



7 July 2017

Ms J Fubbs  
Chairperson: Portfolio Committee on Trade and Industry  
Attention Mr A Hermans  
Parliament of the Republic of South Africa  
CAPE TOWN

By email only to: [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za)

Dear Ms Fubbs

**COPYRIGHT AMENDMENT BILL, NO 13 OF 2017 and PERFORMERS PROTECTION AMENDMENT BILL, NO. 24 OF 2016:  
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 13 of 2017 (referred to in this submission as the "Bill"), which will be deliberated in conjunction with the Performers' Protection Amendment Bill, No 24 of 2016, the Publishers Association of South Africa, PASA, herewith submits its comments and also requests to be heard at the public hearings in August 2017.

- **We believe that Parliament has the opportunity to create effective legislation to bring South African copyright law into the Internet Age and join its main trading partners which already made this transition many years ago. In doing so, Parliament is enjoined to take into account the impact that legislation will have on creators and publishers of copyright works and thereby ultimately on consumers for those works.**
- **PASA can assist Parliament in assessing this impact inasmuch as it relates to the publishing of books and journals, more information about which appears in this submission.**

PASA is the largest publishing industry body in South Africa. It represents book and journal publishers in South Africa in the field of non-fiction, fiction, education, academic and trade publishing. PASA's membership comprises the majority of South African publishing houses, for profit and non-profit, university presses, small and medium sized companies and multinational publishing enterprises. More information can be found on PASA's website at [www.publishsa.co.za](http://www.publishsa.co.za).

PASA has been following the **dti's** determination to amend the Copyright Act, 1978, since the Draft National Policy on Intellectual Property of 2013. PASA commented on the draft Copyright Amendment Bill, 2015, and the Performers Protection Amendment Bill, 2017. Copies of those submissions are attached for reference on the detail of PASA's unchanged position on the legislative proposals and for suggested wording of some of the amendments.

PASA offers to make a presentation to Members of Parliament on the importance of copyright for the publishing industry and the impact of the Bill

- **Parliament's attention is drawn to the Bill's potential impact of critically damaging the South African publishing industry, especially the writing and publishing of quality materials for educational and academic purposes on a sustainable basis, by**
  - ❖ **poorly considered exceptions to copyright,**
  - ❖ **the reversal of rules on parallel importation and**
  - ❖ **the limitation of actions against infringement of copyright that appear in the Bill,****as are further detailed below.**

PASA would like to offer to make a presentation to Members of Parliament on copyright and the publishing industry and will engage with the Committee Secretary to find a suitable occasion during August 2017. An introduction to this topic can be found in the annexure to this submission entitled ***What Publishers Do***, which demonstrates aspects like royalty flows to authors and how the publishing industry works with copyright in order to bring its products to the market.

The diversity in the publishing industry and the role publishers play in producing not only books for pleasure but also the knowledge economy is set out in ***What Publishers Do***. Publishing is an intense and professional process, with many people involved in the production of just one book. It takes a long time and much effort to build the skill. If South Africa were to lose those skills through misguided policy and legislation, the country will not only forego its local thriving industry, but become dependent on imported books and content on the Internet supplied from elsewhere.

**PASA and its members have commissioned an independent economic impact study of the impact that the Bill, notably the exceptions and defences to copyright that are proposed to be introduced. It has decided to take this extraordinary step in the absence of an impact study or regulatory impact assessment (referred to below). Noted accounting and consultancy firm PricewaterhouseCoopers of Johannesburg is carrying out this study.**

**Although still a work in progress, completed analyses and surveys carried out by PricewaterhouseCoopers indicate significant negative consequences for the publishing industry flowing from free and unauthorised uses of copyright-protected content that will become legitimised by the exceptions proposed in the Bill. These include:**

- (1) a weighted average decline in sales revenue for the industry of 33%, that is extrapolated to an amount of around R2,1 billion,**
- (2) a weighted decline in employment of 30%, and**
- (3) a reduced willingness on the part of authors to create content for the broadly-defined education sector, with potentially significant negative implications for South Africa's self-sufficiency in knowledge production and dissemination in an era where this is increasingly important for global competitiveness.**

#### Background context to the Copyright Amendment Bill and the Performers Protection Bill

The origin of this revision lies in the report of the Copyright Review Commission, issued in 2011 and published in 2012, which was mandated to look into the failure of the needletime provisions (Section 9A of the Copyright Act and Section 5 of the Performers Protection Act, introduced in 2002) to benefit copyright owners of sound recordings and the performers of those sound recordings, and into other practices in the music industry and of collective management of copyright. The 2015 draft Copyright Bill which followed that report, was stated by the **dti** to remedy the situation, with a statement in its presentation at a meeting of stakeholders in August 2015 that, "The creative industry in particular musicians, are vulnerable to abuses by users of their IP. Local artists, performers, composers and other authors of copyright works are dying as paupers because royalties of their works are not paid."

