



22 February 2019

The Hon. Mr Edwin Makue
Chair of the Select Committee on Trade and International Relations
National Council of Provinces
Parliament of the Republic of South Africa
CAPE TOWN

By email only to the Committee Secretariat: hmtileni@parliament.gov.za

Dear Mr Makue

COPYRIGHT AMENDMENT BILL, NO B13 OF 2017 and PERFORMERS' PROTECTION AMENDMENT BILL, NO. B24 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 B13 of 2017 (referred to in this submission as the "Bill"), which will be deliberated in conjunction with the Performers' Protection Amendment Bill, No B24 of 2016, the Publishers' Association of South Africa, PASA, herewith submits its comments.

Introduction

PASA welcomes and supports the need for copyright reform, to improve conditions for authors and performers, and to bring South Africa's copyright into the digital age.

PASA has been actively involved in responding to proposals to amend the Copyright Act, 1978, and the Performers' Protection Amendment Act, 1967, since the Draft National Policy on Intellectual Property of 2013. PASA commissioned PwC to carry out an economic impact

assessment of the education exceptions and 'fair use' provisions of the Bill, which report was published in July 2017¹ and delivered to the Portfolio Committee on Trade & Industry. We will similarly make copies available to the Select Committee. The PwC study remains the only comprehensive economic impact assessment of these provisions of that Bill.

PASA made written comments on both Bills while they were being processed and, at the request of the Chair of the Portfolio Committee, made written text proposals on two occasions during 2017 and 2018, in both cases on extremely short notice. PASA also updated the Portfolio Committee on developments in international copyright law.²

Cabinet's decision to approve South Africa's accession to the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty and the Beijing Treaty on Audiovisual Performances

We are encouraged by the Cabinet's decision to approve South Africa's accession to the WIPO Copyright Treaty ("WCT"), as well as the WIPO Performances and Phonograms Treaty and the Beijing Treaty on Audiovisual Performances.³ PASA supports accession to these Treaties and contends that the Bill must again be reviewed in order to ensure that it is compliant with its requirements, in the light of doubts cast on its compliance by a wide range of stakeholders and experts in copyright law and practice.

We therefore ask that the Bill, as well as the Performers' Protection Amendment Bill, be sent back to the National Assembly for revision in the light of this latest development, or at least that deliberations on the Bill be suspended until such time until the National Assembly has decided on the accession to these Treaties.

PASA's past submissions to the Portfolio Committee

We have heard that the NCOP is being advised that the National Assembly has dealt with the comments of interested stakeholders. PASA, as do many other stakeholder associations whose members rely on sound copyright legislation and legislation protecting performers'

¹ Available online at <http://publishsa.co.za/file/1532283880bpc-pwcreportoncopyrightamendmentbill-31july2017.pdf>.

² All of PASA's submissions to the Portfolio Committee can be found linked from its website at <http://www.publishsa.co.za/copyright/pasa-and-the-copyright-amendment-bill>.

³ Cabinet announcement of 5 December 2018 at <https://www.gov.za/speeches/statement-cabinet-meeting-5-december-2018-6-dec-2018-0000>.

rights, with respect, contest that notion, and submit that fact-based and sound concerns have not been addressed by the deliberations in the Portfolio Committee at all.

PASA is disappointed that the National Assembly has not seen fit to make any material changes to the provisions in respect of which PASA contributed. PASA has demonstrated without contradiction, firstly, the damage that the Bill will cause the literary publishing industry in South Africa, both to authors and publishers, and, secondly, that the alleged benefits in innovation that ‘open exceptions’ like ‘fair use’ will supposedly bring to South Africa, are not supported by data.⁴ On the contrary, the Portfolio Committee expanded the copyright exceptions, notably the ‘fair use’ clause by the addition of the words “such as” before an already broad list of ‘fair use purposes’, not seen in the copyright law of any other country. The Portfolio Committee did not call for public comment on this material change, notwithstanding the effect of this change resulting in the statement in the Explanatory Memorandum to the Bill that it provides only “limited circumstances” for “reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty” no longer being correct.

The PwC Report’s findings that the Bill “would impose significant negative consequences on the South African publishing industry” remain uncontested to this day. Yet, there has been no significant change to the provisions of the Bill that will have this detrimental impact, nor has there been any explanation for not taking this report into account in the deliberations of the Portfolio Committee.

PASA also registers its disappointment that Cabinet has not also decided that South Africa should accede to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the “Marrakesh Treaty”), despite wide-ranging support for such a step from stakeholders across all interest groups who commented on it during the oral hearings of the National Assembly in August 2017.⁵

⁴ See the PASA-DALRO submission at <http://publishsa.co.za/file/1532283882bdh-supplementarysubmissiononfairusepasadalro.pdf>.

