

**SOUTH AFRICAN DEMOCRATIC TEACHERS' UNION (SADTU)
WESTERN CAPE PROVINCE**



**"Restore the Character of SADTU as a Union of Revolutionary Professionals,
Agents of Change and Champions of People's Education for People's Power
in Pursuit of Socialism"**

20 January 2023

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SADTU Western Cape



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To: Ms. Zaheedah. Adams, Procedural Officer, WC Legislature

Email: zadams@wcpp.gov.za

Dear Ms. Zaheedah Adams,

**Re: SADTU SUBMISSION ON COPYRIGHT AMENDMENT BILL
[B13D-2017]**

We, the Western Cape Office of the South African Democratic Teachers Union (SADTU) wish to commend the National Assembly for passing the Copyright Amendment Bill (B13D-2017) on 1 September 2022, and for referring it for concurrence to the National Council of Provinces, and the nine Provincial Legislatures during 2023. Thank you for the opportunity to make this submission to the Western Cape Legislature and to make an oral presentation.

The South African Democratic Teachers Union (SADTU) is the largest trade union for teachers in South Africa, with a membership of approximately 264 000 teachers in all nine provinces. It is an affiliate of the Congress of South African Trade Unions (COSATU). SADTU is also affiliated to Education International, a Global Union Federation that represents organisations of teachers and other education

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employees. Educational International (EI) is the world's largest, most representative global, sectoral organisation of unions with more than 32.5 million trade union members in 384 organisations in 178 countries and territories.

Although SADTU was only established in October 1990, we are cognizant of the fact that the current Copyright Act No. 98 of 1978 (as amended) has been a serious barrier to access to information and education in South Africa for decades. The law is outdated and an apartheid-era piece of legislation, which is surprisingly and unjustly still on the statute books, despite our democracy approaching its 29th anniversary in April 2023. It goes against the spirit of our Constitution, 'correcting the wrongs of the past', our liberation struggle, and the ongoing struggles in the educational sector for quality education, equality, and dignity.

SADTU seeks to be a positive and proactive force that contributes towards broad access to knowledge and the creation of an education system that can eliminate the main features of the apartheid education system and improve the lives of South Africans. However, this is extremely difficult to do when outdated and restrictive copyright laws create obstacles daily for teachers and learners, and prevent schools, media- and public librarians from exercising their statutory rights to provide access, resources and services to complement and supplement the teaching programmes in schools, and for the benefit and development of education, especially in the digital environment. Subjects such as robotics, artificial intelligence, digital games, new languages, etc. are already being introduced in many of our schools, yet the copyright law remains a barrier. For these programmes to be successful and rolled out to all schools, it is imperative that the Copyright Amendment Bill be passed without further delay.

CURRENT COPYRIGHT LAW

The current Copyright Act is deeply rooted in the print environment and pre-WWW era, so it fails to address the digital needs of the 21st century and the Third Industrial Revolution, never mind the Fourth Industrial Revolution. It fails to address the daily needs of our teachers, learners and librarians, as well as poor and rural communities who have far more burdens than suburban or city schools. It also restricts access to adequate resources for teachers who are doing postgraduate research or writing textbooks. It also prohibits the conversion of teaching and learning materials into accessible formats for teachers or learners who are blind or visually impaired, thus putting them at a serious disadvantage to those who are sighted. This

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perpetuates discrimination and lack of dignity in our educational system, contrary to the spirit of our Bill of Rights and our mission as a teachers' union.

The body of the current Copyright Act has very limited provisions for education under 'fair dealing' in Section 12(1) but has no other exceptions for education, research, or for libraries. There are, however, a few exceptions in the Regulations (Section 13), for education, libraries and archives, but they are outdated, and print-based only.

There are serious omissions in the current Act, which makes one question its constitutionality.

