25 October 2018

Hon. J Fubbs MP, Chair, Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
CAPE TOWN

By email only to:
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Dear Honourable Ms Fubbs

COPYRIGHT AMENDMENT BILL, NO 13 OF 2017: Submission by the Publishers Association of South Africa (PASA) and the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd (DALRO)

We are writing to respond to the consultation on select clauses of the Bill issued on 12 October 2018.

Before we do so, we have to re-iterate our position as set out in PASA's last submission of 18 July 2018 that:

- Again, stakeholders were given an unrealistically short time period to respond to this consultation. This makes it very difficult, if not impossible, for stakeholders that are membership-based, like all trade associations such as PASA, to consult with their members on the issues involved. We regret to note that unreasonably short time periods have become a characteristic of the entire public participation process for this Bill.

- Material amendments made to the Bill by the Portfolio Committee have not been put up for public comment.

  Those that have a direct detrimental impact on the publishing industry are (i) the insertion of the "such as" wording in the 'fair use' clause, new section 12A, and the fact that it is co-extensive with new exceptions in Sections 12B, 12C, 12D and 19C, many of which have an expropriative effect and may well not pass Constitutional muster nor be in line with South Africa's obligations under the Berne Convention or TRIPs, (ii) the whole of sections 6A and 7A and, by extension, the whole of section 8A, (iii) the inadvertent limitation of the duration of all assignments of copyright for 25 years, with its retrospective effect, and (iv) the adaptation of the contract override clause, new section 39B. Also, (v)

the new Section 22A(10), the application of the orphan works provision to the resale royalty right, has not been advertised for consultation.[1]

If passed into law in this form, the Bill will be extremely damaging to both authors and publishers, for the reasons set out in the earlier submissions of both PASA and DALRO. PASA and DALRO continue to participate in the public participation process in good faith, but have to place on record that we have to keep all options open in responding to the Bill.

We respond to the consultation as follows, with the items raised in the consultation re-ordered in line with the priorities of the literary and publishing industry:

Adding the exclusive rights of distribution and rental to the rights of copyright (Item 2).

PASA and DALRO welcome the addition of the new exclusive rights of distribution for literary, musical and artistic works, as well as for cinematograph films and sound recordings, noting that we had already proposed this text to your Committee.[2] We also welcome the withdrawal of the previously proposed repeal of Section 23(2)(b).[3]

We surmise that these additions have their origin in the expert advice given to the Portfolio Committee on the making compatible of the Act with the requirements of the WIPO Copyright Treaty (WCT). The additions are not complete, and **the following changes still have to be made:**

- **Qualifying the right of distribution in each case with the following proviso (adapted where needed to meet the context of the introductory text):**
  provided that "distribution" of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation by or with the consent of the copyright owner or any subsequent importation of such copies into the Republic;
- **Amending Section 11A in order to grant the new exclusive rights to published editions.**
- **Amending Section 11B in order to grant the new exclusive rights for computer programmes.**
- **Making consequential amendments to the Act to recognise the new rights, notably in Section 27 by adding the following new para (g):**
  (g) communicates to the public for the purpose of trade or for any other purposes to such an extent that the owner of the copyright is prejudicially affected,

It is apparent that no work has been done to consider how the existing secondary rights of distribution in Section 23 and other provisions in the Act that could limit the new exclusive right of distribution will impact on making the Act compliant with WCT.

[1] The Portfolio Committee has been advised on numerous occasions that the resale royalty right is not a right of copyright, yet this mistaken application, with all its consequences, persists. The application of the orphan works provision to it by the new Section 22A(10) will have significant detrimental consequences for any trading in second hand goods, and it should therefore have been advertised for comment, not only to the stakeholders on the Committee's distribution list, but to a far broader audience.

[2] In August 2017. Our proposal was not taken into account then.

[3] The removal of Clause 23(b) appears in the text of the latest version of the Bill but not in the consultation paper.

Importation of copies (Item 7)

We appreciate the revisions to the amendments to Section 28 by Clause 28 as being a step in the right direction. However, we note that there is still no research or impact study into the effect of parallel importation of copyright goods into South Africa, nor are we aware of any underlying policy decision for this amendment in the first place.

Section 28 (proposed to be amended) has an overlapping provision in new Section 12B(6), which must be withdrawn. Not only is its wording not compatible with the wording of the Bill[4] and incorrect,[5] but its implications will be extremely damaging for South African copyright owners and, through that, diminish the royalties due to authors, composers and artists arising from the introduction of the new exclusive rights.

An implication of new Section 12B(6) is that if a South African copyright product is marketed in other countries in Africa at a lower price to meet the demands of the markets in those countries, an unrelated third party can take those works off the market in those countries and reimport them into South Africa at his or her profit, without the permission of, and no remuneration to, the copyright owner. This will compel publishers to price their products in such a way that is not attractive to international markets, thereby reducing exports and income for publishers and authors. We submit that the first sale doctrine must be covered by the clauses introducing the distribution rights[6] and that Section 28 is the only place in the Act that should deal with the importation of copyright protected goods.