It is to be welcomed that the Bill endeavours to bring copyright legislation into the Internet Age by introducing the exclusive right of 'communication to the public' in addition to the other exclusive rights of copyright. We submit that a revision of legislation could do far more to improve the creative industries that rely on copyright, starting with:

- an effective introduction of the 'communication to the public' right, in respect of which we submit that there are some lapses in the Bill,

- the introduction of the exclusive right of distribution required by the WIPO Copyright Treaty,
- solid protection of technological protection measures and copyright and rights management information, and
- effective procedures and remedies against infringement of copyright online.

Instead, the focus of the Bill, as introduced in May 2017, 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. Indeed, a careful study of the Bill indicates that – other than ineffective and error-laden provisions which simply state that authors should have “the right to claim an equal portion of the royalty payable for the use of the copyright work” – the Bill in fact takes rights and opportunities for earning remuneration away from authors, specifically authors of published works, as demonstrated below.

### Suggested way forward for processing the Bill

PASA does not consider that it would be useful to engage in a section-by-section commentary of the Bill in this submission, and refers to the earlier submissions attached to this document. Nevertheless, there are themes in the Bill that are uncontroversial and have been independently researched, and these themes should be fast-tracked by Parliament in a step-by-step approach to modernise the Copyright Act. Other themes require far more thought and analysis, and should be considered in a more moderate process.

- **Parliament has the opportunity to create effective and meaningful legislation to bring the Copyright Act and the Performers Protection Act up to date, in circumstances where the policy considerations are backed up by data and for changes that have been substantively consulted upon.**
- **Effective and meaningful legislation will advance the interests of authors, artists and composers and the creative industries as a whole by protecting their interests, without thereby destroying the value chain of copyright through free, or gratis, ‘uses’ of copyright works, because authors will have nothing to gain if there is nothing to share. PASA considers that a number of possibilities to support authors, artists and composers, as well as copyright owners, have been overlooked by the Bill.**
- **Effective and meaningful legislation will also create a sustainable equilibrium between incentivising local creators and the needs of consumers of content, thereby recognising copyright’s founding social purpose of encouraging learning.**

- **The Bill in the form as introduced to Parliament, due to the many faults in its preparation and drafting, as elaborated on below, is not a starting point to develop effective legislation.**

### Fast track to modernisation of the Copyright Act

PASA welcomes and supports immediate priority being given to the following:

1. The improvement of the ‘needletime’ provisions in accordance with the recommendations of the Copyright Review Commission.
2. South Africa’s accession to WIPO Copyright Treaty (WCT) and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the Marrakesh VIP Treaty).

South Africa should ratify and implement WCT so that South African copyright holders and performers can benefit from national treatment in other Treaty countries by the exclusive right of communication of their works to the public and, in the case of copyright owners, the exclusive right of distribution, i.e. the making available to the public of the original and copies of their works through sale or other transfer of ownership.

Ratification and implementation of WCT would also bring legal recognition to technological protection measures and rights management information and the ability for South African rightsholders to have the same rights recognised subject to the principles of national treatment in other Treaty countries.

3. The introduction of the exclusive right of ‘communication to the public’, so long as all consequential amendments are made and the exclusive right of distribution, as prescribed by WCT, is also introduced. Careful consideration will have to be given to new provisions that give effect to technological protection measures and copyright management information.

PASA suggested wording for these sections in the schedules to its 2015 submission on the Draft Copyright Amendment Bill and its 2017 submission on the Performers Protection Amendment Bill, both attached to this submission.

The insertion in the Bill of qualifications to the exclusive rights of copyright of an additional right by a “user, performer, owner, producer or author” to claim a royalty for the “use” of the copyright work is not only an error in several respects, but also amounts to the removal of the exclusivity of the rights of copyright owners. The equitable remuneration of authors must be dealt with in another way,

4. An exception to copyright for the visually impaired that conforms with, and will allow South Africa's accession to, the Marrakesh VIP Treaty, and at the same time recognises what has been done in South Africa to develop books for the visually impaired and therefore facilitates export from South Africa of such works and also of accessible format copies.