⁵ At the time of writing, all but one of South Africa’s neighbours had either acceded to the treaty – Botswana, Lesotho – or signed it – Mozambique, Namibia, Zimbabwe; on the rest of the African continent, it has been signed and ratified or acceded to by Burkina Faso, Ghana, Kenya, Liberia, Malawi, Mali, Nigeria, Tunisia and Uganda; of the BRICS countries, it has been ratified by Brazil, Russia and India. The opportunities that would arise from South Africa’s accession to both WCT and the Marrakesh Treaty were set out in PASA’s submission at <http://publishsa.co.za/file/1532283879zip-pasa-submission-copyright-amendment-bill7jul2017.pdf> on pp.5-6 and <http://publishsa.co.za/file/1532283879wdz-pasa-dalrosupplementary-submissionprocess-marrakesh-exception21may2018.pdf>.

The deficiencies of the Bill are many, those directly affecting the literary and publishing issues having been set out in PASA's previous submissions. We do not intend to repeat all of them here (kindly see the references above), but, instead, in the remaining part of this submission to focus on new provisions that were developed in the National Assembly.

The policy objective of supporting artists and corresponding deficiencies in the Bill

The Explanatory Memorandum states that “the purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of work” and, “The Bill also aims to enhance ... payment of royalties to alleviate the plight of the creative industry”.

PASA supports the policy objective that the Bill is meant to be supportive of authors, the creators of literary works. The Bill will, however, not be able to achieve this outcome for authors in the literary industry, especially where works made for use in educational institutions are concerned:

- a) The motivation behind the new remuneration clauses in new Sections 6A and 7A seems to be based on the misconception that all works protected by copyright are single-author works, and that their conceptualisation does not cater for multi-author works or even works that contain a multiplicity of copyright works. Academic works more often than not include not only material from different authors, but also a variety of other material like photographs, illustrations and tables, all of which could be copyrighted works. In selling or licensing such works, the various copyright owners might all have to be remunerated as they are original creators. This also goes for school textbooks. We do not see these provisions as being capable of implementation in respect of such works prepared from a multiplicity of sources.
- b) PASA has concerns about the constitutionality of its retrospective provisions in Sections 6A and 7A, in respect of which we understand that advocates who specialise in constitutional law have already advised that they may be unconstitutional.
- c) PASA supports copyright as a means to enable rightsholders, including authors, to negotiate with their rights to copyright works, and it supports freedom to contract. PASA objects to Government-imposed contractual terms and royalty rates, as are intended to be introduced by the new Sections 6A, 7A, 39(cG) and (cI), and the declaration as unenforceable of any contractual terms between willing parties by new Section 39B.

d) Statements by the Hon. Minister for Trade & Industry, Dr Rob Davies, and the Chair of the Portfolio Committee on Trade & Industry, Ms Joanmariae Fubbs, on the occasion of the passage of the Bill by the National Assembly, are indicative of the intention that the Bill's passage into law will have the effect of ending licensing of reproductions of copyright works in the educational space. *Hansard* reports them to have said, respectively:

- “However, also the rights of publishing companies and they will continue to - I'm sure, enjoy significant royalties in this jurisdiction; but at the same time it doesn't generate the ridiculous notion that every time you go to a photocopy machine you have to put a bucket of money into somebody's pocket that doesn't find its way to the author.”
- “I am told that currently students have to pay R1 000 to use one or one-and-a-half chapters in a textbook. This is no longer sustainable.”⁶

Even giving allowance for hyperbole, these statements are completely inaccurate.⁷ They also create the impression that the Bill's passage into law will have the effect of ending licensing of reproductions of copyright works in the educational space.

We note that reprographic licensing of educational institutions was not even discussed at any of the Portfolio Committee's deliberations, and we are therefore extremely surprised that this was only raised once the Bill had been passed by the National Assembly.

If these declarations indicate the true intentions of the responsible Minister and the Chair of the responsible Portfolio Committee behind the 'fair use' defence for the purpose of education in new Section 12A and the education exceptions in Section 12D, then they are evidence of the expropriatory nature of these provisions that are constrained by Section 25 of the Constitution, the property clause of the Bill of Rights, as applied to copyright following the decision in the *Moneyweb* case⁸. No justification for these expropriatory clauses, as required by Section 36 of the Constitution, is apparent.

⁶ *Hansard* at <https://www.parliament.gov.za/storage/app/media/Docs/hansard/2bd886a0-72da-42ed-ad68-d43ac0657394.pdf>, on pp86-87 and 42 respectively.

⁷ See DALRO's submission where it describes its transactional and blanket licensing of educational institutions at http://dalro.co.za/images/documents/DALRO_Submission_Copyright_Amendment_Bill%207Jul2017.pdf, pp43-45.

⁸ *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* 2016 (4) SA 591 (GJ), at para 108.

