

(Conference Draft)

“The Creative Industry and South African Copyright Law”

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1. Introduction: the creative industry in South Africa

The phrase “creative industry” has gained traction since its early usage in the late 1990s.¹ However, as rightly noted by the 2007 *Creative Industries in South Africa* report, it is sometimes used interchangeably with “cultural industry” and “cultural sector” and, consequently these terms “are fluid and lack definition”.² The report further noted that consensus amongst scholars of, and commentators on, these matters was building towards the followed shared understanding of creative industries as

“compris[ing] two distinct groups of activities; basic and applied arts industries. Together with the distribution industries, these form part of the broader ‘copyright industries’. Basic or ‘upstream’ arts then, refers to traditional art forms such as the performing, literary and visual arts, whereas ‘downstream arts’ refer to the applied arts such as advertising, design, publishing and media related activities.”³

The term “creative industries” has been used in important policy and strategy documents such as the *Cultural Industries Growth Strategy* 1998, the Gauteng Government’s *Creative Industries Development Framework* (CIDF)⁴ and the Department of Arts and Culture (DAC)’s *Creative Mapping Study*.⁵ This was indicative of growing clarity and consistency in terminology usage. Unfortunately, the *Revised White Paper on Arts, Culture and Heritage Third Draft, 2017* seems to detract from such progress in its conflated reference to the “cultural and creative industries” which it defines as “the production and dissemination of cultural goods and services that use, embody or convey cultural expressions” and which “offer income generation opportunities for arts, cultural and heritage practitioners and entrepreneurs”.⁶ This sector comprises of numerous sub-sectors including film and video, music recording, publishing and craft. Each of these sub-sectors includes a broad range of activities. For example, the National Film and Video Foundation (NFVF) defines films as including “feature films, documentaries, TV series (including broadcaster commissions), TV

¹ For example in Department of Culture, Media & Sport (DCMS) (1998) *Creative Industries Mapping Document*, p1 “Those activities which have their origin in individual creativity, skill and talent, and which have the potential for wealth and job creation through the generation and exploitation of intellectual property.”

² Avril Joffe and Monica Newton *The Creative Industries in South Africa*, HRSC 2007, 8.

³ at p 9.

⁴ Gauteng Provincial Government *Creative Industries Development Framework* (CIDF) 2005 available at <http://www.sacr.gpg.gov.za/SACRDocuments/Strategies/CIDF.pdf>

⁵ citation here.

⁶ at p34.

films (including broadcast commissions), animation series, short films, documentaries and animation”.⁷

1.1 economic value & contribution of creative industries

The economic significance of the creative industries cannot be gainsaid. Various studies have shown that a significant portion of South African society makes a living through participation in the sector. Three sub-sector specific examples will suffice to substantiate this point. First, the *NFVF South African Film Industry Economic Baseline Study Report 2013* found that the film industry contributed ZARR3.5 billion to South Africa’s GDP through both direct and indirect spend.⁸ Secondly, the *DAC National Mapping Study 2014* found that there were about 27 685 organizations within the cultural industries sector, more than half of which were under black ownership. For a country still working to undo the negative effects of apartheid and colonialism, a sector that is dominated by previously disadvantaged persons becomes of critical importance. The study also found that the sector accounted for 3.6% of employment, contributed between ZAR90 - 107 billion in direct output (turnover) per annum and contributed approximately 2.9% to GDP.⁹ Third, the NFVF commissioned *Economic Impact of the South African Film Industry, 2017* report on the period 1 January 2013 to 31 March 2017 confirmed the continued upward trajectory of the sub-sector’s contribution to GDP.

