



7 July 2017

Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Attention Mr A Hermans
Parliament of the Republic of South Africa
CAPE TOWN

By email only to: ahermans@parliament.gov.za

Dear Ms Fubbs

**COPYRIGHT AMENDMENT BILL, NO 13 OF 2017 and PERFORMERS PROTECTION AMENDMENT BILL, NO. 24 OF 2016:
Submission of Comments by the Publishers Association of South Africa, PASA**

In response to your Committee's invitation to stakeholders to make written submissions in respect of the Copyright Amendment Bill, No 13 of 2017 (referred to in this submission as the "Bill"), which will be deliberated in conjunction with the Performers' Protection Amendment Bill, No 24 of 2016, the Publishers Association of South Africa, PASA, herewith submits its comments and also requests to be heard at the public hearings in August 2017.

- **We believe that Parliament has the opportunity to create effective legislation to bring South African copyright law into the Internet Age and join its main trading partners which already made this transition many years ago. In doing so, Parliament is enjoined to take into account the impact that legislation will have on creators and publishers of copyright works and thereby ultimately on consumers for those works.**
- **PASA can assist Parliament in assessing this impact inasmuch as it relates to the publishing of books and journals, more information about which appears in this submission.**

PASA is the largest publishing industry body in South Africa. It represents book and journal publishers in South Africa in the field of non-fiction, fiction, education, academic and trade publishing. PASA's membership comprises the majority of South African publishing houses, for profit and non-profit, university presses, small and medium sized companies and multinational publishing enterprises. More information can be found on PASA's website at www.publishsa.co.za.

PASA has been following the **dti's** determination to amend the Copyright Act, 1978, since the Draft National Policy on Intellectual Property of 2013. PASA commented on the draft Copyright Amendment Bill, 2015, and the Performers Protection Amendment Bill, 2017. Copies of those submissions are attached for reference on the detail of PASA's unchanged position on the legislative proposals and for suggested wording of some of the amendments.

PASA offers to make a presentation to Members of Parliament on the importance of copyright for the publishing industry and the impact of the Bill

- **Parliament's attention is drawn to the Bill's potential impact of critically damaging the South African publishing industry, especially the writing and publishing of quality materials for educational and academic purposes on a sustainable basis, by**
 - ❖ **poorly considered exceptions to copyright,**
 - ❖ **the reversal of rules on parallel importation and**
 - ❖ **the limitation of actions against infringement of copyright that appear in the Bill,****as are further detailed below.**

PASA would like to offer to make a presentation to Members of Parliament on copyright and the publishing industry and will engage with the Committee Secretary to find a suitable occasion during August 2017. An introduction to this topic can be found in the annexure to this submission entitled ***What Publishers Do***, which demonstrates aspects like royalty flows to authors and how the publishing industry works with copyright in order to bring its products to the market.

The diversity in the publishing industry and the role publishers play in producing not only books for pleasure but also the knowledge economy is set out in ***What Publishers Do***. Publishing is an intense and professional process, with many people involved in the production of just one book. It takes a long time and much effort to build the skill. If South Africa were to lose those skills through misguided policy and legislation, the country will not only forego its local thriving industry, but become dependent on imported books and content on the Internet supplied from elsewhere.

PASA and its members have commissioned an independent economic impact study of the impact that the Bill, notably the exceptions and defences to copyright that are proposed to be introduced. It has decided to take this extraordinary step in the absence of an impact study or regulatory impact assessment (referred to below). Noted accounting and consultancy firm PricewaterhouseCoopers of Johannesburg is carrying out this study.

Although still a work in progress, completed analyses and surveys carried out by PricewaterhouseCoopers indicate significant negative consequences for the publishing industry flowing from free and unauthorised uses of copyright-protected content that will become legitimised by the exceptions proposed in the Bill. These include:

- (1) a weighted average decline in sales revenue for the industry of 33%, that is extrapolated to an amount of around R2,1 billion,**
- (2) a weighted decline in employment of 30%, and**
- (3) a reduced willingness on the part of authors to create content for the broadly-defined education sector, with potentially significant negative implications for South Africa's self-sufficiency in knowledge production and dissemination in an era where this is increasingly important for global competitiveness.**

Background context to the Copyright Amendment Bill and the Performers Protection Bill

The origin of this revision lies in the report of the Copyright Review Commission, issued in 2011 and published in 2012, which was mandated to look into the failure of the needletime provisions (Section 9A of the Copyright Act and Section 5 of the Performers Protection Act, introduced in 2002) to benefit copyright owners of sound recordings and the performers of those sound recordings, and into other practices in the music industry and of collective management of copyright. The 2015 draft Copyright Bill which followed that report, was stated by the **dti** to remedy the situation, with a statement in its presentation at a meeting of stakeholders in August 2015 that, "The creative industry in particular musicians, are vulnerable to abuses by users of their IP. Local artists, performers, composers and other authors of copyright works are dying as paupers because royalties of their works are not paid."

It is to be welcomed that the Bill endeavours to bring copyright legislation into the Internet Age by introducing the exclusive right of 'communication to the public' in addition to the other exclusive rights of copyright. We submit that a revision of legislation could do far more to improve the creative industries that rely on copyright, starting with:

- an effective introduction of the 'communication to the public' right, in respect of which we submit that there are some lapses in the Bill,

- the introduction of the exclusive right of distribution required by the WIPO Copyright Treaty,
- solid protection of technological protection measures and copyright and rights management information, and
- effective procedures and remedies against infringement of copyright online.

Instead, the focus of the Bill, as introduced in May 2017, has shifted to allowing free and unremunerated consumptive uses of copyright works, and it seems to have moved past the original intentions of benefitting authors. Indeed, a careful study of the Bill indicates that – other than ineffective and error-laden provisions which simply state that authors should have “the right to claim an equal portion of the royalty payable for the use of the copyright work” – the Bill in fact takes rights and opportunities for earning remuneration away from authors, specifically authors of published works, as demonstrated below.

Suggested way forward for processing the Bill

PASA does not consider that it would be useful to engage in a section-by-section commentary of the Bill in this submission, and refers to the earlier submissions attached to this document. Nevertheless, there are themes in the Bill that are uncontroversial and have been independently researched, and these themes should be fast-tracked by Parliament in a step-by-step approach to modernise the Copyright Act. Other themes require far more thought and analysis, and should be considered in a more moderate process.

- **Parliament has the opportunity to create effective and meaningful legislation to bring the Copyright Act and the Performers Protection Act up to date, in circumstances where the policy considerations are backed up by data and for changes that have been substantively consulted upon.**
- **Effective and meaningful legislation will advance the interests of authors, artists and composers and the creative industries as a whole by protecting their interests, without thereby destroying the value chain of copyright through free, or gratis, ‘uses’ of copyright works, because authors will have nothing to gain if there is nothing to share. PASA considers that a number of possibilities to support authors, artists and composers, as well as copyright owners, have been overlooked by the Bill.**
- **Effective and meaningful legislation will also create a sustainable equilibrium between incentivising local creators and the needs of consumers of content, thereby recognising copyright’s founding social purpose of encouraging learning.**

- **The Bill in the form as introduced to Parliament, due to the many faults in its preparation and drafting, as elaborated on below, is not a starting point to develop effective legislation.**

Fast track to modernisation of the Copyright Act

PASA welcomes and supports immediate priority being given to the following:

1. The improvement of the ‘needletime’ provisions in accordance with the recommendations of the Copyright Review Commission.
2. South Africa’s accession to WIPO Copyright Treaty (WCT) and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the Marrakesh VIP Treaty).

South Africa should ratify and implement WCT so that South African copyright holders and performers can benefit from national treatment in other Treaty countries by the exclusive right of communication of their works to the public and, in the case of copyright owners, the exclusive right of distribution, i.e. the making available to the public of the original and copies of their works through sale or other transfer of ownership.

Ratification and implementation of WCT would also bring legal recognition to technological protection measures and rights management information and the ability for South African rightsholders to have the same rights recognised subject to the principles of national treatment in other Treaty countries.

3. The introduction of the exclusive right of ‘communication to the public’, so long as all consequential amendments are made and the exclusive right of distribution, as prescribed by WCT, is also introduced. Careful consideration will have to be given to new provisions that give effect to technological protection measures and copyright management information.

PASA suggested wording for these sections in the schedules to its 2015 submission on the Draft Copyright Amendment Bill and its 2017 submission on the Performers Protection Amendment Bill, both attached to this submission.

The insertion in the Bill of qualifications to the exclusive rights of copyright of an additional right by a “user, performer, owner, producer or author” to claim a royalty for the “use” of the copyright work is not only an error in several respects, but also amounts to the removal of the exclusivity of the rights of copyright owners. The equitable remuneration of authors must be dealt with in another way,

4. An exception to copyright for the visually impaired that conforms with, and will allow South Africa's accession to, the Marrakesh VIP Treaty, and at the same time recognises what has been done in South Africa to develop books for the visually impaired and therefore facilitates export from South Africa of such works and also of accessible format copies.

PASA suggested wording for this exception in the schedule to its 2015 submission on the Draft Copyright Amendment Bill, attached to this submission.

Moderate process to consider impact and assess scope of changes to modernise the Copyright Act

PASA agrees that the following should be assessed and factual input obtained in the course of proper consultation with stakeholders for appropriate legislation:

1. Develop a sound and workable policy and associated legislation to support equitable remuneration for authors, artists, composers and performers. For this purpose, the Committee could consider existing best practices (such as referred to in the annexure *What Publishers Do*) and examples from existing legislation which support a balance in the relationships between contracting parties whilst upholding freedom of contract. However, the current provisions, which in contravention of South Africa's Treaty obligations, convert the exclusive rights of copyright into non-exclusive rights, and State-prescribed contractual terms and royalty rates, betray a lack of understanding of the law and practice and are bound to be unworkable.
2. Develop targeted exceptions, including allowing specific, limited, acts for the purposes of education and by libraries, only in relation to situations where it is found that the market for copyright materials cannot efficiently provide. In compliance with South Africa's obligations under the Berne Convention and TRIPS, any exception developed under this heading must (1) apply to a special case, (2) not be in conflict with normal exploitation of the work and (3) not be unreasonably prejudicial to the legitimate interests of the rightsholder.
3. Exceptions for transient copies to facilitate the temporary reproduction of copyright works by computers and online to the extent that they are necessary for their functioning, but not in a way that prejudices authors and copyright owners.
4. Enforcement provisions that are effective in the Internet Age, such as dealing with online platforms that reproduce and communicate copyright works without authorisation; distribution of electronic formats of copyright works made without authorisation; alleviating the burden of proof on claimants in respect of technical allegations in claims that are not in

dispute; and providing for minimum damages for appropriate cases of infringement to balance the interests of the copyright owner and the nature of the infringement.

5. A practical and sensible solution that facilitates the reproduction of orphan works and other acts in relation to such works that are restricted by copyright, which do not amount to de facto confiscation by the State.
6. Develop an implementable artists' resale right. This is a legitimate form of entitlement that will bring benefits to living artists and the families of deceased artists.
7. Compulsory licences for translation of works into South Africa's official languages and for reproduction of works that are not available in South Africa if it can be shown that South Africa qualifies as a 'developing country' as is required by the Appendix of the Berne Convention and that the terms of the compulsory licence meet the requirements of the Berne Convention.

Publishers have always acknowledged that copyright must be fair and balanced to all concerned. Copyright laws must recognise the public interest both in support of the institutions that require content, and the commercial and non-commercial publishers that provide the needed services. They cannot therefore weigh the interests of publishers against the public interest but must balance the interests of partners who both serve the public good. PASA prepared a position paper on this very topic in 2009, entitled *Copyright and the Public Interest*, in response to work on the *Library and Information Services Transformation Charter*. The entire position is still relevant today, and we therefore take the liberty of annexing a copy to this submission as guidance for deliberation on the topic of necessary exceptions.

Themes in the Bill that should be excluded from amending legislation

PASA counsels against:

1. State expropriation of copyright works as a result of any form of funding – which are best regulated by contract - and custodianship by the State of copyright works by the “orphan works” provisions.
2. Overbroad exceptions to copyright, specifically introducing US-style ‘fair use’, rather than pursuing incremental change intended to update copyright legislation in a sustainable way.

The ‘fair use’ defence to copyright infringement proposed to be introduced by the Bill is an incorrect conflation of ‘fair use’ that has its origin in the United States of America and which is determined by reference to a set of factors (which are repeated in the Bill) and ‘fair dealing’, which is an exception

to copyright infringement and which is part of South African law, and which allows “fair dealings” with copyright works in certain limited cases.

We note incorrect terminology used in the Bill, such as “use” and “access”, which is not applied elsewhere in the Copyright Act. ‘Fair use’ is the name for a defence to copyright infringement codified under the laws of the United States, and is not about ‘uses that are fair.’

