Updated PASA Submission to NCOP Select Committee

15 March 2023

The Hon. Chair of the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour

The Hon. M. Rayi MP

National Council of Provinces

Parliament of the Republic of South Africa

CAPE TOWN

ATTENTION: Ms Mahdiyah Koff

Parliament of the Republic of South Africa

CAPE TOWN

By email to the Select Committee Secretariat: mkoff@parliament.gov.za and ndinizulu@parliament.gov.za

AND

To Whom it may concern in the Provincial Legislatures

Dear Honourable Chair

UPDATED: Copyright Amendment Bill [B13D-2017]: 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 B13D-2017 (referred to in this submission as the 'Bill' or the 'CAB'), the Publishers' Association of South Africa, PASA, herewith submits its comments.

PASA acknowledges that despite its serious shortcomings, the Performers' Protection Amendment Bill holds some important advantages for musicians and performers and those in the recording industry. We focus on the Copyright Amendment Bill, as of the two Amendment Bills before the NCOP, it is of major concern to us.

PASA will also request the kind assistance of the Committee Secretariat to distribute printed copies of the collection of articles on the Copyright Amendment Bill by Dr Owen Dean, *A Gift of*

Multiplication (Juta, 2021) to Committee members. The collection can also be read here: https://juta.co.za/uploads/The_Gift_of_Multiplication_Essays_Amendment_Bill/

See, for example, the essays, "Reconstituting the exceptional copyright Amendment Bill", pages 4–8, and "Authors, you've got a friend?", pages 14–20.

The collection includes the seminal critique of 'fair use' by Professor Sadulla Karjiker, 'Should South Africa adopt fair use? Cutting through the rhetoric'.

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4.9 No proper Socio-Economic Impact Assessment Study (SEIAS)

Proposal I: Institute a proper Socio-Economic Impact Assessment Study as a basis, along with an appropriate Intellectual Property Policy and legal foundation, for a redrafting of the Bill.

4.10 **Implications for the South African universities' research economy**

Proposal J: Work with university bodies to engage the implications of the Copyright Amendment Bill with regard to their own resource allocation and Intellectual Property policies, and also to undertake urgent planning to address the likely effects of the legislation on the national research economy.

5. Five key questions on the Copyright Amendment Bill

6. A way forward

Proposal K: Although the above proposals address specific aspects of the Bill, a more meaningful, thorough and preferable approach would be an holistic and fundamental revision of the Bill, using the following steps:

** Reject the Copyright Amendment Bill and eventually have it lapse.*

** Conduct a proper socio-economic impact assessment*

** Acquire independent legal opinion from experts in copyright law and constitutional law*

** Study appropriate examples of laws and model laws, e.g. the 'The African Regional Intellectual Property Organization (Aripo) Model Law on Copyright and Related Rights' (see https://www.aripo.org/wp-content/uploads/2019/10/ARIPO-Model-Law-on-Copyright-and-Related-Rights.pdf)*

** Accompany these steps with an urgent, well-planned, staged implementation of regulations to the principal Act to deal with pressing needs.*

** Enable through dialogue an understanding within the creative sector how past injustices may be cured through a negotiation frame-work that incentivises producers and publishers to redress past injustices whilst allowing future authors and performers to prosper and avoid pitfalls suffered by their forebears*

** Request further input from the House of Traditional Leaders on how so-called 'hybrid fair-use' would impact indigenous and traditional knowledge practitioners and holders of rights. As far as PASA is aware, the traditional knowledge and indigenous knowledge community is only insufficiently cognisant of the erosion of their rights, thinking this affects only 'mother and child, not the grandmother.' This is not so: the rights of indigenous and traditional knowledge holders would be eroded by the same over-broad provisions as the rights of authors and performers.*

ANNEXURE 1 Fully Understanding the Copyright Amendment Bill (CAB): Sources and origins

ANNEXURE 2 Background to the Copyright Amendment Bill (CAB) being sent to the NCOP

ANNEXURE 3 The 'Cultural and Creative Industries Masterplan'

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1. PASA's Participation in the Legislative Process

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. PASA's membership comprises the majority of South African publishing houses, large and small, for-profit and non-profit, educational, trade, self-improvement, leisure, national literature, and tertiary scientific and social science education. PASA promotes the contribution of literature in all its forms to cultural, social, and economic development, both of communities and individuals – that is, for the public good.

In a position paper dated 27 January 2009, 'Copyright and the Public Interest', PASA stated:

> '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.'

PASA therefore supports the necessary changes to the outdated Copyright Act and the Performers' Protection Act. Since the release of the Draft National Policy on Intellectual Property (2013) PASA has been actively involved in the amendment of the two outdated Acts.

To support its involvement, PASA commissioned PwC to carry out an economic impact assessment of the education exceptions and 'fair use' provisions of the Bill, which report was published in July 2017 and delivered to the then Portfolio Committee on Trade and Industry.

This PwC study remains the *only comprehensive economic impact assessment* of those exceptions and provisions of the Bill. The study is available at: http://publishsa.co.za/file/1532283880bpcpwcreportoncopyrightamendmentbill-31july2017.pdf.

PASA is a member of the Copyright Coalition of South Africa (CCSA) which covers a broad range of stakeholders including trade and industry associations that represent local companies responsible for key investments in the creative and education sectors.

PASA's submission has the support of separate and independent organisations, namely the CCSA, the Academic and Non-Fiction Authors' Association of South Africa (ANFASA), the International Publishers Association (IPA), the Dramatic, Artistic and Literary Rights Organisation (DALRO) and the International Federation of Reproduction Rights Organisations (IFRRO). Likewise, PASA supports the submissions made by the said organisations.

2. Introduction

Some diamonds are pure and flawless. Some that appear superficially bright, have a flaw at the heart that is fatal to the diamond being of full value.

Superficially, the Copyright Amendment Bill has appealing facets. However, it too has a fatal flaw at its heart: It under-delivers on promises.

The original drafters of the Bill promised that they would *reward and incentivise authors* and would *protect their economic interests against infringement*. This promise was made in the 'Memorandum on the Objects of the Copyright Amendment Bill' (published with the Bill).

However: The Bill under-delivers on this promise. Instead of being the life-blood of creative authors, performers and practitioners of traditional and indigenous knowledge, the Bill provides for overbroad exceptions and free, unremunerated uses of creatives' works, not benefitting authors. Similarly, the Bill erodes performers' rights and rights of traditional and indigenous knowledge holders.

If this flaw is not seen for the blemish that it is, it will devalue the future of writing and publishing books and diminish investments in both *culture* and *trade*.

The bright and deserved promises to performers in the Performers' Protection Amendment Bill might also go to waste if the Copyright Amendment Bill is passed as it is now: The thinking seems to be that in order to save the baby (e.g. promising better pay for actors and performers working for the SABC), the mother (copyright) and grandmother (traditional/indigenous knowledge) have to die. This is not so; in fact if the grandmother and mother die, the baby will also pass away.

Parliament and provincial legislatures now can create effective legislation to bring South African copyright law into the digital age and join its main trading partners which already made this transition. In doing so, Parliament and Provinces are encouraged to consider the impact that legislation will have on creators and publishers of copyright works, on cultural workers and thereby on users of their works.

3. Background to the Copyright Amendment Bill

For a fuller understanding of the background to the Copyright Amendment Bill, please see the following ANNEXURES:

ANNEXURE 1 Fully Understanding the Copyright Amendment Bill (CAB): Sources and origins

ANNEXURE 2 Background to the Copyright Amendment Bill (CAB) being sent to the NCOP

A significant development in the course of the work by Parliament on the Bill, was the adoption by Cabinet in August 2022 of the 'Creative Industries Masterplan (2022)'[1]. This information is provided in:

ANNEXURE 3 'The Cultural and Creative Industries Masterplan'

[1] Department of Sport, Arts & Culture. May 2022. 'Creating and Designing for Growth. South Africa's Creative Industry Masterplan to 2040. A Report of the South African Creative Industry Masterplan Project.'