Consequently, many provincial and national economic strategies seek to promote this sector. Examples of these include the *Film Development Strategy, 1998* and the *Mzansi Golden Economy Strategy, 2011*. The DAC has published creative industries policies over a sustained period of time. One of the first of these was the *White Paper on Arts, Culture and Heritage, 1996*¹⁰ which has been undergoing revision¹¹ with a current revised draft currently being

⁷ Urban-Econ Development Economists Economic Impact of the South African Film Industry, 2017, 3. Commissioned by the National Film and Video Foundation (NFVF) available at [http://www.nfvf.co.za/home/22/files/2017%20files/NFVF%20Economic%20Impact%20Study%20Report 14 0 6 2017.pdf](http://www.nfvf.co.za/home/22/files/2017%20files/NFVF%20Economic%20Impact%20Study%20Report%2014%206%202017.pdf)

⁸ Available at <http://nfvf.co.za/home/22/files/Baseline%20study.pdf>.

⁹ Cite pages in the report.

¹⁰ DAC *White Paper on Arts, Culture and Heritage, 1996* available at <http://www.dac.gov.za/content/white-paper-arts-culture-and-heritage-0>

¹¹ *Draft: Revised White Paper on Arts, Culture and Heritage, 2015; Second Draft: Revised White Paper on Arts, Culture and Heritage, 2016*. Both available at <http://www.dac.gov.za/white-papers>.

considered in 2017.¹² The White Paper is supported by the *Cultural Industries Growth Strategy, 1998* which was published together with sector reports on Film and Video, Music, Craft and Publishing.¹³

In addition to these general studies, over the years other several studies have been completed on the economic contribution of the copyright industries. It is reported that by December 2014, at least 40 such studies had been completed, using the methodology and approach set out by the WIPO Guide first published in 2003¹⁴ and revised in 2015.¹⁵ The South African study was completed in 2011. These studies reinforce the importance of creative industries and are often used to shore up arguments for strengthening copyright holders’ position.

Copyright law and policy are relevant to the creative industries because copyright creates exclusive economic rights over creative output which enables copyright holders to generate income. The following section provides an overview of copyright law and policy as it pertains to the creative industries.

2. The creative industry, copyright law and policy

South African Copyright Policy will be encased in the National Intellectual Property Policy that this currently under formulation. A draft policy was published for comment in 2013¹⁶ and was followed by Cabinet’s adoption of the Intellectual Property Consultative Framework in 2016. The Consultative Framework noted that IP & creative industries were already the subject of “existing initiatives” which should be aligned with, and subject to monitoring and evaluation under the National Intellectual Property Policy.¹⁷ Several of these have been briefly outlined in above section. A significant portion of the creative industry’s output falls into the category of traditional knowledge, in particular the traditional crafts sub-sector and any endeavours to commercialise traditional cultural expressions. This means that the

¹² As at 26 July 2017, this draft was open for public comment until 31 July 2017. See *Revised White Paper on Arts, Culture and Heritage, Third Draft, February 2017* available at <http://www.dac.gov.za/content/third-draft-revised-white-paper-arts-culture-and-heritage>

¹³ Department of Labour *The Creative Industries in South Africa: Sector Studies Research Project, 2008*.

¹⁴ WIPO *Guide on Surveying the Economic Contribution of the Copyright-Based Industries* (2003).

¹⁵ WIPO *Guide on the economic contribution of the copyright industries – revised edition* (2015)

¹⁶ Notice 918, Government Gazette 36816, 4 September 2013.

¹⁷ The Intellectual Property Consultative Framework, 2016, 17. Available at <https://www.thedti.gov.za/news2016/IPConsultativeFramework.pdf>

national Traditional Knowledge policy becomes of relevance.¹⁸ This policy informed the statutory amendments of Intellectual Property laws, copyrights aspects of which are discussed at section 2.2 below.

2.1 Copyright protection

The Copyright Act 98 of 1978’s provisions are critically important to the creative industries because it is the mechanism through which economic benefits are appropriated.

Creative industry outputs that fall into the statutorily defined list of copyright eligible works are protected by copyright if protection eligibility criteria are met.

