**Comments by PEN Afrikaans and PEN South Africa on the Copyright Amendment Bill, No 13 of 2017
Submitted for the attention of Ms J Fubbs
(Chairperson: Portfolio Committee on Trade and Industry)
Per e-mail:**ahermans@parliament.gov.za

**Introduction**

PEN Afrikaans and PEN South Africa are both associations of authors, journalists and publishers affiliated to PEN International, thus representing their members in an international context. PEN Afrikaans and PEN South Africa represent authors who write trade publications (fiction, nonfiction and books for children and young adults), educational works like school textbooks, as well as academic and scholarly publications.

PEN International, the world’s leading association of writers, is a non-political organisation which holds Special Consultative Status at the UN and Associate Status at UNESCO. It is aimed at promoting literature and defending freedom of expression around the world. PEN Afrikaans and PEN South Africa subscribe to these goals and are geared towards lobbying for the rights of authors, journalists and publishers if and where necessary.

PEN Afrikaans and PEN South Africa are convinced that many of the changes to the Copyright Act, 98 of 1978 (hereinafter “the Act”), envisioned by the Copyright Amendment Bill, no 13 of 2017 (hereinafter “the Bill”) will have a direct and detrimental impact on its members, and indeed all South African authors. As such, PEN Afrikaans and PEN South Africa accept the invitation to submit written commentary on the Bill, extended by the Portfolio Committee on Trade and Industry (“the Committee”) to stakeholders, and herewith submit the following comments.

**Scope**

Even with the extension of the deadline for written submissions to 7 July 2017, it is submitted that stakeholders have not been given enough time to properly engage with and react to the content of the Bill. This submission is therefore not an exhaustive and section-by-section commentary on the Bill, but rather an exposition of the main points of principle which concern the membership of PEN Afrikaans and PEN South Africa, and South African authors in general.

Various other stakeholders have submitted more detailed analyses of the Bill with suggestions on how the text may be improved. PEN Afrikaans and PEN South Africa implore the Committee to take heed of these suggestions, as it is clear that the Bill is riddled with errors of drafting and terminology which will create significant legal uncertainty if passed into law unamended. PEN Afrikaans and PEN South Africa encourage the Committee to pay particular attention to the written submission of the Anton Mostert Chair of Intellectual Property Law, a division of the Law Faculty of Stellenbosch University.

**Summary**

By granting a set of exclusive rights, copyright incentivises authors and the larger creative industries to expend their skills, talent and labour in the creation of works for the ultimate benefit of all. Copyright enables authors to earn income from their creative work. The introduction of wide-ranging exceptions and limitations would discourage authors from writing books and publishers from taking the financial risk to publish those books, as it would create a climate within which freely copying copyright works for a wide range of purposes is permitted. Other points of objection are the proposed weakening of moral rights protection and the appropriation of state-funded copyright works by the state. PEN Afrikaans and PEN South Africa consider these amendments ill-advised and urge that the Bill be withdrawn and redrafted in a process where our criticisms and the other detailed criticisms that have been submitted to the committee are taken into account. Also to be taken into account and adhered to are the appropriate protections for the rights and financial compensation of copyright holders.

We further note the following:

**1. Addition of the communication to the public right**

PEN Afrikaans and PEN South Africa welcome the proposed addition of the right of communication to the public as an exclusive right of copyright. The right of communication to the public is considered the equivalent of the reproduction right in an internet environment. As such, its inclusion represents an important step towards bringing South Africa’s copyright legislation in line with the digital era. PEN Afrikaans and PEN South Africa urge the Committee to also introduce the exclusive right of distribution.

**2. Introduction of wide-ranging copyright exceptions**

The introduction of wide-ranging exceptions and limitations to the exclusive rights of copyright is an especially perturbing aspect of the Bill.

This includes but is not limited to:

* A “fair use” defence or fair dealing exception in respect of educational purposes

Many authors earn their livelihood from writing for the education market. The education market is an operative market and by far the largest sector within the book publishing industry. Allowing copying of books and inclusion of copyright material in course packs instead of encouraging educational institutions to purchase copies of books, or licences to reproduce copyright works, will drastically curtail the author’s ability to make a living from writing for the educational and academic markets.

* A “fair use” defence or fair dealing exception for expanding access for underserved populations

This addition will cause substantial legal uncertainty. There is no definition of “underserved populations” in the Bill. Similarly, the Bill provides no indication of who may “expand access” in this manner, and what that means exactly. What is clear is that provision of “access” to underserved populations will not entail obtaining permission or paying compensation to authors. This very broad exception is open to being exploited at the expense of authors.

Education and research are undoubtedly important public policy considerations, and PEN Afrikaans and PEN South Africa fully support the right to access to information. However, PEN Afrikaans and PEN South Africa object to the proposed weakening of copyright protection in order to achieve these goals.

Furthermore, it is highly unlikely that the extensive exceptions introduced by the Bill are compliant with the international copyright treaties to which South Africa has acceded. Any exceptions or limitations introduced to the Act must be in line with the three-step test set out in the Berne Convention, 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”.[1](http://www.litnet.co.za/comments-by-pen-afrikaans-on-the-copyright-amendment-bill-no-13-of-2017/%22%20%5Cl%20%22_ftn1)

**3. State-funded works**

The Bill proposes that copyright in state-funded works shall automatically vest in the state. The level of funding is not defined. It would be unreasonable for the state to appropriate copyright works as a result of any form of funding.