4. PASA's Concerns

The poorly drafted Copyright Amendment Bill is detrimental to authorship and publishing in South Africa and needs to be reconsidered.

The few benefits introduced by the Bill are outweighed and undermined by a far greater quantity of provisions that allow more free uses of authors' works by others than does the current Copyright Act. Provisions that fail to support secure enforcement of authors' and publishers' rights likewise outweigh benefits.

The key concern for many in the intellectual property sector and cultural industry is that the 'hybrid fair use' provision and exceptions for educational purposes will turn copyright in South Africa on its head: A user can essentially access and re-use a work unless the copyright holder proves *ex post facto* that a use is unfair.

'Hybrid fair use' is a 180-degree reversal of exceptions in the current Copyright Act, which is more specific regarding 'fair dealing' and exceptions. The proposed provision has the potential to create an environment where copyright infringement and the use of copyright materials without compensation may increase in an industry that is already on the precipice due to unauthorised access. In higher education for example, the estimated number of copies sold as a percentage of enrolled students for whom the textbooks are prescribed is 30%, with the rest being fulfilled mainly by piracy and illegal copying.

There is a further concern that deep-pocketed big tech companies will use copyright content on their platforms to generate advertising revenue without compensating rightsholders, claiming to be covered by the presumed 'fair use' by their users.

This looming threat also affects holders of rights in indigenous and traditional knowledge, who are lumped together with other rightsholders for purposes of this notion of an expansive 'fair use'.

The main issues that the members of PASA have with the Bill are categorised into the points below. The discussion focuses on matters relating to authors' and publishers' rights and is not a comprehensive analysis of the Copyright Amendment Bill. We refer the reader to the detailed submission by the South African Institute of Intellectual Property Law (SAIIPL). It is available at https://saiipl.co.za/wp-content/uploads/2023/01/SAIIPL-submission-Copyright-And-Performers-Protection-Amendment-Bill-January-2023.pdf.

PASA's overall position is that two broad approaches may be followed in a critique of the Bill:

* Deal with the Bill item by item and change each as required to retain the main wording of the Bill. The concerns numbered 4.1–4.8 below and Proposals A–H follow this approach.

* Use a systemic and fundamental approach to reviewing copyright legislation, as proposed in Concern 4.9 (Proposal I) and '6. A way forward' with Proposal K.

4.1 The President's concerns insufficiently addressed

The challenge before the NCOP and Provincial Legislatures now is to address the Copyright Amendment Bill in its *entirety*. These legislative bodies are not limited to the President's concerns.

However, it remains important to be reminded of the concerns raised by the President in his letter to the National Assembly, dated 16 June 2020.

Despite the National Assembly having considered the President's reservations, the possibilities remain of a conflict of certain provisions with the Bill of Rights (Chapter 2 of the Constitution) and, possibly, with international treaties.

The President's reservations about 'fair use' and copyright exceptions and the formulation of the provisions to support technological protection measures (the TPMs) were based on both the Constitution and on the international treaties on copyright of which South Africa is a member and in respect of those which the national Legislature resolved that South Africa must become a member.

The National Assembly did concede a few of the President's concerns and made various amendments to the Bill. However, the following specific concerns have not been addressed sufficiently:

The Copyright Exceptions

The President raised a reservation that copyright exceptions in the new sections 12A to 12D, 19B and 19C may encounter constitutional challenges. The specific sections are 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C, 19C(4), 19C(5)(b) and 19C(9) which may constitute deprivation of property; Sections 12A and 12D may further violate the right to freedom of trade, occupation and profession.

International Treaty Implications

The President had reservations about whether the Bills comply with the World Intellectual Property Organisation (WIPO) Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Beijing Treaty on Audiovisual Performances. He referred the Bills back to Parliament in order that Parliament may consider the Bills against South Africa's international law obligations.

Despite the few, cosmetic, and marginal amendments made to the Bills by the National Assembly, the nuts-and-bolts material issues remain unresolved – notably around the copyright exceptions and the protection of Technological Protection Measures.

Research undertaken by PASA shows that the revised D-Bill that is now before the NCOP when compared with the Bill passed in 2019, has hardly any changes to the exceptions and few changes relating to the TPMs. This research was published at https://publishsa.co.za/wp-content/uploads/2022/07/ANFASA_DALRO_PASA-research-report-June2022.pdf.

The author states (page 2):

> "The conclusion is that, notwithstanding the President's referral-back for concerns about the constitutionality and treaty compliance of, amongst others, its copyright exceptions, the 2022 D-Bill preserves the copyright exceptions and, to a lesser extent, the provisions for technological protection measures of the 2019 B-Bill, while accepting most changes in the 2021 Proposals for all the other provisions.
>
> "Of the specific copyright exceptions explicitly mentioned as being of concern in the President's referral-back, only 6 substantive changes that did not limit rights of copyright and moral rights were made to the 2019 B-Bill. Two other substantive changes further limited rights of copyright and authors' moral rights."

The NA also refused to consider other provisions that potentially will lead to a challenge for unconstitutionality. These were raised time and again by various stakeholders during the public participation process. For example, questions continue to be raised about the lack of a sufficient and proper socio-economic impact assessment for the Bills prior to its introduction to Parliament. Answers from Government remain insufficient regarding the existence or location of the research informing the Bill. See more about the lack of a proper SEIAS below under 4.9.

Proposal A: To avoid further delays in finalising the Bill, consider avoiding unconstitutionality and noncompliance with international treaties by following the Proposals below.

4.2 Royalties as the only means of remuneration

The Regulations subsequent to Section 6A (inserted into the principal Act) will prescribe royalty rates as well as minimum terms of contracts.

This development is bound to have a material impact on how publishing and production agreements are negotiated, and will likely impacting on contract terms, like advances, that have up to now been commonplace.

Although the object of benefitting authors has been generally supported by all stakeholders, and should be further investigated by Government, the new Section 6A with its regulatory prescription of royalty rates and minimum terms have been viewed with considerable concern as the benefits will be illusory: The Bill has an apparent, mistaken assumption that every publication is a commercial success and authors will necessarily benefit from royalties through sales.

These concerns about regulatory prescription of royalty rates and minimum terms should be viewed together with the broad exceptions that will cut authors off from remuneration for educational, library and new digital uses of their works.

Proposal B: Reject Section 6A as introduced by Clause 5 and properly investigate workable solution to benefit authors.

4.3 Hybrid ‘fair use’

The Bill coined the novel concept ‘hybrid fair use’ as a new statutory defence against copyright infringement, e.g., Section 12A.

The basis for all provisions setting out exceptions and limitations should be the Three-step Test as formulated in the Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971), which permits ‘…the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

Section 12A

The wording in 12A deviates from the classic ‘fair use’ wording, yet there is no evaluation of the impact of these deviations. Neither do these deviations appear in the ‘fair use’ provisions implemented by any of the few countries that have adopted ‘fair use’.

The wide exceptions in the Bill are not ‘special cases’, i.e. cases that cannot be serviced by South Africa’s well-established and sophisticated publishing and distribution services to provide adequate access to information and knowledge.

The introduction of ‘fair use’ is claimed to be based on an equivalent provision in US law but is actually and patently by the wording wider than the US provision. Submissions by PASA, among others, to the National Assembly have already shown how the ‘fair use’ clause in the Bill differs in material respects from the ‘fair use’ clause in the US Copyright Act. See ANNEXURE 4.

The Bill’s so-called fair use is not ‘fair play’ but invites ‘foul play’ that then requires rightsholders to prove their injuries.