- There are no exceptions for orphan works (where rightsholders are either defunct, untraceable, or have abandoned their copyright). This makes access to, use or reuse of such works impossible, many of which are historical and part of our documentary record and cultural heritage.
- There are no provisions or exceptions for museums and galleries, despite them being important custodians of our cultural heritage.
- There are no exceptions for people with disabilities. This is serious discrimination too. The making of accessible formats for blind, visually impaired persons and those who are dyslexic or unable to hold or turn pages of reading material, etc., is prohibited and can only be done once permission has been obtained from rightsholders and copyright fees have been paid. This is not a quick process. Once permission is obtained, arrangements must be made to convert the material into accessible formats, depending on the disability of the children concerned. The cost of conversion of books to braille, for instance, is exorbitant and takes many months to do. Editing and reformatting is also necessary when converting material to alternative formats. This also causes delays.

The above challenges put teachers and schoolchildren with disabilities at a definite disadvantage. Teachers must first access the material, then arrange for it to be converted into an accessible format, whilst sighted children can read the material much sooner. This is prejudicial towards disabled schoolchildren, as they only receive their study/learning materials weeks or even months later. This is very unfair as it puts schoolchildren at risk of missing assignments or writing tests without having access to the relevant learning resources. This results in substandard marks for projects and examinations. These prejudiced children struggle to catch up with other classmates and become demotivated or even fail their year of study. All because of obstacles caused by the outdated copyright law.

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UNCONSTITUTIONALITY OF CURRENT LAW

Not having any exceptions for people with disabilities means our current Copyright Act is in contravention of our Bill of Rights and international Conventions on Human Rights and Disabilities. On 24 September 2022, the Constitutional Court confirmed a ruling made by Judge Mbongwe on 21 September 2021 in the Gauteng High Court in the matter between Blind SA (assisted by SECTION 27) vs. Parliament, the President, and the DTI and DIRCO, that the Copyright Act of 1978 is indeed unconstitutional for limiting access to reading materials in accessible formats for persons who are blind or visually impaired. The Court provided an immediate remedy for the making of accessible formats, giving Parliament 24 months within which to rectify the “unconstitutional” defects in the Copyright Act. See Judgement at: https://section27.org.za/wp-content/uploads/2022/09/Judgment-CCT-320-21-Blind-SA_final.pdf. This is indeed a victory for people with disabilities. However, they also need fair use and exceptions for education and academic activities, libraries and other information entities, etc., for personal, work, civic, leisure or other purposes, which the Bill provides.

DEPRIVATION OF HUMAN RIGHTS NEEDS TO BE RECTIFIED

As you know well, the cruel apartheid system of Bantu Education deprived our people of access to information and appropriate teaching materials, an acceptable standard of literacy and education, or any at all. In addition, the apartheid copyright law exacerbated the situation then, and continues to restrict or prohibit access to information and teaching and learning materials today. The stark reality of these atrocities should be a glaring reminder to Parliament, the Western Cape Legislature and other Provincial Legislatures, and the President, that access to information and education is enshrined in our Constitution, and that the amendment of discriminatory legislation such as the Copyright Act is long overdue, and that the passing of the Copyright Amendment Bill is extremely urgent.

They also need to give serious attention to the protection of our people’s human rights and less attention to the avaricious intentions of multinationals, many of whom already benefit from similar exceptions in their own copyright laws but prefer that the status quo remains in South Africa. Unfortunately, the Bill has been highly contentious from the start, but during its passage through Parliament is has become a battleground - human rights and access to knowledge vs multinationals and protection of their profits. Their agendas cannot be allowed to derail a progressive Bill that is aligned with our Bill of Rights and will improve the lives of millions of South Africans.

COPYRIGHT AMENDMENT BILL (B13D-2017)

The Copyright Amendment Bill is aligned to our Bill of Rights and is the key to turning our backs on the past, ridding the statutes of apartheid copyright legislation, and fast-tracking access to information and teaching and learning materials. The Bill was in fact informed by and adapted from many international and domestic policies, documents, WIPO studies, treaties, and proposed WIPO treaties, an international model copyright law and research reports. It also includes many copyright limitations and exceptions that have been enacted and enjoyed by many developed countries for decades. This also confirms that the Bill does NOT conflict with international treaties, such as the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the WIPO Marrakesh Treaty (2013). It is time that our teachers and learners, people with disabilities, libraries, archives, galleries, and museums, were afforded the same privileges as other progressive countries.

