



18 July 2018

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

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Dear Ms Fubbs

COPYRIGHT AMENDMENT BILL, NO 13 OF 2017: Limited consultation on the Memorandum on the Objects of the Bill and Specific Clauses of the revised Bill - Submission by the Publishers Association of South Africa, PASA

PASA herewith submits its comments in response to your Committee's invitation to stakeholders to make written submissions in respect of limited aspects of the Copyright Amendment Bill, No 13 of 2017, as revised by your Committee and made available to us on 20 June 2018 (referred to in this submission as the "Bill").

Introductory overarching comments

PASA supports empowering South African authors, composers and artists, the wide availability of locally-produced copyright works for the South African public as well as accessibility of published works for the visually impaired and other disabled persons in South Africa. PASA made this clear in its main submission of July 2017 and in supplementary submissions to your Committee between March and May 2018.

However, PASA considers that the Bill, if passed into law in its current form, will not meet the objectives your Committee has set out for it. We foresee many unintended consequences of the Bill which will, in balance likely harm, not benefit, authors, composers and artists, both in negotiating remuneration and in the recognition of their moral rights.

The Bill, having been devised without taking into account reliable information made available to the dti and Parliament demonstrating how the publishing sectors and other creative sectors work with copyright, contains provisions which are made to apply to circumstances which are not prevalent or do not even exist. Other provisions are disproportionate in setting out to achieve outcomes desired by your Committee, even outright confiscatory. All of these provisions will have a devastating impact on authors and publishers.

PASA therefore places the following points on record:

- **The limited nature of the current consultation, as to (i) the limited items in the Bill in respect of which comment has been invited, (ii) the limited effective period of the consultation, from the circulation of the consultation document by email on 20 June, for 20 days until 9 July, even if subsequently extended to 29 days until 18 July.**

As a result, stakeholder organisations that are membership-based will only be able to respond with extreme difficulty, if at all, and we are concerned that the thousands of authors, composers, artists and other creators of copyright works, will not have the opportunity or time to consider how the Bill will impact them, whether it will even benefit them, and to formulate a response on this very complex topic.

Regrettably, this is not the first time this point has been raised, there having been unrealistically short periods within which to respond set in all the prior consultations relating to this Bill, going back to the Draft Copyright Amendment Bill in 2015.

- **The continued absence of any real research into many of the provisions being proposed and of an impact assessment.**

We refer specifically to the Bill's provisions for 'fair use' and the many over-broad copyright exceptions for, amongst others, educational and academic uses and by libraries, galleries and museums; perpetual, un-waivable and un-assignable claims to royalties by authors, composers, artists and filmmakers; unlimited parallel importation; and override of contracts, all of which will create a disproportionate imbalance in the copyright system against creators and producers of copyright-protected works.

PASA has consistently reported both to the dti and your Committee on the shortcomings of the SEIAS report on this legislation, which was never published by the dti. We find no convincing motivation for these provisions nor any impact assessment of them in the SEIAS report. The Memorandum on Objects similarly indicate that no research or impact assessment has been undertaken by your committee.

In addition, PASA commissioned an expert economic impact assessment of the 'fair use' provisions and the exceptions for education, namely PwC's report *The economic impact of 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry*, the findings of which remain unchallenged.

Nevertheless, the 'fair use' clause, the copyright exceptions and the contract override clause remain nearly unaltered in the revised Bill. Two of the few alterations in the revision are (i) the expansion of the 'fair use' clause in the revised Bill (by the addition of the words "such as" before a long list of permitted purposes) and (ii) the amendment of the contract override clause (by inserting 'open licences' and removing the 'carve-outs' for cases where the clause would not apply). However, neither altered clause appears in the list of Specific Clauses in this consultation.

The perpetuation of these provisions, the absence of response by your Committee to PASA in respect of the introduction of the PwC impact assessment and the fact that the PwC impact assessment has not materially figured in the debate about 'fair use', education exceptions and override of contracts at all, indicate to us that neither the PwC impact assessment nor our substantiated motivations were taken into account in this revision. PASA has also indicated to your Committee (by its supplementary submission in March 2018) the substantial flaws in the principal arguments substantiating 'fair use'. We believe that trade associations representing publishers, of which ours is the largest in South Africa, are entitled to a public explanation in these circumstances, and that the Memorandum on Objects should contain a properly substantiated motivation as to why these provisions are being persisted with.