Since exceptions – including the ‘fair use’ instances – are cases where copyright works can be used by others without permission and without remuneration, this means that authors and publishers will be cut off from the economic benefits of new ‘transformative’ ways – the language used by proponents of ‘fair use’ – of propagating their works. South African authors and publishers will be at a disadvantage, since the Bill does not import mandatory statutory damages, a key factor in the US that balances out ‘fair use’ with the interests of copyright holders.

Authors and other copyright owners who do not want to litigate against infringers who claim ‘fair use’ may well end up having to unwillingly agree to unauthorised uses of their works. In important cases, there will be litigation between publishers and their traditional customers who may believe that copying will be allowed for all educational uses and will be for free. This is unsustainable.

The litigation costs will have to be borne not only by publishers but also by the very educational institutions that the exception is meant to benefit. The net result will be unbudgeted legal expenses and years of litigation – to the detriment of improving the educational environment and further prejudicing the young generation of learners.

In an environment with very little precedent, many such institutions, companies and other users would want to push the law to the limit and place as much as possible under fair use, thereby making it onerous for rightsholders to litigate on each account and uphill. Many will just let it go because they will not be able to afford the litigation costs.

In 'Comments on behalf of Intellectual Property Law Scholars' delivered before the Office of the United States Trade Representative in the Matter of South Africa Country Practice Review in terms of the Generalized System of Preferences (GSP), six American academics found, 'Combining U.S.-style fair use with expansive fair dealing provisions creates a complicated and unpredictable system that does not adequately and effectively protect intellectual property.' (ANNEXURE 5)

The academics explained, 'If the provisions become law, the result would be an impractical mashup of fair use and fair dealing standards that would deter foreign investment and ultimately harm local creators and creative industries…The uncertainty with which this irregular mixture would be applied by courts would not only result in hesitancy on the part of foreign copyright owners to enter South African markets, but would also ultimately lead to confusion among local creators, copyright owners, and users…**The confusion and hesitancy stemming from the mashup of laws and the expansive new exceptions cannot support a robust market or local creative economy, and a redrafting of the proposed amendments is necessary to ensure that South African creative ecosystems flourish** and U.S. interests are preserved.' (Our emphasis) (See https://cip2.gmu.edu/wp-content/uploads/sites/31/2020/01/Comments-on-Behalf-of-IP-Law-Scholars-South-Africa.pdf)

In addition to the unpredictability of 'fair use', the danger exists that 'fair use' creates an opening *for courts to determine public policy* and decide what is in the public interest. Courts will hereby appropriate the exclusive powers of parliament and the executive to do so. We refer you to the seminal critique of 'fair use' by Professor Sadulla Karjiker, 'Should South Africa adopt fair use? Cutting through the rhetoric'. Professor Karjiker refers to,

> '…the fundamental concern that fair use amounts to giving the courts – with all due respect to judges – the right to determine public policy in the realm of copyright law…there is no peer-reviewed research in South Africa indicating why fair use, as proposed by the Bill, would be consistent with South Africa's obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Given the clear language of the three-step test, and how different our legislative history and systems of litigation are from those of the United States, it is submitted that there has to be a proper legal basis for the introduction of fair use in South Africa. That simply has not been provided.'

This article is included in the collection by Professor Owen Dean, *A Gift of Multiplication*, which can be read here:

https://juta.co.za/uploads/The_Gift_of_Multiplication_Essays_Amendment_Bill/

Proposal C: Remove Section 12A and first put in place:
1. A proper socio-economic impact assessment

2. A sound policy foundation
3. A legal evaluation and basis for the exceptions and limitations in South Africa.
4. Exceptions and limitations based on the Three-step Test.

4.4 Over-broad exceptions

The Bill proposes new, overbroad exceptions for educational and other purposes in new Sections 12B, 12C, 12D and 19C – as part of the so-called 'hybrid model of copyright exceptions grounded in a fair use model'.

An immediate comment that can be made on these exceptions is that '(iv) scholarship, teaching and education' in the 'fair use' Section 12A gets virtually repeated in the 'fair dealing' Section 12D ("Reproduction for educational and academic activities"). This unnecessary repetition of exceptions highlights the legal intricacies courts of law will have to untangle when faced with two legal regimes.

The new copyright exceptions in 12B–12D and 19C are more expansive than in most countries in the world. As in other African countries, 60% of publishing in South Africa is educational publishing. Copyright exceptions that are too broad cut authors and publishers off from being remunerated for their work. Such exceptions for education will place a disproportionate burden of education and public funding on authors and businesses – disproportionate because authors and publishers will be left to carry the state's responsibility of ensuring access to textbooks by students.

Another indirect consequence of over-broad exceptions is that publishers who publish educational as well as other titles for leisure reading, or specialised titles, will not be able to cross-subsidise such titles. This will affect especially SMME publishers.

In the absence of any independent socio-economic impact and regulatory assessment by the legislator, PASA commissioned PriceWaterhouseCooper (PwC) to assess the anticipated impact of the Bill's 'fair use' provisions and the copyright exceptions for education and other institutions on the South African book publishing industry. The detrimental economic impact of these provisions is sketched in this economic impact assessment (at http://publishsa.co.za/file/1532283880bpcpwcreportoncopyrightamendmentbill-31july2017.pdf).

Amongst other things, the PwC report states (page ii):

> '[A] weighted 33% decrease in sales [is] expected. In many cases the response to these negative impacts would be significant restructuring, retrenchments and – in some cases – business closure. On a weighted basis, a 30% decline in employment is expected in the event that the Bill is promulgated. It is also likely that the volume of imported publications will increase and exports will decrease. South Africa would become more dependent on imported knowledge production.'

This impact assessment has to date not been taken into account by government decision-makers, but no comparative information has been released either.

Section 12D

Although we are also critical of 12B and 12C, it is especially 12D that causes serious concerns as it introduces new, broadened exceptions for educational and academic activities which will have negative effects on writing and publishing. We explain the causes of our concern by referring to some issues:

12D(1): The Bill allows 'a [i.e. any] person' to make copies, which is in conflict with the requirement in the Three-step Test that such copies be for 'certain special cases'.

12D(2): Incorporating copies in course packs, study packs, etc. undermines the long-standing practice of collective licensing agreements.

12D(3): It is false to assume that licencing whole books or journals would be authorised under any collective licencing scheme as it would compete with sales.

12D(3): Whether the title is available "…on reasonable terms and conditions…" may be decided on highly subjective grounds. This subsection could therefore lead to serious abuse and transgression of the Three-step Test.

12D(4): The exception to make copies is not a 'right', but exactly what it says: an exception to the right of the copyright holder.

12D(4): Any person (as explained in 12D(1) above) will have the 'right' to reproduce a whole textbook under the listed conditions.

12D(4)(c): Similarly to the concern re. 12D(3) above, subjective interpretations of e.g. 'reasonably' and 'normally charged' could lead to transgressions of the Three-step Test

12D(5): No definitions of 'a person' (12D(1)) and 'educational institutions' (12D(3)) are given. Their 'right' to reproduce copies could lead to any kind of service provider offering course packs at cost price, i.e. not 'for commercial purposes', thereby sidestepping the Three-step Test which requires "…that such reproduction does not conflict with a normal exploitation of the work…".

12D(6): Online repositories communicate and make copies available to the public. The exception in 12D(6) in fact allows the communication and making available of unauthorised copies to the public.

12D(7)(a): An author of a work, as stipulated here, may make the final version of a manuscript available to the public despite having granted a publisher exclusive rights. This will undermine the subscription business model and scientific publishing in South Africa.

12D(8)(a): The deviation from the current Act Section 12(4), by adding to '…the name of the author, if it appears on the work…", the wording, "…**shall as far as is practicable**…", might impact on authors' moral rights. [Emphasis in bold added.]