PASA suggested wording for this exception in the schedule to its 2015 submission on the Draft Copyright Amendment Bill, attached to this submission.

#### Moderate process to consider impact and assess scope of changes to modernise the Copyright Act

PASA agrees that the following should be assessed and factual input obtained in the course of proper consultation with stakeholders for appropriate legislation:

1. Develop a sound and workable policy and associated legislation to support equitable remuneration for authors, artists, composers and performers. For this purpose, the Committee could consider existing best practices (such as referred to in the annexure *What Publishers Do*) and examples from existing legislation which support a balance in the relationships between contracting parties whilst upholding freedom of contract. However, the current provisions, which in contravention of South Africa's Treaty obligations, convert the exclusive rights of copyright into non-exclusive rights, and State-prescribed contractual terms and royalty rates, betray a lack of understanding of the law and practice and are bound to be unworkable.
2. Develop targeted exceptions, including allowing specific, limited, acts for the purposes of education and by libraries, only in relation to situations where it is found that the market for copyright materials cannot efficiently provide. In compliance with South Africa's obligations under the Berne Convention and TRIPS, any exception developed under this heading must (1) apply to a special case, (2) not be in conflict with normal exploitation of the work and (3) not be unreasonably prejudicial to the legitimate interests of the rightsholder.
3. Exceptions for transient copies to facilitate the temporary reproduction of copyright works by computers and online to the extent that they are necessary for their functioning, but not in a way that prejudices authors and copyright owners.
4. Enforcement provisions that are effective in the Internet Age, such as dealing with online platforms that reproduce and communicate copyright works without authorisation; distribution of electronic formats of copyright works made without authorisation; alleviating the burden of proof on claimants in respect of technical allegations in claims that are not in

dispute; and providing for minimum damages for appropriate cases of infringement to balance the interests of the copyright owner and the nature of the infringement.

5. A practical and sensible solution that facilitates the reproduction of orphan works and other acts in relation to such works that are restricted by copyright, which do not amount to de facto confiscation by the State.
6. Develop an implementable artists' resale right. This is a legitimate form of entitlement that will bring benefits to living artists and the families of deceased artists.
7. Compulsory licences for translation of works into South Africa's official languages and for reproduction of works that are not available in South Africa if it can be shown that South Africa qualifies as a 'developing country' as is required by the Appendix of the Berne Convention and that the terms of the compulsory licence meet the requirements of the Berne Convention.

Publishers have always acknowledged that copyright must be fair and balanced to all concerned. Copyright laws must recognise the public interest both in support of the institutions that require content, and the commercial and non-commercial publishers that provide the needed services. They cannot therefore weigh the interests of publishers against the public interest but must balance the interests of partners who both serve the public good. PASA prepared a position paper on this very topic in 2009, entitled *Copyright and the Public Interest*, in response to work on the *Library and Information Services Transformation Charter*. The entire position is still relevant today, and we therefore take the liberty of annexing a copy to this submission as guidance for deliberation on the topic of necessary exceptions.

#### Themes in the Bill that should be excluded from amending legislation

PASA counsels against:

1. State expropriation of copyright works as a result of any form of funding – which are best regulated by contract - and custodianship by the State of copyright works by the “orphan works” provisions.
2. Overbroad exceptions to copyright, specifically introducing US-style ‘fair use’, rather than pursuing incremental change intended to update copyright legislation in a sustainable way.

The ‘fair use’ defence to copyright infringement proposed to be introduced by the Bill is an incorrect conflation of ‘fair use’ that has its origin in the United States of America and which is determined by reference to a set of factors (which are repeated in the Bill) and ‘fair dealing’, which is an exception

to copyright infringement and which is part of South African law, and which allows “fair dealings” with copyright works in certain limited cases.

We note incorrect terminology used in the Bill, such as “use” and “access”, which is not applied elsewhere in the Copyright Act. ‘Fair use’ is the name for a defence to copyright infringement codified under the laws of the United States, and is not about ‘uses that are fair.’

We also note that many of the cases proposed for the ‘fair use’ defence are not cases for ‘fair use’ even in the US – mentioning as examples “education”, “public administration”, “underserved populations” and “tributes.” We reiterate our concern that the introduction of the ‘fair use’ defence, coupled with a ban on contractual terms overriding acts permitted by the Act, once amended, will create uncertainty and insecurity, leading in turn to costly and fruitless litigation.