- **The manner in which the revision of the Bill was carried out, perpetuates material flaws underlying the original Bill.**

During the course of the public hearings in August 2017, it was clear that your Committee recognised the flaws in the original Bill. However, flaws in the original Bill that were perpetuated in the revised Bill include the application of recommendations made by the Copyright Review Commission in respect of its findings relating to the music sector across all copyright works, as well as a material misunderstanding of the recommendation of a right of reversion in favour of composers of musical works as a limitation on the term of an assignment of copyright.

At the time of the public hearings, we were encouraged by the general recognition of the flaws in the original Bill, and expected a substantive rewrite, in response to which, at the Committee's oral request during the hearings, we contributed extensive proposals on text at very short notice. However, your Committee then embarked on a process, not to rewrite the Bill, but with an attempt to correct the original Bill. Your Committee's planned programme to consider policy themes raised by the Bill was abandoned, and, without the benefit of research or impact assessment, a section-by-section discussion was embarked on, leading to the current version of the Bill.

The way in which your Committee approached the Bill has resulted in your Committee not having the opportunity to consider key elements to which a bill amending the Copyright Act should aspire in order to bring it up to date with international standards and to be fit for the digital world.

A specific example is the watering down of the moral rights of authors to be named in respect of any re-uses of their work, whether falling under an exception or not, where they will be in a poorer position under the Bill than under the current Act.

- **Your Committee has not given any real opportunity to the creative sectors to demonstrate how they rely on copyright, how copyright is used in developing products protected by copyright and how those products are made available to the public.**

Copyright protection extends to all literary, musical and artistic works as defined in the Copyright Act, whether they are made for public enjoyment or not, and the principles applied in the revision do not seem to take cognisance of this modern world reality.

- **Provisions having retrospective effect have been proposed in the Bill, without legal opinion first having been obtained and made available to the public for consideration.**

The revised Bill perpetuates flaws from the original Bill and introduces new material errors, the net result of which is that, if passed into law in this form, it will be extremely damaging to both authors and publishers. PASA and its members, whilst wishing to contribute to the public participation process and having done so in good faith by responding to this and earlier consultations, have no choice but to keep all options open in responding to the Bill.

Comments on the Memorandum on the Objects of the Bill

The Bill proposes to introduce radical changes in the copyright framework that has existed to date. The Memorandum of Objects, however, lacks an overarching description of the new framework. That the Bill has not benefitted from proper research or impact assessment or from a deliberation of policy objectives, is the cause for this deficiency in the Memorandum. As a further result, apart from the principle of updating the Copyright Act to cater for the digital environment and to be “strategically aligned” with international treaties, the structure of the Bill comes across as a tinkering with specific provisions, many of them having the effect of weakening copyright, in some cases beyond what is allowed by international norms, such as the Three-Step Test under the Berne Convention and TRIPS.

As a general observation, the Memorandum remains incomplete in respect of explaining material provisions of the Bill, leaving an explanation for some of these material provisions out altogether. The Memorandum is also, with respect, poorly written, containing a number of errors and *non-sequitur* statements, the most noticeable ones being elaborated upon below. We will confine our comments to only those points that impact on the publishing sectors appearing under the headings “Background” and “Overview” and, as a result, this is not a critique of all the issues raised by the Memorandum.

Introduction of the exclusive rights of communication to the public’ and ‘making available’

PASA welcomes the introduction of the ‘making available’ right in the revised Bill in order to make the Act compliant with the WIPO Copyright Treaty.

The introduction of the ‘making available’ right is, however, immediately undone by the provisions of the new Section 12B(6) (Clause 14), the deletion of Section 23(2)(b) (Clause 26) and the amendments to Section 28 (Clause 28). The net effect of these provisions is to allow unlimited parallel importation of all

copyright works, a situation that can be extremely harmful for local creators and publishers of published literary works, yet these provisions have not been subject to research or impact assessment.

Consequential amendments arising from the introduction of the ‘communication to the public’ and the ‘making available’ rights, such as in Section 27, have not been made in the revised Bill.

Clarity on commitment to accede to international treaties

It is not clear whether South Africa intends to accede to the international treaties affecting copyright and performers rights, specifically the WIPO Copyright Treaty and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.

We had the impression that accession to these treaties had been recommended by the dti, but that notwithstanding, the Memorandum contains no unequivocal commitment to accession.

The Memorandum still only states that the provisions of the Bill are “strategically aligned” with these treaties and that “South Africa will be able to accede to international treaties and conventions”, which treaties and conventions are not specified in that paragraph.