In view of these concerns, a strong case can be made for the retention of the exception for teaching in the current Copyright Act – after all, if it is not broken, do not fix it. This exception reads,

> 12(4) The copyright in a literary or musical work shall not be infringed by using such work, **to the extent justified by the purpose**, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use **shall be compatible with fair practice** and that **the source shall be mentioned, as well as the name of the author if it appears on the work**. [Emphasis in bold added.]

Proposal D: 12B–12D need to be redrafted using the Three-step test as a criterion and the current exceptions in 12(4) as template.

4.5 Issues regarding contracts

PASA highlights two issues regarding contracts.

Government to regulate publishing contracts

According to Clause 35(b)(cG) amending Section 39 of the Act, the Minister for the Department of Trade, Industry and Competition may prescribe compulsory and standard contractual terms for contracts – among other aspects, for the new statutory royalty entitlements by e.g. the insertion of Section 6A in the Act.

This intrusion into copyright owners' freedom to negotiate and contract represents unacceptable overregulation of free markets that would devalue intellectual property and result in an unwillingness among investors to invest in South African. In addition, this interference with contracting freedom would disregard the rights and interests of local creators by forcing them to accept the terms of a government ministry that may lack sufficient knowledge to proscribe key components of a contract. Setting up such a rigid and inflexible system will also be time-consuming – if ever accomplished.

As a result, authors may end up choosing to publish overseas.

The Academic and Non-Fiction Authors' Association of South Africa (ANFASA) and the Publishers' Association of South Africa (PASA) already have in place a charter, the "ANFASA PASA Agreement on Contract Terms" (APACT), of what should be covered by publishing contracts (see https://publishsa.co.za/anfasa-pasa-agreement-on-contract-terms-apact-2016/).

Unenforceable contractual terms

The Bill proposes (Clause 36 inserted as Section 39B) a blanket override of all contractual terms as it has effect across all acts which 'by virtue of this Act would not impinge copyright' and all rights and protections 'afforded by this Act'.

Section 39B challenges the long-standing principle in international law of copyright owners' exclusive rights to authorise the use of their works under the conditions they determine freely.

PASA points out again that – like in the rest of the Bill – these two sections have been included with no basis in an intellectual property policy, nor in a social and economic impact assessment.

Proposal E: These sections should be deleted in their entirety and APACT (see above) be acknowledged for the value it adds to the creative industry ecosystem.

4.6 Copyright assignment limited to 25 years

Assignment of copyright gets limited to 25 years (Clause 25(b) amending Section 22(3)).

This provision to be added to the current provisions relating to the formalities of assignments, simply states that every assignment of copyright in a literary or musical work shall only be valid for 25 years, and not potentially the current 50 years after the death of the author or first date of publication. This is irrespective of whether the publisher is marketing the work or not; even irrespective of whether the assignment is made by an author or a successor-in-title.

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 (see ANNEXURE 1).

Bluntly capping transfers of copyright at 25 years may to a lay person seem a long time, but publishers often invest in their authors, supporting their further development. This may take time – it is not uncommon for the first book of an author to start selling after only the 5th, 6th or 7th book title of the same author is available, which could easily be after 25 years. There is no fairness in allowing another publisher – or a global tech platform – free-riding on the first publisher's effort. Platforms would reap where they have never sown, cherry picking and leaving the rest stranded like a ship in the Namib.

Proposal F: Reject Clause 25(b) amending Section 22(3) and retain the current assignment formality in the Copyright Act.

4.7 Parallel imports

In Clause 30, which amends Section 28 in the current Act (1978), the Bill may be read to allow so-called parallel imports.

Parallel imports are understood as imports of 'genuine' copies of books legitimately produced and published editions for markets outside South Africa, for example, India or Malaysia where the said books are offered for sale at a price lower than the corresponding South African edition of the same work. Section 28 would appear to permit the importation of such books, undercutting the market for a South African publisher or distributor.

The amendment turns the current parallel importation rules – including copyright owners' remedy – on their head with no explanation and permits overseas imports, even re-imports of local goods that have been exported to compete with the locally-produced works.

The shortcoming of the amendment is that Section 23(2) of the current Act stipulates the standards by which copyright shall be infringed through importation. This Section is, however, retained in the Bill. The result is that new Clause 30 conflicts with Section 23(2) and should be rejected.

Section 28 is perhaps intended as a pro-consumer exception but the amendment will hit the local book trade hard. While South Africa is engaged in a battle to stimulate reading, harming our own

booksellers in this way is highly detrimental and ill-advised for the cultural and educational development of our nation.

It will also be damaging to South African creators who earn a living from their work.

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

Section 12B(6) also refers to the possibility of parallel importation and should be rejected.

What would be suitable is to retain the present scheme, where parallel imports are permitted if and only if the making of copies in any foreign jurisdiction would have been legal, had the copies been made in South Africa – in other words, where a South Africa copyright holder agrees to the making of copies fit for importation into South Africa. Where, however, the copyright is held in South Africa by a South African publisher and the foreign copyrights are held by a foreign publisher, the foreign publisher would not be able to consent to the importation without also seeking consent from the South African holder of the relevant rights of copyright (the right of reproduction, translation (where applicable), distribution, and communication to the public (in the case of ebooks)).

Proposal G: Clause 30, which amends Section 28 in the current Act (1978), should be rejected and the current scheme in the Act, as explained above, should be retained.

4.8 Technological Protection Measures (TPMs)

Section 28P(2) inserted into the Act still entails ultimately what is colloquially known as a 'licence to hack' by users and in combination with other sub-paragraphs in the Section creates a secondary market in circumvention devices and services for private persons believing to be acting within the scope of an exception.

This modus operandi is inconsistent with the Beijing Treaty Agreed Statement to Articles 13 and 15. To allow a private individual to hack without approaching a government entity first to seek authority, or mediation of a refusal by a rightsholder, is incompatible with an effective protection of TPMs as required under international norms.

Below follows a more detailed discussion of the shortcomings of the Bill in this regard.

The definitions of 'technological protection measure' and 'technological protection measure circumvention device' are insufficient to meet the requirements of Article 15 of WCT, Article 18 of WPPT and Article 15 of the Beijing Treaty, which all require 'adequate legal protection.' Especially to be noted is the agreed statement at Article 18 of the Beijing Treaty which links the application, non-application or lifting of 'technical protection measures' to a three-step test. Importantly, the agreed

statement[2] allows the rightsholders applying a 'technological protection measure' to accommodate the uses permitted by legislation without destroying the technical protection system overall.

The proposed text in para (b) of the definition of 'technological protection measure' indicates that all processes, etc. capable of controlling non-infringing uses are exempt from the concept, but this seems to cover most, if not all such processes, etc., as they might be used for various non-infringing uses, such as reproduction for private study or research, time-shifting, criticism or review or any other uses covered by limitations and exceptions, or all uses of works that have fallen into the public domain. Thus, in practice there is a risk that only very few, or none, of the circumvention devices defined below in reality would be covered by the protection of Section 27, as it is to be amended by the Bill.

The definition of 'technological protection measure circumvention device' focusses on whether a device is 'primarily' designed, produced or adapted for the purpose of circumvention. This will create loopholes for infringers, in that the definition is inadequate if the device is still deliberately designed with such a purpose as a feature.

The new subsection (5A) for the infringement provision, Section 27, does not completely fulfil the requirements of Article 11 of WCT, which requires 'adequate legal protection and effective legal remedies' against the circumvention of technological protection measures. The proposed text appears to allow, for example, sale and dissemination of circumvention devices, as long as the person doing that has only reason to believe that the circumvention is not for purposes of copyright infringement. The private access to a work, however, does not necessarily infringe copyright, and the provisions may therefore lead to widespread dissemination of such devices, which would then for all practical purposes undermine the legal protection. The fact that the act of accessing data without authorization is an offence under Section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), to which the proposed Section 28O(6) of the principal Act refers, apparently would not prevent a widespread dissemination of circumvention devices.