Acts permitted by copyright exceptions mean no remuneration to rightholders, or even to authors who are intended to be rewarded in terms of the Bill. In South Africa copyright exceptions under the Act (and under the Bill) allow only unremunerated uses. (This is unlike the situation in many countries in Continental Europe, where exceptions are usually accompanied by a requirement to pay a fee to a collecting society for further distribution.)

3. A blanket ‘fair use’ defence or fair dealing exception in respect of educational purposes, which fails to acknowledge sufficiently the harm such a change could do to the educational sector (as outlined above), noting that the education market is a legitimate market in commerce as well as the publishing industry.

We note in particular the detrimental impact that a broadly-interpreted fair dealing exception had on licensing revenue in Canada, and thereby on educational publishing in that country. For the South African Higher Education sector in particular, this precedent is a concern., Although PricewaterhouseCoopers’ study into the impact of these exceptions is still a work in progress, based on work they have completed, we can expect that their report will show the detail of the anticipated negative consequences of these similar exceptions on the South African publishing industry. I.

As currently drafted, all educational use would be permitted by the ‘fair use’ defence in the Bill applying to “education”, which will annihilate the market for educational publishing, leading to both a likely decline in education standards as well as negatively impacting the ability of authors to earn an income and a resultant non-availability of authors for educational works. In addition, the special exceptions for education enable the sort of activity (e.g. creating course-packs) which are very likely to cause significant market harm to educational publishers, and which are made subject neither to fairness nor the payment of licence fees. Education exceptions need to be clearly limited in scope, and to reflect the understanding that the concept of “market harm” by exceptions extends to both the primary and secondary markets of the works in question. To avoid the situation that developed in Canada where there was not only a broad exception, but it was interpreted too liberally by educational institutions, terms of an education exception need to be very precise and accompanied



by appropriate guidelines that maintain a fair balance between creators and consumers of educational materials and that are understood by all.

In the context of creating new educational exceptions, it is extremely important to be able to draw a distinction between works created largely for non-educational purposes but which may occasionally be useful in a classroom, and those works which are created solely to function as educational materials. Whilst a broader educational exception is unlikely to affect the core market for the former, it will certainly undermine the market for the latter. Any new legislation needs to reflect those key points of differentiation and the potential market impact in both the primary and secondary markets.

4. The reversal of recognised rules relating to parallel importation, which will have the effect of undermining the local publishing industry and which will likely also not necessarily have the expected benefit for users of those imported materials, especially for education.

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

5. Provisions that are held out to be improvements to authors' moral rights, but instead take rights away from authors. The taking away of moral rights in cases where copyright exceptions apply is wrong, and the remaining amendments to Section 20 of the Act proposed by the Bill are unnecessary.
6. A limitation on all assignments to a period of 25 years. We consider that 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.
7. A blanket override of all contractual terms and a blanket importation of statutorily implied terms in licence agreements, noting that licensing is the contractual mechanism by which copyright works are made available to the market.

Parliament is encouraged to look at the causes underlying many of the provisions of the Bill to determine whether the underlying causes are real and, if so, whether they relate to industry-wide practices, whether such practices in fact relate to copyright or not, or whether these causes in fact originate with the practices of individual actors and are not representative of industry.

## Shortcomings hampering proper consideration of the issues

PASA submits that there needs to be a full and open discussion amongst all stakeholders on the bulk of the items proposed in the Bill. Thus far, mainly themes relating to the music industry have been the subject of proper investigation, namely by the Copyright Review Commission.

There have been a number of shortcomings in how the **dti** has managed the process leading up to the introduction of the Bill.

- No independent economic impact assessment of the Bill has been carried out.

The SEIAS Report is, with respect, not persuasive, and the document itself does not indicate that any independent research was carried out in its preparation.

An undertaking by the dti at the August 2015 conference with stakeholders to undertake such a study was not implemented; the tender put out for such a product was never awarded.

PASA has, as a result of this failing, commissioned PricewaterhouseCoopers to carry out a study to assess the impact that key provisions of the Bill will have on publishing in South Africa.

- The consultation period in respect of the 2015 draft Bill was unreasonably short and had to be extended. Even for this consultation, a period of five weeks (itself having been extended twice) is very short for legislation of this complexity.