Collecting societies / collective management organisations (Items 1, 4, 5 and 6)

PASA and DALRO accept the need for the regulation of collecting management of copyright and are encouraged by the Portfolio Committee's acceptance of the example of the European Union CMO Directive[7] in the new definition. There is more to the definition in the CMO Directive, since it is part of a legal setting that is different from the Bill (namely where no accreditation is required), that must be absorbed into the Bill, as further explained below.

Terminology: "collective management organisation" is correct in this context

The correct term for the aggregation of collecting societies that work on the basis of remuneration rights[8] and organisations like DALRO that represent rightsholders collectively on the basis of voluntary licensing is:

"collective management organisation".

[4] Use of the word "exhaust."

[5] The terminology "other assignment of ownership of an assigned original or copy of a work" is somewhat confused, but has nothing to do with "first sale."

[6] See our comment to Item 2 above and also our text submissions of August 2017.

[7] Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN.

[8] Remuneration rights such as "needletime" or remunerated exceptions, as one finds in Germany and Switzerland.

This is the term used in the CMO Directive. The term "collecting society" suggests that they only collect, when their main task is to distribute collected royalties to rightsholders and also to actively manage the rights for rightsholders who mandate them. We submit that the term "collective management organisation" must replace the term "collecting society" wherever it is found in the Act or the Bill.

Required structure of collective management organisations (definition in Item 1)

The definition of "collecting society" (or, as we propose, "collective management organisation") should not appear in the definitions, but in new Section 22B(1), since we agree in principle that the characteristics set out in the definition should only apply to organisations that apply to be registered, and are in fact registered, under new Section 22B.[9] It is also important that, as with the CMO Directive, entities that are not intended to be regulated – such as photographers licensing agencies – not be captured by the definition.

Section 22B(1) should therefore read as follows (in which case the proposed definition of "collecting society" should be removed):

> 22B. (1) A person who intends to act as a representative collective management organisation in terms of this Chapter must;
>
> (a) be a non-profit company contemplated in the Companies Act, 2008 (Act No. 71 of 2008) –
>
> (i) that is owned or controlled, directly or indirectly, by copyright owners, authors of copyright works or holders of performers rights in terms of the Performers Protection Act, 1967 (Act No. 11 of 1967), or some or all of them, or organisations that represent some or all of such copyright owners, authors or performers,
>
> (ii) whose members authorise it by virtue of their membership or by way of licence or any other contractual arrangement, or is otherwise authorised by law, to manage those rights under copyright or performers rights or to undertake any of the actions contemplated by Section 22C(2) on behalf of more than one copyright owner or holder of performers rights, for their collective benefit,
>
> (iii) whose sole or main purpose is to manage rights under sub-paragraph (ii) above;
>
> (b) apply to the Commission in the prescribed manner and form for accreditation;
>
> provided that the foregoing shall not prevent the management of rights by unaccredited businesses, such as publishers, producers or other form of independent rights management agents, managing the rights on behalf of any copyright owner or holder of rights based on contract, whether or not these businesses are contractually entitled to a share of the rights revenue.

Such a change would mean that **Section 22D(1) need no longer also prescribe the structure of a collective management organisation – in any event a duplication**[10] **– and its introduction can now read**:

[9] An important difference with the CMO Directive is that the CMO Directive does not require registration as a condition to operate.

[10] It would be a duplication even with the acceptance of the new definition of "collecting society" being proposed in Item 1 of this consultation.

22D(1) A collective management organisation shall, in such manner as may be prescribed –

Empowering collective management organisations (Item 4)

PASA and DALRO welcome the revision of Section 22C. However, please note that the purpose of getting accurate records is not to calculate the royalties due and payable by the licensee, but to determine the shares in the distribution of the royalties collected.

We point out that much collective licensing is carried out by way of blanket licensing, where a user pays a fixed amount for a given period or event, and then can make as much use of the licensed material as he or she wants.[11]

We assume for the provisions of Section 22C(2)(e) that blanket licence tariffs will be allowed. It is therefore imperative that **the words "for the purpose of calculating the royalties due and payable by that person" must be deleted from Section 22C(2)(b) and also from Section 9A(aA)(ii)**.

We note that Section 22C(3)(c) has been amended, we assume with the intention of not placing South Africa in conflict with its National Treatment obligations under the Berne Convention and TRIPs. However, the amendment still does not meet the National Treatment obligations due to the use of the term "reciprocal" before "agreement." In all cases, the copyright laws of any given TRIPs country are not identical to the copyright laws of South Africa, so the term "reciprocal" can never be completely accurate.