The Copyright Act lists the following copyright eligible works:

literary works;¹⁹

musical works;²⁰

artistic works;²¹

cinematograph films;²²

sound recordings;²³

broadcasts;²⁴

¹⁸ Policy Framework for the Protection of Indigenous Traditional Knowledge through the Intellectual Property System and the Intellectual Property Laws Amendment Bill, 2008 (General Notice 552 in Government Gazette 31026 of 5 May 2008).

¹⁹ Defined as “includes, irrespective of literary quality and in whatever mode or form expressed—

(a) novels, stories and poetical works;

(b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;

(c) textbooks, treatises, histories, biographies, essays and articles;

(d) encyclopaedias and dictionaries;

(e) letters, reports and memoranda;

(f) lectures, speeches and sermons; and

(g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program”

²⁰ Defined as “a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music;”

²¹ Defined as “, irrespective of the artistic quality thereof—

(a) paintings, sculptures, drawings, engravings and photographs;

(b) works of architecture, being either buildings or models of buildings; or

(c) works of craftsmanship not falling within either paragraph (a) or (b);”

²² Defined as “any fixation or storage by any means whatsoever on film or any other material of data, signals or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program;”

²³ Defined as “any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film;”.

programme-carrying signals;²⁵

published editions;²⁶ and

computer programs.²⁷

The works will be copyright protected if they are original, fixed in material form and are authored by a South African citizen or resident or a citizen or resident of a Berne Convention country.²⁸ The originality standard requires that the work be independently created, with the exertion of skill and effort.²⁹ The material fixation requirement excludes unexpressed ideas from copyright protection in keeping with established copyright principles and treaty obligations.³⁰ Copyright subsists automatically and there is no constitutive registration requirement. However, the Registration of Copyright in Cinematograph Films Act 62 of 1977 facilitates voluntary registration of copyright which creates prima facie evidence, in all civil and criminal proceedings relating to copyright in cinematograph films, of the subsistence and ownership of copyright.³¹

The author of the work is the copyright holder³² but where some works are commissioned or created within an employment context,³³ the commissioner or employer will be the copyright holder. Section 21(1)(c) provides that the commissioner of a photograph, painting, portrait, gravure, cinematograph film and sound recording will be the copyright holder. The author of a work and relevant commissioner or employer can change this statutory position by

²⁴ Defined as “a telecommunication service of transmissions consisting of sounds, images, signs or signals which—

(a) takes place by means of electro-magnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and

(b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;”

²⁵ Defined as “a signal embodying a program which is emitted and passes through a satellite;”

²⁶ Defined as “the first print by whatever process of a particular typographical arrangement of a literary or musical work;”

²⁷ Defined as “a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result;”

²⁸ ss 2(2) – 2(2A) SA Copyright Act s 2 Copyright Act.

²⁹ *Smith Copyright Companion* 9, *Dean Copyright* 1-15 - 1-17, citing, among others, *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd and others* 2006 (4) SA 458 (SCA) at 472 - 474 . Also see *Accesso CC v Allforms (Pty) Ltd and another* [1998] JOL 3924 (T) at 32.

³⁰ TRIPS art 9(2) provides ‘copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such’; WIPO Copyright Treaty 36 ILM 65 (WCT) art 2 provides that ‘copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.’

³¹ s 30

³² s 21(1)(a).

³³ S21(1) (b) and (d).

agreement. Where work is made by or under the direction or control of the state or an international organization, the copyright will vest in the state or international organization.³⁴

Copyright allows its holder to exclude the economic exploitation of protected work by others. For each type of work the Copyright Act lists the economic acts that are within the exclusive domain of the copyright holder. These are enumerated below:

Work & relevant section	Economic exclusivity
literary works and musical works - s6	Reproducing the work in any manner or form; publishing the work if it was hitherto unpublished; performing the work in public; broadcasting the work; causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster; doing any of the above in relation to an adaptation of the work making an adaptation of the work;
artistic works – s 7	Reproducing the work in any manner or form; publishing the work if it was hitherto unpublished; including the work in a cinematograph film or a television broadcast; causing a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster; doing any of the above in relation to an adaptation of the work making an adaptation of the work
cinematograph films – s8	Reproducing the film in any manner or form, including making a still photograph therefrom; causing the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public; broadcasting the film; causing the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster;

³⁴ s 21(2).