We also note that many of the cases proposed for the ‘fair use’ defence are not cases for ‘fair use’ even in the US – mentioning as examples “education”, “public administration”, “underserved populations” and “tributes.” We reiterate our concern that the introduction of the ‘fair use’ defence, coupled with a ban on contractual terms overriding acts permitted by the Act, once amended, will create uncertainty and insecurity, leading in turn to costly and fruitless litigation.

Acts permitted by copyright exceptions mean no remuneration to rightholders, or even to authors who are intended to be rewarded in terms of the Bill. In South Africa copyright exceptions under the Act (and under the Bill) allow only unremunerated uses. (This is unlike the situation in many countries in Continental Europe, where exceptions are usually accompanied by a requirement to pay a fee to a collecting society for further distribution.)

3. A blanket ‘fair use’ defence or fair dealing exception in respect of educational purposes, which fails to acknowledge sufficiently the harm such a change could do to the educational sector (as outlined above), noting that the education market is a legitimate market in commerce as well as the publishing industry.

We note in particular the detrimental impact that a broadly-interpreted fair dealing exception had on licensing revenue in Canada, and thereby on educational publishing in that country. For the South African Higher Education sector in particular, this precedent is a concern., Although PricewaterhouseCoopers’ study into the impact of these exceptions is still a work in progress, based on work they have completed, we can expect that their report will show the detail of the anticipated negative consequences of these similar exceptions on the South African publishing industry. I.

As currently drafted, all educational use would be permitted by the ‘fair use’ defence in the Bill applying to “education”, which will annihilate the market for educational publishing, leading to both a likely decline in education standards as well as negatively impacting the ability of authors to earn an income and a resultant non-availability of authors for educational works. In addition, the special exceptions for education enable the sort of activity (e.g. creating course-packs) which are very likely to cause significant market harm to educational publishers, and which are made subject neither to fairness nor the payment of licence fees. Education exceptions need to be clearly limited in scope, and to reflect the understanding that the concept of “market harm” by exceptions extends to both the primary and secondary markets of the works in question. To avoid the situation that developed in Canada where there was not only a broad exception, but it was interpreted too liberally by educational institutions, terms of an education exception need to be very precise and accompanied

by appropriate guidelines that maintain a fair balance between creators and consumers of educational materials and that are understood by all.

In the context of creating new educational exceptions, it is extremely important to be able to draw a distinction between works created largely for non-educational purposes but which may occasionally be useful in a classroom, and those works which are created solely to function as educational materials. Whilst a broader educational exception is unlikely to affect the core market for the former, it will certainly undermine the market for the latter. Any new legislation needs to reflect those key points of differentiation and the potential market impact in both the primary and secondary markets.

4. The reversal of recognised rules relating to parallel importation, which will have the effect of undermining the local publishing industry and which will likely also not necessarily have the expected benefit for users of those imported materials, especially for education.

Permitting parallel imports of materials for schools and other educational institutions will encourage materials to be imported that are not suited to South Africa's curricula, to the detriment of South African publishing and local content.

5. Provisions that are held out to be improvements to authors' moral rights, but instead take rights away from authors. The taking away of moral rights in cases where copyright exceptions apply is wrong, and the remaining amendments to Section 20 of the Act proposed by the Bill are unnecessary.
6. A limitation on all assignments to a period of 25 years. We consider that this amendment is an incorrect implementation of the recommendation of the Copyright Review Commission, which was a recommendation for the reversion of rights to composers and performers in respect of musical works and performances taken up in sound recordings.
7. A blanket override of all contractual terms and a blanket importation of statutorily implied terms in licence agreements, noting that licensing is the contractual mechanism by which copyright works are made available to the market.

Parliament is encouraged to look at the causes underlying many of the provisions of the Bill to determine whether the underlying causes are real and, if so, whether they relate to industry-wide practices, whether such practices in fact relate to copyright or not, or whether these causes in fact originate with the practices of individual actors and are not representative of industry.

Shortcomings hampering proper consideration of the issues

PASA submits that there needs to be a full and open discussion amongst all stakeholders on the bulk of the items proposed in the Bill. Thus far, mainly themes relating to the music industry have been the subject of proper investigation, namely by the Copyright Review Commission.

There have been a number of shortcomings in how the **dti** has managed the process leading up to the introduction of the Bill.

- No independent economic impact assessment of the Bill has been carried out.

The SEIAS Report is, with respect, not persuasive, and the document itself does not indicate that any independent research was carried out in its preparation.

An undertaking by the dti at the August 2015 conference with stakeholders to undertake such a study was not implemented; the tender put out for such a product was never awarded.

PASA has, as a result of this failing, commissioned PricewaterhouseCoopers to carry out a study to assess the impact that key provisions of the Bill will have on publishing in South Africa.

- The consultation period in respect of the 2015 draft Bill was unreasonably short and had to be extended. Even for this consultation, a period of five weeks (itself having been extended twice) is very short for legislation of this complexity.

The SEIAS Report on the Bill contains a material misrepresentation on the position of publishers in earlier consultations. Under para 8 “Consultations” (p.8) under the heading “Affected Stakeholders” in respect of the item “Authors and Publishers” and in response to the question “Do they support or oppose the proposal”, it is stated, “They support the ‘fair use’ proposal.” This statement is incorrect, since PASA and other publisher associations, such as the International Publishers Association, have been consistent in cautioning against the unintended consequence of adopting ‘fair use’.

- Documentation relevant to this consultation was not made available by the **dti** to be distributed for this consultation.

These documents include the SEIAS Assessments of both Bills, the 2013 Draft National Policy on Intellectual Property, and the public comments and the 2014 Regulatory Impact Assessment on the latter Draft Policy.

The comments on the Draft Policy and the 2014 Regulatory Impact Assessment are not public. Their absence impedes research on the foundation of many controversial provisions in the Bill.

- The Bill is stated, in the Explanatory Memorandum, to be based in part on the 2013 Draft National Policy on Intellectual Property, “as commented upon.” We question why legislation is based on a document that never matured into a ‘final’ policy.
- Legislation must be based on a policy decision that has not yet been made, on whether or not South Africa will accede to international treaties relating to copyright.

The Treaties include the *WIPO Copyright Treaty (WCT)*, the *WIPO Performances and Phonograms Treaty (WPPT)*, the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the Rome Convention) and the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (the Marrakesh VIP Treaty), as well as the *Beijing Treaty on Audiovisual Performances* (the Beijing Treaty – which is not yet in force).

The Copyright Review Commission recommended “The CRC believes that an overall impact study should be conducted and finalised to determine the appropriateness for the country to ratify and implement the World Intellectual Property Organisation (WIPO) Internet treaties.” In 2013, the dti said “the dti and DOC should, therefore, co-ordinate their activities so as to have a conducive environment in relation to the ratification of digital treaties. ... The WIPO Internet treaties must be viewed in the context of the country’s needs and requirements.”

However, the Explanatory Memorandum to the Bill states that it is : “strategically aligned with ... the WIPO Copyright Treaty (“WCT”); the WIPO Performance and Phonograms Treaty (“WPPT”); the Beijing Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.” In its presentation to Parliament, the dti states: “PC should consider ratification of all treaties/conventions relating to these Bills.”

This Bill, however, does not meet the basic requirements of WCT by not having correctly introduced the exclusive right of ‘communication to the public’ right, by not having introduced the exclusive right of ‘distribution’ at all, and the provisions relating to technological protection measures and copyright management information need more consideration.

Selected shortcomings of the Bill

We consider that there are very many shortcomings in the Bill and do not propose dealing with all of them. The most significant ones for PASA are the following:

- The Bill, deliberately or not, will have disastrous consequences for the South African publishing industry by, amongst others, overbroad, duplicated and poorly-thought-out exceptions to copyright and a blanket interference with legitimate contractual terms.

Insofar as exceptions are concerned, the Bill confuses the United States concept of ‘fair use’, a defence against copyright infringement, and fair dealing exceptions to copyright. As it stands in the Bill, we consider that its passage will leave South Africa in breach of its international treaty obligations under the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property, TRIPS.

Broadening the exceptions without appropriate legislative checks and balances will have the effect of transferring the prospects of economic benefits from the creative industries to technology companies, which, ultimately, will be to the detriment of copyright owners and authors.

- In a misguided attempt to bolster the rights of authors for remuneration for their works, the Bill adds provisos to each of Sections 6, 7 and 8 of the Copyright Act. These sections are the sections will grant the exclusive rights of copyright. By adding provisos which grant persons who are not the copyright owners the rights to claim “a royalty”, with a concomitant new provision in Section 23 of the Act that the failure to pay the royalty to the third party will amount to an infringement of the copyright in that work, the Bill detracts from the exclusive rights and makes them non-exclusive. This is in breach of the requirements of the Berne Convention and TRIPS that the rights granted by copyright be exclusive.
- The Bill will not improve the position of authors, composers and artists. The Bill will in fact take rights away from them compared to the rights they have under the Copyright Act before amendment.
 - ❖ The ill-defined nature of the new provisions claiming to entitle authors and performers to an inalienable right to a royalty for “uses” of their works, indiscriminately applied across all copyright works, will, we believe, fail to add any effective income stream, just as Section 9A, introduced in 2002, failed to produce remuneration benefits until the legislation was clarified by the Courts many years later.
 - ❖ Authors’ entitlement to recognition by way of accreditation is being eroded by disentitling them from acting on their moral rights when exceptions apply. As a result, authors will be worse off under the Bill.
 - ❖ Rightsholders ability to act against infringers (often done at the behest of authors and performers in the literary publishing and music industries) will be eroded due to:
 - the lack of new enforcement provisions equipped to deal with the Internet Age and
 - the removal of the right to prevent trade in infringing copies.
 - ❖ South African authors will have to compete with to-be-permitted parallel imports of cheaper goods.
 - ❖ Due to unrealistically broad and poorly defined exceptions, there will be

- greater scope for consumers of copyright works to claim free uses which require no authorisation and no remuneration, whether to rightsholders or to authors and performers under the new “inalienable right to royalty” sections, and
 - technology companies, local and overseas, will be allowed unrestricted uses of copyright works on the unproven basis that the exceptions allow merely “technological uses, like artificial intelligence and machine learning, that do not use works for expressive purposes”, which technological uses in fact encompass the unauthorised and unremunerated reproduction of entire corpuses of whole copyright works.
- Steps that could have improved the position of authors and copyright owners, especially for the Internet Age, have not been taken.

These include:

- Introducing the exclusive ‘distribution’ right prescribed by WCT.
 - Consideration could have been given to a copyright levy for private uses and the public lending right to remunerate authors for the use of their books by library patrons.
 - Amending the offences and penalties provision to deal with criminal infringements of the ‘communication to the public’ right.
 - Adding presumptions for infringement claims, such as a presumption of ownership of copyright for authors, publishers and their exclusive licensees and a presumption of subsistence of copyright in works.
 - No appropriate minimum level of damages for infringing uses to disincentivise infringement.
 - No procedure for relief against infringements online where the infringer is not within the jurisdiction of the South African Courts. (Arguably, such provisions are better suited to the Electronic Communications and Transactions Act.)
- The indiscriminate application of certain principles and exceptions to copyright across all copyright works.

This has been done without taking into account the differences between creative industries that rely on copyright (music compared to literary publishing, film, computer programmes, etc) or taking into account differences within each industry (e.g. in literary publishing, between trade, educational, academic and scholarly publishing).

The new exceptions to copyright attempt, imperfectly, to consolidate the exceptions that are to some extent applicable across a range of copyright works into one single section – thereby extending the exceptions to works for which they were not originally intended thereby creating the risk of violating the Three-Step Test of the Berne Convention as they fail to take into account the market for the primary work.

It is a flaw of the Bill that it treats all copyright works on the same, one-size-fits-all, basis – it shows that no consideration has been given to the impact of exceptions in relation to the uses of specific works or the uses of those works in industry.

- The Bill is not compliant with the terms of WCT and the Marrakesh VIP Treaty.

The goal should be to adopt legislation that will enable ratification of the international treaties relating to copyright, the two of most relevance to the publishing industry being WCT and the Marrakesh VIP Treaty.

The Bill does not meet the basic requirements of WCT by not having correctly introduced the exclusive right of 'communication to the public' right, by not having introduced the exclusive right of 'distribution' at all, and the provisions relating to technological protection measures and copyright management information need more consideration.

The Bill does not meet the requirements of the Marrakesh VIP Treaty and in that the proposed exception endeavours to cover many disabilities other than visual impairment. Also, the exception proposes to apply to all copyright works, as opposed to only certain literary and artistic works.

- Numerous conceptual and drafting errors.