The SEIAS Report on the Bill contains a material misrepresentation on the position of publishers in earlier consultations. Under para 8 “Consultations” (p.8) under the heading “Affected Stakeholders” in respect of the item “Authors and Publishers” and in response to the question “Do they support or oppose the proposal”, it is stated, “They support the ‘fair use’ proposal.” This statement is incorrect, since PASA and other publisher associations, such as the International Publishers Association, have been consistent in cautioning against the unintended consequence of adopting ‘fair use’.

- Documentation relevant to this consultation was not made available by the **dti** to be distributed for this consultation.

These documents include the SEIAS Assessments of both Bills, the 2013 Draft National Policy on Intellectual Property, and the public comments and the 2014 Regulatory Impact Assessment on the latter Draft Policy.

The comments on the Draft Policy and the 2014 Regulatory Impact Assessment are not public. Their absence impedes research on the foundation of many controversial provisions in the Bill.

- The Bill is stated, in the Explanatory Memorandum, to be based in part on the 2013 Draft National Policy on Intellectual Property, “as commented upon.” We question why legislation is based on a document that never matured into a ‘final’ policy.
- Legislation must be based on a policy decision that has not yet been made, on whether or not South Africa will accede to international treaties relating to copyright.

The Treaties include the *WIPO Copyright Treaty (WCT)*, the *WIPO Performances and Phonograms Treaty (WPPT)*, the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the Rome Convention) and the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (the Marrakesh VIP Treaty), as well as the *Beijing Treaty on Audiovisual Performances* (the Beijing Treaty – which is not yet in force).

The Copyright Review Commission recommended “The CRC believes that an overall impact study should be conducted and finalised to determine the appropriateness for the country to ratify and implement the World Intellectual Property Organisation (WIPO) Internet treaties.” In 2013, the dti said “the dti and DOC should, therefore, co-ordinate their activities so as to have a conducive environment in relation to the ratification of digital treaties. ... The WIPO Internet treaties must be viewed in the context of the country’s needs and requirements.”

However, the Explanatory Memorandum to the Bill states that it is : “strategically aligned with ... the WIPO Copyright Treaty (“WCT”); the WIPO Performance and Phonograms Treaty (“WPPT”); the Beijing Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.” In its presentation to Parliament, the dti states: “PC should consider ratification of all treaties/conventions relating to these Bills.”

This Bill, however, does not meet the basic requirements of WCT by not having correctly introduced the exclusive right of ‘communication to the public’ right, by not having introduced the exclusive right of ‘distribution’ at all, and the provisions relating to technological protection measures and copyright management information need more consideration.

### Selected shortcomings of the Bill

We consider that there are very many shortcomings in the Bill and do not propose dealing with all of them. The most significant ones for PASA are the following:

- The Bill, deliberately or not, will have disastrous consequences for the South African publishing industry by, amongst others, overbroad, duplicated and poorly-thought-out exceptions to copyright and a blanket interference with legitimate contractual terms.

Insofar as exceptions are concerned, the Bill confuses the United States concept of 'fair use', a defence against copyright infringement, and fair dealing exceptions to copyright. As it stands in the Bill, we consider that its passage will leave South Africa in breach of its international treaty obligations under the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property, TRIPS.

Broadening the exceptions without appropriate legislative checks and balances will have the effect of transferring the prospects of economic benefits from the creative industries to technology companies, which, ultimately, will be to the detriment of copyright owners and authors.

- In a misguided attempt to bolster the rights of authors for remuneration for their works, the Bill adds provisos to each of Sections 6, 7 and 8 of the Copyright Act. These sections are the sections will grant the exclusive rights of copyright. By adding provisos which grant persons who are not the copyright owners the rights to claim "a royalty", with a concomitant new provision in Section 23 of the Act that the failure to pay the royalty to the third party will amount to an infringement of the copyright in that work, the Bill detracts from the exclusive rights and makes them non-exclusive. This is in breach of the requirements of the Berne Convention and TRIPS that the rights granted by copyright be exclusive.
- The Bill will not improve the position of authors, composers and artists. The Bill will in fact take rights away from them compared to the rights they have under the Copyright Act before amendment.
  - ❖ The ill-defined nature of the new provisions claiming to entitle authors and performers to an inalienable right to a royalty for "uses" of their works, indiscriminately applied across all copyright works, will, we believe, fail to add any effective income stream, just as Section 9A, introduced in 2002, failed to produce remuneration benefits until the legislation was clarified by the Courts many years later.
  - ❖ Authors' entitlement to recognition by way of accreditation is being eroded by disentitling them from acting on their moral rights when exceptions apply. As a result, authors will be worse off under the Bill.
  - ❖ Rightsholders ability to act against infringers (often done at the behest of authors and performers in the literary publishing and music industries) will be eroded due to:
    - the lack of new enforcement provisions equipped to deal with the Internet Age and
    - the removal of the right to prevent trade in infringing copies.
  - ❖ South African authors will have to compete with to-be-permitted parallel imports of cheaper goods.
  - ❖ Due to unrealistically broad and poorly defined exceptions, there will be

