SUBMISSION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY FROM THE SOUTHERN AFRICAN REGIONAL UNIVERSITIES ASSOCIATION (SARUA)

Introduction

Founded in 2005, SARUA is a membership-based organisation which is open to all the public universities of the 15 countries that make up the Southern African Development Community (SADC). SARUA was established to assist in the revitalisation and development of the leadership and institutions of higher education in the southern African region, thus enabling the regional higher education sector to meaningfully respond to the developmental challenges facing the region.

These broad principles serve to establish the fundamental modus operandi of SARUA, and provide SARUA’s strap-line “Enhancing Regional Higher Education and its Role in Regional Development”.

SARUA’s overall aim is thus to strengthen the leadership and institutions of higher education in the southern African region, thereby consolidating a southern African agenda for higher education, and enabling higher education to make a significant contribution to national and regional development.

The mandate of SARUA is:

To assist in the revitalisation and development of the leadership and institutions of Higher Education in the Southern African region (i.e. Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe). This enables the regional Higher Education sector to meaningfully respond to the developmental challenges facing the region.

The purpose of SARUA is:

To strengthen the leadership and institutions of Higher Education in the Southern African region, thereby consolidating a Southern African Agenda for higher education which results in a significant contribution by Higher Education to national and regional development.
Promoting science, technology and innovation (STI) is one of the broad strategic objectives of the SADC regional integration and cooperation agenda. The SADC Ministerial meeting on Science, Technology and Innovation held in December 2008 in South Africa, recognized the importance of IPR at national and regional levels, particularly concerning Indigenous Knowledge Systems (IKS), and the importance of developing IPR policies, strategies and systems to protect intellectual capital and assets, and to promote the development and application of STI in the Region.¹

The Protocol on STI of 2008² recognized, amongst other objectives:

- the need to “enhance and strengthen the protection of intellectual property rights”.
- to promote the development and harmonization of STI polices in the Region.
- to pool resources for scientific research, technological development and innovation within the Region.

In 2015, the SADC region developed and approved the regional Industrialization Strategy and Road Map (2015-2063) which underscores science, technology and innovation as one the important enabling factors for Industrialization. The development and strengthening of IPR systems in Member States is important to support industrialization and to contribute to the development of knowledge economies. The region is rich in biodiversity [sic]; mineral resources and indigenous [sic] knowledge therefore IPR systems and frameworks helps countries to unlock the assets for economic value and contribution to sustainable development [sic]. The SADC Industrialization Strategy and Roadmap (2015-2063) recognizes as a challenge the “limited legal and institutional capacity for formulating, implementing and enforcing Intellectual Property Rights (IPRs)”, and further recognizes the importance of the “use of IPRs to encourage Research and Development, innovation and new product development”.

SARUA is a key player in this regional agenda and upholds the values and objectives of the abovementioned Protocols and Industrialization Strategy and Road Map. SARUA notes that South Africa, Angola, Lesotho, Madagascar, Malawi, Mozambique, and Swaziland, together with 5 other African countries specifically highlighted the importance of fair and balanced copyright laws, when they signed the Cape Town Declaration in August 2015. SARUA believes that the principles of this Declaration, as well as those of the SA Constitution, should be enshrined in the new Copyright Amendment Bill 2017.

SARUA commends the South African Government on the new 2017 Bill and its endeavour to redress the serious shortcomings of the current Copyright Act No. 98 of 1978 which has always created barriers for education, research and innovation. SARUA supports the Bill’s fair and balanced provisions for education, research, and people with disabilities. It also supports the provisions for libraries, archives and museums, including digitisation, format-shifting, and protection and preservation of collections, including cultural heritage.

¹ http://www.sadc.int/index.php/download_file/4333/1700/ (p. 7)
SOME CONCERNS AND RECOMMENDATIONS

1. The Bill needs to be reviewed for grammatical errors, incorrectly named definitions and clarity in general.

2. The word ‘author’ is used in many instances throughout the document, but it would be correct to use the term ‘rights-owner’, as in most cases, authors assign their rights to third parties and do not have the right to authorise reproduction or other uses of their works.