	<p>doing any of the above in relation to an adaptation of the work</p> <p>making an adaptation of the film;</p> <p>letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the film.</p>
sound recordings – s9	<p>Making, directly or indirectly, a record embodying the sound recording;</p> <p>letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the sound recording;</p> <p>broadcasting the sound recording;</p> <p>causing the sound recording to be transmitted in a diffusion service, unless that service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster;</p> <p>communicating the sound recording to the public.</p>
Broadcasts – s10	<p>Reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph therefrom;</p> <p>rebroadcasting the broadcast;</p> <p>causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.</p>
programme-carrying signals – s11	<p>the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.</p>
published editions – s12	<p>Reproduction in any manner</p>

Any exercise of the above rights without authorization from the copyright holder would constitute infringement unless it falls under an exception or limitation. The Copyright Act sets out exceptions and limitations in sections 12 – 19. A full exposition of exceptions and limitations is beyond the scope of this paper. Suffice it to say that they are a public policy device that permits certain users to use work without seeking authorization from the copyright holder. Such authorization is often granted in return for the payment of a royalty and, in some cases, requires substantial efforts to identify the copyright holder and to thereafter successfully conclude negotiations for the terms of usage. Where the copyright holder cannot be identified or located, the relevant work is known as an orphan work. The only non-infringing use that can be made of it would then be what is permitted by exceptions and limitations.

Exceptions and limitations are an important mechanism that serves to exclude the copyright licensing process and to ameliorate what has become known as clearance culture. This phenomenon refers to an environment where using existing copyright protected works has become so fraught with licensing processes that progress or the creation of new works is often frustrated. The mechanism is structured in several ways. First, some works such as legislative texts and mere press items are simply excluded from copyright protection.³⁵ Second, some unremunerated uses are provided for, such as fair dealing. Thirdly, certain remunerated uses may be permitted subject to the grant of the compulsory license and the payment of a royalty determined by a defined entity.

South African copyright law provides for the first and third forms of exceptions and limitations. An example of the latter is s 12’s provision for the fair dealing exception in relation to literary or artistic works, in terms of which the work may be made for purposes of research or private study; personal or private use; criticism or review of the work and reporting current events provided that the source is mentioned and attribution is included if the author was identified on the work. The list of purposes is exhaustive and only the above three purposes are countenanced by the section. Fair dealing for all three purposes is extended to broadcasts (s 18) and published editions (s 19A). Fair dealing for purposes of criticism or review and reporting current events is extended to cinematograph films (s 16(1)), sound recordings (s 17) and computer programs (s 19B(1)).

To rely on this exception, one must show (1) that the dealing is permissible, in other words, it is one of the listed purposes; (2) that the dealing is fair; and (3) that the conditions stated in the proviso have been met. The fair dealing exception has been criticized for being too narrow because only the enumerated purposes are permitted and not all three are extended to all kinds of work.³⁶ For instance the failure to extend fair dealing for purposes of personal or private use to sound recordings and cinematograph works means that format shifting of music or a movie one owns to enable the lawful owner of a copy of the work to listen or view it on another device is unlawful.³⁷ Further, the lack of any statutory guidance on how to conduct the fairness analysis is often cited as a major shortcoming. In some fair dealing jurisdictions,

³⁵ s 12(8).

³⁶ Cite fair dealing critiques here.

³⁷ Xxx.

such as Canada, a rich body of jurisprudence that sets out the factors to be considered, has developed.³⁸ These factors are substantively the same as the United States’ fair use considerations which are set out in s107 of its Copyright Act.³⁹ South Africa’s first judicial consideration of fair dealing was set out in *Moneyweb (Pty) Ltd v Media24 Limited and Another*⁴⁰ decided in 2016.

