

## **COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 – Research demonstrating the absence of proper impact assessment for the Copyright Amendment Bill**

**Academic and Non-Fiction Authors’ Association of South Africa (ANFASA), the Publishers Association of South Africa (PASA) and Dramatic Artistic and Literary Rights Organisation (Pty) Ltd DALRO**

**May 2022**

### Introduction: Timeline

The research on impact assessments is best summarised by a timeline in the development of the Bill from when the report of the Copyright Review Commission was published in 2012 until immediately after introduction of the Bill to Parliament.

A. Before the publication of the first version of the Bill:

<b>Date</b>	<b>Item</b>	<b>Observations</b>	<b>Reference to document</b>
31 August 2012	Copyright Review Commission Report (2011) published		<a href="https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf">https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf</a>
4 September 2013	Draft National Policy on Intellectual Property published for comment	This Draft never proceeded to a final policy, and was replaced by the Intellectual Property Policy of the Republic of South Africa Phase 1 in 2018.	Government Notice 918 of 2013 <a href="https://www.gov.za/sites/default/files/gcis_document/201409/36816gen918.pdf">https://www.gov.za/sites/default/files/gcis_document/201409/36816gen918.pdf</a> <a href="https://www.gov.za/sites/default/files/gcis_document/201708/41064gen636.pdf">https://www.gov.za/sites/default/files/gcis_document/201708/41064gen636.pdf</a>
6 August 2014	“Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa” prepared by Genesis Analytics submitted to the dti	Never published	

B. From date of publication of the Draft Copyright Amendment Bill, 2015 until the first presentation to Parliament of the Copyright Amendment Bill, 2017:

Date	Item	Observations	Reference to document
27 July 2015	Draft Copyright Amendment Bill released for public comment		<a href="https://www.gov.za/documents/copyright-amendment-bill-comments-invited-27-jul-2015-0000">https://www.gov.za/documents/copyright-amendment-bill-comments-invited-27-jul-2015-0000</a>
27 August 2015	dti conference on the draft Copyright Amendment Bill at the Birchwood Hotel, Boksburg.	DTI undertakes to have an independent economic impact study carried out.	
28 August 2015	Invitation to tender for the independent economic impact study	Tender closed 18 September 2015.  Although there were four bidders, the tender was not awarded.	dti tender 06/15-16 Government Tender Bulletin, 28 August 2015, Government Gazette no 2883 p.123.
1 October 2015	SEIAS Guidelines implemented	“Cabinet Memoranda seeking approval for draft policies, Bills regulations must include an impact assessment that has been signed off by the SEIAS Unit. ... In addition, the Memoranda provide for a summary of the main findings of the final impact assessment as well as annexing a full report (refer to the Presidency Guide for the Drafting of the Cabinet Memoranda ).”	<a href="#">SocioEconomicImpactAssessmentSystem</a>
20 April 2016	Minister of Trade and Industry announces the intended introduction of the Copyright Amendment Bill in his department’s budget speech.	“The Copyright Amendment Bill will be tabled in Cabinet for approval on 18 May 2016; and in Parliament on July 2016. When the legislative process is completed, the creative industries, in particular the music sector, will greatly benefit.”	<a href="https://www.gov.za/speeches/minister-rob-davies-trade-and-industry-dept-budget-vote-ncop-201617-20-apr-2016-0000">https://www.gov.za/speeches/minister-rob-davies-trade-and-industry-dept-budget-vote-ncop-201617-20-apr-2016-0000</a>
8 June 2016	Cabinet approves the Copyright Amendment Bill.	“The Copyright Amendment Bill ... will be introduced into Parliament. The Copyright Act, 1978 (Act 98 of 1978) ... [is] outdated and [does] not consider developments at multilateral level nor deal with digital issues. This is aligned to the NDP’s objectives of promoting innovation, improved productivity, more intensive pursuit of a knowledge economy and better exploitation of comparative and competitive advantage.  The current policy revision is based on the need to align the Intellectual Property legislation with the digital era and developments at a multilateral level. This also secures a one-policy	<a href="https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-8-june-2016">https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-8-june-2016</a>