**4. Interference with contractual terms**

PEN Afrikaans and PEN South Africa object to the intention to prescribe “compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act”. This overbroad wording will affect the author’s ability to exploit the fruits of his or her labour through licensing agreements. Deeming contractual terms unenforceable if they aim to restrict the wide-ranging exceptions and limitations to copyright will also hamper the author’s ability to commercialise his or her work.

**5. Weakening of moral rights**

Section 19 of the Bill proposes to amend Section 20 of the Act which deals with the author’s moral rights. The proposed amendment deprives authors of the opportunity to enforce their moral rights when any of the copyright exceptions and limitations apply. This limitation is unwarranted and should be removed forthwith.

**6. Impact on book publishing in South Africa**

PEN Afrikaans and PEN South Africa note with great concern that an independent economic impact assessment on the introduction of a copyright exception for educational purposes has not been done. Experience in other jurisdictions points to a potential disastrous economic impact on the book publishing industry. Bearing in mind the symbiotic nature of the relationship between authors and publishers, this will have a trickle-down effect on authors, especially authors whose livelihood depends on creating materials for educational and academic purposes.

With all due respect, PEN Afrikaans and PEN South Africa dispute the following statement from the Memorandum on the Objects of the Copyright Amendment Bill:

“It is also envisaged that the proposed legislation will reward and incentivise authors of knowledge and art.”

In many ways, the opposite is true. The Bill strips authors of their rights and deprives them of opportunities for earning remuneration. PEN Afrikaans and PEN South Africa strongly recommend that the Bill be withdrawn and redrafted to protect the interests of authors and the creative industries as a whole.

Please let us know if you require further input on behalf of authors. We would gladly assist. An effective copyright regime is of singular importance to the members of PEN Afrikaans and PEN South Africa, and indeed to authors in general.

Yours sincerely,

Kerneels Breytenbach (Chairperson: PEN Afrikaans) and Nadia Davids (President: PEN South Africa)

[1](http://www.litnet.co.za/comments-by-pen-afrikaans-on-the-copyright-amendment-bill-no-13-of-2017/%22%20%5Cl%20%22_ftnref1)Art. 9(2) Berne Convention, Art. 13 TRIPS, Art. 10 WIPO Copyright Treaty.

**The following list of published authors, organisations and concerned members of the public support the above comments by PEN Afrikaans and PEN South Africa on the Copyright Amendment Bill, No 13 of 2017**

AA Cruywagen

Adriaan Oosthuizen

Africana Uitgewers

Aletta Leach

Alettie van den Heever

Amanda Claassens

Annari van der Merwe

Anoeschka von Meck

Ansie Crous

ATKV-Skryfskool van die Noordwes-Universiteit (Potchefstroomkampus)

Barbara Potgieter

Bernhard Nagel

Casper Kempff

Chanette Paul

Chante Kelder

Charles Skeen

Charl-Pierre Naude

Chris Karsten

Christiaan van Rooyen

Christien Neser

Christo Meyer

Cobus Behrens

Corlia Fourie

Danie Marais

Daniel Nicholas Steenkamp

Dawie du Toit

Dibi Breytenbach

Dr David Smith

Dr Louwrens Pretorius

Dr Marié Heese

Dr Francis Galloway

Ebbe Dommisse

Eben Venter (skrywer/writer)

Elaine Bing

Elizabeth Hentschel

Elsa Winckler

Engemi Ferreira

Estelle Haward

Eugene La Grange

Frederick J Smith

Frederick J. Botha

Frederik B O Nel

Friedel Swartz

Garth Holden

Gerard Scholtz

Gerhard Mulder

Hans du Plessis

HC (Christo) Viljoen

Heinie Heydenrych

Helene vd Westhuizen

Hendrina Gelderblom

Hester Carstens

Hetta Pieterse

HM Carlsson

Ilze Bruggemann

Irma Venter

Izak de Vries

J.C. (Jaap) Steyn

Jacques Steenkamp

Jean Geldenhuys

Jean-Pierre de Kock

Jeremy Vearey

Jim Pascual Agustin

Johan Thuynsma

John Miles

John Mobbs

Juhlene Moller

Karen van der Merwe

Karin Behrens

Karina Magdalena Szczurek

Kleinboer (Fanie de Villiers)

Laurette Campher

Leopold Scholtz

Lidia Theron

Liezel van Beek

Lindie Koorts

Line Enslin

Loraine Fourie

Louis Esterhuizen

Louis Vorster

Louise van der Merwe

Louise Viljoen

Lynn Jansen van Vuuren

Madelein Meier

Madri Victor

Marga Stoffer

Marion Erskine

Mark Fysh

Marko van der Colff

Marlies Haupt

Martie Muntingh

Martie Pozyn

Martin Steyn

Merle Chalmers

Naas Steenkamp

Nanette van Rooyen

Naomi Bruwer

Nicoline Anker

Petra Odendaal

Philippus P Janse van Rensburg.

Piet Potgieter

Pieter Haasbroek

Pieter Strauss

PJ Music & Media

Prof Wannie Carstens, NWU

Rachelle Cilliers

Rachelle Greeff

René Bohnen

Reney Warrington

Ria Horn

Rika Cloete

Rina Swanepoel

Roela Hattingh

Rolene Oosthuizen

Ronel S

Rosita Oberholster

Rozaan Boer

Rustum Kozain

SA Vryskutskrywer

Tanya Krüger

Thea Korff

Theresa Papenfus

Vita du Preez

Willie Viljoen

Wium van Zyl

Yvonne Botha