Some sub-sectors of the creative industries, find this exception to be relevant to their work.

For example, documentary filmmakers often have recourse to existing works which they want to include in their works for a variety of reasons. The fair dealing exception may permit such use, if it falls into the enumerated purposes.

The author of work also has the moral rights of integrity and paternity which enable him to object to any distortion or mutilation of the work and to be identified as the author of the work, respectively.

2.2 traditional knowledge and traditional cultural expressions

As noted above, a significant portion of the creative industry’s output falls into the category of traditional knowledge, specifically traditional cultural expressions. Copyright’s protection eligibility criteria often exclude these expressions because they fall short of the originality and material fixation criteria. In addition, traditional authorship and ownership norms do not easily align with the copyright’s conceptualisations.⁴¹ Faced with the option of creating *sui generis* protection for traditional knowledge and traditional cultural expressions or stretching Intellectual Property law to provide protection, South Africa selected the latter to the chagrin

³⁸ For example *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 3 SCR 326.

³⁹ For a reprise of recent case law see Michael Geist (ed) *The Copyright Pentology: How the Supreme Court of Canada shook the foundations of Canadian copyright law* (2013).

⁴⁰ [2016] ZAGP JHC 81.

⁴¹ Lee- Ann Tong ‘Using Intellectual Property rights to protect for traditional knowledge’ in Hennie Klopper, Tana Pistorius, Brian Rutherford, Lee-Ann Tong, Andries van der Merwe & P van der Spuy *Law of Intellectual Property in South Africa* 2ed Durban: LexisNexis, 2016, 555 at 558 - 559; Y Daya and N Vink ‘Protecting traditional ethno-botanical knowledge in South Africa through the intellectual property regime’ (2006) 45 (3) *Agrekon* 319; Andries van der Merwe ‘Can Traditional Knowledge be effectively covered under a single "umbrella"?’ (2010) 13(4) *Potchefstroom Electronic Law Journal* 1-10, 2, Charles A Masango ‘Indigenous traditional knowledge protection : prospects in South Africa's intellectual property framework?’ (2010) 76(1) *South African Journal of Libraries and Information Science* 74.

of many.⁴² The Intellectual Laws Amendment Act 28 of 2013 was passed by the South African parliament and received Presidential assent.⁴³ However, this statute is yet to come into force.

When it comes into force, it will amend the Copyright Act to create copyright protection for a new category of work, the traditional work. These works are defined as indigenous works and derivative indigenous works. An indigenous work is defined as

“a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community”.

The author of indigenous works is “the indigenous community from which the work originated and acquired traditional character”.

A derivative traditional work is, in turn, defined as

“any work ...applied to any form of indigenous knowledge recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which was derived from indigenous cultural expressions or knowledge...”

The author of a derivative indigenous work is defined as “the person who first made or created the work, a substantial part of which was derived from an indigenous work”.

Traditional works will be afforded copyright protection if it is ‘written down, recorded, represented in digital data or signals, or otherwise reduced to a material form or is capable of substantiation from the collective memory of the relevant indigenous community’.⁴⁴

⁴² Tong supra 566, Caroline B Ncube ‘Sui Generis Legislation for the Protection of Traditional Knowledge In South Africa: An Opportunity Lost’ in C B Ncube & WE Du Plessis (eds) *Indigenous Knowledge & Intellectual Property*, Juta, 2016; André van der Merwe ‘The old and the new: A concise overview of the Intellectual Property Law Amendment Act’ De Rebus, September 2014:28 [2014] *Derebus* 167; Andre van der Merwe ‘South and Southern Africa—recent developments in the legal protection of traditional knowledge and traditional cultural expressions’ (2014) 9(1) *Journal of Intellectual Property Law & Practice* 417; Caroline B Ncube ‘Intellectual Protection of Traditional Knowledge and Access to Knowledge in South Africa’ in Matthew Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research*. Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2015 543.