		approach at national and international level from government. This revision also includes the incorporation of key flexibilities in the area of copyright ... protection.”	
12 July 2016	Announcement on the dti website of the Cabinet approval.	The announcement contains a forecast of growth in the economy of 5% if the bill is properly implemented.  The forecast is not supported by an impact study.	
30 August 2016	Presentation by dti’s Meshendri Padayachy at PASA Annual Meeting, Cape Town.	Statement that socio-economic impact assessment (SEIA) has been completed in respect of the Bills.	
16 May 2017	Copyright Amendment Bill, no 13 of 2017, introduced to Parliament. Published 17 May 2017.		<a href="http://www.gov.za/documents/copyright-amendment-bill-b13-2017-16-may-2017-0000">http://www.gov.za/documents/copyright-amendment-bill-b13-2017-16-may-2017-0000</a>
25 May 2017	PASA writes to the Director-General, dti, requesting an urgent meeting with Mr Lionel October personally.	“We note with concern that an economic impact study promised at the end of the consultation period for the draft Copyright Amendment Bill, 2015, was not proceeded with, and that the Socio-Economic Impact Assessment Study (SEIAS) report was not released with the introduction of the Bill. A mutual understanding of the evaluation of the true impact of the Bill on creativity and the industries that invest in it is a pre-condition to a meaningful debate on the Bill in Parliament.”  By return email on 25 May 2017, the D-G’s office refers PASA to the DDG, Mr Macdonald Netshitenszhe. No further response from the dti. .	
30 May 2017	dti presentation to joint sitting of the Trade & Industry and Arts & Culture Portfolio Committees.	Document entitled “Socio-Economic Impact Assessment System (SEIAS) Final Impact Assessment Template (Phase 2): Copyright Amendment Bill” made available to the Committees.  The document was not published in the Government Gazette or on the dti website.  The document was reproduced by PMG in its online report of the meeting (subscription only at that time).	<a href="https://pmg.org.za/committee-meeting/24502/">https://pmg.org.za/committee-meeting/24502/</a>

1. Document entitled “Socio-Economic Impact Assessment System (SEIAS) Final Impact Assessment Template (Phase 2): Copyright Amendment Bill” (the “30 May 2017 Document”)

The Bill was tabled with the Cabinet in 2016<sup>1</sup>, which is after the SEIAS Guidelines were implemented.<sup>2</sup> The SEIAS Guidelines<sup>3</sup> provide the following directions as to procedure:

- “Cabinet Memoranda seeking approval for ... Bills ... must include an impact assessment that has been signed off by the SEIAS Unit. ... In addition, the Memoranda provide for a summary of the main findings of the final impact assessment as well as annexing a full report (refer to the Presidency Guide for the Drafting of the Cabinet Memoranda).” (Para 2.)
- “SEIAS aims:
  - To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
  - To anticipate implementation risks and encourage measures to mitigate them.”(Para 3.)
- “Procedures: main stages in the policy process
  4. Development of a final impact assessment that provides a detailed evaluation of the likely effects of the legislation in terms of implementation and compliance costs as well as the anticipated outcome.
  5. Publication of the ... for public comment and consultation with stakeholders, with the final assessment attached.
  6. Revision of the draft and the final assessment based on comment from the public and stakeholders, if required, and submission of the ... legislation for approval with the final assessment attached.”(Para 4.1)
- “[D]epartments are responsible for the following...
  4. Departments must publish the draft final assessment with the ... legislation ... when it goes for public comments and consultation, unless it can provide sound reasons not to, which will generally relate to security and confidentiality.
  5. Departments are responsible for attaching the final impact assessment to legislation ... when submitted for approval by the relevant authorities, whether Cabinet, the Minister or Parliament. Directors General and Ministers are expected to sign for the quality of impact assessments by their departments when they submit them to Cabinet.”(Para 4.2.)

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<sup>1</sup> Cabinet meeting June 2016: <https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-8-june-2016>

<sup>2</sup> Department Planning, Monitoring and Evaluation document “Socio-Economic Impact Assessment System (SEIAS)” at <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx>

<sup>3</sup> SEIAS Guidelines at <https://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/SEIAS-Guidelines.aspx>

The impact assessment of the Bill attached to the Cabinet Memorandum for its approval is not accessible to the public. After the Cabinet approved the Bill on 8 June 2016, the dti, on 12 July 2016, put up a media release on its website<sup>4</sup> where with a forecast that the Bill, and the Performers Protection Amendment Bill would, if passed and “properly implemented will grow the economy by not less than 5%.” This statement was not accompanied by a reference to an impact assessment, but the statement goes on to say that “this prediction is confirmed by the study conducted by the dti and the World Intellectual Property Organisation (WIPO) on copyright-based industries.” There is no “study conducted by the dti and WIPO” on the Bills, and this claim and the study are not referenced in the 30 May 2017 Document.