In this regard, Section 28O(6) and 28P(1) would seem to be an attempt to reduce the scope of the Electronic Communications and Transactions Act, without formally amending it. This action, we submit, would not only require additional inter-governmental cooperation of the responsible Government Department, but may well have constitutional implications.

[2] Agreed Statement to Beijing Treaty of 2012: 'Concerning Article 15 as it relates to Article 13: It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party's national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.'

The provisions in the exception clause, Section 28P(2), are problematic, in that it legitimises uses of measures by means of circumvention devices simply by notice to the copyright owner. This is compounded by the broad scope of the new copyright exceptions, especially the 'fair use' defence to copyright infringement. The United States undertakes a three-yearly rule-making process for exemptions and this may be a solution for the Bill. However, as it stands, Section 28P(2) undermines the protection afforded by technological protection measures and that may well, too, not be sufficient for the amended copyright legislation to comply with Article 11 of WCT.

New Section 39(*c*H) contemplates "prescribing permitted acts for circumvention of technological protection measures". However, there are a number of errors, since this section cross-refers to Section 28B, where it should be 28P, and Section 28P has no reference to permitted acts 'as prescribed.'

Proposal H: Reject the current provisions regarding TPMs and exceptions in Section 28P as they do not comply with international treaties. Replace with treaties-compliant text.

4.9 No proper Socio-Economic Impact Assessment Study (SEIAS)

A proper Socio-Economic Impact Assessment Study (SEIAS) was not conducted before the Bill was approved. Although such a study is not a legislative prescript, the potentially far-reaching social, cultural and trade impacts of the CAB does require a sound basis for legislative decisions.

The lack of a proper SEIAS report was confirmed in a study, 'COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 – Research demonstrating the absence of proper impact assessment for the Copyright Amendment Bill' (May 2022). (See https://publishsa.co.za/https-publishsa-co-za-wp-content-uploads-2022-06-anfasa_dalro_pasa-research-report-may2022-pdf/)

See ANNEXURE 1.

The Government seems to rely on the theory that an insufficient SEIAS hardly invalidates Bills passed by Parliament. However, when a Bill fundamentally threatens the healthy balance of power between stakeholders, users, creators, producers, and publishers and stands to benefit mainly one set of new actors, the electronic platforms, then PASA submits that a proper and sufficient SEIAS up to Governments' most recent standards is an essential requirement as a matter of law, as much as good governance and common sense.

Proposal I: Institute a proper Socio-Economic Impact Assessment Study as a basis, along with an appropriate Intellectual Property Policy and legal foundation, for a redrafting of the Bill.

4.10 Implications for the South African universities' research economy

The recent article by prof. Keyan Tomaselli, "The 2022 Copyright Amendment Bill: Implications for the South African universities' research economy" published in *Communicare: Journal for Communication Studies in Africa*. Vol 41, No 2 (2022), suggests that South African universities have yet to systematically engage the implications of the Copyright Amendment Bill with regard to their own resource allocation and Intellectual Property policies, and also to undertake urgent planning to

address the likely effects of the legislation on the national research economy. (Available at https://journals.uj.ac.za/index.php/jcsa/article/view/1479)

The article concludes with the stern warning that: a) a significant portion of the state publishing incentive that currently finances research activities would be in the parallel context of open access rerouted to meet publication charges, were the Bill to be enacted in its current form; and b) the effects might witness: i) a swing away from the publication of homegrown textbooks in favour of copyright-protected expensive imports; with clear implications for the ii) de-colonisation of content; iii) a reluctance of international firms to collaborate with South African publishers; and iv) a significant contraction of the South African publishing industry. And c) while the Creative Industries Masterplan piloted by the Department of Small Business Development (DSBD) aims to protect intellectual property rights, the Bill will undermine such rights.

Proposal J: Work with university bodies to engage the implications of the Copyright Amendment Bill with regard to their own resource allocation and Intellectual Property policies, and also to undertake urgent planning to address the likely effects of the legislation on the national research economy.

5. Five key questions on the Copyright Amendment Bill

In conclusion, Professor Sadulla Karjiker's five key questions[3] need to be answered by legislators when contemplating a way forward:

1. "Should the Bill become law, is it more, or less, likely that there will be more publications published by South Africans in South Africa than at present, particularly educational books and academic journals?

2. "Will the continued economic viability of authors and publishers in South Africa, especially those specialising in educational and academic publications, be enhanced?

3. "In relation to both the aforementioned questions, how will they be financed?

4. "...why has the rhetoric [by proponents of the Bill] not convinced more jurisdictions elsewhere, like Germany, to adopt similar amendments?

5. "... the Bill will relegate South African creatives, authors and publishers (the majority of whom are Black) to being second-class citizens in the global copyright community. The message is clear: South African (and, by implication, probably African) authors and copyright owners are not entitled to the same legal protection in respect of their creations as their counterparts in Europe and the US. Why are they granted lesser protection?"

[3] Sadulla Karjiker. December 2022. 'A joinder to Keyan Tomaselli's 'The 2022 Copyright Amendment Bill: Implications for the South African universities' research economy'. *Communicare: Journal for Communication Studies in Africa*. Vol 41, No 2. Pages 4-6. Accessed online on 16 January 2023. DOI10.36615/jcsa.v41i2.2241 / SSN0259-0069

6. A way forward

The Publishers' Association of South Africa supports those changes to the outdated Copyright Act and the Performers' Protection Act that will "offer appropriate solutions to information dissemination in an African context and seek the most effective ways of protecting the rights of authors and publishers in the digital environment while still ensuring access by readers" (PASA Position Paper on Copyright, April 2015).

The two Amendment Bills potentially hold significant advantages to performers and many creators, as well as print-impaired persons. PASA welcomes such benefits. However, a prolonged further history of deliberations will hardly benefit anyone, least of all those musicians who initiated the whole process almost 15 years ago.

Proposal K: Although the above proposals address specific aspects of the Bill, a more meaningful, thorough and preferable approach would be an holistic and fundamental revision of the Bill, using the following steps:

**** Reject the Copyright Amendment Bill and eventually have it lapse.***

**** Conduct a proper socio-economic impact assessment***

**** Acquire independent legal opinion from experts in copyright law and constitutional law***

**** Study appropriate examples of laws and model laws, e.g. the 'The African Regional Intellectual Property Organization (Aripo) Model Law on Copyright and Related Rights' (see https://www.aripo.org/wp-content/uploads/2019/10/ARIPO-Model-Law-on-Copyright-and-Related-Rights.pdf)***

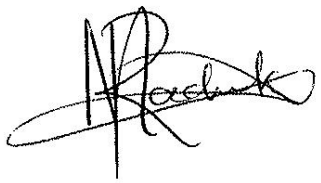
**** Accompany these steps with an urgent, well-planned, staged implementation of regulations to the principal Act to deal with pressing needs.***

**** Enable through dialogue an understanding within the creative sector how past injustices may be cured through a negotiation frame-work that incentivises producers and publishers to redress past injustices whilst allowing future authors and performers to prosper and avoid pitfalls suffered by their forebears***

**** Request further input from the House of Traditional Leaders on how so-called 'hybrid fair-use' would impact indigenous and traditional knowledge practitioners and holders of rights. As far as PASA is aware, the traditional knowledge and indigenous knowledge community is only insufficiently cognisant of the erosion of their rights, thinking this affects only 'mother and child, not the grandmother.' This is not so: the rights of indigenous and traditional knowledge holders would be eroded by the same over-broad provisions as the rights of authors and performers.***

Thank you for your attention and best wishes for your work on these Bills.