Exceptions to copyright, ‘fair use’, and override of contractual terms

One of the most concerning features of the original Bill, retained with only minor changes in the revised Bill, are the provisions referred to in para 2.7 of the Memorandum, “Scope ... for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty.” This introduces the new ‘fair use’ defence to copyright infringement and other very broad exceptions.

The provisions to which para 2.7 of the Memorandum refer are, we deduce, the new Sections 12A (‘fair use’), 12B (general exceptions), 12C (transient or incidental copies) and 12D (educational and academic uses) (all in Clause 14), new Section 19C (library uses) (Clause 20) and the contract override provision in new Section 39B (Clause 34), as well as consequential provisions such as the broad exception in relation to technological protection measures in new Section 28P(1) (Clause 29).

PASA objects to there being no further consultation on the new Sections 12A and 39B, despite seemingly small but material changes, for the reasons elaborated upon below.

The revision undertaken by your Committee made a material change to the new Section 12A by introducing the words “such as” in the introduction, before the permitted purposes. The permitted purposes are extensive, going beyond the purposes permitted by Section 107 of the United States Copyright Act, which country is the origin of the ‘fair use’ doctrine. For example, “education” is not a ‘fair use’ purpose in the United States, but it does appear in the new Section 12A. We have objected to this in past submissions and we record our objection to it again, because the education market is a legitimately accepted market for publishers. Moreover, the application of the *eiusdem generis* rule to the

proposed Section 12A will therefore extend permitted purposes to far beyond what is accepted in the United States.

The new Section 39B has also undergone a change, now resulting only in 'open licences' being immune from this prohibition on contracts overriding permissive provisions of the Act.

The PwC impact assessment referred to above demonstrated that publishing for education is the lifeblood of the publishing sectors and that the 'fair use' provision and the over-broad copyright exceptions for education will be extremely damaging to the publishing industry.

We have the following comments on these provisions:

- They are claimed to have their origin in the 2013 Draft National Intellectual Property Policy "as commented on" (para 1.2). That draft policy was the subject of numerous comments as well as a regulatory impact assessment, none of which have been disclosed in this process.

The 2013 Draft National Intellectual Property Policy never matured to a final policy and has in fact been replaced by the Intellectual Property Policy of the Republic of South Africa – Phase 1, adopted by Cabinet earlier in 2018.

- We are not aware of any research or impact assessment undertaken by the dti or Parliament in respect of these provisions, nor does the Memorandum refer to any such research or impact assessment.
- We submit that these provisions taken together will significantly negate the exclusive rights of copyright owners to such an extent so as to be unreasonably prejudicial to their legitimate interests, and we question whether sufficient study has been undertaken to confirm that these provisions are compliant with South Africa's existing treaty obligations under the Berne Convention and TRIPS.

The contract override provision in new Section 39B (Clause 34) is not dealt with in the Memorandum. We note that, as a blanket provision covering all acts permitted in the Act, its impact will be far-reaching, covering situations which do not seem to have been contemplated.

We have noted observations in your Committee that the contract override provision will assist authors, artists, composers and performers to escape from unfair contracts in relation to their copyright. However, we submit that, whereas this may be a desirable result from a national policy perspective, this clause may well not achieve the purposes spoken about in your deliberations.

On the contrary, the vagueness of this clause will in fact enable consumers of copyright goods to abuse the copyright of the very persons the Act is intended to protect.

- The clause, as amended in this revision, will now make it impossible to settle by agreement any claim for copyright infringement where a fair use defence is raised, necessitating all such infringement

claims to proceed to final judgment – thereby too removing freedom of contract from both copyright owners and users.

- This provision's interaction with the 'fair use' provision and the over-broad exceptions referred to above will create considerable uncertainty in contractual relations, which could undermine business and licensing models for all copyright works.

25-year limit on the period of assignments of copyright

The 25-year limitation on the period of assignments (amendment to Section 22(3), Clause 23) is a material provision which the Overview in the Memorandum does not mention and which para 3.22 incorrectly describes as a "reversion right."

We note the adaptation in the revised Bill by attempting to limit the effect of this provision to literary and musical works alone, but this adaptation has given rise to a material mistake which will have unintended consequences.