SADTU has followed the process of this Bill since it was first published in 2015 and has formally supported it from 2018. We are extremely disappointed at the ongoing delays in the legislative process, especially since the inception of this Bill was in 2009, and the first version of the Bill was published 7 ½ years ago. It then sat waiting for the President's signature for 15 months, before he sent it back to Parliament in June 2022 for review for 'constitutionality issues', which we questioned at the time. The review has subsequently provided sufficient evidence and opinions that the Bill is in fact constitutional and in line with international IP commitments.

Political parties strongly supported the Bill in 2019, but when a new committee was elected in mid-2019, it seems members were not familiar with the complexities of the Bill or its urgency, especially for education. Surprisingly, the new committee did a turn-about on the same Bill in 2021, when they failed to vote for the Bill to advance and agreed for it to once again be stalled for further consultations and to be retagged as a Section 76 Bill. SADTU is seriously disappointed about this state of events. In hindsight and with the evidence emanating from the review, the Bill should not have been sent back in 2020. It should have progressed at that stage. It certainly seems that the right to access to information and education was not a priority for Members of Parliament, and that multinationals in the entertainment and publishing sectors, working together with the USTR and EU, were successful in putting undue pressure on our President and influencing the path of the Bill. This is totally unacceptable. Such interference in our domestic legislative process is a danger to our sovereignty and democracy.

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SADTU knows first-hand the access problems, the urgent move to digital platforms and resultant training requirements, additional and diverse financial demands, no copyright budgets, and restrictive protocols experienced by teachers, learners and librarians during the COVID-19 lockdown, and the ensuing problems that are still negatively affecting teaching and learning, and library services. Without an enabling copyright law and the helpful exceptions that the Copyright Amendment Bill could have provided at the time, millions of learners were deprived of much material during the lockdown because printed materials were inaccessible when libraries were closed for such a long period. Most of our schools were not in a financial position nor technically prepared for the transfer from printed to digital teaching that had to take place at very short notice. They were also not prepared for the copyright compliance requirements to share learning resources via digital platforms. Many of these issues persist today because schools have had to move to blended learning in many instances, and the copyright law does not allow digitisation or format-shifting, scanning, reproduction or sharing in the digital space, without copyright permission and payment of copyright fees. As a result, teachers often must find alternative materials, sometimes older or of a lesser quality than the ones they require. This devalues educational standards and negatively affects the school curriculum and expected academic outcomes.

South African schools are statutorily mandated to provide quality education with appropriate and quality teaching materials and support to enable every child to become educated. Without quality education and access to a wider variety of study materials and other reading materials, they will not be able to become active citizens in our economy in the future. Many schools also have libraries or media centres that play a pivotal role in providing teaching and learning material, access to multimedia, Wi-Fi, and computers, as well as literacy training and information literacy programmes. Some schools also provide access to historical records and cultural heritage objects housed in museum or archival collections. Where schools do not have such in-house collections or services, for example in the rural areas, or informal settlements in the Western Cape and elsewhere, public libraries play a key role in providing these services, especially in rural communities, but copyright law creates many barriers for them.

Without adequate, appropriate, and enabling copyright laws, libraries are hampered daily in carrying out their statutory mandates to serve and uplift communities through their many and varied educational and literacy programmes. The lack of adequate copyright provisions for lecturers, researchers, teachers (including learner teachers in tertiary educational programmes), as well as for school librarians and library staff in general, is also hampering the success of teachers and learners. Innovation, curriculum development and

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provision of relevant teaching materials and programmes for blended and distance learning programmes are also negatively affected.

An important function of educators and school librarians (as well as public librarians) is reading books and other material to learners during literacy classes, reading circles and ABET training programmes. This practice has been negatively affected due to copyright restrictions. What was normal practice for librarians and teachers in the print environment has now become a problem in the digital space. During the lockdown, librarians or teachers were forced to apply for copyright permission (or use alternative material if they had no funding for copyright fees) before they were permitted to read out aloud from books via digital platforms such as YouTube or Facebook. This problem persists as key library functions move into the digital space.

REJECTION OF BILL B13B-2017

SADTU is relieved that recommended amendments and deletions in version B13B–2017, which we and many other stakeholders formally objected to in January 2022, have been deleted or amended by Parliament. The recommended measures would have disenfranchised our members, our schoolchildren, and the broader community from accessing information, especially for educational and research purposes, but also for leisure, civic, employment, health, safety and security, and any other purposes for the upliftment and socio-economic development of our people. They were extremely restrictive and, in some instances, unconstitutional.