Yours sincerely



PASA Executive Director

Mr Mpuka Radinku

ANNEXURE 1

Fully Understanding the Copyright Amendment Bill (CAB): Sources and origins

According to Section 76 in the South African Constitution ('Ordinary Bills affecting provinces'), Bills submitted to the National Council of Provinces by the National Assembly need to be considered in their totality – that is, afresh, as if they were new Bills. This procedure implies that the sources and origins of the Bills also need to be taken into account. These sources and origins contribute to the standards against which the Bills need to be assessed.

1. The South African Bill of Rights

Chapter 2 of the South African Constitution (the 'Bill of Rights') is 'a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' (Section 7(1)). The section continues: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights', and 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

Several sections relate directly to issues of copyright: Sections 9 (Equality), 10 (Human dignity), 16 (Freedom of expression), 22 (Freedom of trade, occupation and profession), 25 (Property), 29 (Education), 32 (Access to information).

Legislators need to account for and balance these rights.

2. The global system of intellectual property rights

Intellectual property is also called 'the products of the mind': works created through the mental efforts of authors and other creators.

Copyright is a branch of intellectual property. Other branches are patents, trademarks and designs.

Just as persons have rights over their physical property, so they have rights over their intellectual property, even if the works are immaterial and intangible. The current Copyright Act (1978) protects for example literary, artistic and musical works, radio and television broadcasts, cinematograph films and sound recordings.

Copyright is the right of a creator to defend and protect what belongs to them from unauthorised uses. This right therefore is a class of property protected under Section 25 of the Bill of Rights, the so-called 'property clause'.

Publishers acquire from the author, at the least, the right to produce and publish the work. The author can either **assign** copyright to the publisher, or grant an exclusive **licence**.

If the author assigns copyright the publisher has full control, and may exploit the work in their discretion. The author, however, still owns moral rights: rights of paternity (the right to be identified as author) and integrity (the right to object to any derogatory treatment of the work which might damage the author's reputation).

If the author grants the publishers an exclusive licence, they also grant subsidiary rights which enable the publishers to exploit the work in several ways in addition to publishing it. The subsidiary rights include the rights, for instance, to authorise reproduction under certain conditions, to permit a magazine or newspaper to publish an extract, to digitise the work, to sub-license another company or organisation to make a film of the work, or to translate the work into another language and sell it in another country.

The published work becomes the subject of copyright for the publisher. In every book there are two copyrights: copyright in the literary work embodied in its pages (which usually belongs to the author), and copyright in the published edition, the typographical arrangement on the page (which belongs to the publisher). There may also be a number of other copyrights – in illustrations, for instance, which would belong to the illustrator or photographer.

This global legal system has developed over centuries. Today it is reflected in common understandings of the underlying principles of copyright – often philosophical and ideological – and in several international treaties. The application in particular contexts of these understandings and of the legal system needs to be based on the general, globally agreed principles of intellectual property rights.

3. Benefits of copyright

Copyright enables authors to control the commercial uses of their original works and to derive an income from them. Copyright can also incentivise authors to create more and better works.

However, we should weigh up an author's private right against the public good. Copyright should, in the public interest in some circumstances, not inhibit the general availability of works.

Copyright legislators have the duty to place limitations on the exclusive rights of authors in certain defined circumstances which serve the public interest.

4. The Copyright Act (1978)

It is common cause that South Africa's Copyright Act is outdated. It needs to be brought into the digital world.

However, because of the general nature of intellectual property principles, and the international agreements South Africa has been part of, some ideas informing the Act will be reflected in the new Copyright Amendment Bill.

Inappropriately claimed sources and origins of the Copyright Amendment Bill (the CAB)

1. The Copyright Review Commission (CRC, 2011)

The Commission's thorough investigations led to two main sets of recommendations intended to relieve the plight of creators in the music industry: 'Defects in legal provisions relating to copyright and the performers right to needletime' (page 101) and 'Other recommendations as to how the

position of musicians can be improved.' (page 104). See: https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf.

The drafters of the Copyright Amendment Bill (mis-)applied the concepts in the CRC report to other copyright owners as well. The result is that the current CAB contains a number of inappropriate sections (see below). The 'Memorandum on the Objects of the Copyright Amendment Bill'[4] states this explicitly: 'Various sectors within the South African Copyright regime are dissatisfied. Ranking highest are local performers and composers, who have not benefitted due to the lack of access to the Copyright system. (CRC report 2011). Thus, the Bill aims to make copyright consistent with the digital era…' (Underlining added.)

2. Draft National Policy on Intellectual Property

A 'Draft National Policy on Intellectual Property' was published for comment on 4 September 2013 (Government Notice 918 of 2013). (See: https://www.gov.za/sites/default/files/gcis_document/201409/36816gen918.pdf)

This Draft never proceeded to a final policy and was replaced by the 'Intellectual Property Policy of the Republic of South Africa Phase 1' in 2018. (See: https://www.gov.za/sites/default/files/gcis_document/201708/41064gen636.pdf)

The latter addresses copyright in only two limited respects. It states: 'Based primarily on institutional capacity within government, as well as public interest considerations, two main themes are addressed substantively in the immediate term. These are the intersection between IP and public health, which covers, among others, medicines, vaccines and diagnostics, as well as South Africa's approach to international IP cooperation.' (page 10)

Similar to the error regarding the above-mentioned reference to the CRC report, the 'Memorandum on the Objects of the Copyright Amendment Bill' (published with the CAB) incorrectly claims: '1.2. The Bill is consistent with the Draft National Policy as commented on…'

The Copyright Amendment Bill therefore lacks a grounding in an intellectual property policy.

3. No report on a proper Socio-Economic Impact Assessment Study

A proper Socio-Economic Impact Assessment Study (SEIAS) was not conducted before the Bill was approved. Although such a study is not a legislative prescript, the potentially far-reaching social, cultural and trade impacts of the CAB do require a sound basis for legislative decisions.

There simply is no such basis, except the study by PricewaterhouseCoopers commissioned by PASA, 'The expected impact of the "fair use" provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry'. (See http://www.publishsa.co.za/file/1501662149slppwcreportonthecopyrightbill2017.pdf).

[4] Published with a Bill to provide background on proposed new legislation, reasons for proposed changes to existing legislation and further explanations or examples where necessary

The lack of a proper SEIAS report was confirmed in a study, 'COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 – Research demonstrating the absence of proper impact assessment for the Copyright Amendment Bill' (May 2022). (See https://publishsa.co.za/https-publishsa-co-za-wp-content-uploads-2022-06-anfasa_dalro_pasa-research-report-may2022-pdf/)

This study, commissioned by the Academic and Non-Fiction Authors' Association of South Africa (ANFASA), the Publishers' Association of South Africa (PASA) and the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd DALRO concludes: 'No research was done on the impact of the provisions of the Bill in compiling the 30 May 2017 Document, including about the "fair use" clause, the copyright exceptions and the 25-year limit on assignments of copyright.' (page 9)

4. A shift from the intentions in the 'Memorandum of Objects' of benefitting authors

The 'Memorandum on the Objects of the Copyright Amendment Bill' (published with the CAB) intended:

'2.1. The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. It is also envisaged that the proposed legislation will reward and incentivise authors of knowledge and art…The Bill also aims to enhance access to and use of copyright works, to promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creative industry.

'2.7. Scope is left for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty. Limited circumstances have been provided for in this regard.' (Underlining added for emphasis)

Instead, the focus of the CAB 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. In fact, the Bill takes rights and opportunities for earning remuneration away from authors, specifically authors of published works.

