

21 May 2018

Hon. J Fubbs MP, Chair, Portfolio Committee on Trade and Industry  
Hon. LC Theko MP, Chair, Sub-Committee on the Copyright Amendment Bill  
Parliament of the Republic of South Africa  
CAPE TOWN

By email only to:

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Dear Honourable Fubbs, dear Honourable Theko

**COPYRIGHT AMENDMENT BILL, NO 13 OF 2017: Supplementary submission on**

- **Two phase process for the Bill, and**
- **Support for exception for the visually disabled in line with the Marrakesh Treaty, by the Publishers Association of South Africa (PASA) and the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd (DALRO)**

We are writing in response to your public statement on 17 May 2018 concerning the dti's proposal for a two-phased approach to the Bill and the numerous reactions thereto. We also write to support the recent e-mailed plea by the SA Library for the Blind for the first phase to retain an exception for the visually-impaired which is compliant with the requirements of the Marrakesh Treaty.

A two-phase approach to amending the Copyright Act is essential to passing critical amendments

It is clear that much work needs to be done to update South Africa's Copyright Act, 1979.

- One set of recommendations of the Farlam Commission points to exactly that, namely updating the Act to provide for the exclusive rights contemplated by the WIPO Copyright Treaty and certain corollary exceptions, which we support.
- Other Farlam Commission recommendations relate to improving the position of music composers and performers, where we anticipate that much work will still have to be done in fixing Section 9A, the regulation of collecting societies and the Performers Protection Amendment Bill.
- Finally, there are recommendations that are not contentious and which have broad support, such as:
  - an exception for the visually disabled that is in line with the Marrakesh Treaty,
  - properly couched exceptions for libraries, archives and museums,
  - the resale royalty right, *if* its provisions are limited to the fine arts.

These provisions alone still require a lot of work, since the relative provisions introduced by the Bill are mostly ill-considered and will prove to be ineffective. It is therefore only prudent

that attention be focused on these provisions. In respect of some of them, PASA and DALRO already submitted text proposals in August 2017 in response to the call by the Committee.

PASA and DALRO have consistently pointed to the lack of study into the Bill's provisions importing 'fair use' and overbroad exceptions and the absence of a real impact assessment, noting the deficiencies of the unpublished SEIAS report (see our letter of 8 March 2018).

We welcome the proposal for a two-phase approach that will result in removal of these provisions, as well as the others that do not benefit from any in-depth enquiry or impact assessment, to be dealt with in a second phase of considering amendments to the Copyright Act where there will be a proper impact assessment, even though we have consistently counselled against South Africa's adopting 'fair use' and overbroad exceptions.

Indeed, we find it disturbing that there are interest groups that are prepared to push South Africa into adopting these ill-considered provisions to serve their interests and, in reality, paying no heed to the needs for copyright having to function in the digital age. Claims that 'fair use' – an exception to copyright which allows unpermissioned uses of copyright works with no reward for creators and rightsholders – is somehow necessary to update South Africa's copyright laws are, at best, misleading.

#### More developments internationally on 'fair use'

Our letter of 8 March 2018 set out our position on 'fair use' and overbroad exceptions, and also reported on international developments in the 'fair use' debate. Since that letter, Ireland has published a Bill to amend its Copyright Act. The Bill, introduced in March 2018 proposes exceptions for education and for the visually impaired, but not 'fair use'. The Regulatory Impact Analysis accompanying the Irish Bill specifically stated that it was decided not to introduce 'fair use', despite the investigatory commission's recommendation to do so, stating:

Our probing in terms of extending beyond targeted exceptions did not suggest that significant economic benefits would arise from the introduction of a fair use regime in Ireland, or that the appetite for the introduction of same was particularly strong even in some of those who submitted in favour. The case was not made that an innovation of fair use exception would provide tangible benefits, particularly economic benefits, in promoting new technologies.

The introduction of a new fair use exception would give rise to legal uncertainty in practice and an increased number of disputes that would inevitably involve legal proceedings. It was considered that this could potentially result in increased litigation costs, which runs contrary to the recommendations on access to the courts system and could result in further pressure on the courts system as a result of such cases...

There is also a danger that the introduction of a Fair Use provision could potentially inappropriately skew the copyright balance in favour of users of copyright or even be perceived to do so and, in effect, could potentially hamper innovation and disadvantage rightsholders.

Many of the intended benefits of the envisaged fair use exception could be achieved by legislating in Irish law for targeted copyright exceptions. These include exceptions under the

Information Society Directive for news reporting, comedy, pastiche and satire, and the expansion of existing education and research exceptions. While we cannot identify clear causal benefits from these proposals, they will assist in supporting the Government's priority to create the ecosystem that will make Ireland the best small country in which to do business.

Support for an exception for the visually disabled in line with the Marrakesh Treaty

PASA and DALRO have been consistent in supporting an exception for the visually disabled that is in line with the Marrakesh Treaty. Our criticism of the exception for the disabled in the Bill is simply that it does not allow for implementation of the Marrakesh Treaty and the benefits of cross-border exchanges of accessible format copies of published works. We already provide you with a proposal for text in August 2017.

The way forward is for an urgent adoption of such an exception for the visually disabled. In this, we support the recent call by the SA Library for the Blind for such an exception to be dealt with in the current phase of amending the Act. The position of other disabled persons and access to works other than published works should be left for the second phase, to which we would gladly contribute.

Yours faithfully



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