Furthermore, noting that the purpose of the Bill is to benefit authors – the recommendations of the Copyright Review Commission report in relation to musical works having been extrapolated across all copyright industries – then the public would have expected the Legislature to protect authors by ensuring that royalties relating to reprography of their works are passed through to them. Indeed, PASA has been working with DALRO since early 2017 to enable the necessary systems to be put in place for the direct payment to authors. However, instead, the exceptions take that remuneration away from authors and publishers, and it appears from the above-quoted statements that this decision has been deliberate. Considering that there is no link between the means adopted by the Legislature (copyright exceptions intended to end licences of reprographic uses in educational institutions) and the end sought to be achieved (to benefit authors, in this case authors of works that are reproduced in educational institutions), as required by the Constitutional Court as in the *Merafong* case for legislation to meet compliance with the principle of rationality⁹, the relative copyright exceptions are open to constitutional challenge.

- e) There has been some reference to having South Africa benefit from “flexibilities” allowed by the Berne Convention for educational purposes. For instance, this appears in the SEAIS report at p.4: “There is a need to provide exceptions and flexibilities to allow third parties to gain access to copyright works for education and personal use” and is also referred to in a letter from the Minister for Trade & Industry to authors’ associations PEN Afrikaans and ANFASA dated 19 February 2019, stating that an impact assessment undertaken by the dti in 2014 supports the approach of the Bill to exceptions and limitations.

The impact assessment referred to is the impact assessment undertaken by Genesis Analytics on the 2013 Draft National IP Policy, and it makes no such recommendation. The recommendation is that South Africa avail itself of the flexibilities of the Appendix to the Berne Convention, which is a statutory licence and not an exception, and therefore only supports the adoption of Schedule 2 by the Bill (which it has done incorrectly, as explained below). PASA’s position on the adoption of the Berne Appendix is neutral, in the sense that if South Africa can benefit from its provisions it should do so, but PASA

⁹ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para 62.

questions whether the research has been done to determine whether it can still give notice in terms of the Berne Convention to benefit from its provisions.¹⁰

However, there are two errors in the Bill that are not only a misapplication of the relevant provisions, but which will also cause South Africa to breach its treaty obligations under the Berne Convention and TRIPs and, by having been incorrectly couched as a prescription for licence terms, will have an effect that is expropriatory that cannot be justified under the Constitution. First, Schedule 2 has to be an exact replication of the terms of the Berne Appendix, perhaps subject only to changes in terminology to match the terminology of local legislation. Schedule 2 imports far more material than allowed by the Berne Appendix. Secondly, Schedule 2 is linked to the provisions relating to the formalities for licences in Section 22(3), whereas it should be a loose standing provision for statutory licences, ideally after the exceptions. Ms Michelle Woods of WIPO, whom the Portfolio Committee of the National Assembly appointed to its Panel of Experts, provided a simple solution as to how this second problem could be corrected by linking Schedule 2 from the exceptions, but this recommendation was not taken up, and in this respect the Bill remains fatally deficient.

Impact of the Bill in respect of legislation and activities that are the responsibility of other Government departments

We question to what extent the Bill has had the input of other Government departments who are responsible for legislation that will be impacted by the Bill.

Due to the uncertainty of what is meant by the words in new Section 28O(6), the new exceptions relating to enforcement of technological protection measures, that “this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002”, it is not clear whether the Bill will result in an amended application of the notice and take down provisions in the Electronic Communications and Transactions Act, for which the Department of Communications is responsible.

In October 2018, the Department of Science and Technology was responsible for the joint issue between the South African Government and the European Commission on the “SA-EU Open Science Dialogue”. The report states at pp.18-19:

¹⁰ <http://publishsa.co.za/file/1532283879zip-pasa-submission-copyright-amendment-bill7jul2017.pdf>, at p.6-7, the introductory sentence and the item numbered “7”.

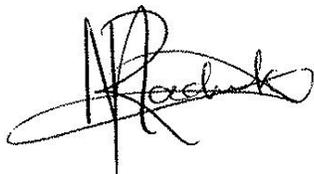
“With respect to the legislation on intellectual property, it is noted that the conceptualisation of, and the discourse on, Open Science in opposition to Intellectual Property (Rights) is neither accurate nor helpful to the practice of both approaches. It is not valid to consider that the two approaches are mutually exclusive; both practices act in synergy and relate to alternative impact pathways for public-funded R&D. This aspect is an important part of the training needs (as discussed in Section 7.3) and will need to be addressed in this manner. It is not considered that this aspect will require revision to the Intellectual Property legislation in South Africa.”

If the Bill has not had the input from the Department of Communications and the Department of Science and Technology, then this alone should be a reason for referring the Bill back to the National Assembly.

Deficiencies in the public participation process

Finally, we wish to note that in this consultation, 8 days were given for comment on extremely complex legislation. We place on record that too-short notice periods have been a characteristic of nearly all the Government and Parliamentary consultations on this Bill.¹¹ These short notice periods are to the detriment of membership-based associations, such as ours, to fully involve their memberships in the public participation process.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mpuka Radinku', with a large, sweeping flourish underneath.

Mpuka Radinku
Executive Director

¹¹ Consultation periods in August 2015, May 2017 and July 2018 all were extended following requests by stakeholders, including PASA.

Publishers' Association of South Africa, PASA

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.