ANFASA
Dedicated to empowering authors

ACADEMIC AND
NON - FICTION
AUTHORS'
ASSOCIATION OF
SOUTH AFRICA

SAMRO Place
20 De Korte Street
Braamfontein, 2001

P O Box 31134, Braamfontein, 2017
Tel: 011 712 8008 Fax: 011 403 9094
E-mail: info@anfasa.org.za www.anfasa.org.za

INTELLECTUAL PROPERTY LAWS AMENDMENT BILL, 2008

ANFASA SUBMISSION

TO THE PARLIAMENT PORTFOLIO COMMITTEE

ON TRADE AND INDUSTRY

ANFASA was founded in 2004 and is South Africa's first national association specially for authors of general non-fiction works, textbooks and academic books, dedicated to promoting their works and their status in society, sharing information and offering advice. Our vision is to be a member-driven association aiming to uphold and enhance the profile and status of academic and non-fiction authors in South Africa, through advocating for the recognition of their works and protection of their rights, in collaboration and cooperation with all stakeholders in the book value chain.

ANFASA represents authors and lobbies for authors' rights within the publishing industry. ANFASA's membership currently stands at 320 and comprises of academic and non-fiction authors in the country who write scholarly works, academic textbooks, school textbooks, manuals, biographies, histories, works of general interest, articles and essays. However, most of these non-fiction and academic authors also write fiction works.

INTRODUCTION AND EXECUTIVE SUMMARY

ANFASA welcomes the initiative by the Department of Trade and Industry to give legal cognizance to indigenous traditional knowledge systems and understands the importance of according traditional knowledge holders the legal protection for the intellectual knowledge they possess. Furthermore, ANFASA would like to uphold and promote the recognition of indigenous traditional knowledge systems.

ANFASA
Dedicated to empowering authors

SAMRO Place
20 De Korte Street
Braamfontein, 2001

ACADEMIC AND
NON - FICTION
AUTHORS'
ASSOCIATION OF
SOUTH AFRICA

P O Box 31134, Braamfontein, 2017
Tel: 011 712 8008 Fax: 011 403 9094
E-mail: info@anfasa.org.za www.anfasa.org.za

However, ANFASA submits that the laudable objectives in the policy framework for the protection of indigenous traditional knowledge should be achieved outside the ambit of the existing Intellectual Property laws and that the Intellectual Property Laws Amendment Bill 2008 is inappropriate to achieve this end. In particular, our submission relates to amendments to the Copyright Act 98 of 1978.

The Copyright Act is an orthodox piece of legislation whose implementation is quite rigid and terse to be successfully amended enough to address the nature of indigenous traditional knowledge systems. A *sui generis* piece of legislation would be more appropriate as has been successfully promulgated in other countries seeking to protect indigenous knowledge systems, and is espoused by the World Intellectual Property Organisation (WIPO).

The Copyright Act is very technical in nature and so is its implementation. Issues of originality, authorship and ownership are particularly critical and these are inconsistent with, and are not adequately addressed in, the move to incorporate a "traditional work" as a work and "traditional community" as an author. The amendments made and the consequential amendments resulting from this inclusion are generally arbitrary and would certainly cause undue ambiguity and uncertainty. Moreover, they undermine long established principles of copyright law and thus do damage to this important branch of the law.

In essence, it is ANFASA's position that:

- The Copyright Act should be made exempt from the Intellectual Property Laws Amendment Bill 2008, if the Bill is to be enacted at all.

- Indigenous traditional knowledge systems should enjoy legal protection in terms of a *sui generis* form of legislation which best accommodates its nature. As a consequence the Bill should be withdrawn.

- Important constitutional liberties such as academic freedom should not be compromised. Furthermore South Africa's international treaty obligations should be met, which the Bill fails to do.

ANFASA
Dedicated to empowering authors

SAMRO Place
20 De Korte Street
Braamfontein, 2001

ACADEMIC AND
NON - FICTION
AUTHORS'
ASSOCIATION OF
SOUTH AFRICA

P O Box 31134, Braamfontein, 2017
Tel: 011 712 8008 Fax: 011 403 9094
E-mail: info@anfasa.org.za www.anfasa.org.za

ANFASA SUBMISSION IN DETAIL

1. Definition of authorship

S. 1(1)(j) incorporates a traditional community as the author of a traditional work. This imposes severe problems because authorship is a complex issue and yet a critical issue when it comes to copyright, especially in this instance where there is not an identifiable author or authors within the traditional communities. Furthermore a traditional community is not a legal person and therefore cannot perform legal acts from which rights can flow. Apart from that, a certain work is recreated and given renewed meaning over time, which shows the inherent dynamics of this process of intellectual creation. Also many indigenous ethnic groups are not necessarily grouped within the same territory and influence of one indigenous group over another will result in hybrid indigenous knowledge systems. Therefore a specific indigenous knowledge might be shared by different ethnic groups e.g a fusion between Ndebele and Zulu folklore.

The issue of authorship is further compounded by scenarios where a member of a traditional community wishes to explore his/her own indigenous knowledge by embarking on a writing project which addresses that particular knowledge but intends to do so with a colleague who does not belong to the traditional community. The amendment bill fails to envisage or cater for such a case. What exemptions exist?

