that a law is only ‘unconstitutional’ when a court of law declares it as such, however, the text of section 2 seem to imply that the law is invalid *ab initio*. In any event, the effect of this section is that laws which conflict with the Constitution do not carry the legitimate force that characterizes the modern state.

¹⁵ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC).

¹⁶ At pars 65-66.

‘the rule of law excludes arbitrariness and unreasonableness.’

I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law.”

It is important to note the following observations made by the honourable judge. The Rule of Law:

- Permeates the entire Constitution.
- Prohibits unlimited arbitrary or discretionary powers.
- Requires equality before the law.
- Excludes arbitrariness and unreasonableness.
- Excludes unpredictability.

The Good Law Project’s *Principles of Good Law* report largely echoes this, saying:¹⁷

“The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation.”

The report also identifies four threats to the Rule of Law,¹⁸ the most relevant of which for purposes of this submission, is the following:

“[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** [...]”

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government”.¹⁹

Friedrich August von Hayek wrote:²⁰

“The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal.”

What is profound in Von Hayek’s quote is that he points out that *the* Rule of Law is not the same as *a* rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple ‘rules of law’ on a regular basis. The Rule of Law is a doctrine, which, as the Constitutional Court implied in *Van der Walt*, permeates all law, including the very Constitution itself.

¹⁷ Good Law Project. *Principles of Good Law*. (2015). 14.

¹⁸ On page 29.

¹⁹ AV Dicey. *Introduction to the Study of the Law of the Constitution*. (1959, 10th edition). 202-203.

²⁰ FA von Hayek. *The Constitution of Liberty*. (1960). 206.

5.2 Discretionary Power

Dicey writes “the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”.²¹ He continues, saying the Rule of Law means “the absolute supremacy of predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government”.²²

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to make a decision “in the public interest.” What is and what is not “in the public interest” is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The “public interest”, however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e. they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility, because it is of a substantive nature rather than mere enforcement. Unfortunately, the Basic Conditions of Employment Act²³ gives the Minister of Labour the authority to make “sectoral determinations” – which includes determining a minimum wage – which is a clear violation of the Rule of Law and the separation of powers.²⁴

5.3 Good Law

The Rule of Law is a non-negotiable, prerequisite characteristic of any state which purports to call itself a constitutional democracy founded on values such as equality, freedom, and justice. In South Africa, the principles of the Rule of Law were explicitly adopted into our law by the constitutional drafters in section 1(c), and this provision, due to its inclusion in the Constitution, cannot be limited,²⁵ modified, or abridged, by virtue of section 2 of the Constitution.

The concept of Good Law, however, is wider than the concept of the Rule of Law, and is not a rigid rule. Rather, it is a guideline which a state can adhere to, to various extents, if it wishes to be a prosperous, successful, and free society. A law must certainly adhere to the Constitution and the Rule of Law in the first place, in order to be a good law; but what makes good law broader than the Rule of Law, is the inquiry into whether or not a particular law is both feasible and desirable.

²¹ Dicey (footnote 39 above) 184.

²² Dicey (footnote 39 above) 198.

²³ Basic Conditions of Employment Act (75 of 1997)

²⁴ Section 51 of the Basic Conditions of Employment Act.

²⁵ Section 1 is not part of the Bill of Rights (Chapter 2, sections 7-39), hence the general limitations clause which appears in section 36, which will be discussed below, does *not* apply.

The goal of the law, as well as the textual provisions in the law, must plausibly be achievable, for the law to be feasible.

The movement control laws of the Apartheid era, for instance, were certainly not feasible. The desire of the people to move into urban areas and earn a living was too great for the law to ever hope to control. This is why the Apartheid government, almost immediately after enacting those laws, started chipping away and relaxing them, to the extent of their being virtually repealed in many cases, by the late 1980s.

A law must, furthermore, be desirable. This does not mean that bureaucrats and Members of Parliament desire a law, but rather, it is an inquiry into whether something is jurisprudentially desirable.

For instance; passing a law which creates three new government agencies which do exactly the same thing, would not pass the desirability test, even if it is feasible and constitutionally permissible.

If the goal of government is to encourage legislation which advances transformation and makes South Africa a prosperous society for all to live in, then it will be wise for it to adhere to the principles of Good Law, and not only those of constitutionality or the Rule of Law.

6. Provisions of the Copyright Amendment Bill

For more detail on the concerns with the content of the Copyright Amendment Bill, please see the submission of the Anton Mostert Chair of Intellectual Property Law, Stellenbosch University.²⁶

6.1 Drafting quality

The quality of drafting and legal awareness that is apparent in the Bill is inadequate for a statute that aspires to be consistent with the Rule of Law. The Bill, for instance, provides for the insertion of a section 2A, which defines the scope of copyright protection. Section 2A(1) provides that expressions, not “ideas, procedures, methods of operation or mathematical concepts” or “interface specifications” in the case of computer programmes, are protected by copyright.