One set of drafting errors has the appearance of having been the consequence of an incorrect 'global cut & paste' action – rights, including rights to royalties, are granted to “the user, performer, owner, producer or author” throughout the Bill. Of the many faults arising from this error, the most obvious is the inexplicable consequence that “users” of copyright works share in the royalties for their use of the works.

It is outside the scope of this submission to endeavour to deal with or correct all the drafting errors.

PASA is ready to engage in the goal of improving South Africa's legislation in the fields of copyright and performers rights, and looks forward to being able to participate in the public hearings.

Yours sincerely



Mpuka Radinku
Executive Director

Annexures:

- PASA submission on the draft Copyright Amendment Bill, 2015, dated 16 September 2015
- PASA submission on the Performers Protection Amendment Bill, No 24 of 2016, dated 6 February 2017.
- *Copyright and the Public Interest* - PASA Position submitted to NCLIS, 27 January 2009
- *What Publishers Do*



**The Director General, Department of Trade and Industry
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16 September 2015

Dear Sir, Madam

**DRAFT COPYRIGHT AMENDMENT BILL, 2015:
SUBMISSION OF THE PUBLISHERS' ASSOCIATION OF SOUTH AFRICA (PASA)**

We respond to the various proposals made in the draft Copyright Amendment Bill published on 27 July 2015, the due date for submissions for which was subsequently extended to 16 September 2015.

PASA supports the submissions separately made by the Association of Non-Fiction Authors of South Africa (ANFASA), the Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd, the South African Federation Against Copyright Theft (SAFACT) and the South African Music Rights Organisation (SAMRO). Moreover, PASA supports the submission made by the International Publishers' Association (IPA), the International Association of Scientific, Technical and Medical Publishers (STM) and the International Federation of Reproduction Rights Organisations (IFRRO) from an international copyright context. In **Annexure I** to this letter, we set out some proposals for textual improvements to the draft Bill. Each of these proposals constitutes a whole draft and each proposed section should be incorporated as such, not selectively, in our respectful view.

Where PASA has not provided comments, this should not be understood as support or opposition. The time available being short, PASA has focused on areas where its members are directly affected. PASA does, however, also have an interest that is holistic, i.e. maintaining a supportive environment for creativity and innovation. Some of the proposed amendments are therefore needed and we commend the inclusion of these, while others would be highly detrimental to these objectives. The latter are the proposed amendments we focus on.

About PASA

The Publishers' Association of South Africa (PASA <http://www.publishsa.co.za/>) is the largest publishing industry body in South Africa. It represents book and journal publishers in South Africa in the field of non-fiction, fiction, education, academic and trade publishing. PASA's membership comprises the vast majority of South African publishing houses, for profit and non-profit, university presses, small and medium sized companies and multinational publishing enterprises. PASA is committed to creativity, development of literacy and the exchange of ideas and encourages a culture of reading. PASA promotes the contribution of literature in all its forms to social and economic development, both of communities and individuals through the contribution of intellectual property. PASA is a full member of the International Publishers Association (IPA), as are 60 other publishers' organisations from approximately 50 countries.

General Observations and Summary of Position

PASA welcomes a revision of Copyright Act, 1978 (the Act), among other things to enable South Africa to deal with the requirements of the digital age and thereby to ensure the livelihood of authors whose works are disseminated by the use of digital technology. We also welcome initiatives to deal with topics such as access to copyright works for the visually impaired and otherwise disabled, the use of orphan works and a resale right for artistic works, including works of craftsmanship. PASA also sees the rationale of finally devising a system that delivers benefits to both performing artists and producers of sound recordings; after all "needletime" has been part of our law for considerable time, but more work seems needed to implement the needletime provisions in the Act and the Regulations correctly.

That said, we are concerned about the way in which the draft Bill was conceived and drafted. Many of the updates needed to protect the rights and interests of creators, publishers and producers will be undone by new exceptions and defences not requiring permission or payment of royalties, resulting in the benefits intended to be granted to rights holders, especially authors, by the draft Bill being only apparent and not real.

Specifically the proposed exceptions and defences create a very real risk of copyright works being capable of being taken by entities with whom authors or their publishers have no relationship, without permission or payment, where those entities could have been legitimately served by commercial supply or where those entities even use works ultimately to advance their own business models.

Particularly technology platforms and multinational internet companies stand to benefit from a one-sided transplant of fair use from the United States (US) into South African law, without considering that the other copyright elements in South Africa, are not ready to make such a transplant a success or a balanced proposition: these elements include insufficient penalties, a court system ill-equipped to cope and manage a five-fold or even ten-fold increase of "fair use" litigious cases, compared to the well-established "fair dealing" concept.

In summary, PASA's view is that modernisation of copyright is desirable, but should not be rushed. The current draft Bill is ample demonstration that rushing the drafting of legislation not only leads to clerical errors, but errors in design and concept, which can only lead to faulty implementation.

For this reason PASA proposes firstly, a "Fast-Track Modernisation", i.e. adoption of some aspects of the current draft Bill and allowing for more time to consider more fully the impact and need of other proposed amendments, and secondly, a "Moderate Track to Modernisation" of the remainder of the draft Bill:

Fast-Track Modernisation (paras 1-3 below):

1. Performers' Protection and Producers' Protection for musical performances and sound recordings.
2. Introduction of an exclusive right of communication and, either subsumed in it an exclusive right of distribution, or preferably a distinct exclusive right of distribution.
3. Ratification of the Marrakesh Treaty and adoption of provisions for the visually impaired that allows the import and the export of accessible format files legitimately made or received into South Africa.

Moderate Track to Modernisation (paras 4-7 below):

4. A Resale Right applying both to Artistic Works and to Craft Works.
5. Exceptions and Limitations, Copyright Transfer and Licensing Provisions and Orphan Works;
6. Transient Copies, Safe Harbours, Technological Protection Measures and Rights Management Information Protection;
7. Enforcement Provisions and Administrative Copyright (Tribunal, Commission, Supervision of Collecting Societies).

PASA comments on specific clauses of the draft Bill

(Note – Paras 1-3 are to be understood as fast-track, while paras 4-7 as proposals for the moderate track to modernisation)

FAST-TRACK MODERNISATION (PARAS 1-3)

1. "Needletime" – Clause 9 of the draft Bill

PASA is not in a position to assess if the newly proposed amendments will succeed in creating a favourable "needletime" environment for domestic artists and record companies, consistent with international copyright norms, but in any event supports the effort to do so. PASA defers to the views expressed by the music copyright sectors: the composers, music publishers, performing artists and producers of sound recordings. PASA notes, however, that much of the value of licensing for the performing arts will depend on the efficiency of the court

system and the inability of would-be users to frustrate and delay entirely justified royalty payments. For this reason, some elements of enforcement may be part of fast-track “work in progress” throughout the first phase of modernisation.

For this reason, it is essential to preserve the sanctity of contract and to establish the basic principle that market value should be the starting point in the determination of any licensing fees to be adjudicated before a Copyright Tribunal. Would-be users should not be able to avoid payment altogether by lodging a claim or counter-claim against the amount or the rate of the licensing fees. A mechanism should be devised to make sure that a to-be-determined amount is provisionally paid to a Collecting Society (but not distributed) and that only an amount that is fairly placed in dispute is paid into Court and that interest accrues for the benefit of the party ultimately entitled thereto. Such mechanisms exist in other countries, notably in Germany, precisely to avoid any party lodging frivolous or dilatory claims purely to avoid and delay payment of due amounts.

2. The exclusive rights of Communication to the Public and Distribution - Clauses 4, 5, 7 and 8 of the draft Bill

PASA has a longstanding position that the rights granted by copyright need to be updated, specifically by adding an exclusive right of communication to the public for internet-based dissemination of works and services, as well as an exclusive distribution right, for e-commerce of tangible goods supplied offline (e.g. USB sticks, DVDs, e-book devices pre-loaded or cloud-based).

South Africa is one of those all too rare countries in the South that has enormous culture to share and a viable publishing and creative producer sector which is capable of doing it. In the digital environment and in an environment where e-book platforms establish a borderless competitive environment, it is key that South African authors and their South African publishers have a level-playing field and get the same protection as their international counterparts.

South Africa should build its copyright law playing to its strength, encouraging its creative innovation sector, rather than undermining this sector based on a dated claim of South Africans stuck in the role of passive receivers, needing “access” to a perceived uniquely Northern domain, called “knowledge”. Rather, South Africa should awake and engage in a dialogue leading to greater wisdom and confidently claim its place as an active contributor to global cultural diversity and ever greater universal knowledge.

For this reason, PASA reiterates its position in favour of acceding to the WIPO Internet Treaties, especially the WIPO Copyright Treaty (WCT).

3. Exceptions for the visually impaired and otherwise disabled – Clause 22 of the draft Bill and related definitions

PASA was taken aback by the view expressed at the Conference on 27 August 2015 that the DTI is sceptical about the Marrakesh Treaty. PASA has played a very active role and fully supports access for the visually impaired, be that through licensing agreements, commercially increasingly available “born-accessible” publishing products and services, and exceptions as a last resort (publishers will increasingly design their workflows such that “accessibility” by the print disabled is part of the initial design – hence the term “born-accessible”). Ratifying the Marrakesh Treaty fully, i.e. in such a way that permits South Africa not only to import accessible format copies but also operating a hub for export, seems highly desirable not only out of self-interest for the South African community of the print disabled, but also for South Africa taking its responsibility for the whole of the African Continent. At the Conference, it was said that the Marrakesh Treaty did not go far enough in the view of international harmonisation. Whether this is so or not, PASA considers that this is not a case where the DTI should allow its views to stand in the way of a perfectly good solution, consistent with human rights legislation for a key community, and on which consensus exists internationally.

The full ratification of the Marrakesh Treaty would and should in PASA’s view be another sound reason to accede to the WCT. We understand that the DTI does not recognise the immediate benefit of protecting South African rightsholders abroad as a sufficient reason to accede to WCT. From PASA’s standpoint, this is sufficient and the benefits of becoming an active international participant both in the Marrakesh and WCT would be even greater.

MODERATE TRACK TO MODERNISATION (PARAS 4-7)

4. Resale Right in respect of Artistic Works and Craft Works - Clauses 6 and 9(k) of the draft Bill and related definitions

In PASA’s view, an artists’ resale right is a justified right of copyright and would benefit living artists and the families of famous deceased artists. Recognising the right would also allow the repatriation of amounts collected for South African authors abroad.

The trend in the entire world is for the recognition of an artist resale right and certainly those illustrators who work with book publishers are artists in their own right, and would benefit. **In PASA’s view, a similar right should be recognised for original manuscript of authors and their heirs.** In some cases, original manuscripts of authors, e.g. “*Long walk to freedom*” by Nelson Mandela, may be appropriated and sold in auction. The heirs should benefit or a public interest foundation designated by the heirs if they so choose (which frequently happens).

5. Exceptions and Limitations, Copyright Transfer, Licensing, Orphan Works

Copyright law, since its inception, has always striven for a balance. As Lord Mansfield cogently observed in 1785, [...] “*we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.*[...]”

(*Sayre v. Moore*, 1 East 361 n. (b), 102 Eng.Rep. 139, 140 n. (b) (K.B.1785), Register's Supplementary Report 13.)

PASA fully supports this view of copyright and recognises that carefully crafted exceptions and limitations are part of this equation. However, exceptions must not become the rule and where transaction costs are low, and where multiple copying risks depriving the South African publishing industry and other rightsholders, PASA cannot support overbroad exceptions.

Publishing in South Africa is 80% educational publishing and, therefore, the notion that copying is acceptable if it is done by a teacher or educational institution, or condoned by them if undertaken by a copy shop or by students, deprives the South African authors and publishers of their livelihood. Copying without permission erodes a viable publishing industry in South Africa: the effect will be that future generations will not obtain locally published or well-adapted texts, but South African authors will have to compete with foreign authors for the attention of distant publishers.

These dangers are real, as the example of Canada illustrates. Due to overbroad educational exceptions, an ever greater proportion of Canadian students does not purchase textbooks, but copies them. The consequence is that publishing in Canada for the educational market is becoming unviable. The damage in lost revenue will be considerable and very real (see attached memorandum, **Annexure II**). The same fragility goes for the booksellers: an increase in free copying reduces the viability of booksellers and reduces the wide availability of books.

5.1 Libraries and Archives - Clauses 15, 22 and 24 of the draft Bill

PASA notes that WIPO has published a study by Kenneth Crews on national library exceptions in more than 150 countries¹. Whilst not all national examples would be suitable for South Africa, it may be possible to find some useful examples on exceptions and limitations for the following purposes, which PASA would consider positively:

- a. Long-term preservation;

¹ http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_3.pdf

- b. On the spot consultation on dedicated terminals on library premises, subject to fair compensation in the absence of direct publisher licensing agreements;
- c. Virtual learning environments, subject to collective licensing fees;
- d. Orphan and Out-of-Commerce Works that form part of the cultural heritage, subject to acceptable collective licensing agreements;
- e. Accessibility for the visually impaired, implementing the Marrakesh Treaty for Visually Impaired Persons.