The term of the trade is "bilateral agreement", but we understand that that term will not be universally understood. Since the entire concept behind Section 22C(3)(c) seems to be a misconceived attempt to circumvent National Treatment obligations, in circumstances where there are other options, such as under Article 21 of WPPT, **Section 22C(3)(c) must be withdrawn in its entirety**.

Offences and penalties (Item 5)

PASA and DALRO agree that failure to provide retruns of usage should be a criminal offence and is an important provision empowering the role of collective management organisations for the benefit of their members. However, the fine proposed for users who do not supply returns in Section 22C(4)(b) (10% of turnover) comes across as very arbitrary, especially considering the administrative nature of the offence.

Whilst not expressing a view either way, **we ask that expert opinion, perhaps from the Department of Justice, be obtained in respect of all the penalties proposed in the Bill.**

[11] DALRO's blanket licences are described on pp.44–45 of its submission of 7 July 2017. A simple example of a blanket licence is the licences available for mobile DJs by SAMRO and SAMPRA – for an annual fee of R1 130,25 payable to SAMRO and a fee of R171,21 per event, a DJ can play to the public as much music as he likes.

We are extremely concerned that rightsholders and collective management organisations will be left without any remedy if these penalty provisions are held to be unconstitutional.

Administrator for a collective management organisation (Item 6)

We welcome the prospect of the CIPC being able to appoint a business rescue practitioner for a failing collective management organisation, and it therefore makes sense that collective management organisations are proposed to be companies governed by the Companies Act, 2008.

There are, however, two consequences that have to be worked through. The first is that the conditions in the Companies Act for the appointment of a business rescue practitioner are not the same as contemplated here, and the Bill needs additional provisions to supplement these conditions for collective management organisations. Second is that, if a business rescue practitioner is appointed, the suspension of accreditation would not be appropriate.

Chapter 6 of the Companies Act allows for Non-Profit Companies[12] to be placed in business rescue. We are concerned, however, that the provisions of Chapter 6 of the Companies Act do not meet the needs contemplated by Section 22F, and that additional grounds would have to be incorporated by reference to the Companies Act, such as deeming the CIPC ("Commission") to be an "affected person" for the purposes of its definition in the Companies Act or for contravention of the terms of accreditation as meant in Section 22F to be a ground for business rescue. The prospect of business rescue then begs the question whether suspension of accreditation is appropriate for so long as business rescue proceedings are underway.

The proposals in Items 1 and 6 of this consultation are welcome moves in the right direction, but the provisions for suspension of accreditation in new Section 22F have not been thought through, especially in circumstances that the members of the collective management organisations will be authors, performers or copyright owners and where business rescue is now a prospect to restore a failing collective management organisations to compliance.

The short time period of this consultation simply does not provide the opportunity to provide detailed suggestions. We are happy to assist with appropriate text, but it can only be after the consultation period has been concluded. We would appreciate the opportunity to review this with the Portfolio Committee and its advisers in order to prevent a situation where the failure of a collective management organisation leads to the prejudice of authors, performers and copyright owners, and the provisions that are there to protect them have no effect.

Recording of acts in respect of audiovisual works (Item 3)

[12] All collective management organisations will be non-profit companies in terms of the new definition proposed in Item 1 or its inclusion in Section 22B(1) we propose above, thereby settling the first qualification for business rescue in terms of the Companies Act.

Many stakeholders, including ourselves, have expressed concern about whether the provisions of the new Sections 6A, 7A and 8A will be workable in practice, also having noted that the basic provisions have never been put up for public comment, nor has permission been obtained from the National Assembly in terms of Rule 286(4)(c) of the Rules of the National Assembly.

We submit that Section 8A(6) turns the exclusive rights in respect of cinematograph films / audiovisual works into remuneration rights. As such, this provision will bring South Africa in conflict with the provisions of the Berne Convention and TRIPs and will disentitle South Africa to accede to WCT.

Similar problems apply to new Sections 6A(4) and 7A(4) – on the one hand, an agreement is contemplated, and there can be no valid agreement if the remuneration (ie the royalty) is not determined; yet, at the same time, the situation seems to have been contemplated that there could be an agreement without an agreed royalty, that has to go to the Tribunal. If this means that users can determine agreements by order of the Tribunal, it turns exclusive rights into mere remuneration rights, in contravention of South Africa's obligations under the Berne Convention and TRIPs, and these provisions will disentitle South Africa from becoming a member of WCT.

We are concerned that, even with Section 8A(6) being fatally flawed for the reason set out above, its notice provisions are unworkable and the fine proposed for Section 8A(7)(b) (10% of turnover) is arbitrary, especially considering the administrative nature of the offence (failure to render returns).

Section 8A(6) and (7) must be withdrawn and the whole of Sections 6A, 7A and 8A opened for public consultation.

Yours faithfully

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