⁴³ Government Gazette 37148, 10 December 2013.

⁴⁴ s 28B(2) Copyright Act.

Copyright protection for derivative indigenous work will subsist for 50 years from the first authorized communication to the public or from the death of the author or all authors, whichever term expires last.⁴⁵ Copyright in indigenous works will be of infinite duration. Copyright will vest in the author. Since in the case of indigenous work, the author will be an indigenous community, such communities are given the status of a juristic person.⁴⁶ The National Trust for Indigenous Knowledge will hold the copyright where the identity of an author is indeterminate, the author indigenous community is no longer in existence or authorship cannot be shared between communities claiming authorship.⁴⁷

The copyright protection afforded to traditional works will give its holder exclusivity over several acts including reproduction; taking still photographs from cinematograph films; publishing unpublished works; performing or broadcasting works of a dramatic, literary or musical nature; including musical or artistic traditional work in a cinematograph film, TV broadcast or sound recording; and making an adaptation of the work.⁴⁸

Section 28G provides for a number of exceptions and limitations. Most importantly, it begins by providing that the exceptions and limitations in sections 12 – 19 of the Act extend to traditional works, to the extent that they are applicable. It then provides for the following new exceptions:

- (7) A traditional work may be used without obtaining prior consent of the copyright owner, if it is for the purpose of—
 - (a) private study or private use;
 - (b) professional criticism or review;
 - (c) reporting on current events;
 - (d) education;
 - (e) scientific research;
 - (f) legal proceedings; or

⁴⁵ s 28F(1).

⁴⁶ s 28D(1).

⁴⁷ s 28(D)(3).

⁴⁸ s 28E.

(g) the making of recordings and other reproductions of indigenous cultural expressions or knowledge for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes and incidental uses:

Provided that only such excerpts or portions as is reasonably required are used and that the copyright owner's name is acknowledged.

2.3. copyright reforms

The *2017 White Paper Revision draft* considers the significance of copyright regarding several aspects including the proposed Artist Resale Right (ARR) in the Copyright Amendment Bill, 2017 and providing access for visually impaired persons through the ratification of the Marrakesh Treaty.⁴⁹ The Copyright Amendment Bill proposes far-reaching reform of the fair dealing provisions that would result in a more open approach, akin to the United States’ fair use provision. [To be developed further].

3. Discussion: the author as user

The value and contribution of the creative industry to economic growth has been used to substantiate calls for providing increasingly stronger protection for copyright to enable copyright holders to increase their revenue generation from the protected works. The main shortcoming of such calls is two-fold. First, they overlook the fact that authors are not often copyright holders and therefore do not benefit from ever-stronger copyright protection due to inequitable contracts or arrangements with the copyright holders who commercialise the work. Secondly, authors rely on existing works and, therefore are also users. To promote further creativity, copyright law needs to equitably enable access to, and use of, works.

To return to an example cited above at section 2.1, documentary filmmakers may wish to use existing work in the creation of new works. It has been shown that currently the copyright system is not optimized for documentary filmmakers because they are unsure of access and usage rights.⁵⁰ XXX is another example of a creative industry sub-sector that relies heavily

⁴⁹ at p28.

⁵⁰ Sean Flynn and Peter Jaszi *Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture* available at

http://www.pijip-impact.org/wp-content/uploads/2012/04/untold_stories_in_south_africa.pdf; Tobias Schonwetter ‘Summary of the Evolution, Current State, and Potential Future Developments of the Fair or Flexible Dealing Norms in South Africa that Allow the Use of Copyrighted Material, Especially in

on existing works and would benefit from a more open and flexible access and usage copyright regime. [to be developed further].

4. Conclusion

The creative industry’s economic significance and the nuanced position of authors, as consumers and users of copyright protected works, requires a thoughtful approach to copyright law and policy. If the boundaries between author and user are often intertwined and creativity is served by an equitable approach, copyright law and policy has to cater adequately for the rights and interests of both constituents [to be developed further] .