Assuming the existence of a sound copyright system that protects authors and the industries to which they provide their works, it is only for the cases where there is a *failure in the market* for the supply of copyright works or permissions to use such works in relation to exclusive rights granted by copyrights that the need for legislated exceptions or limitations may arise. For this purpose, it is necessary to determine the needs of the market and to determine if and how the market fails to supply such needs. From the perspective of international law, this principle is set out in the three-step test of both the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), to which South Africa is a party, namely that the exception must relate to a “special case” which does not conflict with the normal exploitation of the copyright work and that does not unreasonably prejudice the legitimate interest of the author or the right holder, as the case may be.

5.2 Distance Education – Clauses 13 and 14 of the draft Bill

Any new exceptions on distance education, educational uses or fair use must be without prejudice to existing functioning licensing markets. Similar to the change in the music market away from the whole LP to the single song, the reassurance that not whole books are copied is insufficient. Whenever licensing options are available for a substantial part of a work/book, licensing should take precedence over exceptions. Thus PASA opposes the overbroad exception relating to distance education, and copying in educational establishments and also the fair use exception as they apply to distance education. In relation to these exceptions, PASA provides **draft language** of its own in **Annexure I**.

5.3 Fair use - Clause 14 of the draft Bill

PASA opposes the introduction of fair use, as a transplant from the US that will lead to increased levels of litigation and legal uncertainty. If fair use were to be adopted, then US punitive damages and statutory damages should also be imported as these balance out the risk profile for infringements.

After careful evaluation, the UK did not introduce fair use, even though its many copyright exceptions are harmful to its creative sector. The reason was that the UK realised that, after fair use was codified in the US copyright legislation, well over 200

fair use cases had to be litigated in the US – and that is just since 1978. Meanwhile, the UK, with fair dealing exceptions similar to South Africa, in the same period had just over 20 cases before its court. Handing over determining public policy of what is falling under an exception to the courts will not promote democratic development in South Africa and should be rejected for that reason alone. In any case, it is an open question whether the South African court system would cope with a great number of contentious cases.

The notion that a broadly flexible regime of exceptions in copyright, including fair use, is good for economic growth is disputed. It is a myth that has recently been **discredited** in a response to a study by the **Lisbon Council**² – a “think-tank” funded by large corporations, including Google. In his response to the Lisbon’s Council’s *IP Index Report*, **Professor Ford dismisses it as “junk science”**.³ He concludes:

“The IP Index Report’s conclusion that “[c]ountries that employ a broadly ‘flexible’ regime of exceptions in copyright also saw higher rates of growth in value-added output throughout their economy” has zero support. In fact, given that the results can be fully explained by random variation, the results presented in the IP Index Report are better and more honestly interpreted as evidence of no relationship between copyright flexibility and economic outcomes.”

From the answers given at the various meetings hosted by the DTI in August, there is no indication that the DTI has received any legal opinion in respect of the introduction of the kind of fair use and the broad exceptions for education proposed in the draft Bill, especially in relation to South Africa’s obligations under the Berne Convention and the TRIPS Agreement. There are no persuasive arguments that should lead South Africa to change its current copyright regime. Rather it would be appropriate to build further on its own legal traditions, including the concept of fair dealing.

DALRO has provided a balanced solution on licensing for moderate fees and at reasonable costs for course packs, e-reserve and other related uses of works lawfully available within libraries.

² B. Gibert. 2015. “The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs, and Prosperity, Innovation Economics Center” The Lisbon Council. Available at:

<http://www.lisboncouncil.net/publication/publication/122-the-2015-intellectual-property-andeconomic-growth-index.html>

³ Prof George S Ford, PhD. 2015. “The Lisbon Council’s 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder”. Phoenix Center for Advanced Legal & Economic Public Policy Studies. June 29, 2015. Available at:

<http://www.phoenix-center.org/perspectives/Perspective15-03Final.pdf>

5.4 Compulsory Licences for Reproduction and Translation - Schedules A and B to the draft Bill

“Compulsory licence” for print works not available in South Africa

From the outset, we point out that the new definition of “reproduction” is erroneous, in that it has the effect, which we can only assume is unintended, of removing the existing definition in relation to all other types of copyright works. The introduction of this erroneous definition would undermine the proposed Schedule B.

Although not entirely clear from the proposed Schedule B, it seems to create the framework for a compulsory licence for the republication by reproduction of works which are out of commerce in South Africa.

Other countries, notably in the European Union, are coming to grips with the making available of out of commerce works. The European Union favours a licensing solution, the European Commission having presided over a Memorandum of Understanding concluded between library associations, publishers and copyright collective management societies for the reproduction of out-of-commerce works for libraries and archives. France has recently passed legislation to facilitate the republication of out-of-commerce French works, subject to the right holder having a right of first refusal to do so. In both cases, the licence relates only to works first published in the country concerned, not to all works. Germany has similar legislation for German works. South Africa should thus focus and consult primarily with stakeholders on South African works first, before attempting to devise a scheme for all works in the world, consistent with international obligations.

There is no indication that the DTI has taken legal advice on the compliance of this proposed legislation, which in essence amounts to the framework for a compulsory licence, insofar as it relates to South Africa’s compliance with the Berne Convention and the TRIPS Agreement, especially considering that works first published in other Convention countries are covered, indeed targeted, by this compulsory licence provision. For this reason alone, we submit that this amendment should not be proceeded with in the next version of the Bill.

5.5 Copyright Transfer

5.5.1 State Copyright Law – Clauses 3 and 26(a) of the draft Bill:

In PASA’s view the extension of state copyright and prohibiting its assignment is highly detrimental and will negatively affect private public partnerships in the cultural sector. We understand that the Department of Science & Technology also requests

DTI to reconsider this extension. We urge the DTI not to carry the amendments of sections 5 and 22(1) forward into the next version of the Bill.

5.5.2 25-year Barrier to Assignment – Clause 26(b) of the draft Bill:

In PASA's view the transplant of a right of termination into South African law (US law includes such a right after 35 years) should only be undertaken after careful consideration. The risk is that South African publishers are driven to recommend to authors to enter into agreements with foreign publishing houses that do not have such a barrier. The issue deserves greater study, even if well-meaning. Any provision should also not have retroactive effect on existing licensing and copyright transfer agreements. Otherwise litigation may result. The new provision also needs to be read with the new s39A, which purports to make any negotiated settlement void. A retroactive effect of limiting an assignments effect would lead to great legal uncertainty and increased litigation.

5.6 Licensing Provisions – Clause 37 of the draft Bill

In PASA's view the sanctity of contract should prevail. The Roman-Dutch principle of “pacta sunt servanda” – contracts voluntarily agreed upon must be binding, underlies the entire legal system and tradition of South African law. In some cases, the law can skew the principle to protect a party and courts should have the power to disregard grossly unreasonable terms. However, the blunt instrument proposed in the draft bill's revised section 39A, to declare contracts unenforceable would have terrible consequences.

The proposed Section 39A, importing a blanket unenforceability of all contractual terms purporting to prevent or restrict the doing of an act which would not infringe copyright or which purport to renounce a right or protection afforded by the Act, should be removed, and in its place, contract override should be considered on the basis of exception by exception.

A blanket contract override is, in our submission, not only unwarranted but will also interfere with the normal trading in copyright works. We question whether the blanket application of contract override in combination with certain broad exceptions being proposed, will impact on the Constitutional right of South African citizens to the freedom of trade occupation and profession.

Conflict between licensing terms and the scope and reach of exceptions which override contracts will create uncertainty. If copyright exceptions were allowed to overrule commercial terms, it is quite probable that this will lead to cases where there are disagreements between users and rights holders over the scope and reach of exceptions. For instance, some users may feel that a contractual provision limits an exception, when the rights holder believes the

use does not fall within the scope of an exception. In such a scenario, the contract would actually reduce the risk of misunderstanding and provide legal certainty where an exception cannot.

Contracts, specifically licensing, are the mechanism by which digital products are made available to consumers. A blanket contract override provision covering all conceivable provisions of the Act allowing certain uses will make licensing unmanageable by virtue of the uncertainty it creates.

Often the demand for contract override in exceptions is based on the incorrect notion that rightsholders employ contracts to override specific exceptions. There is no evidence that such a practice is common or even exists. On the contrary, there are many uses under exceptions where there is no contract between the rightsholder and the user (for example for quotation, criticism and review and reporting on events).

Contract override would not only affect licences, which give access to copyright works, but also other contracts where copyright is the subject, even settlement agreements concluded to resolve disputes concerning copyright infringement. It is not uncommon that, in a dispute as to whether the exclusive rights of copyright apply or not in the light of an exception, the parties, for the purpose of settlement, agree to disagree on the applicability or not of the exception. Statutory contract override will make such settlements impossible due to key clauses, if not the whole agreement, being made unenforceable, thereby compelling the parties to proceed with litigation.

A case could be made out for specific exceptions to provide that unfair contract terms be unenforceable. Such specific case would be one where circumstances suggest that a contractual relationship between a rightsholder and a user contains extraneous or unreasonable obligations. As mentioned before, this should be carefully evaluated, exception by exception.

5.7 Orphan works - Clauses 2, 25, 27 of the draft Bill and related definitions

Clause 2 of the draft Bill, amending Section 3 of the Act, provides for perpetual copyright subsisting in orphan works, as defined. From the outset we must point out that this provision has no rationale in resolving the question of orphan works and holds great risk of unintended consequences. This clause should not appear in the next version of the Bill.

PASA believes that the resolution to the questions surrounding the use of orphan works are not answered by the draft Bill, nor are confiscatory provisions the solution. PASA believes that the key three questions necessary to resolve in the case of orphan works are:

- (i) What is the liability of a user engaging in a use of a work wrongly classified as an orphan work? In other words, the legislation should deal with “false positives”. In

PASA's view, any user having engaged and documented a diligent search, should be liable only prospectively, i.e. should only be subject to the right to prohibit and damages from the moment the erroneous status is discovered.

- (ii) What uses can be made of (true) orphan works? In PASA's view, a collective licensing agency should be entrusted with the right to issue licences in lieu of the absent owners and act as "good steward" of the "parents" of the work that cannot be found or are unknown. There is no need for the State to become the designated owner or administrator for such works.
- (iii) What should happen in the event of the "return of the rightholder"? Firstly, rightholders should always be able to return and claim their role in relation to a work temporarily administered as an orphan. Authors and their assigns should not forfeit this right, ever. Secondly, authors returning should only be given the ability to control rights prospectively (absent bad faith on the part of the user): Where a user has greatly invested and promoted the orphan work, their rights should vest in some rare cases and be allowed to continue for a finite period to recoup the investment (e.g. for 3-5 years into the return), but already during this time the returning owner should be accorded a reasonable royalty.

6.1 Transient copying – Clause 15 of the Bill

The provisions on transient copying ("Temporary reproduction") are vague and highly detrimental. These should be omitted. There is actually at present no legal uncertainty over the treatment of transient copies and the issue is best left alone.

6.2 Technological Protection Measures and protection of copyright management information

The provisions should be brought in line with the WCT. The current draft is insufficient and too narrow to be effective.

7.1 Need for a Presumption of Subsistence of Copyright in Legal Proceedings

PASA supports DALRO'S submission regarding the need for such presumptions and supports the draft language submitted and incorporate into **Annexure I** hereto.

7.2 Damages

PASA supports DALRO'S submission regarding the need for such presumptions and supports the draft language submitted and incorporate into Annexure I hereto.

PASA also supports the submissions of SAFACT and of DALRO regarding amendments to Section 26 and 27 of the Act.

7.3 Criminalising Copyright Holders

PASA in strongest terms opposes section 27(4)(d) of the Act, which would create a criminal offence for “unreasonably” withholding a copyright permission. The wording of the section is vague, but its basic tenet is wholly unsupportable from the point of view of copyright – in fact it denigrates copyright as a concept – and the point of view of criminal law. From copyright point of view this is a provision in violation of Article 9(2) of the Berne Convention – a disproportionate limitation of the exclusive right of the author. From a criminal law perspective, the provision is so vague that – it is submitted – it does not constitute a sufficient basis to create a criminal offence (with a hefty penalty of prison up to ten years).

Finally, in our view the provision is also unconstitutional, because the freedom to publish also includes the freedom NOT to publish and the criminal offence is a disproportionate intrusion into that essential freedom.