SADTU SUPPORTS THE COPYRIGHT AMENDMENT BILL B13D-2017

SADTU is happy in that wisdom had prevailed and that a much improved and more balanced version B13D-2017 was approved by the National Assembly on 1 September 2022. We fully support the Bill B13D-2017 in general, but especially the provisions for 'fair use' in section 12A, and the positive exceptions in section 12B, 12C, 15(1), 19B, 19C, 19D, 22A and 39B. These positive and practical exceptions will be most helpful to suburban, poor, and rural schools, as well as tertiary educational institutions, libraries and other information services, and people with disabilities in the Western Cape. Since the Western Cape is a hub of advanced technologies, health and other scientific research, and 4IR advancements, the fair use clause (including research and text and data mining) and exceptions for education, academic activities, libraries, etc., will be

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extremely useful. They will also enhance open science, open educational resources, open data and other open content programmes in the private and public sector in the Western Cape.

Fair use lawfully allows the US and about 12 other countries to access, use and re-use works produced in South Africa. Yet, without 'fair use' in our copyright law, South Africans cannot access those countries' copyright works in the same way, nor can they access, use, or reuse South African copyright works. In other words, those countries can legally access our works, but we cannot access SA works or theirs, because fair dealing is so restrictive. The fair use provisions in the Copyright Amendment Bill will finally give South Africans similar rights to reciprocally access, use and reuse works from those and other countries too. In the process, fair use will provide wider access to much needed resources for research, scholarship, teaching and learning, and enable libraries and other information services to digitise materials for preservation of and access to their collections. Fair use will also enhance the preparation and standard of assessments, research reports, and examination papers, as it will allow works to be used for comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche.

The Bill will enable teachers to use copyright works to prepare teaching resources and include extracts of copyright works in study packs or course packs, which will increase the number and variety of resources and content quality for learners. This exception for course packs, which Canada and India already benefit from under their 'fair dealing' clauses, will be extremely helpful to teachers and learners, especially in schools in poor or rural areas in the Western Cape. Teachers will also be able to create learning materials on open-source platforms to share widely with learners.

Teachers who plan to upgrade their qualifications by doing postgraduate research, can benefit from fair use and the specific exceptions for education and academic activity, to produce new knowledge, discover, innovate, and share their knowledge through publications and open access platforms. This will lead to much improved educational programmes and resources, including the creation of open educational resources and other open content programmes.

Many of our teachers are also authors of textbooks and other reading materials. The current copyright law is not 'author-friendly' as publishers are the main beneficiaries of copyright. The Copyright Amendment Bill provides authors with more control over their works, better contractual options with publishers, a reversion of copyright assignment after 25 years, which is re-negotiable, or the authors can exploit their works in new ways to gain the best benefits for themselves. Regulatory provisions for collection societies will force these

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entities to be more accountable and transparent and, in the process, to pay authors fairer royalties. This will hopefully rectify some of the current practices that exploit authors and other creators, rather than benefit authors and creators themselves. Authors will also have more choice regarding open access publishing and making their research works widely accessible via open access institutional repositories in tertiary institutions. Teachers can also use these open access repositories for research, preparation of teaching materials, or their own postgraduate studies.

Opponents of the Bill often claim that it will cause damage and other problems to the publishing industry. In fact, it is the unfair contracts and deceptive practices that exist in this industry that negatively affect authors, creators and consumers. For instance, from 2018 – 2020 alleged price-fixing of textbooks and other reading material by members of the Publishers Association of South Africa, which has its head-office in Wynberg, Western Cape, was investigated by the Competition Commission. See: CC annual report 2019/20 (pg.18) at: https://www.compcom.co.za/wp-content/uploads/2021/02/CC_Annual-Report-2019_20s.pdf and <https://www.thebookseller.com/news/south-african-publishers-under-fire-alleged-price-fixing-854626>.