The recommendation of the Copyright Review Commission was for a right of reversion only in respect of assignments of copyright in musical works by their composers to producers of sound recordings, not a limitation on the period of assignments of copyright. The application of this provision to other copyright works is, as we have noted, a perpetuation of a flaw from the original Bill, with no enquiry or impact assessment to support its application in respect of such other works. On the contrary, this application betrays that the clause was written and subsequently revised with no knowledge of what happens in the literary and publishing sectors, and that the factual position laid out in the annexure *What Publishers Do* appended to our July 2017 submission was not taken into account.

It is not clear to us whether the 25-year limitation is intended to apply only to copyright works created after the Bill takes effect as an Amendment Act, or retrospectively in relation to works in which the copyright was assigned in the past and which is still under copyright. PASA not only objects to the 25-year limitation for the reasons set out in this and previous submissions, but also for its retrospective effect, which will amount to a reopening of all contracts in relation to published works where an assignment was involved, thereby likely creating an arbitrary dispossession of property that is constrained by the Constitution.

The new criminal sanctions (Clause 27, amendments to Section 27(6)) create an unacceptable risk of criminal prosecution of publishers following the expiry of a 25-year period of an assignment of copyright.

We submit that the whole of Clause 23 must be revisited (also the need for the limitation on assignment of copyright by the State and statutorily imported terms into licences), so that the provision intended by the Copyright Review Commission can be introduced and the Memorandum is completed by referring to the nature and need for the right of reversion.

Commissioned works

The Overview of the Memorandum does not explain the rationale underlying the proposed changes to the 'commissioned works' provision (amendments to Sections 21(1)(c) and (2), inserting a new Section 21(3); Clause 22). The new 'commissioned works' provisions, coupled with an amendment to the provision relating to the vesting of copyright in works made under the direction or control of the State, unspecified international organizations and unspecified local organizations (amendment to Section 5(2) by Clause 3), can ostensibly conflict with each other and will create uncertainty as to the initial ownership of all copyright works.

It would have been preferable to decide which of (i) the taking of a photograph, (ii) the painting or drawing of a portrait, (iii) the making of a gravure, (iv) the making of a cinematograph film / an audiovisual work or (v) the making of a sound recording should remain in Section 21(1)(c) and which should be removed, based on research, evidence and impact assessment. PASA is neutral on this point.

If it is nevertheless desired to retain Section 21(1)(c), then it is suggested that minimum standards for a commissioning agreement be prescribed, instead of providing for the process in new section 21(3), which we submit is extremely burdensome and will create more, not less, confusion in its practical application.

We submit that the whole of Clauses 3 and 22 must be revisited and the Memorandum must be updated to set out the need for the changes to the 'commissioned works' provision. We submit that Clause 3 is unnecessary and can be removed, but a new 'commissioned works' provision will have to be the subject of a fresh consultation.

No remedies to prevent online infringement

Despite the statement in the Memorandum (para 2.1) that "The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement ...", the Bill introduces no new remedies to support rightsholders in respect of the burgeoning cases of infringement on the Internet and, in this respect, it does not meet the objective of updating the Copyright Act.

PASA had recommended the introduction of 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. Regrettably, there is no indication that this was even considered by your Committee.

Since criminal cases are hardly ever brought in relation to the infringement of copyright, the amendments to the criminal sanctions (which we believe will be ineffective in any event) will not support authors and publishers of literary works in combating online infringement.

Errors and non-sequiturs

A sample of questionable statements in the Memorandum appear below:

“The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities.”
(Para 2.1)

Comments:

- The statement read as a whole is a *non-sequitur*, in that its conclusion does not follow from the statements that lead to it. Copyright infringement is not countered “by promoting the progress of science and useful creative activities.”
- Infringement of copyright is a concern of copyright owners, who may be authors or assignees of copyright.
- “Creators” is not a term used in the Act.
- Copyright infringement is countered by remedies supplied in the Act – the Bill adds two new sets of exclusive rights and amends the criminal sanctions provisions – but contains no new remedies to counter infringement. This point is addressed below.
- There does not appear to be anything in the Bill that promotes “the progress of science and useful creative activities.”

“... local performers and composers, who have not benefitted due to the lack of access to the Copyright system” (Para 2.1)

Comments:

- No South African author, composer or artist is denied copyright protection for their original literary, musical or artistic works.
- The reference to “performers” in the context of copyright is incorrect.
- Inasmuch as this statement has its origin in the report of the Copyright Review Commission, it needs to be elaborated upon in reflecting the findings of that Commission. There is no justification for extending those findings to any creative sector other than the sector in respect of which the findings were made.