7.4 Copyright Tribunal, Collective Licensing

Due to the short time period afforded to submit written comments on the draft Bill, PASA is unable to consult sufficiently with its members about the possible effect of the provisions dealing with a broader jurisdiction of a Copyright Tribunal and rules and supervisory authority on Collecting Societies. PASA therefore refrains from expressing a view, but would ask that these provisions also be put on a more Moderate Track to Modernisation.

On the Intellectual Property Tribunal, we note the broad scope of the jurisdiction of the proposed Tribunal and that its functions may usurp the role of the Courts, our principal concern is that the amendment has resulted in the original function of the Tribunal, namely the adjudication of licensing schemes, having been lost by the proposed repeal of Sections 30 and 31 of the Act.

We submit that the complaints that there may have been about the operation of the existing Tribunal in the past do not justify the extent of the overhaul proposed by the draft Bill and that, in the absence of a need identified by the public for a Tribunal with such extended powers, we submit that the amendments in terms of the draft Bill should not be proceeded with and that the present provisions relating to the Tribunal should remain, and that any deficiencies that may have been found in the procedures of the Tribunal should be corrected by passing appropriate regulations in terms of Section 29(3)(a) of the current Act.

Consultation process

We take this opportunity to express concerns about the process in which the dti’s intentions with copyright legislation have been communicated to us and to other stakeholders and question, whether in the context of the reform of copyright, this amounts to consultation.

We have seen that recent (since 2011) consultations on the review of copyright in the United Kingdom, Australia and the European Union, and a current consultation of reforming aspects of copyright in the United States, have undertaken a very different route than that currently undertaken by the dti. What has been common in all these consultations is an expert committee researching the needs, calling evidence, consulting individually with stakeholder groups, coming up with a report and gathering feedback on the report before draft legislation is introduced. This is often a process that takes two years or more.

Our comments above note various instances where there has been no consultation, or even research on the needs for reform, with the notable exception of the Copyright Review Committee chaired by Mr Justice Farlam, whose report was delivered in 2011 and released to the public in 2012.

The initially proclaimed consultation period was a mere 30 calendar days from 27 July to 26 August, later extended to 16 September. (This compares to the 3 month consultation period given by the Department of Justice on the new Cybercrimes Bill published shortly after this draft Bill.).

Thus, the brevity of the consultation period has not enabled us to consult with our many members, all of whom are directly affected by the many proposals in the draft Bill. The only reason why we have been able to communicate this position to our members at all is because our Annual General Meeting just happened to have been held within the extended consultation period – had the consultation period not been extended, not even this opportunity would have been available to us. A further effect of the short consultation period is that constructive proposals which we wish to make in relation to certain matters cannot be drafted and circulated for support from our membership.

We believe that the absence of a proper consultation on, firstly the issues, then policy proposals and then, as a final step, on text of legislation, means that the opportunity to contribute to good legislation has been lost insofar as the draft Bill is concerned, and that the solution to remedying key policy issues will lie in the approach of prioritising some of them for fast tracking and leaving others for later, as proposed in this submission.

PUBLISHERS' ASSOCIATION OF SOUTH AFRICA (PASA)
16 September 2015

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Mpuka Radinku', with a stylized, cursive script.

Mpuka Radinku, Executive Director, PASA

ANNEXURE I: SPECIFIC SUGGESTIONS FOR IMPROVED TEXT OF THE BILL

For an electronic copy, please contact Mpuka Radinku by email: mpuka@publishsa.co.za>

The exclusive right of Communication to the Public

Sections 6, 7, 8, 9, 11A, 11B and 27(1) of the Act to be amended

The exclusive right of Distribution and its corollary exception of Exhaustion

Sections 6, 7, 8, 9, 11A and 11B of the Act to be amended

Replace clauses 2, 3, 4, 5, 7 and 8 of the draft Bill with the following:

Amendment of section 6 of Act 98 of 1978

[x]. Section 6 of the principal Act is hereby amended:

(a) by the addition after paragraph (e) of the following paragraphs:

“(eA) the issue to the public of copies of the work, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the work not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;

(eB) communicating to the public of the work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access the work from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (g) of the following paragraph:

“(g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (eB) **[(e)]** inclusive.”

Amendment of section 7 of Act 98 of 1978

[x]. Section 7 of the principal Act is hereby amended:

(a) by the addition after paragraph (d) of the following paragraphs:

“(dA) the issue to the public of copies of the work, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the work not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of

copies of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;

(eB) communicating to the public of the work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access the work from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (f) of the following paragraph:

“(f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (dB) **[(d)]** inclusive.”

Amendment of section 8 of Act 98 of 1978

[x]. Section 8 of the principal Act is hereby amended:

(a) by the addition after paragraph (d) of the following paragraphs:

“(dA) the issue to the public of copies of the film, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the film not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a film does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;

(eB) communicating to the public of the film, by wire or wireless means, including the making available to the public of the film in such a way that members of the public may access the film from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (f) of the following paragraph:

“(f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (dB) **[(d)]** inclusive.”

Amendment of section 9 of Act 98 of 1978

[x]. Section 9 of the principal Act is hereby amended –

(a) by the substitution for paragraph (e) of the following paragraph:

“(e) communicating the sound recording to the public^[.] by wire or wireless means, including the making available to the public of the sound recording in such a way that members of the public may access the sound recording from a place and at a time individually chosen by them;”

(b) by the addition after paragraph (e) of the following paragraph:

“(f) the issue to the public of copies of the sound recording, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the

copyright owner and the act of putting into circulation outside the Republic copies of the sound recording not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a sound recording does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic.”

Amendment of section 11A of Act 98 of 1978

[x]. The following section is hereby substituted for section 11A of the principal Act:

11A. Nature of copyright in published editions

“Copyright in a published edition vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Making a reproduction of the edition in any manner;
- (b) the issue to the public of copies of the edition, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the edition not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of an edition does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;
- (c) communicating to the public of the edition, by wire or wireless means, including the making available to the public of the edition in such a way that members of the public may access the edition from a place and at a time individually chosen by them.”

Amendment of section 11B of Act 98 of 1978

[x]. Section 11B of the principal Act is hereby amended –

(a) by the addition after paragraph (e) of the following paragraphs:

- “(eA) the issue to the public of copies of the program, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the program not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a program does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;
- (eB) communicating to the public of the program, by wire or wireless means, including the making available to the public of the program in such a way that members of the public may access the work from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (g) of the following paragraph:

“(g) doing, in relation to an adaptation of the computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (eB) **[(e)]** inclusive;”

Amendment of section 27(1) of Act 98 of 1978

[x]. Section 27(1) of the principal Act is hereby amended by the addition after paragraph (f) of the following paragraph:

"(g) communicates to the public for the purpose of trade or for any other purposes to such an extent that the owner of the copyright is prejudicially affected,"

Fair Use

Amendment to Section 12 and new Section 12A of the Act

Subsections to be inserted into section 12 and/or 12A, as the case may be:

“subsection XXX Copying and use of extracts of works by educational establishments:

(i) The copying of extracts of a relevant work by or on behalf of a pupil, the staff or an educational establishment does not infringe copyright in the work, provided that—

(aa) the copy is made for the purposes of instruction for a non-commercial purpose, and

(bb) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

(ii) Copyright is not infringed where a copy of an extract made under subsection (i) is communicated by or on behalf of the educational establishment to its pupils or staff for the purposes of instruction for a non-commercial purpose.

(iii) Subsection (ii) only applies to a communication received in or outside the premises of the establishment if that communication is made by means of a secure electronic network accessible only by the establishment’s pupils and staff.

“(iv) Not more than 5% of a work may be copied under sections 12 and s12A by or on behalf of an educational establishment in any period of 12 months, and for these purposes a work which incorporates another work is to be treated as a single work.

“(v) Acts which would otherwise be permitted by this section are not permitted if, or to the extent that, licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that fact.

“(vi) The terms of a licence granted to an educational establishment authorising acts permitted by this section are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted by this section.

(vii) If a copy made under this section is subsequently dealt with—

(aa) it is to be treated as an infringing copy for the purposes of that dealing, and,

(bb) if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes.

(viii) In this section “dealt with” means—

(aa) sold or let for hire,

(bb) offered or exposed for sale or hire, or

(cc) communicated otherwise than as permitted by subsection (iii) hereof.”.

[Note: Wording based on new Section 36 of UK Copyright Patents and Designs Act, 1998 (as amended in 2014) available at:

<http://www.legislation.gov.uk/ukxi/2014/1372/regulation/4/made>]

Need for a Presumption of Subsistence of Copyright in Proceedings

Amendment to Section 26 of the Act, new sub-section (4)

Section 26(4)

(a) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

(i) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and

(ii) the author, performer, producer or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

(b) Where any matter referred to in subsection (4)(a) is at issue and an assignment of the copyright, or an exclusive licence granting an interest in the copyright, has been proven to exist between the author, performer, maker or broadcaster, the assignee or exclusive licensee named in that licence shall be presumed to be the owner or exclusive licensee of the copyright in respect of the transferred or licensed rights in question, provided that this presumption shall not apply in any dispute between the author, performer, producer or broadcaster and the named assignee or licensee.

[Note: adapted from Section 34.1 of the Canadian Copyright Act, adapted to the South African context where save for cinematograph films there is no copyright registration for works, assignments or exclusive licenses.

See: <http://laws-lois.justice.gc.ca/eng/acts/C-42/page-40.html#docCont>

Exceptions for the visually impaired

New definitions in Section 1(1) and new Section 19D of the Act

Amendment of section 1 of Act 98 of 1978 (herein after referred to as “the principal Act”)

x. Section 1 of the principal Act is hereby amended by -

(z) the insertion before the definition of “adaptation” of the following definition:

“**accessible format copy**’ means a copy of a literary work in an alternative manner or form which gives a visually impaired person access to the said work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability; provided that the accessible format copy is used exclusively by visually impaired persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

(z) the insertion after the definition of “adaptation” of the following definition:

“**authorised entity**’ means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations

(z) the insertion after the definition of “performance” of the following definition:

“**visually impaired person**’ means a person who is blind, has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability, or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;”

Insertion of section 19X in Act 98 of 1978

x. The following section is hereby inserted in the principal Act after section 19B:

“19X Multiple copies for visually impaired persons

(1) If an authorised entity has lawful possession of a copy (“the master copy”) of the whole or part of—

(a) a published literary work, or a print or text-based version of a dramatic, musical or artistic work; or

(b) a published edition,
it is not an infringement of copyright in the work or of the published edition for the authorised entity to make, or supply, accessible format copies for the personal use of visually impaired persons to whom the master copy is not accessible because of their impairment.

(2) Subsection (1) does not apply if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it.

(3) Subsection (1) does not apply in relation to the making of an accessible format copy if, or to the extent that, copies of the work or the published edition are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.

(4) Subsection (1) does not apply in relation to the supply of an accessible format copy to a particular visually impaired person if, or to the extent that, copies of the work or the published edition are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(5) An accessible format copy made under this section must be accompanied by—

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(6) If an authorised entity charges for supplying an accessible format copy made under this section, the sum charged must not exceed the cost of making and supplying the accessible format copy.

(7) An authorised entity making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.

(8) If the master copy is in copy-protected electronic form, any accessible format copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection, unless the copyright owner agrees otherwise.

(9) If an authorised entity continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.

(10) If an accessible format copy which would be an infringing copy but for this section is subsequently sold or let for hire or offered or exposed for sale or hire or communicated to the public

—
(a) it is to be treated as an infringing copy for the purposes of that dealing; and

(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

Exception for reproduction of transient copies as part of a technical process

New Section 13A of the Act

Insert text based on Article 5(1) of the EU Copyright Directive, 2001/29

Section 13A

(1) Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or of a performance protected under der Performers' Protection Act 1967 to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 6, 7, 8, 9, 9A of the Act.

(2) "Temporary", "transient or incidental acts of reproduction" shall mean, reproductions that are inseparable and not stored for any length of time exceeding the technological process of which they are a part of; for avoidance of doubt, this definition shall be without prejudice to and not detract from any requirement contained in the Electronic Communications and Transactions Act, 2002, in terms of which a service provider or search engine is obliged to remove content to avoid liability.