2. Nature of indigenous knowledge

S. 2(2) includes traditional work as an exception to the "material form" requirement, however S.2B is incorporated and it gives a requirement of material form which potentially infringes the very nature of indigenous knowledge. It provides, *inter* alia, that it must be "…communicated to the public" In a scenario where indigenous knowledge has not been communicated to the public or where that cannot be proved reliance on the Act will be futile. If indigenous knowledge has only been communicated within the particular traditional community where it is from (which is most likely) does that constitute "public" because if it does the inherent contradiction is that the traditional community itself is the author, therefore giving rise to a case where an author internal communication amounts to communicating with the public.

ANFASA
Dedicated to empowering authors

SAMRO Place
20 De Korte Street
Braamfontein, 2001

ACADEMIC AND
NON - FICTION
AUTHORS'
ASSOCIATION OF
SOUTH AFRICA

P O Box 31134, Braamfontein, 2017
Tel: 011 712 8008 Fax: 011 403 9094
E-mail: info@anfasa.org.za www.anfasa.org.za

Copyright exists in the material expression of a work and not in the idea or concept. It is infringed by reproducing or performing various other activities in respect of a substantial part of the material expression of the work. If the work does not exist in material form, copyright enforcement cannot work. This illustrates the point that copyright is fundamentally unsuitable for application to traditional knowledge.

3. Duration of copyright in a traditional work

S. 3(2) (g) provides for the duration of copyright in a traditional work lasting for 50 years. This duration does not give due cognizance to the nature of indigenous knowledge and the need for long term protection and benefit to the rights holders of it. Indigenous knowledge takes on a very dynamic and amorphous nature which would only accrue a benefit to the community if the legal protection given to it extends beyond a very restricted period like 50 years. This is one of the complexities involved in trying to address it in terms of the Copyright Act as opposed to a *sui generis* piece of legislation which can comfortably accommodate the nature of indigenous knowledge. Cultural traits and practices within a community are capable of enjoying a prolonged existence and constant change, this should be accommodated when seeking to protect indigenous knowledge but the current amendment falls short in that respect.

4. Nature of exclusive rights given

S. 11C lists the exclusive right in a traditional work and makes these similar to the ones already enjoyed in literary or musical works. However, in the list drawn up it fails to come up with exceptions where applicable. In a scenario where it is a hybrid indigenous knowledge system, comfortably blended with other indigenous knowledge forms, how will that be addressed? Can that traditional work be licensed in portions? Or does it enjoy a general exception? These are some of the difficulties with a general inclusion of traditional works in the Copyright Act. Academic freedom to research and write on indigenous knowledge must be preserved this calls for a general exception in S.19C which will take into account an academic work on an indigenous theme for publication. This will furthermore be in line with the constitutional guarantee of academic freedom.

ANFASA
Dedicated to empowering authors

SAMRO Place
20 De Korte Street
Braamfontein, 2001

ACADEMIC AND
NON - FICTION
AUTHORS'
ASSOCIATION OF
SOUTH AFRICA

P O Box 31134, Braamfontein, 2017
Tel: 011 712 8008 Fax: 011 403 9094
E-mail: info@anfasa.org.za www.anfasa.org.za

5. International obligations

South Africa is a signatory of the TRIPS Agreement. This international treaty requires it and other member counties to provide so-called "national treatment" in giving copyright protection. This means that South Africa must give subjects of other member countries the same copyright protection as it gives to its own subjects. If "traditional knowledge" is protected as a species of copyright, then South Africa is obliged to give this same protection to "traditional knowledge" emanating from other member countries. The Bill does not provide for this and thus places South Africa in breach of the TRIPS Agreement. It is suggested that it is probably inappropriate to grant such protection to foreign works at the present time. We could legitimately make this distinction if "traditional knowledge" was granted protection in sui generis legislation as has been recommended. We cannot, however, legitimately make this distinction and discriminate against foreign works for as long as "traditional knowledge" is protected as a species of work eligible for copyright.

CONCLUSION

The objective to ensure the protection of indigenous knowledge systems from commercial exploitation can be achieved without necessarily encroaching on an orthodox piece of legislation such as the Copyright Act.

Thus:

- The Copyright Act 98 of 1978 should remain exempt from the Intellectual Property Laws Amendment Bill, 2008.
- Exploitation of indigenous knowledge systems for commercial gain should be guarded against by a legal protection mechanism that ensures commercial gain for the indigenous knowledge rights holders.
- Addressing the protection of indigenous knowledge systems should be achieved in the form of a *sui generis* piece of legislation which will best understand and be suited to the nature of indigenous knowledge.
- Important liberties of the Constitution, such as academic freedom must not be compromised.

ANFASA
Dedicated to empowering authors

ACADEMIC AND
NON - FICTION
AUTHORS'
ASSOCIATION OF
SOUTH AFRICA

SAMRO Place
20 De Korte Street
Braamfontein, 2001

P O Box 31134, Braamfontein, 2017
Tel: 011 712 8008 Fax: 011 403 9094
E-mail: info@anfasa.org.za www.anfasa.org.za

For and on behalf of ANFASA:

Prof. Sihawukele Ngubane
ANFASA Chairman

Kundayi Masanzu
ANFASA Director