This is a redundant provision, in light of the fact that it has been known in copyright law that unmanifested ideas are not subject to copyright protection.

This provision also errs in using the word “specifications”, which is “a term of practice that, in the context of computer programs, bears a specific meaning that has nothing to do with visual appearance, function, design or other non-literal elements. Specifications [are] *needs* or *requirements* for operation. Thus, when coupled with ‘interface’ the term ‘specifications’ refers to the demands of the computer program or other software and/or hardware in order to produce the visual appearance of a part of the program, namely the interface. This is, clearly, a hollow provision that is far removed from the intention of the drafters”.²⁷

²⁶ Sadulla Karjiker & Cobus Jooste. “Commentary on the Copyright Amendment Bill 2017.” (2017). Anton Mostert Chair of Intellectual Property Law, Stellenbosch University. <http://blogs.sun.ac.za/jplaw/2017/06/14/full-review-copyright-amendment-bill-2017/>. Accessed: 4 July 2017.

²⁷ Chair of Intellectual Property (footnote 26 above) 8.

6.2 Terminology

Related to the unfortunate poor drafting quality of the legislation is the use of incorrect or confusing terminology. This introduces ambiguity and uncertainty into the Amendment Bill itself and to copyright law in general. Ambiguity and uncertainty are prohibited by the principle of the Rule of Law, and would be detrimental to South Africa's economic growth.

South African copyright law distinguishes between "authors" (those who create the work) and "owners" (those who own the work). These two entities are often the same person, but they are conceptually different.

The Amendment Bill, unfortunately, introduces new, unnecessarily and unknown terms into our copyright law, such as "performer" and "user". Within the context where it is used, namely section 9B(3), it would have been sufficient to continue to refer to "authors" and "owners". These new terms introduce unnecessary confusion, and appear throughout the Bill.²⁸

Another confusing phenomenon in the Amendment Bill is the introduction of "fair use", both in the long title as well as the body of the Bill.

The concept of "fair dealing" is known to South African copyright law, and was inherited from British copyright law. "Fair use", on the other hand, has no history in our law and is an American concept. Yet, the Bill uses this in the long title, as well as section 10. The words "fair dealing or fair use" implicitly indicate that fair dealing and fair use will co-exist in South Africa henceforth, but this is not made clear and this intention is not evident from the substantive law proposed.

To avoid confusion, the DTI must either make its intentions regarding introducing "fair use" into South African copyright clear, or it must remove any mention of "fair use" from the Amendment Bill.

6.3 Substance of the Bill

The legal content of the Amendment Bill is worrying in several respects, only two of which will be mentioned.

In the proposed section 12(1)(a)(iv), the Amendment Bill proposes to add "scholarship, teaching and education" to the fair dealing exception. This implies that persons may now use educational textbooks without permission and without remuneration to the copyright holders. Writes the Chair of Intellectual Property:

"... there is no evidence to suggest that copyright law is a material impediment to education. If government would like to provide cheaper textbooks without having to negotiate with copyright owners, it is quite at liberty to commission, and print, its own material. Again, if there is a desperate need for translations of copyright works into other languages, why is government not entering into arrangements with the relevant copyright owners in getting the required works translated".²⁹

The proposed section 13B(1) read with section 13B(6), furthermore, "clearly allows for the copying of entire textbooks, on the basis that, inter alia, that [sic] the particular textbook was not 'priced

²⁸ Chair of Intellectual Property (footnote 26 above) 5.

²⁹ Chair of Intellectual Property (footnote 26 above) 20.

reasonably' in relation to the price 'normally charged' in the country for 'comparable works'."³⁰ This is illogical. If there are "comparable works" which are more "reasonably" priced, it follows that the comparable work, rather than the work in question, should be used for the purpose being pursued.

7. Conclusion

Other than these two instances, the Department of Trade and Industry is enjoined to reconsider the entirety of the Bill in light of South Africans' constitutional right to property as well as the nature of copyright law as a protective instrument, rather than a property rights-limiting instrument.

Copyright law and intellectual property law more broadly are by their nature meant to protect intangible ideas, which have been reduced to material form, from violation by private persons as well as governments. The Copyright Amendment Bill, unfortunately, does not live up to the standards previously set by South Africa's copyright law.

The Amendment Bill is unclear, ambiguous, and contains intellectual property-violating provisions which will stifle innovation and potentially further harm South Africa's economic growth.

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³⁰ Chair of Intellectual Property (footnote 26 above) 28.