Damages for infringement
New Section 24(4) of the Act

24(4). Remedies for infringement: Damages and profits

(a) In General. — Except as otherwise provided under this Act, an infringer of copyright is liable for either —

(i) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (1); or

(ii) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits. — The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages. —

(i) Except as provided by clause (b) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than Rand 7,500 or more than Rand 300,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(ii) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed wilfully, the court in its discretion may increase the award of statutory damages to a sum of not more than Rand 1,500,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than Rand 2,000. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 12A, if the infringer was: (i) an employee or agent of a non-profit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or sound recordings; or (ii) a public broadcasting entity which or a person who, as a regular part of the non-profit activities of a public broadcasting entity infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(c) (A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed wilfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered wilful infringement under this subsection.
(d) Additional Damages in Certain Cases. — In any case in which the court finds that a defendant proprietor of an establishment who claims as a defence that its activities were exempt under section 12(1) or section 12A(3) or section 13(C) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

[Note: Based on Title 17, §504 of US Copyright Act of 1976
<http://www.copyright.gov/title17/92chap5.html#504>]

ANNEXURE II – SEPARATE DOCUMENT

“AAP (American Association of Publishers): Canadian fair dealing exception chills investment in educational content”



6 February 2017

Ms J Fubbs
Chairperson: Portfolio Committee on Trade and Industry
Attention Mr A Hermans
Parliament of the Republic of South Africa
CAPE TOWN

By email only to: ahermans@parliament.gov.za; dwoodington@parliament.gov.za.

Dear Ms Fubbs

PERFORMERS PROTECTION AMENDMENT BILL, NO. 24 OF 2016: Submission of Comments by the Publishers Association of South Africa, PASA

In response to your Committee's invitation to stakeholders to make written submissions in respect of the Performers' Protection Amendment Bill, No 24 of 2016, the Publishers Association of South Africa, PASA, herewith submits its comments and also requests to be heard at the public hearings on 24 February.

PASA is the largest publishing industry body in South Africa. It represents book and journal publishers in South Africa in the field of non-fiction, fiction, education, academic and trade publishing. PASA's membership comprises the majority of South African publishing houses, for profit and non-profit, university presses, small and medium sized companies and multinational publishing enterprises. More information can be found on PASA's website: www.publishsa.co.za.

Our submission is supported by DALRO, the copyright management organisation for the publishing industry, and a letter of support from DALRO will be appended to this submission. DALRO similarly request the opportunity to be heard at the public hearings.

As an association representing publishers, our interest in the Bill is largely limited to items which we expect will have equivalents in the Copyright Amendment Bill, once it is introduced.

In this submission, we therefore only focus on the following topics, recognising that other stakeholders will comment more comprehensively:

1. The need for South Africa to become a party to international treaties on copyright and, by extension, performers' rights
2. Strengthening the rights of authors and publishers and, by extension, performers, in accordance with international norms
3. Miscellaneous points on the conceptualisation and drafting of the Bill

We note that there are a number of provisions in this Bill which cross-refer to the Copyright Act, 1978, as to be amended by the new Copyright Amendment Bill, but that, at the time of writing, the Copyright Amendment Bill had not yet been introduced to Parliament. Both this Bill and the to-be introduced Bill have their origin in the draft Copyright Amendment Bill, 2015, on which we have already commented. A copy of that submission is attached for ease of reference.

Although we welcome the opportunity to comment on the Performers Protection Amendment Bill, we observe that it will not be possible to debate the latter Bill exhaustively until the Copyright Amendment Bill is tabled in Parliament.

The topics listed above are dealt with in greater detail below.

1. The need for South Africa to become a party to international treaties on copyright and, by extension, performers' rights

We note that the new rights to be granted to performers accord with the corresponding provisions of the WIPO Performances and Phonograms of 1996 (WPPT; which South Africa has signed but not yet ratified) and the Beijing Treaty on Audiovisual Performances (the Beijing Treaty, which has been signed by a number of countries but which is not yet in force), and that the existing Performers Protection Act, 1967, was itself based on the terms of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, to which South Africa has not acceded.

Officials of the Department of Trade & Industry have advised PASA's representatives at various meetings that the Government is prepared to move forward on accession to the international treaties which, in the case of copyright, would include the WIPO Copyright Treaty (which South Africa signed in 1997, but has not yet ratified). PASA and its members would therefore welcome a definitive statement from the Government whether it is the intention that South Africa accede to these Treaties or any of them.

South Africa should ratify and implement the Treaties mentioned above so that South African copyright holders and performers can benefit from national treatment in other Treaty countries by the exclusive right of communication of their works to the public and, in the case of copyright owners, the exclusive right of distribution, i.e. the making available to the public of the original and copies of their works through sale or other transfer of ownership.¹

Ratification would require South Africa to update its own copyright legislation to import these rights. The draft Copyright Amendment Bill, 2015, already provided for the addition of the right of communication to the public, and, in our submission in 2015, we pointed to the necessary consequential changes to the Copyright Act, 1978, that still had to be made and stated that the right of distribution should follow.

Ratification and implementation of the above-mentioned Treaties would also bring legal recognition to technological protection measures (TPMs) and rights management information and the ability for South African rightsholders, including performers, to have the same rights recognised subject to the principles of national treatment in other Treaty countries.

In conclusion, PASA would welcome South Africa's accession to WPPT and the Beijing Treaty (once the latter comes into force), but the Bill needs to be reworked substantially to make this possible. Accession to these treaties would give South African performers the benefit of national treatment of their rights in the other respective convention countries.

2. Strengthening the rights of authors and publishers and, by extension, performers, in accordance with international norms

South Africa should aspire to a world-class Performers Protection Act that is consistent with the Beijing Treaty and WPPT. From individual discussions with officials of the Department of Trade & Industry, we understand that they have set this goal for themselves. However, unless the Bill is redrafted, it will fall short of this goal.

Duplication of rights in audiovisual fixations

Different rights for the same fixations are duplicated: The conceptualisation of the Bill by specifying exclusive rights - which have their source in Articles 6-11 of the Beijing Treaty relating to rights in audiovisual fixations - in a new section 3(4) and then specifying parallel

¹ We understand that there may be one reservation to national treatment, which is in relation to "needletime" rights in Section 9A of the Copyright Act and Section 5(1)(b) of the Performers Protection Act, where South Africa may wish to consider a regime of reciprocity instead.

rights for performers under the heading of the existing ‘right to prohibit’ - introduced by the term “No person shall ...” - in relation to audiovisual fixations of their work in the amended section 5, amount to a duplication of different rights for the same work, which is not what is intended by the Beijing Treaty

Section 3 of the Act is no more than an introduction to the rights, which are then detailed in Section 5. Attention must be given how these rights are cast in a reworking of the Bill.

In order to meet the standards set by the Beijing Treaty, we suggest that:

- the treatment of the different kinds of rights in new Section 3(4) and in Section 5 of the Act (as to be amended in terms of clause 4 of the Bill) be reviewed so that they are couched as true economic rights, in the sense of an exclusive right which can only be exercised by, or with the authority of, the performer (subject to the various procedures, deeming provisions and exceptions that the Act will contain);
- the kind of text set out in new Section 3(4) be used, since this text confers such exclusive rights, and that it not be attempted to amend the existing subsections of Section 5 of the Act to cater for audiovisual rights in the way that it has been done in the Bill;
- careful attention be given to correct cross-referencing and to avoid errors.²

Equitable remuneration

WPPT and the Beijing Treaty prescribe equitable remuneration for performers. However, the Bill does not follow international standards in order to achieve this goal in its reliance on:

- contract terms and remuneration prescribed by the Government in new Section 3A,
- prescribed remuneration in new Section 3B(2) – which, incidentally, does not meet the requirements of Article 15 of WPPT, which requires a “*single* equitable remuneration”, and
- an onerous prescribed procedure for obtaining rights set out in new Sections 5(1A)-(1D).

PASA has two fundamental objections to the policy of Government prescription underlying these procedures. First, they undermine, if not completely obviate, freedom of contract, to the detriment of both performers and producers, making it extremely difficult for producers to make investment decisions. Second, we are concerned about a one-size-fits-all approach to regulating, in such a prescriptive way, contracts between creative talent

² An example is the cross reference in Section 5(4)(a), as to be amended, to “fair equitable remuneration” in Section 5(1)(b), which has no provision for “fair equitable remuneration” in its to-be-amended form (nor was it intended to provide for “fair equitable remuneration” – see para 3 below.

(performers, authors, artists, composers, etc) and producers who would invest in their works (producers of performances, publishers, etc) across all copyright industries.

There is no indication that the impact of this prescriptive regulatory approach on the creative industries has been researched and whether any comparison has been made to successful and Treaty-compliant approaches in other countries – certainly the SEIAS assessment of the Bill makes no mention of such research.³

PASA suggests that the method for achieving the goal of equitable remuneration for performers should be entirely reconsidered.

Moral rights

Moral rights for performers are dealt with in new sections 3(2) and (3) (clause 2 of the Bill), following the wording of Article 5 of the Beijing Treaty. The introduction of moral rights for performers is welcomed, but we suggest that these would be better placed in a new section immediately after section 5 of the Act, with an appropriate cross-reference in section 3.

In relation to the introduction of moral rights for performers, we note two substantial departures from the wording of the Beijing Treaty:

- Firstly, these rights are expressed to exist “independently of a performer’s rights *after the transfer of those rights*” (our emphasis, (new subsection 3(2)), which we take to mean a reference to transfer of rights under the new section 3A (clause 3). Section 3A is unclear, even contradictory, and consideration should therefore be given in a reworking of the Bill to the corresponding text of the Beijing Treaty “*even if transferred*”.
- Second, the duration of the moral rights (new subsection 3(3)) incorporates by reference “other provisions of the Copyright Act.” Since performers’ rights are meant to last for a maximum of 50 years and since performers rights are not rights of copyright, it is not clear what is meant by this reference and, due to the uncertainty it could cause, this reference should be deleted.

3. Miscellaneous points on the conceptualisation and drafting of the Bill

a. *Consequential amendments to the Offences and Penalties provision of the Performers Protection Act*

The current list of offences in Section 9 only relates to Section 5 of the Act. Consequential amendments to Section 9 need to be made, following from the

³ Available at https://www.thedti.gov.za/parliament/2016/Performers_Protection_Amendment_Bill_SEIAS_Report.pdf. We would have expected that Part 7, from page 12 onwards, should have dealt with this.

introduction of exclusive rights in respect of electronic communications, as well as offences following from the infringement of the provisions relating to the protection of technological protection measures and rights management information.

- b. The Performers Protection Act should have its own exceptions and its own provisions relating to technological protection measures and rights management information, and not be dependent on the terms of the Copyright Act*

We submit that the simple incorporation by reference in new section 8(2)(f) (in clause 5(a) of the Bill) of all exceptions and all other allowable acts in relation to all kinds of copyright works (“for purposes which are acceptable and exempted in terms of any other provisions of the Copyright Act”) will create unnecessary uncertainty.

It would be better to identify exceptions and permissible acts by reference to the need for such acts to qualify for being the subject of exceptions and to add them to Section 8(2). However, both the Memorandum and the SEIAS assessment are silent on identifying such needs.

We also propose that the Act have its own provisions relating to the protection of technological protection measures and rights management information. For this purpose, one could consider incorporating text allowed by WPPT and the Beijing Treaty for new sections 8A and 8B, such as along the lines set out in the appendix to this letter.

- c. The relation between performers rights and published works*

The Act was already not entirely clear about the relationship between performers’ rights and copyright in copyright works. Some guidance is given in Section 2 of the Act, to the effect that performers’ rights do not impact on the exclusive rights under copyright, which we propose be expanded to all types of copyright works, including published works.

- d. Incorrect adaptation of a provision intended to deal with needletime*

The Bill proposes to amend Section 5(1)(b) by including audiovisual fixations and by adding rights relating to the “sale” and “commercially rent[ing] out” of performances.

We submit that these amendments are based on a misconstruction of Section 5(1)(b). That subsection is the counterpart to the needletime rights in Section 9A of the Copyright Act, 1978, which in effect turn those rights insofar as they relate to certain specified uses of sound recordings (which would invariably be fixations on phonograms)

into remuneration rights for performers. It is therefore not appropriate to include audiovisual fixations here.

In addition to being inappropriate for the reasons set out above, we are concerned by the proposed addition of sub-paragraphs (iv) and (v) in Section 5(1)(b) and the cross-reference to them in Section 5(5) - with new rights to demand remuneration from the sale and rental of performances - since, first, it is not clear what is intended here and, second, they could impact on the exclusive rights of the copyright owner of copyright works containing these performances.

e. *The SEIAS Assessment for the Bill and the need for an independent and objective study to determine the impact of the Bill*

With respect, we find the SEIAS assessment⁴ disappointing, with no attempt seeming to have been made to research any of the policies and procedures underlying the Bill. There are indications in the document itself that the persons who carried out the SEIAS assessment did not even read the Bill.⁵ There is no enumeration of the consultations carried out, and even the underlying reason for the Bill itself is given in the vaguest and generic terms (“Local performers and composers have voiced their dissatisfaction with the current legislation in that it has not offered them adequate protection.”) Here we would have expected a reference to the *Copyright Review Commission* chaired by Mr Justice Farlam, the findings and recommendations of the Commission as set out in its 2011 report⁶ and how the Bill meets those findings and recommendations.