- greater scope for consumers of copyright works to claim free uses which require no authorisation and no remuneration, whether to rightsholders or to authors and performers under the new “inalienable right to royalty” sections, and
  - technology companies, local and overseas, will be allowed unrestricted uses of copyright works on the unproven basis that the exceptions allow merely “technological uses, like artificial intelligence and machine learning, that do not use works for expressive purposes”, which technological uses in fact encompass the unauthorised and unremunerated reproduction of entire corpuses of whole copyright works.
- Steps that could have improved the position of authors and copyright owners, especially for the Internet Age, have not been taken.

These include:

- Introducing the exclusive ‘distribution’ right prescribed by WCT.
  - Consideration could have been given to a copyright levy for private uses and the public lending right to remunerate authors for the use of their books by library patrons.
  - Amending the offences and penalties provision to deal with criminal infringements of the ‘communication to the public’ right.
  - Adding presumptions for infringement claims, such as a presumption of ownership of copyright for authors, publishers and their exclusive licensees and a presumption of subsistence of copyright in works.
  - No appropriate minimum level of damages for infringing uses to disincentivise infringement.
  - No procedure for relief against infringements online where the infringer is not within the jurisdiction of the South African Courts. (Arguably, such provisions are better suited to the Electronic Communications and Transactions Act.)
- The indiscriminate application of certain principles and exceptions to copyright across all copyright works.

This has been done without taking into account the differences between creative industries that rely on copyright (music compared to literary publishing, film, computer programmes, etc) or taking into account differences within each industry (e.g. in literary publishing, between trade, educational, academic and scholarly publishing).

The new exceptions to copyright attempt, imperfectly, to consolidate the exceptions that are to some extent applicable across a range of copyright works into one single section – thereby extending the exceptions to works for which they were not originally intended thereby creating the risk of violating the Three-Step Test of the Berne Convention as they fail to take into account the market for the primary work.

It is a flaw of the Bill that it treats all copyright works on the same, one-size-fits-all, basis – it shows that no consideration has been given to the impact of exceptions in relation to the uses of specific works or the uses of those works in industry.

- The Bill is not compliant with the terms of WCT and the Marrakesh VIP Treaty.

The goal should be to adopt legislation that will enable ratification of the international treaties relating to copyright, the two of most relevance to the publishing industry being WCT and the Marrakesh VIP Treaty.

The Bill does not meet the basic requirements of WCT by not having correctly introduced the exclusive right of 'communication to the public' right, by not having introduced the exclusive right of 'distribution' at all, and the provisions relating to technological protection measures and copyright management information need more consideration.

The Bill does not meet the requirements of the Marrakesh VIP Treaty and in that the proposed exception endeavours to cover many disabilities other than visual impairment. Also, the exception proposes to apply to all copyright works, as opposed to only certain literary and artistic works.

- Numerous conceptual and drafting errors.

One set of drafting errors has the appearance of having been the consequence of an incorrect 'global cut & paste' action – rights, including rights to royalties, are granted to “the user, performer, owner, producer or author” throughout the Bill. Of the many faults arising from this error, the most obvious is the inexplicable consequence that “users” of copyright works share in the royalties for their use of the works.

It is outside the scope of this submission to endeavour to deal with or correct all the drafting errors.

PASA is ready to engage in the goal of improving South Africa's legislation in the fields of copyright and performers rights, and looks forward to being able to participate in the public hearings.

Yours sincerely



Mpuka Radinku  
**Executive Director**

Annexures:

- PASA submission on the draft Copyright Amendment Bill, 2015, dated 16 September 2015
- PASA submission on the Performers Protection Amendment Bill, No 24 of 2016, dated 6 February 2017.
- *Copyright and the Public Interest* - PASA Position submitted to NCLIS, 27 January 2009
- *What Publishers Do*