3. **Fair Use provisions (Section 12[1][a])**. The current Copyright Act has fair dealing provisions which have always proved to be restrictive for information-users. SARUA was pleased to see that ‘open fair use’ had been included in the 2015 Amendment Bill. However, with the removal of the words ‘such as’ in the Section 12(1)[a] provision of the 2017 Bill, it has now lost its value and is limited to a finite number of activities, much the same as ‘fair dealing’. SARUA stresses that fair use provisions need to be as wide as possible to accommodate unforeseen uses, or future uses, e.g. the ever-changing advances in technology, media, and methods of producing knowledge. It needs to be clearly spelt out as ‘open fair use’ and distinct from the more restrictive ‘fair dealing’ provisions. Providing a limited list of fair use options is short-sighted and will require the law to be changed on a regular basis, as new technologies, media, machinery and artificial intelligence developments change the face of accessing, creating and sharing knowledge. If South Africa wants to progress with socio-economic development, and in the process, contributes to development of the SADC region, it needs to ensure that knowledge is as accessible as possible for all information-users and creators of intellectual property, for the public good.

4. **Quotation - Section 12A.[1][a]** – The provision for quotation is extremely restrictive and concerning to SARUA. It is far stricter than the current Copyright Act’s provision for quotation. It essentially prevents anyone who writes, uses/re-uses, or creates intellectual property in any way, from using extracts from others’ work, without prior authorisation, except in the case of a summary of that work. It will stifle creativity and innovation, which contradicts the whole purpose of copyright. Imagine if researchers were not allowed to quote from other academic works; imagine if authors or publishers couldn’t quote from third party works in order to create new works. Imagine how impractical it would be for them to apply for copyright permission each time! Essentially, this provision will restrict every single writer, creator, technology innovator, journalist, educator, researcher, student, etc. The sentence therefore needs to be corrected urgently by the deletion of the comma after the word ‘periodical’ and before the word ‘that’.

5. **Author’s Resale Right – Section 9**
SARUA commends the DTI for attempting to compensate artists for their artworks on re-sale, but the provisions are far too wide and would be impossible to regulate. As in other countries, the provision should only apply to commercial galleries and auction houses, and perhaps commercial exhibitions. Ideally, the Bill should give a list of exactly which artworks are applicable. If the purpose is to compensate indigenous knowledge works, then that should be dealt with in the ‘sui generis’ Traditional Knowledge Bill proposed by the Dept. of Science and Technology, and not in the Copyright legislation.

6. **Orphan Works – Section 22**
SARUA is aware of international, regional and local discussions on how to address ‘orphan works’. No ideal solution has been found yet. SARUA does not support the...
provisions of Section 22, especially since many of those works belong to authors and creators outside the borders of South Africa. It would not be correct for them to be under the control or copyright ownership of the South African Government.

SARUA believes that the correct way to deal with ‘orphan works’ is to apply the criteria of open Fair Use. In most instances, the rights-owners no longer exploit and/or have abandoned those works, or do not know they own them (e.g. through deceased estates). By not exploiting their rights, they have essentially waived their exclusive rights in the process. Information users should not have to encounter such difficult and almost impossible processes, and expense, to access these works, for research, education, libraries, etc., as prescribed in Section 9 of the Bill. Fair Use would be a fair and practical way to deal with these works. Also, accumulating a Fund for royalties on orphan works would serve no purpose. Rights-owners would not know royalties had been collected on their behalf, and the monies would remain in the State fund indefinitely. SARUA believes that Section 22 provisions are flawed and need to be deleted, with open fair use being applied to all orphan works. This would also eliminate the unnecessary administrative, personnel and other related costs that would be necessary to manage such a system.

7. **Technological Protection Measures – Section 27**
   The correct term ‘technological protection measure(s)’ should be used in this Section.

   SARUA recommends that in a situation where one party assists another party in circumventing a technological protection measure, for a legitimate use/exception, the assisting party should be protected from any liability. Users should also be entitled to re-engineer and/or bypass such measures in order to repair machinery, printing or other equipment.

8. **Text and Data Mining**
   SARUA stresses that it is imperative that text and data mining provisions be included in the Bill. These are crucial for research, technological innovation, statistical analysis, and a host of other purposes. Apart from negative implications for research and innovation, South Africa could be at a disadvantage in the international marketplace if these provisions are not permitted. As new technologies, artificial intelligence and future developments transform knowledge, text and data mining will become even more crucial.

SARUA thanks the Portfolio Committee on Trade and Industry for the opportunity to contribute to the discussions on the Copyright Amendment Bill and hopes that its recommendations will be accorded the attention they deserve.

Signed at PARKTOWN on the 30th day of JUNE 2017.

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CEO - SARUA