The 30 May 2017 Document was presented to the Portfolio Committee for Trade & Industry of the Fifth Parliament, according to the Parliamentary Monitoring Group PMG.<sup>5</sup>

The PMG report lists the 30 May 2017 Document as “SEIAS: Copyright Amendment Bill”, and it can be downloaded from its online report. The downloadable document is in Microsoft Word format and there is no indication that it was approved by the dti or signed on behalf of the Department Planning, Monitoring and Evaluation and the dti, and the document contains no date.

The 30 May 2017 Document was never published. Contrary to the spirit of the SEIAS Guidelines (para 4.1), it was not published with the Bill with the notice of the first consultation in July to August 2017. There is no indication that there were any reasons – such as relating to security and confidentiality – why a SEIAS report on the Bill should not be published. (This contrasts with the SEIAS report on the Performers Protection Amendment Bill, 2016, that is being processed together with the Bill, that was published on the dti’s website.)

In 2017, the PMG report with its link to a copy of the 30 May 2017 Document was limited to subscribers only. In the absence of publication in terms of the SEIAS Guidelines, few stakeholders had access to it in time for the public consultation on the Bill during July and August 2017.

It has been noted that in response to statements by stakeholders that no proper impact assessment on the Bill was carried out, officials of the DTIC have referred to other

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<sup>4</sup> This media release no longer appears on the DTIC website.

<sup>5</sup> PMG record of meeting of the Portfolio Committee for Trade & Industry on 30 May 2017 “Copyright Amendment Bill: briefing” is at <https://pmg.org.za/committee-meeting/24502/>

documents that they claim were impact assessments, and any mention of the 30 May 2017 Document seems to consider it as a subsidiary document and not the kind of impact assessment required by the SEIAS Guidelines.<sup>6</sup> Taking this into account and also the other events related below, it appears to be generally accepted that the 30 May 2017 Document was not a proper SEIAS Report on the Bill. Questions surrounding the other documents claimed to be impact assessments are dealt with in paragraph 5 below.

Conclusion: It is doubtful that the 30 May 2017 Document was a completed report prepared under the SEIAS Guidelines.

## 2. Content of the 30 May 2017 Document

The SEIAS Guidelines sets out, in Para. 5, the methodology required to prepare a report:

“The SEIAS builds on two fundamental approaches to evaluating the impact of a new rule:

1. Technical analysis, where researchers identify from their investigations, published studies and more or less complex simulations how the new rule will likely affect different groups in society, and
2. Participatory research, mostly through consultation with stakeholders, in order to get an assessment of the impact of a new rule from those most affected and knowledgeable about the context.”

The 30 May 2017 Document itself contains no indication that either kind of research was undertaken. Its only external references as primary source material are “the Draft National Policy on Intellectual Property as commented on” and “the recommendations of the Copyright Review Commission” (para 1.2).

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<sup>6</sup> For example, the dti’s Dr Evelyn Masotja said in a report to the Select Committee on Trade & International Relations on 6 March 2019:

“[T]here were many stakeholders who raised a concern around the impact study of the Bill, that the study, the Bills were not taken through impact assessments. And our response to that is that there were various studies that the Department undertook over many years from 2009, and looking at different aspects of the legislation. And in 2013, 2014, there was an ... impact assessment on the IP policy that was done, that also looked at some of the aspects of these Bills. And there was a WIPO study that was done, looking at the impact of these industries in the economy. ... [T]here was a Corporate Review Commission that also was part of the processing of the Copyright Amendment Bill. So, there was research that was done, studies that were done to inform where we are now. So, it is just to clarify that part, that there were, there was work that was undertaken on the Bills. And, in addition, there was the socio-economic impact assessments that were conducted as well, as if, as an addition.”

Although Dr Masotja was not part of the dti team responsible for the Bill from 2015 to 2017, when a SEIAS report for the Bill was supposed to be prepared and published, it is noted that only after making reference to the other documents, she refers to SEIAS reports (which would include the one for the Performers Protection Amendment Bill, that was published).