The SEIAS assessment makes the unsupported statement⁷ that, “Incorporation of the fair use provision will afford the public access to protected performances for fair use and dealings such as education, reporting of current events, personal use, research, etc.” Not only does the Bill not explicitly deal with fair use or fair dealing, but the wealth of evidence relating to the impact of importing fair use from the copyright law of the United States, and introducing a fair dealing exception for education on the creative industries (including publishing) has clearly not been considered.⁸ The topics of ‘fair use’ and ‘fair

⁴ At https://www.thedti.gov.za/parliament/2016/Performers_Protection_Amendment_Bill_SEIAS_Report.pdf.

⁵ Page 12 of the SEIAS assessment contains the statement “A performer and the producer of a performance (including phonograms) shall enjoy the right to a *single* equitable remuneration for the direct or indirect use of the performance published for commercial purposes for broadcasting or for any communication to the public, which remuneration *shall be shared equally between the producer on the one hand, who shall receive half thereof, and a performer on the other, who shall receive the other half*, as provided for in this Act.” Wording reproduced in italics do not appear in the Act.

⁶ *Copyright Review Commission* report at <http://www.gov.za/documents/copyright-review-commission-report-2011>.

⁷ On page 5 of the SEIAS assessment.

⁸ See for instance the impact studies conducted by PricewaterhouseCoopers on the consequences of the introduction of fair dealing for education in Canada at http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf, and on the

dealing for education' will be raised when considering the Copyright Amendment Bill, since these are typically defences to the infringement of copyright, not performers' rights.

We are deeply concerned that the undertaking given by the Department of Trade & Industry at the meeting of stakeholders (including PASA) at the Birchwood Hotel in August 2015, at the end of the consultation period of the draft Copyright Amendment Bill, 2015, to commission an independent economic impact study was not followed through.⁹

The SEAIS assessment is, regrettably, no substitute for the promised study and, we submit, not a document that can be relied on in evaluating the impact of the Bill once passed into law.

PASA is ready to engage in the goal of improving South Africa's legislation in the fields of copyright and performers rights, and looks forward to being able to participate in the public hearings.

Yours sincerely



Mpuka Radinku
Executive Director

Enclosure: PASA submission on the draft Copyright Amendment Bill, 2015, dated 16 September 2015

proposed introduction of US-style 'fair use' in Australia at http://www.pc.gov.au/data/assets/pdf_file/0010/195850/sub133-intellectual-property-attachment.pdf.

⁹ A tender request was put out by the Department for such a study on 28 August 2015 – Government Tender Bulletin 2883, p123 for tender no dti-06/15-16 - but the tender was never awarded.

APPENDIX: SUGGESTED PROVISIONS FOR THE PROTECTION OF TECHNOLOGICAL PROTECTION MEASURES AND RIGHTS MANAGEMENT INFORMATION

Prohibited conduct in respect of technological protection measure

8A. (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale, a technological protection measure circumvention device, if such a person knows or has reason to believe that it will or is likely to be used to infringe a right granted to a performer in terms of this Act in respect of a fixation of his or her performance to which a technological protection measure has been applied by the performer or the producer.

(2) No person may provide a service to another person if -

(a) such person intends the service to enable or assist another person to circumvent an effective technological protection measure; and

(b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe the rights granted to a performer in terms of this Act in a fixation to which a technological protection measure has been applied by the performer or the producer.

(3) No person may publish information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting another person to unlawfully circumvent a technological protection measure in the Republic.

(4) No person may, during the subsistence of the rights granted to a performer in respect of a fixed performance and without authority, knowingly or having reasonable grounds to know, circumvent an effective technological protection measure applied by the performer or producer to such fixation.

(5) A technological protection measure shall be deemed to be effective where the use of the work is controlled by the performer or the producer or their assignees or successors-in-title through the application of an access control or protection process, such as, encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

(6) The provisions of this section 8A are without prejudice to the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002).

Prohibited conduct in respect of rights management information

8B. (1) No person may knowingly perform any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right granted to a performer in terms of this Act:

(a) to remove or alter any electronic rights management information without authority;

(b) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances or copies of fixed performances or phonograms or audiovisual fixations knowing that electronic rights management information has been removed or altered without authority.

(2) In this Act, "rights management information" means information which identifies the performer, the performance of the performer, or the owner of any right in the performance, or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in a phonogram or an audiovisual fixation.

COPYRIGHT AND THE PUBLIC INTEREST

PASA Position submitted to NCLIS

27 January 2009, Meeting on the Draft Library and Information Services Transformation Charter

1. Introduction

Publishers have always acknowledged that copyright must be fair and balanced to all concerned. This remains true for the digital environment. Copyright exceptions may be suitable under the changed circumstances. This paper sets out the general principles under which copyright exceptions in the public interest may be acceptable.

Education, research, preservation and access to works for disabled persons are crucial public policy areas. A vibrant and diverse book culture contributes to policy goals in this area. This is particularly true for the publishing industry sectors that directly serve libraries, educational institutions and research facilities.

Copyright laws must recognise the public interest both in support of the institutions that require content, and the commercial and non-commercial publishers that provide the needed services. They cannot therefore weigh the interests of publishers against the public interest but must balance the interests of partners who both serve the public good.

2. Basic Principles:

Need to update South African Copyright Act in line with International Treaties – WIPO COPYRIGHT TREATY 1996

For years PASA, and indeed the whole of the creative sector in South Africa have demanded that South Africa ratify and accede the WIPO Copyright Treaty (WCT) of 1996 and the WIPO Performance Protection Treaty (WPPT) of the same year.¹ Unless South Africa accedes to WCT, South African works may be used abroad with impunity and without compensation. The benefit of signing onto an agreement like the WCT provides immediate relief and benefits SA creators and publishers instantly, without any harm to SA users at all (foreign rightsholders enjoy the same protection as South Africans abroad anyway in South Africa, already now).

When discussing updating the South African Copyright Act it is vital not to limit the discussion to “exceptions” – they are after all called “exceptions” for a reason – but the general rules of copyright and the Internet. This is best achieved by ratifying the above treaties, WCT and WPPT.

Ratifying the said treaties creates an incentive that will contribute to view South Africa as a country ready for the knowledge economy, rather than a jurisdiction that is left behind.

The one issue that is not popular in the WCT is Digital Rights Management (DRM). Some may mistakenly think that without WCT there is no DRM protection in SA. That is simply wrong. There already is DRM protection much more stringent than it need be under WCT/WPPT.²

¹ South Africa is a signatory to those treaties, but still has taken no practical steps to implement them.

² Marlize Jansen, Access to Works Protected by Copyright, Right or Privilege, Dep. of Mercantile Law, UNISA "[...] 4. Although South Africa is a signatory to the WIPO Copyright Treaty, it has not yet implemented the provisions of Article 11 of the WCT in national legislation. There is currently no provisions in South African copyright legislation that specifically protects access to works protected by copyright. However, Article 86(1) of the Electronic Communications and Transaction Act 25 of 2002(the

WCT would give an opportunity to implement DRM protection in ways that would take into account the needs of beneficiaries of exceptions and limitations compatible with fair practice. Publishers would be willing to lend a hand to do so.

Support for the Berne Convention Three Step Test

Any possible future exceptions or limitation introduced in South Africa must of course be developed in the context of the Berne Convention's 3-step test, which requires that any exception must be confined to

*"certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holder"*³

The Berne Convention three step test has historically allowed balanced copyright exceptions to be achieved. Publishers remain supportive of the three step test. It is a tool that is flexible enough to allow copyright exceptions to be adapted to change. It also draws sufficiently clear boundaries to the possible extent of national exceptions.

It is often stated that because education and research are in the public interest, they constitute a "certain special case" on which any copyright exception is premised (first step under the Berne Convention). Moreover, the presumed non-commercial nature of many educational and research activities is frequently cited as a strong indicator that the use should be legitimised under an exception and does not "interfere with the normal exploitation", ie the market, of the rights-holder (the second step), or is not "unreasonably prejudicial" to his/her interests (the third step).

The public interest of research and education is best served by encouraging the creation of new publications and information services with these audiences and markets in mind. For example, journal articles, academic treatises and textbooks are published for the very purpose of contributing to scholarly communication and education. Libraries for non-commercial research or non-commercial educational institutions are the primary (and pivotal) purchasers of (or licensees for) these materials and services. Offering publications and information services is the main business of educational and academic publishers and "research" and "education" are, therefore not "certain special cases" for copyright exceptions. On the other hand, "illustration for teaching" is.

"Normal exploitation" includes digital delivery and licensing to libraries, education and research institutions. This includes the delivery of individual articles which has now become part of the product and service offering of publishers and their agents. "Normal exploitation" may also include the provision of content to course packs, or accessible formats to disabled persons and their institutions.

"Unreasonable prejudice" occurs where the argument brought forward for exceptions fundamentally lies not with technical problems with copyright clearance but with the insufficient funding of the relevant institutions.

ECT Act) criminalizes the conduct of unlawful accessing data. Section 86(3) does the same to the trafficking in devices designed to overcome security measures or access codes. The ECT Act therefore effectively recognizes the right to control access to data. In terms of section 1 of the ECT Act the term "data" "means electronic representations of information in any form". Digitization is the dematerialization of content into electronic format readable by technologies such as computers. Once a copyrighted work is digitized, it becomes an electronic representation of information or content. The definition of "data" is thus broad enough to include digital copyright works. South Africa in this way protects the right to control access to works protected by copyright through criminal sanctions. [...]"

³ Art. 9(2) Berne Convention, Art. 13 TRIPS, Art. 10 WIPO Copyright Treaty.

3. Copying for Preservation:

Publishers recognize the importance of the long-term preservation of their works. In many sectors, such as scholarly journal publishing, publishers have acknowledged the shared responsibility that new publishing technologies bring and have developed practical solutions both within and outside of licensing relationships.

Publishers therefore support copyright exceptions that ensure that copies are preserved and maintained for general access after copyright has expired.

Publishers oppose copyright exceptions that provide access to such copies during the term of copyright, in particular where it would compete with commercial offerings. Copying for preservation and copying for current access must be strictly separated.

4. “On-the-spot consultation” on dedicated terminals within library premises

Publishers want the works they sell or license to libraries to be accessible to the patrons of that library. The use of electronic generated content should be governed exclusively by licensing terms.

Publishers believe that the permission to scan and display works acquired in paper form can be acceptable under a copyright exceptions under specific terms. These would need to be subject to the commercial availability of the works in electronic form. Because the use of works in copyright must be agreed and adjusted over time, collective licensing can provide a solution. In any case a royalty to the rightsholders must be paid.

5. Interlibrary Copying

Publishers recognise the increasing interlinking between libraries and similar institutions. Where copies of works are not commercially available the provision by libraries to other non-commercial libraries is important and copyright exceptions may be necessary.

Where publishers offer articles, directly or through collective licensing arrangement, the sale of articles is part of the normal exploitation by publishers. Publishers therefore oppose copyright exceptions. A copyright exception is not required.

6. Course-packs

Course packs, whether in paper or digital “Electronic Reserves” are an important part of modern teaching technique. Publishers have responded and are collaborating through their own commercial services or through licensing schemes to enable rights clearance of course pack content.

Copyrights exceptions are not needed and can, indeed impede the growth of the developing market for customised teaching products that many dynamic and innovative publishers are serving.

There may remain some areas, in particular where different kinds of resources are combined where a licensing clearing house like DALRO, ie a properly mandated collective licensing society provides the most convenient and fair solutions. Publishers support the approach taken by DALRO and also in the USA, for example, by the American Association of Publishers and Cornell University.

7. Orphan works

Works in copyright whose copyright owner cannot be identified (“orphan works”) are an important issue that publishers would like to see resolved. At international level, publishers have offered practical solutions to this effect and PASA would support a similar exercise in South Africa.

8. Restrictions

In all cases where publishers accept the principle of an exception the terms must be clearly specified and specific terms may be required to ensure that the exceptions are applied in the spirit of the three step test. Publishers are prepared to discuss such details when specific solutions are sought in the context of specific national circumstances.



Publishing in South Africa: What Publishers Do

1. Introduction

PASA promotes best practice and the highest standards of ethics in publishing amongst its members. The relationship with authors is central to publishing and South African publishers pride themselves on sound and honest business practices in dealing with the authors who write for them and foster writing talent in all sectors of society and in all South African languages.

Below is a short explanation of the tasks publishers undertake in conducting their business. While the majority of these tasks corresponds across the different publishing sectors, some are particular to a specific publishing sector. As such, a short differentiation of the various sectors in the greater South African publishing industry is included. Managing the publisher-author relationship is a professional function undertaken by publishers across the board. It is a relationship at the very core of the industry and a function in which publishers invest substantially.