ANNEXURE 2

Background to the Copyright Amendment Bill (CAB) being sent to the NCOP

The Copyright Amendment Bill (CAB) has had a decade-and-longer passage through Parliament up to this point where it now serves before the National Council of Provinces and provincial legislatures.

Assessing this long history, reveals a possible intention on the part of the drivers of the Bill in the Portfolio Committee to preserve the copyright exceptions as well as the exceptions to the provisions for technological protection measures, while making concessions on all the other provisions.

The first draft, Copyright Amendment Bill, B13 of 2017, was adopted by Parliament in March 2019 and sent to the President. It was referred back to the National Assembly by the President in June 2020 for his concerns about the absence of sufficient consultation on the copyright exceptions 'fair use' clause, the constitutionality of certain of its provisions and their compliance with international treaties relating to copyright.

The Portfolio Committee for Trade, Industry and Competition (DTIC) made proposals – ostensibly to address the President's concerns – in December 2021 for changes to the CAB. Most of the substantive changes proposed in the 2021 DTIC Proposals in relation to the copyright exceptions and the technological protection measures were retracted by the very Portfolio Committee, notably those relating to the Bill's many copyright exceptions and the provisions for the protection of technological protection measures.

As a result, many of the provisions in the D-Bill ended up being substantially the same as the corresponding provisions in the B-Bill.

This version, the 'D-Bill', was approved (with minority views) by the Portfolio Committee on 8 June 2022 and by the National Assembly on 1 September 2022.

Inasmuch as the President's referral-back may have required legal opinion on constitutionality and treaty-compliance, the Portfolio Committee and the DTIC did not obtain independent legal opinion from experts in copyright law or constitutional law. Views on these points only came from stakeholder submissions.

Commissioned research[5] traces the changes made to the Copyright Amendment Bill, B13 of 2017, adopted by Parliament in March 2019 (the "B-Bill"), from when it was referred back to the National

[5] Academic and Non-Fiction Authors' Association of South Africa (ANFASA), Publishers Association of South Africa (PASA) & Dramatic Artistic and Literary Rights Organisation (Pty) Ltd (DALRO). June 2022. 'COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 – Comparisons of • the text of the B-Bill adopted by Parliament in May 2019 and referred back to the National Assembly by the President in June 2020 • proposals by the Portfolio Committee for Trade Industry & Competition in December 2021 for the public participation process ending January 2022 • the text of the D-Bill approved by the Portfolio Committee in June 2022 for adoption by the National Assembly'. Available at: https://publishsa.co.za/wp-content/uploads/2022/07/ANFASA_DALRO_PASA-research-report-June2022.pdf.

Assembly by the President to the D-Bill that was approved by the Portfolio Committee on 8 June 2022.

This analysis shows, notwithstanding the President's referral-back for concerns about the constitutionality and treaty compliance of, amongst others, its copyright exceptions, the 2022 D-Bill preserves the copyright exceptions and, to a lesser extent, the provisions for technological protection measures of the 2019 B-Bill, while accepting most changes in the 2021 Proposals for **all** the other provisions.

In addition, the Portfolio Committee did not deal with controversial provisions of the Bill that can be viewed as errors and in respect of which changes were recommended by the Minister of Trade, Industry and Competition and stakeholders.

The findings of this research confirm the perception that the B-Bill's provisions relating to copyright exceptions and, to a slightly lesser extent, those relating to technological protection measures, **remain substantially the same** in the D-Bill, although the D-Bill does make substantial changes in respect of other provisions.

These findings are significant, since the President's concerns specifically raised the absence of sufficient consultation on the copyright exceptions 'fair use' clause, the constitutionality of the copyright exceptions, and the Bill's compliance with international treaties, of which the legal protection of technological protection measures for copyright works is a key feature.

A possible conclusion is that there is an intention on the part of the drivers of the Bill in the Portfolio Committee to preserve the copyright exceptions as well as the exceptions to the provisions for technological protection measures, while making concessions on all the other provisions.

ANNEXURE 3 The Cultural and Creative Industries Masterplan

A significant development in the course of the work by Parliament on the Bill, was the adoption by Cabinet in August 2022 of the 'Creative Industries Masterplan (2022)'[6].

The 'Masterplan' was simultaneously devised by the Department of Small Business Development (DSBD) and the Department of Sport, Arts and Culture in close and sustained consultation with representatives of the creative industries, including PASA, DALRO and ANFASA.

The Masterplan was accepted by Cabinet in August 2022. A statement on the virtual Cabinet Meeting of Wednesday, 17 August 2022 reads,

A. Cabinet Decisions

1. Cultural and Creative Industries Masterplan

1.1. Cabinet approved the Cultural and Creative Industries Masterplan for implementation. The masterplan focuses on visual arts; crafts and design; audio-visual and interactive media; design and creative services; performance and celebration, including music, publishing and printed media.

1.2. The masterplan will intervene in these sectors towards building a transformed creative innovative sector that will be globally recognised and competitive in the space. It will work towards the South African creative industry being able to access the local and international markets.

Significantly, in addressing copyright issues, the Plan states that, 'The creative economy is increasingly producing "dematerialised" (digital) goods and services. Ensuring IP protection (through the Copyright Amendment Bill under discussion) to enable monetisation in the digital environment is an absolutely fundamental part of enabling the sector to grow and develop.'

'Annexure 3. Publishing Key Action Plan', dated September 2021, refers specifically to publishing:

> **2. Constraints to growth**
> …constraints include the following:
> • Legislative framework that impedes business growth.
> - Protection of intellectual property and copyright not adequate in the new Copyright Amendment Bill… [Emphasis added]
>
> **Key Action Programme 2: Intellectual Property rights management, protection and development**
> **2.1 Objective**
> Ensure that we have a strong, regulated, fair and transformed publishing industry that enables investment, monetisation of intellectual property (IP), protection of IP for authors and publishers as well as trade and economic growth in an equitable and socially responsible manner. Ensure that South African intellectual products are valued locally and can be

[6] Department of Sport, Arts & Culture. May 2022. 'Creating and Designing for Growth. South Africa's Creative Industry Masterplan to 2040. A Report of the South African Creative Industry Masterplan Project.'

developed for international distribution with adequate protection to ensure a revenue stream for authors and publishers in South Africa.

2.2 Nature of Intervention

- Amendments to the Copyright Act need to be supportive to the protection of intellectual property rights for authors and publishers to ensure they can earn a fair income from the products that they develop.
- South Africa needs to adhere to international IP treaties to ensure global intellectual property cooperation.
- Training for authors and SMME and emerging publishers on intellectual property management and protection, contracts that are fair to authors and publishers.
- Develop an agency to actively find, close down and prosecute networks that pirate or copy books illegally for distribution physically or digitally in South Africa and to support publishers and authors whose work is illegally copied or distributed internationally.
- Support needs to be provided to DALRO (Dramatic and Literary Rights Organisation) which manages the licences to reproduce material on behalf of rightsholders.

The Cabinet statement notably reiterates the view that the Copyright Amendment Bill has the flaw at its heart whereby ‘Protection of intellectual property and copyright [is] not adequate in the new Copyright Amendment Bill…’

ANNEXURE 4

Comparison between the 'fair use' provision in the new Section 12A of the Copyright Amendment Bill and Clause 13 and Section 107 of the US Copyright Act	
Clause 13 of the Bill	Section 107 of the US Copyright Act
12A. (a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work: (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; (ii) criticism or review of that work or of another work; (iii)reporting current events; (iv)scholarship, teaching and education; (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche; (vi)preservation of and access to the collections of libraries, archives and museums; and (vii) ensuring proper performance of public administration. (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to— (i) the nature of the work in question; (ii) the amount and substantiality of the	107A. Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

part of the work affected by the act in relation to the whole of the work; (iii)the purpose and character of the use, including whether—(aa) such use serves a purpose different from that of the work affected; and (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and (iv)the substitution effect of the act upon the potential market for the work in question. (c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned, if it appears on the work.	(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors

Legend: Yellow highlight / Single underlining are textual additions in the SA bill that are substantially widening the scope and also widen the meaning of "such as", present in the chapeau of both the SA and US provision. Green highlights / Double underlining in the US section are textual nuances or text entirely omitted from the SA bill with a material effect on the direction of enquiry or parameters by which any use is to be judged 'fair use', or not.