The Draft National Policy on Intellectual Property was issued for public comment in 2013.<sup>7</sup> It described certain policy objectives and contained no impact assessment. It never matured to a final policy, and was replaced by the Intellectual Property Policy of the Republic of South Africa Phase 1.<sup>8</sup>

One member of the previous Portfolio Committee's Panel of Experts identified a number of misstatements on matters of international law that appeared in the Draft National Policy on Intellectual Property.<sup>9</sup>

A regulatory impact assessment was undertaken with respect to the Draft National Policy on Intellectual Property, namely the "Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa" prepared by Genesis Analytics in 2014.<sup>10</sup> So far as we are aware, this document was never made public. Also, Government did not publish a revised policy document after this assessment.

Both the Draft National Policy on Intellectual Property and the "Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa" preceded the first version of the Bill. Neither contained clauses that the legislation that they contemplated – namely the Bill - should have. In this respect already, neither document is an impact assessment of the Bill.

It is also apparent that the 30 May 2017 Document was not compiled in line with the methodology prescribed in the SEIAS Guidelines.

The 30 May 2017 Document has a statement supporting the introduction of 'fair use' and copyright exceptions for libraries, archives, museums, galleries and persons with disabilities (Proposal 17). This statement is no more than a summarised description of the corresponding provisions that appear in the Bill. These provisions, the 'fair use' clause and the copyright exceptions, are amongst the most controversial provisions of the Bill and are likely to be harmful to the literary and publishing industries, yet there is no

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<sup>7</sup> Government Notice 918 of 2013  
[https://www.gov.za/sites/default/files/gcis\\_document/201409/36816gen918.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/36816gen918.pdf)

<sup>8</sup> Government Notice 636 of 2017  
[https://www.gov.za/sites/default/files/gcis\\_document/201708/41064gen636.pdf](https://www.gov.za/sites/default/files/gcis_document/201708/41064gen636.pdf) and Government Notice 518 of 2018  
[https://www.gov.za/sites/default/files/gcis\\_document/201808/41870gen518\\_1.pdf](https://www.gov.za/sites/default/files/gcis_document/201808/41870gen518_1.pdf)

<sup>9</sup> "Advice on the Copyright Amendment Bill, No 13 of 2017, revised as at 3 September 2018, for the Portfolio Committee on Trade and Industry of the Parliament of The Republic Of South Africa", AF Myburgh, 1 October 2018, at [https://legalbrief.co.za/media/filestore/2018/10/andre\\_myburgh.pdf](https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf), para 1.2. This was written before the Genesis Analytics impact assessment became available.

<sup>10</sup> The Genesis Analytics document is dealt with in para. 5 below.

Government impact assessment or evaluation of their compliance with international treaties, whether in the 30 May 2017 Document or elsewhere.

From the perspective of the literary and publishing industries, the 30 May 2017 Document contains at least the following errors, indicating an absence of research:

- 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.

Publisher associations have been consistent in cautioning against the unintended consequence of adopting ‘fair use’, and PASA, being one of the few stakeholders to have a copy of the 30 May 2017 Document, commented on it in the first consultation on the Bill in July to August 2017.<sup>11</sup>

This incorrect statement was not commented on by authors associations such as ANFASA simply because the document was not published with the legislation and they were not aware of it.

- Many of the references to the needs of “authors” do not apply to authors of literary works. Instead, these are references to authors of artistic works that are works of fine art or, more often, composers, who are authors of musical works.

In South Africa, authors of literary works do not habitually assign their copyright to publishers (as assumed in Proposal 2 of Para.7). Authors of literary works are never called on to assign copyright in their works to a collecting society because they do not have a collecting society that distributes royalties to them directly (contrary to the assumption in Para. 4).

These errors can be explained by the Copyright Review Commission (2011) being one of the only two main sources for the report. The Copyright Review Commission (2011) dealt mostly with the requirements of composers, ie authors of musical works, not of authors of other copyright works.

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<sup>11</sup> Submission by PASA, 7 July 2017, at <https://publishsa.co.za/wp-content/uploads/2021/07/Pasa-Submission-Copyright-Amendment-Bill-7jul2017-1.pdf>, p.10 of the PDF file.

