

## Publishers' Association of South Africa

### Presentation at Cape Town public hearing on the Copyright Amendment Bill – Talking points

7 March 2023

NOTE: PASA will also deliver a full written submission to the provincial legislature before 6 April 2023.

#### The core problem with the flawed Copyright Amendment Bill

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.

#### Five key questions on the Copyright Amendment Bill<sup>1</sup>

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?"

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<sup>1</sup> 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

Clause Number	Text from the Bill	PASA's Concern	An Alternative
<p><b>'Hybrid fair use'</b></p> <p>Clause 15 of the Bill: Sections inserted in the Copyright Act after Section 12: 12A, 12B, 12C and 12D:</p> <p>Clause 22 of the Bill: Section 19C inserted in the Copyright Act after Section 19B</p>	<p>&gt; 'General exceptions from copyright protection'</p> <p>'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:</p> <p>(i) Research, private study or personal use, including the use of a lawful copy...'</p> <p>&gt; 'Specific exceptions from copyright protection applicable to all works'</p> <p>'12B. (1) Copyright in a work shall not be infringed by any of the following acts:</p> <p>'(a) Any quotation:...'</p> <p>&gt; 'Temporary reproduction and adaptation'</p> <p>'12C. Any person may make transient or incidental copies or adaptations of a work...'</p> <p>&gt; 'Reproduction for educational and academic activities</p> <p>'12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities.</p> <p>'(2) Educational institutions may incorporate the copies...'</p> <p>&gt; 'General exceptions regarding protection of copyright work for libraries, archives, museums and galleries</p> <p>'19C. (1) A library, archive, museum or gallery may, without the authorization of the copyright owner...'</p>	<p>New rights and exceptions:</p> <p>These new sections distort the balance which copyright should maintain between copyright holder and copyright user.</p> <p>The Bill favours the user to the extent that copyright materials will be used to a far greater extent than now without the author or publisher receiving rewards.</p> <p>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.</p> <p>3.8 No proper Socio-Economic Impact Assessment Study (SEIAS)</p> <p>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.</p> <p>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 <a href="https://publishsa.co.za/https-publishsa-co-za-wp-content/uploads-2022-06-anfasa_dalro_pasa-research-report-may2022-pdf/">https://publishsa.co.za/https-publishsa-co-za-wp-content/uploads-2022-06-anfasa_dalro_pasa-research-report-may2022-pdf/</a>)</p>	<p>Certain materials where the public interest is served should be freely available. However, there should be a balance between the rights of the copyright holder and the rights of the copyright user. The sections in the Bill that allow 'fair use' and other much too broad exceptions should be scrapped and replaced with wording that is in line with those of the vast majority of countries and with the international treaties on copyright.</p> <p>PASA proposal:</p> <p>Remove Section 12A and first put in place:</p> <ol style="list-style-type: none"> <li>1. A proper socio-economic impact assessment</li> <li>2. A sound policy foundation</li> <li>3. A legal evaluation and basis for the exceptions and limitations in South Africa.</li> <li>4. Exceptions and limitations based on the Three-step Test.</li> </ol>

Clause Number	Text from the Bill	PASA's Concern	An Alternative
<p><b>'Royalties as the only means of remuneration'</b></p> <p>Clause 5 of the Bill: Section inserted in the Copyright Act after Section 6: 6A</p>	<p>'Share in royalties regarding literary or musical works'</p> <p>'(2) Notwithstanding—</p> <p>'(a) the assignment of copyright in a literary or musical work; or</p> <p>'(b) the authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6,</p> <p>'the author shall, subject to any agreement to the contrary, be entitled to receive a fair share of the royalty...</p> <p>'(3) (a) The author's share of the royalty...shall be determined by a written agreement in the prescribed manner and form...</p> <p>'(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4).</p> <p>'(4) Where...cannot agree on the author's share...may refer the matter to the Tribunal for an order determining the author's share of the royalty.</p> <p>'(5) The agreement...must include the following:</p> <p>'(a) The rights and obligations...</p> <p>'(b) the author's share of the royalty</p> <p>'(c) the method and period...must be paid</p> <p>'(d) a dispute resolution mechanism.</p>	<p>Section 6A will prescribe royalty rates as well as the minimum terms of contracts.</p> <p>This development is bound to have a material impact on how publishing and production agreements are negotiated, and will likely impact on commonplace contract terms.</p> <p>The Section ignores the specific models of remuneration in publishing, which are by nature diverse, and should be subject to free negotiation between the parties.</p> <p>The benefits will be therefore 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.</p> <p>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.</p>	<p>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, APACT, of what should be covered by publishing contracts (see <a href="https://publishsa.co.za/anfasa-pasa-agreement-on-contract-terms-apact-2016/">https://publishsa.co.za/anfasa-pasa-agreement-on-contract-terms-apact-2016/</a>).</p> <p>PASA proposal:</p> <p>Reject Section 6A as introduced by Clause 5 and properly investigate workable solution to benefit authors.</p>