These unfair, and in fact, unacceptable activities by publishers have had a negative impact on schoolchildren and university students, authors, schools and tertiary institutions, libraries, and consumers, and on the market in general. Yet, to date the Commission's report has not been made public, despite requests for it. These deceptive practices went unchecked for many years (and the Commission's findings remain secret). Yet, their actions would have unfairly impacted on libraries, as well as schoolchildren and university and college students who were forced to pay questionable prices for their books. Another example is where publishers get authors to assign their copyright for the entire copyright term, leaving authors without fair royalties, or the chance to exploit their works elsewhere. It is easy for this industry to blame the Bill for something they think 'may happen' in the future, but they need to be introspective because they have been engaging in these unfair practices for decades. They must change their ways, not the Bill. The Bill has many helpful provisions that will remedy some of these unfair practices, e.g. reversion of assignment, unenforceable contracts, better choices regarding open access, and regulation of collection management organisations to ensure transparency and accountability which is lacking at this stage. All these will go a long way to helping authors and creators have more control over their works, especially our teachers who write textbooks, journal articles, and other materials.

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Without fair access to library collections and services, teachers and learners would be at a serious disadvantage. The helpful and practical exceptions in the Bill for libraries (including legal deposit libraries), archives, museums and galleries are welcomed. They will enable these entities to make works accessible through digitisation, e-learning platforms, format-shifting, and conversion from old to new technologies, as well as to convert material into accessible formats for people with disabilities. They will also be able to replace fragile, lost, stolen, or damaged works in their collections and include copyright works in exhibitions and commemorative events for educational purposes. They will also be empowered to digitise and preserve our historical records and cultural heritage for future generations. Their services will be greatly enhanced, which will benefit all those who use their services and collections. Provisions for 'freedom of panorama', 'orphan works' and 'unenforceable contracts' will also be advantageous to our members.

PROCESS OF THE BILL

SADTU has made submissions on previous versions of the Bill and presented at the Parliamentary public hearings in August 2021. We have also perused many of the submissions made by stakeholders for and against the various versions of the Bill since 2017. We have workshopped and discussed them and their impact on and implications for education and libraries at length with various organisations, including Education International, which has a keen interest in the success of this Bill, not only for the educational sector in South Africa but also for the continent.

SADTU has carefully perused Opinions by senior Counsels, intellectual property academics and other submissions by stakeholders. We strongly support their views that the Bill is constitutional and does comply with international IP commitments, and that it should be passed by Parliament and assented to by the President as soon as possible.

SADTU has also listened to many media reports. TV interviews, and webinars for and against the Bill. We have also noted much disinformation about the Bill in the media, purposely circulated by opponents of the Bill to confuse or persuade the public to reject the Bill, despite its benefits for all stakeholders. Generally, the public do not have access to Parliamentary reports, academic papers or legal discussions about the Bill, nor do they attend copyright workshops. Unless people are legally minded, involved in law-making, work directly with copyright issues, or practice or are interested in copyright law, they tend to avoid copyright altogether.

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It is a complex subject, and the current reform process has certainly highlighted this, and confused people even more. Their only access to information on the Bill tends to be via newspapers or the media, which they accept as the truth. Disinformation and obfuscation have unfortunately caused scepticism and mistrust. So, even though the Bill would improve their lives considerably, some people are reluctant to support the Bill, or have been encouraged to actively lobby against it. Sadly, this is at their disadvantage. The public need to be kept informed of the facts, the purpose and benefits of the Bill for all stakeholders, especially as the Bill progresses through the provinces.

Many opponents continue to criticise the Bill but fail to provide any constructive criticism or workable solutions. They just continue calling for the Bill to go back to the drawing board, suggesting that it will 'destroy' the creative industries and negatively affect the research and education economies. No evidence has been produced by them in this regard, apart from a flawed PWC report. A similar report produced in the hearings of the Australian Productivity Commission was debunked. See: <https://www.pc.gov.au/media-speeches/speeches/fair>. There is also no evidence that countries with fair use have suffered any major crises because of fair use. In fact, they all still publish, create and innovate, and enjoy the benefits of fair use.