The 25-year limit on assignments of copyright in terms of the amendment to Section 22(3) of the Act to be introduced by the Bill has been identified as not having an origin in the Draft National Policy on Intellectual Property.<sup>12</sup> The 30 May 2017 Document is silent on this issue. The Copyright Review Commission report (2011) had envisaged a reversionary right in respect of musical works. The Bill's provision is not a reversionary right, and even if it were, there is no assessment of the impact of having a reversionary right apply to any work other than musical works.

Conclusion: No research was done on the impact of the provisions of the Bill in compiling the 30 May 2017 Document, including about the 'fair use' clause, the copyright exceptions and the 25-year limit on assignments of copyright.

### 3. Undertaking by the Department of Trade & Industry (dti) to stakeholders to undertake an impact assessment

The dti undertook to carry out a regulatory impact assessment of the Bill at a stakeholders conference at Birchwood Hotel, Boksburg, that took place on 27 August 2017 during the consultation period in respect of the Draft Copyright Amendment Bill, 2015. At that time, regulatory impact assessments of bills were carried out by outside experts (Genesis Analytics, referred to in para. 5 below, being one of them).

The Draft Copyright Amendment Bill had been severely criticised by numerous stakeholders from professional and trade associations whose members rely on copyright, and the undertaking to have a full regulatory impact assessment before the Bill was introduced to Parliament was an important concession.

The dti put the contract for a regulatory impact assessment out to tender in August 2015 with a deadline of 18 September 2015.<sup>13</sup> Although four companies tendered, this tender was not awarded.

The dti's undertaking was made before the SEIAS Guidelines came into effect. At a presentation by the dti's Ms Meshendri Padayachy to PASA's 2016 annual meeting on 30 August 2016, she said that the SEIAS report had been completed, and that this would replace the regulatory impact assessment.

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<sup>12</sup> "Advice on the Copyright Amendment Bill, No 13 of 2017, revised as at 3 September 2018, for the Portfolio Committee on Trade and Industry of the Parliament of The Republic of South Africa", AF Myburgh, 1 October 2018, at [https://legalbrief.co.za/media/filestore/2018/10/andre\\_myburgh.pdf](https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf), para.13.

<sup>13</sup> dti tender 06/15-16, Government Tender Bulletin, 28 August 2015, Government Gazette no 2883 p.123.

However, when the Bill was introduced in May 2017, the SEIAS report, contrary to the instructions in the SEIAS Guidelines, was not published. PASA wrote to the Director-General of the dti on 25 May 2017 requesting an in-person meeting, saying, “We note with concern that an economic impact study promised at the end of the consultation period for the draft Copyright Amendment Bill, 2015, was not proceeded with, and that the Socio-Economic Impact Assessment Study (SEIAS) report was not released with the introduction of the Bill. A mutual understanding of the evaluation of the true impact of the Bill on creativity and the industries that invest in it is a pre-condition to a meaningful debate on the Bill in Parliament.”

By return email on 25 May 2017, the D-G’s office referred PASA to its Deputy Director General, Mr Macdonald Netshitenzhe, but there was no further response from the dti.

PASA raised the absence of the promised impact assessment in its submission to the Portfolio Committee of 7 July 2017<sup>14</sup>:

“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.”

DALRO also noted the absence of the promised impact assessment<sup>15</sup>:

“Neither the Explanatory Memorandum of the Bill nor the Socio-Economic Impact Assessment (SEIAS) Report for the Bill make reference to the impact of the Bill on DALRO’s [Higher Education Institution] Licence. This outcome was not contemplated by the Copyright Review Commission of 2011 – on the contrary, its recommendation in respect of DALRO was that DALRO facilitates distributions, in addition to publishers, to authors directly.”

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<sup>14</sup> Submission by PASA, 7 July 2017, at <https://publishsa.co.za/wp-content/uploads/2021/07/Pasa-Submission-Copyright-Amendment-Bill-7jul2017-1.pdf>, p.10 of the PDF file.

<sup>15</sup> Submission by DALRO, 7 July 2017 at [http://dalro.co.za/images/documents/DALRO\\_Submission\\_Copyright\\_Amendment\\_Bill%207Jul2017.pdf](http://dalro.co.za/images/documents/DALRO_Submission_Copyright_Amendment_Bill%207Jul2017.pdf), pp. 1 and 6 of the PDF file.