Comments on the specific clauses in this consultation

Items 2, 3, 4, 5 and 6: Perpetual and un-assignable right to a royalty in favour of authors of literary, musical and artistic works (Clause 5, new Section 6A; Clause 7, new Section 7A)

PASA considers that these provisions undermine contractual arrangements for remuneration and, in relation to the publishing sectors, indicate that existing practices were not taken into account or even known when considering them. In fact, publishers do *not* take assignment of copyright from authors in respect of most kinds of literary works for publication, and where they do, there is a legitimate rationale for doing so. Specific consequences of these provisions which have likely not been taken into account are elaborated upon below:

These provisions do not take into account multi-author works and the commissioning of illustrations for published editions. We cannot foresee any circumstance where the provisions can work in relation to literary and artistic works which are not published in their own right and only contribute to a larger work, since there is no question that an assigning author of such a work can, in contract negotiations, claim a royalty from sales of the completed published work. In a similar vein, these provisions cannot work in relation to engineering drawings or artwork for logos and product designs undertaken by commercial artists.

New technologies, such as digital asset management systems, mean that it is now possible to produce new high-quality materials which may incorporate digital assets in respect of which the copyright was previously assigned to publishers. This kind of re-use simply would not be practical if publishers would be required to pay royalties to the creators of those assets. The practical effect will be that it will not be feasible to produce such works in South Africa, which will be to the detriment of both authors and publishers.

Contributions of articles to scholarly journals are typically done on the basis of the author assigning copyright to the learned society or university that publishes the journal or to the publisher, with no remuneration asked or expected. The consideration for these assignments of copyright is not financial. The new Section 6A will result in learned societies, university presses and academic publishers being burdened with un-waivable claims for royalties in respect of journal editions, placing them in an untenable financial position, resulting in the undermining of scholarly publishing in South Africa. University presses which are members of PASA and which will be directly impacted by these provisions include Wits University Press, UNISA Press, UKZN Press and HSRC Press.

These provisions could actually result in being to the disadvantage of authors of works where the copyright is assigned. If the Bill were to become law, we foresee that remuneration structures for authors will be changed, by exchanging fixed prices and advances in return for a risk on royalties which will then be compulsory by law.

PASA objects to the terms of contract prescribed by the new provisions in the Bill and to these provisions applying retrospectively to works that have already been assigned, for which there will be no budget for additional remuneration. We consider that the retrospectivity of these provisions, too, may well be contrary to the South African Constitution and its Bill of Rights, amounting to an arbitrary deprivation of property.

Item 15: Commissioned works (Clause 22, amendment to Section 21(1)(c) and new Section 23)

The new 'commissioned works' provisions coupled with an amendment to the provision relating to the vesting of copyright in works made under the direction or control of the State, unspecified international organizations and unspecified local organizations (amendment to Section 5(2) by Clause 3), can ostensibly conflict with each other and will create uncertainty as to the initial ownership of all copyright works.

It would have been preferable to decide which of (i) the taking of a photograph, (ii) the painting or drawing of a portrait, (iii) the making of a gravure, (iv) the making of a cinematograph film / an audiovisual work or (v) the making of a sound recording should remain in Section 21(1)(c) and which should be removed, based on research, evidence and impact assessment. PASA is neutral on this point.

If it is nevertheless desired to retain Section 21(1)(c), then it is suggested that minimum standards for a commissioning agreement be prescribed, instead of providing for the process in new section 21(3), which we submit is extremely burdensome and will create more, not less, confusion in its practical application.

We submit that the whole of Clauses 3 and 22 must be revisited. Clause 3 is unnecessary and can be removed, but a new 'commissioned works' provision will have to be the subject of a fresh consultation.

Item 17: Clause 25: Section 22C(3)(c): Reciprocity applying to pay-outs of royalties by Collecting Societies to foreign countries.

There is no basis in international law requiring or even justifying reciprocal agreements between countries for the remittance of royalties by collecting societies, which, in relation to royalties collected for the use of literary works and published editions in South Africa or abroad for the benefit of South African rightsholders, only take place between countries that are members of the Berne Convention.

The new Section 22C(3)(c) may well place South Africa in breach of its obligations under the Berne Convention and TRIPS to apply the principle of 'national treatment' in favour of the nationals of other countries that are members of these treaties. This provision, as many other provisions purporting to benefit South African authors, composers and artists, are indicative of the obligations of 'national treatment' not being understood or properly applied.