ANNEXURE 5

BEFORE THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Washington, D.C. 20006

In the Matter of South Africa Country Practice Review

Generalized System of Preferences (GSP)

Request for Public Comment

Docket No. 2019-0020

https://cip2.gmu.edu/wp-content/uploads/sites/31/2020/01/Comments-on-Behalf-of-IP-Law-Scholars-South-Africa.pdf

COMMENTS ON BEHALF OF INTELLECTUAL PROPERTY LAW SCHOLARS

The undersigned intellectual property law scholars respectfully submit these comments in response to the U.S. Trade Representative (USTR) Generalized System of Preferences (GSP) request for public comment in the matter of "South Africa Country Practice Review." We write to express our concerns that proposed amendments to the Government of South Africa's copyright laws do not provide adequate and effective protection for U.S. copyrighted works and, if enacted, would further weaken the intellectual property rights of creators and copyright owners. In addition to harming U.S. industries and legitimate global markets, the proposed revisions to an already problematic legal regime will deter direct foreign investment in South Africa, stifle the growth of local creative sectors, and result in noncompliance with international agreements. For these reasons, we believe that South Africa is not meeting the GSP criterion required of a GSP beneficiary country, and that if requisite improvements are not made by South Africa to remedy the deficiencies outlined below, GSP benefits should be suspended or withdrawn.

1. The Transplant of Intellectual Property Laws to Foreign Jurisdictions Must be Carefully Considered

… But while the import of recognized IP standards to developing countries often includes an array of benefits to diverse stakeholders, policymakers must first carefully consider the effectiveness of transplants upon existing legal frameworks and local conditions. The intellectual property laws of major IP-exporting countries are complex and interrelated standards that have been developed over time to serve the particular needs of the jurisdictions…

…simply transplanting "principles" in statutory language without the case law context can lead to unintended consequences.

…implementing standards that result from years of distinctive legal developments carries risks, especially when transplanted to countries with unique legal and cultural backgrounds. Scholars recognize that, in instances where standards are transplanted hastily and without appropriate

consideration, they can be ineffective, insensitive to local traditions, and ultimately stifle development.

….policymakers must identify the objectives of importing specific foreign standards, involve all stakeholders in discussions and negotiations, and consider whether adaptation or adjustment of the standards are necessary to serve the local community, market, and economy.

Unfortunately, legislation recently approved by South Africa's Parliament includes provisions that would transplant foreign copyright standards into the country without a thorough review of the potentially harmful effects to creators, copyright owners, and creative industries both locally and globally. In addition to a number of revisions to existing copyright law that would devalue intellectual property and disrupt legitimate markets for creative works, the proposals include the import of U.S.-style fair use standards that would complicate a system of limitations and exceptions that is already at risk of violating international agreements. In order to avoid the formation of an unpredictable and inequitable copyright regime that would harm U.S. industries and local creative sectors, the copyright provisions must be redrafted with careful consideration of their practicality, legality, and compliance with international treaties.

2. Combining U.S.-Style Fair Use with Expansive Fair Dealing Provisions Creates a Complicated and Unpredictable System that Does Not Adequately and Effectively Protect Intellectual Property

… If the provisions become law, the result would be an impractical mashup of fair use and fair dealing standards that would deter foreign investment and ultimately harm local creators and creative industries.

…The proposed amendments to this already questionable rubric involve codifying the U.S.-style four-factor fair use test on top of the fair dealing provisions. Additionally, proposed revisions to the existing 12(1)(a) language would add a broad exception for 'education'. This significantly vague expansion to the list of permissible uses, combined with the requirement of an unfamiliar four-factor fair use analysis, would create an unprecedented mashup of laws that would serious[ly] complicate determinations of fair use/dealing.6 The uncertainty with which this irregular mixture would be applied by courts would not only result in hesitancy on the part of foreign copyright owners to enter South African markets, but would also ultimately lead to confusion among local creators, copyright owners, and users.

…The confusion and hesitancy stemming from the mashup of laws and the expansive new exceptions cannot support a robust market or local creative economy, and a redrafting of the proposed amendments is necessary to ensure that South African creative ecosystems flourish and U.S. interests are preserved.

3. South Africa's Proposed Fair Dealing Provisions are Part of Greater Problematic Copyright Amendments that do not Adequately and Effectively Protect Intellectual Property

… the current drafts of the two bills undermine the rights of creators and copyright owners by creating an ambiguous and inequitable framework. In addition to the fair dealing/use proposals, the bills feature provisions that would result in overregulation of free markets, misguided compulsory licensing mechanisms, inadequate penalties for infringement, and flawed exceptions to prohibitions against the circumvention of technical protection measures. If enacted, the laws would not only fail to provide adequate and effective intellectual property protection, but they would also violate international treaties and best practices.

… This type of intrusion into copyright owners' and creators' freedom to negotiate and contract represents serious overregulation of free markets that would devalue intellectual property and ultimately result in an unwillingness among investors to enter South African markets. In addition to deterring foreign direct investment, this severe interference with concerned parties' contractual freedom would disregard the rights and interests of local creators …

… The current proposals also do not provide appropriate remedies in cases of infringement. With online streaming piracy a persistent and growing threat to creative industries worldwide, it's imperative that sufficient remedies be in place to both allow copyright owners to recover lost costs and to deter future infringement. As criminal fines are not awarded to copyright owners, civil remedies are the only opportunity for copyright owners to recoup the massive losses associated with the billions of instances of online infringement occurring every year. Yet no additional civil remedies are provided in the proposed amendments, leaving copyright owners without an effective mechanism for combating infringement and recovering costs.

Another problematic amendment pertains to technical protection measures (TPMs), which are essential digital tools that allow copyright owners to control creative works and protect them from infringement. Under South Africa's current PPAB amendment, exceptions to prohibitionism against the circumvention of technical protection measures include broad definitions that do not provide adequate legal protections against the circumvention of TPMs. While it's understood that some exemptions to the circumvention of TPMs will allow persons engaged in specific noninfringing uses of certain classes of creative works to override access controls, it is critical that these provisions be drafted with detail and clarity to ensure that TPMs are permitted to be bypassed only in limited circumstances that do not interfere with TPMs facilitation of legitimate licensing and markets for creative works. The inadequately defined provisions of the current TPM section of the PPAB would create exceptions that are substantially susceptible to abuse by those providing circumvention technologies for unlawful purposes.

Considered together, the current drafts of the PPAB and CAB raise serious questions about government overregulation, legal certainty, practicality, and treaty compliance. Without careful reconsideration—including input from all stakeholders—and redrafting, the amendments to South Africa's copyright system would disrupt proven business models and fail to provide adequate and

effective protection of the rights of copyright owners and creators in the United States and South Africa.

4. South Africa's Creative Community Opposes Further Devaluation of Intellectual Property Rights
5. The Proposed Amendments Are a Threat to U.S. Industries and the Global Creative Ecosystem
6. Conclusion

… The mashup of legal standards that would result from mixing U.S.-style fair use with overbroad fair dealing exceptions, along with numerous other vague and inequitable amendments, would lead to an impractical and unpredictable copyright system that would harm U.S. industries, global ecosystems, and local South African creative sectors.

Respectfully submitted,

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