These ongoing calls for the Bill to be drafted from scratch are absurd and totally impractical, especially in view of the time, human capacity, resources, expertise, and huge expenses that have already been invested in this Bill. The Bill has gone through a fair and extended public process with many calls for comments, amendments, and updated versions, as well as a Parliamentary review, with written submissions and oral presentations from many stakeholders, with expert advice from IP lawyers, academics and the Parliamentary Legal Team, headed by Advocate Charmaine van der Merwe. We are aware that to avoid further delays at this stage, some of the issues raised by opponents of the Bill can be addressed in draft Regulations once the Bill has been assented to by the President.

SADTU believes it would be a huge failure of Parliament if it does not proceed with the current Bill, which is strongly supported by many local, regional and international organisations, NGOs, representative bodies of education, libraries and archives, IP experts, creators, authors, disabled communities, etc. Stakeholders have been patient during this long process, but they cannot be expected to wait another 7 or more years for a new Bill to be drafted, published for comments, and processed through Parliament yet again.

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SADTU reminds the Western Cape Legislature and others that the current Copyright Act of 1978 will be 45 years old in 2023, and in all that time, it has never been amended for education, research, libraries and other information entities or people with disabilities. This long-term apathy to the needs of the educational and library sectors and people with disabilities, but also authors, creators and producers of copyright works cannot continue any longer. Academic studies, and the positive example of several developed countries, show how a more flexible approach to copyright is beneficial to users, creators, scholarship, research, innovation, and the economy in general.

What was also a key finding in an 8-country ACA2K copyright study in Africa (including SA) conducted in 2007-2010 (see: <https://openuctpress.uct.ac.za/uctpress/catalog/book/5>), was that the stricter the copyright law, the more people infringe. In fact, in some instances, people really need access, but the copyright law prohibits it, so they infringe anyway to get access. So it is not copyright law that enables access in many instances, but infringing acts. SADTU does not condone this practice but understands that there are circumstances where this may happen, because the law is so outdated. We therefore believe that the Copyright Amendment Bill, which is fair and balanced, will help to improve copyright compliance as citizens will have more clarity as to what they can and cannot do in terms of the copyright law.

SADTU also believes that once the Bill is enacted, together with Regulations, a great deal of educational programmes will be provided by relevant government departments and many stakeholders, including SADTU. These will teach the public and different constituencies like schools, tertiary institutions, libraries, disabled communities, authors, creators, and publishers, as well as the legal fraternity and general public, how the law has changed, how to apply the amended law, and what the dos and don'ts of the amended law are. The application of fair use factors will be part of those programmes.

South Africa's copyright law is far behind many countries that have enjoyed similar exceptions for decades. Australia, New Zealand, Ireland and others are also keeping a watchful eye on the SA copyright reform process, as they also favour fair use and similar exceptions to those in the Copyright Amendment Bill. The Senate and House of Assembly in Nigeria has recently passed a new Copyright bill which includes the fair use factors. In some recent cases, Kenya has applied the four factors of fair use, seemingly moving away from their restrictive fair dealing provisions.

SADTU believes that the Bill (B13D-2017) is progressive, positive, constructive, and practical, and addresses the profoundly serious problems of lack of access to information, especially teaching and learning materials

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and other problems mentioned in this submission. Our schoolchildren are the future adults and leaders of our country. Teachers play a crucial role in their educational and social development. Teachers and learners should, therefore, not be prejudiced any longer by our outdated copyright law. We look to Parliament to act decisively and to accelerate the passage of this Bill, so that all teachers and learners, researchers, and authors, as well as libraries and other important information services, persons with disabilities, and in fact, all South Africans can start benefitting from this long overdue Bill.

PLEASE PASS THE BILL URGENTLY

In September 2022, both President Ramaphosa and the Minister of Sports, Arts and Culture supported the Bill in their Heritage Day speeches. SADTU calls for the Bill to be passed urgently by the National Council of Provinces and the Provincial Legislatures and returned to the President for assent during the first half of 2023.

SADTU looks forward to a new Copyright Amendment Act this year that will be aligned with our Constitution as well as progressive copyright regimes around the world. The apartheid Copyright Act of 1978 will finally be scrapped and equality, equity and non-discrimination in our copyright law will become a reality for all South Africans.

Please include SADTU in the public hearings in Cape Town on 7 March 2023 and confirm details with us.

Thank you,

S Kwazi

South African Democratic Teachers Union – Western Cape Provincial Office