The need for new Section 22C(3) has to be reconsidered, since under the current Act, collecting societies may enter into bilateral agreements with collecting societies in other countries, and remittances into and out of South Africa are already controlled under the Exchange Control regulations.

Item 19: Increased penalties for infringement (Clause 27, amendments to Section 27(6))

PASA has severe reservations about concepts like unlimited fines on individuals and fines determined as a measure of turnover in relation to persons who are not natural persons and therefore objects to this amendment, suggesting instead a simple increase in the amount of the maximum fine.

There is no guarantee that prosecuting authorities will prosecute every case of copyright infringement. A fine based on turnover could bias prosecuting companies with assets and overlooking juristic persons that are perceived not to have assets – a major imbalance in respect of infringers who hide their assets or house infringing operations in under-capitalised juristic entities.

In our experience, criminal prosecutions for copyright infringement of literary and published works are relatively rare. Fines are paid to the State and will not assist copyright owners in recovering their losses

from successfully prosecuted infringements. We therefore consider that this amendment will not bring about any real benefit in combating infringement.

As already mentioned, the Bill has no new civil remedies to support copyright owners in relation to cases of online infringement. Since the burden of suffering damage from, and for resolving cases of, copyright infringement falls on copyright owners, there is a real need for more tools to combat infringement. The Bill also has no remedy for the most pervasive form of infringement, which is online infringement in respect of content uploaded outside the borders of South Africa and accessible within the country.

We therefore propose not going ahead with this amendment, but simply increasing the amount of the prescribed fines after consultation with enforcement authorities, and also consider additional remedies to enable copyright owners to counter online infringement, 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.

Item 20: Copyright Tribunal (Clauses 30 and 31, new Sections 29: Section 29A(3) and Section 29E)

The revision of the Bill to provide that the Tribunal will only consist of judges, acting judges and retired judges of the Supreme Court (Clause 30) is an improvement on the provisions of the original Bill. In respect of new Section 29B, we expect that judges appointed to the Tribunal will at least have “adequate knowledge” in commercial law, intellectual property law *and* copyright law (not “or”).

The logistics of setting up the Tribunal’s office, appointing its members and issuing regulations also justify a future effective date for the Bill to become law once it has been signed by the President. We submit that the substantive provisions of the Bill should not take effect before the Tribunal can be put in place.

We question, however, whether the cost for such a Tribunal has been assessed and budgeted by Government since, in the scheme of this Bill, much will hinge on a strong Tribunal to give clarity on many of the provisions being introduced by the Bill. Conversely, if it subsequently were to transpire that there will not be a budget to set up such a Tribunal, a critical balancing element will fall away.

We therefore wish to record our concern for the event that there has been no input from the Department of Justice and Constitutional Development or of an impact assessment of the cost of these provisions before releasing the Bill with this revision for public consultation.

We also wish to express concern that provisions in the original Bill relating to the right of appeal and review and in relation to interim relief (previously new Sections 29L and 29M) have been removed without raising it in consultation with all stakeholders.

Item 21: Transitional provision (Clause 37)

This transitional provision relates to the Intellectual Property Laws Amendment Act, 2013 (IPLAA), which has been on the statute books for nearly five years and never put into operation. IPLAA is now the subject of an ongoing discussion as to whether it should be amended or even repealed in the light of the new Protection, Promotion, Development and Management of Indigenous Knowledge Systems, Bill, No 6 of 2016.

PASA, together with many other interested and qualified parties, have shown that IPLAA will be unworkable and will fail to benefit traditional communities. As a result, it was foreseen that IPLAA would become a dead letter in the law, that has now transpired to be the case. IPLAA, in giving extensive exclusive *rights of copyright* to traditional works which are not original and which cannot be attributed to an author, is not capable of being handled in the copyright system, yet IPLAA will make extensive amendments to the Copyright Act, which may well never be implemented.

PASA has supported the Protection, Promotion, Development and Management of Indigenous Knowledge Systems, Bill, No 6 of 2016, subject to limited qualifications relating to specific cases of re-uses of such works that should be permitted.

The transitional provision, inasmuch as it is an attempt to preserve an Act that is not in operation and is likely never to be put into effect, is ill-founded. Instead, the decision on whether IPLAA is amended or repealed should be taken before the Bill is processed further. PASA submits that the best solution is that IPLAA should be repealed by this Bill, and that the section numbering and cross references of the current Act, before IPLAA, be re-instated.

PASA remains committed to engage in the goal of improving South Africa's legislation in the fields of copyright.

Yours sincerely



Mpuka Radinku
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