South Africa has a respected publishing sector which contributes to knowledge attainment, nation building and development across the African continent more generally. Any substantive copyright changes are likely to undermine this national professional sector, leading to loss of specialist skills and capacities, and solutions being sought increasingly outside of the country.

2. The Sectors

Most people will be familiar with books published for a general audience, the books one typically would find in retail bookshops. These books are published by the sector of the publishing industry that is commonly called the “Trade” sector. There are other sectors too, Educational, TVET, Academic and Scholarly. This Section deals with publishing practices in the other Sectors first before coming back to the Trade sector.

2.1. Educational

Educational publishing refers to the publication of learning and teaching materials that are aimed at the school curriculum from pre-school to Grade 12. The core of educational publishing is usually a textbook, with its accompanying teacher’s guide, which are available mostly in printed format but are increasingly also published in digital formats. Educational publishing also encompasses a range of other materials that are required to support the curriculum, such as reading schemes, literature, dictionaries, atlases and wall charts.

Publishers respond to tenders or calls for new books by the Department of Basic Education, and are regulated by a stipulated curriculum.



Copyright assignment often occurs in respect of works such as educational and academic textbooks. For works of this kind it is likely that the publisher did the research for the project, identified, approached and briefed an author or authors to write it, and managed the writing process. Copyright assignment is often applicable where a book has multiple authors, as it allows the publisher easily to manage the intellectual property of the team of authors. The assignment of copyright also enables publishers to respond immediately to requests for content without the administrative delays of requesting permission from authors. This ensures content can be reused for the financial and reputational benefit of the authors.

2.2. Technical and Vocational Education and Training (TVET)

This sector produces textbooks for students at the TVET colleges in South Africa, which offer technical or vocational training. It thus has similarities to the academic sector, but the procurement and distribution model is completely different as the TVET system is more centralised.

There are 50 public TVET colleges, each with several campuses, as well as numerous private TVET colleges across the country. The TVET sector produces books – overwhelmingly in print – for two different levels: the National Certificate (Vocational), or NCV, and the National Accredited Technical Diploma (NATED). All textbooks for the TVET colleges are produced in South Africa.

The core of TVET publishing is usually a textbook, with its accompanying lecturer’s guide, which is in most instances available in print and digital formats. Published educational and TVET works rarely come from self-promotion by authors. For syllabus driven works, educational and TVET publishers play the more creative role in responding to the syllabus, carrying out research and then commissioning authors to write for them.

Although there is no universal rule, publishers of works for the TVET market normally pay royalties to the authors from the sales of the works they write.

2.3. Academic

The academic publishing sector is geared towards publishing textbooks for the university and university of technology markets. Print remains the format of preference, although all academic publishers have invested in new technologies and new digital products.

The relatively small size of the academic market in South Africa results in strong competition for influential authors at key institutions. Publishers draw authors from the higher education sector or research institutes who are active researchers and educators in their field of scholarship.

The involvement of commercial publishers in academic publishing activities is important due to the excellence of quality that results from a competitive market place, as well as academic freedom. Profits that result from such publishing activities ensure that their activities remain sustainable, and that content



development may continue alongside the requisite investment in learning technology, distribution channels and platforms.

The South African market is very small, therefore publishers try to produce a book that meets the requirements of a number of institutions, while maintaining a fit with the differences in curricula that are evident.

- The lead author or general editor will take the role of the initial reviewer of content, and many author teams review each other's chapters.
- Publishers use plagiarism checking software like iThenticate to check for any IP problems that need to be rectified.
- Publishers find external reviewers to provide input and feedback, and changes may be recommended ahead of publication.
- In many disciplines, a technical editor is employed to check calculations, questions and information that needs to be checked by a subject matter expert.
- The book is edited for language and pedagogy, and several iterations of the typeset (designed) page proofs are checked by the author team and by proofreaders.
- Artwork is created and third-party copyright permissions are checked and paid for.
- Publishers also invest in the additional multimedia assets that are included in ebooks to make these interactive.
- References are checked and an index is produced.
- Publishers commission and invest in additional material that support lecturers and students including substantial investment in questions and solutions to assist in teaching and learning.

The support material is distributed via electronic platforms that require substantial investment and ongoing maintenance and support. These include digital platforms like eBook reader applications and content management systems, learning management systems and other educational technologies like adaptive learning.

2.4. Scholarly

The scholarly publishing in South Africa consists largely of four university presses and a few independent presses linked to research organisations. Their main objective is to contribute to dissemination of research in book form, and in some cases by way of journal articles, written by local academics. The scholarly market in South Africa remains small, but enjoys a good reputation both nationally and internationally.

The scholarly publishing sector positions itself globally in terms of readership, as most of the publishing houses sell, distribute and disseminate their books and journals worldwide or seek for their books and journals to have a global impact. To enable international dissemination, scholarly publishers need to keep up with technological developments (XML based publishing, ORCID's for authors, ONIX metadata, etc) at large costs to small organisations.



International impact is key for authors. In the case of book authors, international impact is at least as important as the payment of royalties, which payments are relatively small due to the constraints of high publishing costs in a very small market. For authors publishing in the scholarly sector, benefits of publication are linked to academic prestige and reputational factors. Publication is key to academic progression for individual authors. In scholarly journals, there is typically no demand by authors for royalties; the author wants professionally edited, peer-reviewed and globally discoverable publication of his or her research.

Publishers manage the peer-review process. This plays an important role when universities claim DHET subsidies on behalf of their authors, as the DHET relies on publishers' evidence and confirmation that peer review was done to an acceptable international 'best practice' standard. DHET subsidies are paid to universities, who all have different policies regarding how much is kept in central funds and how much is distributed to faculties and eventually to the academic authors themselves. Generally, peer-review across the sector is of a world-class standard, which enables the South African sector to compete effectively with scholarly and academic publishers from across the world.

Academic journal authors have the choice to publish in publications which are available on a subscription basis and also in publications where the cost of publication is paid by the author or a funder upfront and then published under an Open Access licence. Publishers publish both subscription journals and Open Access journals, and even some books are being published on an Open Access basis. The business model for recovering publishers' significant editorial, production, marketing and online costs is different for subscription and Open Access models – under the subscription model, their costs are recovered by sales of the journals, whereas in Open Access publishing, the cost is recovered from the upfront author publication charge.

Most scholarly presses have diversified their publishing lists to cater for wider readerships. They may also publish textbooks for the academic market, or “cross-over” general non-fiction books that sell predominantly to a general trade market. As such, they need to invest in marketing and promotion to the local audience as well.

3. General functions of publishers

3.1. Publishing agreement

Publishers carry the costs of having publishing agreements drafted and kept up to date, recognising the importance of having the agreement expound the legal, administrative and financial aspects of the working relationship clearly and unambiguously.

To encourage fair contract terms between publishers and authors, PASA and ANFASA (Academic and Non-Fiction Authors' Association of South Africa) mandated their respective copyright committees to draft a document recording the standard terms for book publishing contracts. The ANFASA-PASA Agreement on Contract Terms (“APACT”) is aimed at fostering and upholding a constructive and cooperative relationship



between authors and publishers. As a framework for promoting cooperation between authors and publishers, as well as an understanding of contractual relationships between them, this document is not static, but subject to development and adaptation by ANFASA and PASA. This is in line with the evolving nature of the publishing industry itself. The first version of AFACT was published in 2012, and an updated version was released in 2016. It is available as a free resource on the websites of both PASA and ANFASA and can be accessed here: <http://www.publishsa.co.za/file/1472202535llj-apactdocument.pdf>.

3.2. Pre-publication

The publisher typically either commissions or receives manuscripts, trains/develops authors where necessary and guides the writing process, edits the manuscript, designs and prints them as books or alternative formats, and invests in advertising and promotion to generate maximum sales. The editorial and production processes entail substantial financial investment on the part of the publisher, which results in significant added value through editing, design and layout, indexing and proofreading. Publishers either employ editors, marketers and designers to develop the book, or they contract outside service providers – both at great cost to the publisher.

Experience and expertise during the origination process results in a more refined product which has a better chance of succeeding in the market place. Due attention to production details includes the assessment of the quality of paper, printing and binding in the case of a printed book, and in the case of an e-book, ensuring that digital files are clean and comply with the highest industry standards.

3.3. Sales, marketing and distribution

Publishers make a great effort to establish and maintain sales and distribution channels. This is true across the sectors. While educational publishers are dependent on state and provincial government departments for the majority of orders, they also distribute their products through a variety of other sales channels. Publishers keep a watch on demand for their products in order to manage their stocks and, in the case of hard copies, to decide on reprints to meet high demand.

Each sector in the publishing industry has its own markets and its own distinct customer bases.

Importantly, publishers invest in distribution networks (both for physical stock and electronic products) and infrastructure that facilitates the accessibility of books and materials. Publishers continuously invest in new technologies and publishing media. This ensures that publishers maintain viability and competitiveness, which not only advances the best interests of the publishing industry, but also serves the authors whose work is published.

Publishers understand that it is not possible for every student to buy every book they require. That is why educational publishers invest in options that aid in the development of low-cost editions, course-packs,



adaptations and reprint titles, as well as supporting local and university libraries – all of which provides access to the best-in-class learning material at a fraction of the cost of an equivalent imported title.

3.4. International dissemination

Ensuring international exposure and recognition for authors is an important focus for publishers in the scholarly and trade publishing sectors. As it is tailored for the South African education market, the publishers in the educational, TVET and academic sectors have a more local focus.

International dissemination is achieved through export, print-on-demand facilities, rights trade, or co-publishing partnerships. For trade publishers, participation in international book fairs and establishing a network of subagents in key territories plays an important role in selling foreign and translation rights to their books. Information on rights sales and the progress and reception in other formats and markets, forms part of the dialogue between the author and the publishing house about the dissemination of his or her work.

3.5. Rights management

The copyright in the work includes subsidiary or secondary rights and uses. These are rights which allow further forms of exploitation of the work, which includes licensing the content of the book to other publishers for publication or production into other formats, languages, as well as adaptations. The publisher does not exploit these rights directly as a primary right, but will license or sell them to third parties if authorised by the author. The income received from the third party is then divided between the author and the publisher according to the royalty division agreed upon in the publishing agreement. Subsidiary rights can be an important additional revenue stream for both the author and the publisher.

Managing subsidiary rights is a service publishers provide to authors. It entails a hefty administrative load. Each permission request or licence requires negotiating a fee for use of the work, drafting and concluding a contract to regulate said use, invoicing the third party and following up on payment and distribution to authors as necessary. Publishers either employ full-time staff members to deal with these types of requests, or outsource rights management to freelance service providers.

3.6. Copyright enforcement

Publishers go to great lengths to protect the intellectual property embodied in the works they publish, and to therefore protect the economic interests of themselves and of their authors. Many authors do not



have access to the required resources to pursue copyright enforcement actions and rely on publishers to protect their economic interests through publisher membership of organisations such as the Southern African Federation Against Copyright Theft (“SAFACT”).

A problem academic, educational and TVET publishers face in selling their books is photocopying and resale of photocopied books. The industry has made attempts to stamp out this practice in co-operation with SAFACT. Incidents of piracy (both in print and digital book formats) continue to emerge, and publishers work closely with SAFACT to investigate and prosecute offenders.

Similarly, trade publishers rely on the services of SAFACT to deal with widespread incidents of digital piracy – where offenders remove metadata from e-books and distribute and sell those e-books without consent. Depending on the circumstances, publishers also appoint legal counsel to address infringing conduct, at substantial cost to the publisher.

3.7. Royalty payments

The publishing agreement stipulates when royalty statements will be provided and royalty payments remitted to the author. Statements may be sent twice yearly or annually calculated to the end of the publisher's financial year. Royalty payments are usually made within 2-3 months of such dates.

Royalties payable include income generated from subsidiary rights, including DALRO distributions, as well as royalties on book sales. DALRO distributions occur six-monthly and income received from licences granted by DALRO is divided between author and publisher in line with the subsidiary rights clause in the publishing agreement.

Should the royalties payable be below a certain amount (this ranges from R100 to R500), the royalties will be carried forward to the next payment period.

Publishers not paying royalties is a breach of contract on the part of the individual publisher, not the norm or general practice. Publishers go to considerable effort to ensure that authors' personal and bank details are up to date in order for royalty payments to be remitted. They also generally maintain a high level of auditing and accountability in disclosure to authors of royalty income due to them. Authors are provided with detailed royalty statements which contains sales and stock data as well.

3.8. Reversion of rights

The publishing agreement sets out the procedure for reversion of rights to the author. Typically, the relevant clause would state that, if the book is out of stock, the author may request that the publisher reprint or publish a new edition. If the publisher fails to do so within an agreed timeframe, the rights revert to the author.