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<p><b>‘Regulation of publishing contracts’</b></p> <p>Clause 35 of the Bill: Paragraph inserted in the Copyright Act after Section 39 paragraph (cE):</p> <p>Clause 36 of the Bill: Section inserted in the Copyright Act after Section 39A: Section 39B</p>	<p>‘(cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act’</p> <p>‘Unenforceable contractual term’</p> <p>‘39B. (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.</p> <p>‘(2) This section does not prohibit or otherwise interfere with open licences or voluntary dedications of a work to the public domain.’</p>	<p>The Bill proposes a blanket override of all contractual terms: An author will not be able to agree to a contract term whereby they chose voluntarily to renounce or waive a right according to the Bill.</p> <p>Noting that licensing is a contractual mechanism by which copyright works are made available to the market, the Bill also contains a blanket importation of statutorily implied terms in licence agreements.</p> <p>Contractual freedom and legal certainty are key factors to ensure investments in the publishing industry. There is a long-standing principle in international law of copyright owners’ exclusive rights to authorize the use of their works under the conditions they determine freely.</p> <p>The Minister will be empowered and called upon to prescribe the terms of publishing contracts. This will be time-consuming – if ever accomplished – and once adopted will result in a rigid and inflexible system that interferes with freedom of contract between authors and publishers, taking bargaining power away from authors and interfering with the healthy competitive environment for the best authors. As a result, authors may end up choosing to publish overseas.</p>	<p>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, APACT, of what should be covered by publishing contracts (see <a href="https://publishsa.co.za/anfasa-pasa-agreement-on-contract-terms-apact-2016/">https://publishsa.co.za/anfasa-pasa-agreement-on-contract-terms-apact-2016/</a>).</p> <p>PASA proposal:</p> <p>These sections should be deleted in their entirety and the ANFASA PASA Agreement on Copyright Terms be acknowledged for the value it adds to the creative industry ecosystem.</p>

<b>PASA’s Concern</b>	<b>An Alternative</b>
<p><b>‘No report on a proper Socio-Economic Impact Assessment Study’</b></p> <p>All the above concerns are exacerbated by the lack of an impact study of the possible consequences for trade and culture of the Bill. Questions continue to be raised about this unacceptable procedure. Government has not yet supplied a satisfactory answer to these questions and repeated queries.</p> <p>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.</p> <p>Although a Socio-Economic Impact Assessment Study (SEIAS) study is not a legislative prescript, the potentially far-reaching social, cultural and trade impacts of the Copyright Amendment Bill do require a sound basis for legislative decisions.</p> <p>There simply is no such basis and no sufficient evidence could be provided by the DTIC after a request for it at the public hearing in Stellenbosch on 21 February 2023.</p> <p>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 <a href="https://publishsa.co.za/https-publishsa-co-za-wp-content-uploads-2022-06-anfasa_dalro_pasa-research-report-may2022-pdf/">https://publishsa.co.za/https-publishsa-co-za-wp-content-uploads-2022-06-anfasa_dalro_pasa-research-report-may2022-pdf/</a>)</p> <p>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)</p>	<p>In the absence of any independent socio-economic impact and regulatory assessment by the legislator, PASA commissioned PriceWaterhouseCoopers (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 expected impact of the “fair use” provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry’. See <a href="http://www.publishsa.co.za/file/1501662149slppwcreportonthecopyrightbill2017.pdf">http://www.publishsa.co.za/file/1501662149slppwcreportonthecopyrightbill2017.pdf</a>). 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.’</p> <p>This PwC impact assessment has to date not been taken into account by government decision-makers, but no comparative information has been released either.</p> <p>PASA proposal:</p> <p>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.</p>
<p><b>A way forward</b></p> <p>Although the above proposals address some specific concerns, a more meaningful, thorough and preferable approach would be an holistic and fundamental revision of the Bill, using the following steps:</p> <ul style="list-style-type: none"> <li>* Reject the Copyright Amendment Bill and eventually have it lapse.</li> <li>* Conduct a proper socio-economic impact assessment.</li> </ul>	

- \* 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.



N. Faasen, Chair: PASA Legal Affairs Committee

0842163333 / nicolf1@gmail.com