“We are taken aback that there has been no assessment of the impact of these exceptions on this existing licensing solution, which financially benefits both copyright owners as well as authors. Neither the Explanatory Memorandum to the Bill, nor the SEIAS Report mention the impact. The independent economic impact assessment that was promised by the dti at the Birchwood Hotel meeting in August 2015, and which may have picked this up, has not been undertaken – the dti never awarded the tender it put out for this work.”

The impact assessment of ‘fair use’ and the copyright exceptions on the publishing industry by PwC (formerly PricewaterhouseCoopers) undertaken by PASA was completed in time for the public hearings in August 2017. The PwC report summarised that “In quantifying the anticipated economic impact of the proposed exceptions in the Bill, it was found that it would impose significant negative consequences on the South African publishing industry.”<sup>16</sup>

Numerous parties, including those who were not aware of the existence of the 30 May 2017 Document, raised the need for impact assessment of ‘fair use’ and the exceptions. For example, ANFASA stated in its written submission in June 2017 (in para. 8.2), “This submission forecasts that fair use will have a devastating effect on writing and publishing. However, only an independent impact assessment can provide a reliable evaluation, and one must be undertaken before a decision is made.”

There was no reaction from the Portfolio Committee or the dti to the absence of the promised impact assessment or to the findings of the PwC impact assessment.

Conclusion: The dti undertook to stakeholders that an impact assessment would be undertaken. This undertaking was not met.

#### 4. Copyright Review Commission Report (2011) not an impact assessment of the Bill

The report of the Copyright Review Commission<sup>17</sup> was an important antecedent to the Bill. Whilst it recommended the kinds of provisions that should be adopted in legislation revising the Copyright Act, it did not put forward textual clauses for inclusion in the Bill.

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<sup>16</sup> “PwC The expected impact of the ‘fair use’ provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry”, July 2017, at <https://publishsa.co.za/wp-content/uploads/2021/07/Pwc-Report-On-Copyright-Amendment-Bill-31-July-2017-1.pdf>.

<sup>17</sup> Copyright Review Commission Report (2011), published in 2012, at [https://www.gov.za/sites/default/files/gcis\\_document/201409/crc-report.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf)

This report is not a source for the most controversial provisions of the Bill, namely ‘fair use’ and the copyright exceptions. It proposed only one exception, namely for format shifting.

The report dealt mainly with challenges faced in the music industry. The recommendations flowing from that are therefore not capable of being extrapolated in the same terms across all professions and industries that rely on copyright. It only made one main recommendation affecting the literary and publishing industries, namely that distributions of copyright remuneration received from the DALRO Higher Education Institution Licence be paid directly to authors (instead of via publishers).

One member of the previous Portfolio Committee’s Panel of Experts identified how the recommendations of the Copyright Review Commission report were incorporated in the Bill, and how some were incorrectly written into the Bill or did not find their way into the Bill<sup>18</sup>. The two that are the most relevant to this enquiry, in that they would have been relevant to an impact assessment of those provisions of the Bill relevant to the literary and publishing industries:

“(b) “The ‘private use’ exceptions must be expanded and adapted for the digital era to include, for example, format shifting and ensure that the law is in accordance with the expectations of reasonable persons.”

Comments

This is the only recommendation the CRC Report makes for copyright exceptions, and is implemented ...

(c) “The Copyright Act must be amended to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence. (The drafters of the section must have regard for proposals currently under discussion in the US for an amendment of the section to overcome difficulties encountered in practice.) Such an amendment will go far to relieve the plight of composers whose works still earn large sums of money that are going to the assignees of the composers’ rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken. The period proposed is shorter, based on the fact that the local copyright duration is shorter than the American one...”

Comments

The Bill’s implementation of this recommendation is one of its most serious errors. Instead of introducing a new provision which is meant to be along the lines of Section 203 of the United States Copyright Act, the [original Bill] introduces a 25-year limitation on assignments of all rights of copyright

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<sup>18</sup> “Advice on the Copyright Amendment Bill, No 13 of 2017, revised as at 3 September 2018, for the Portfolio Committee on Trade and Industry of the Parliament of The Republic Of South Africa”, AF Myburgh, 1 October 2018, at [https://legalbrief.co.za/media/filestore/2018/10/andre\\_myburgh.pdf](https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf), para 1.3.

in Section 22(3) of the Act. Section 22(3), however, which deals with the formal requirements for the transfer of copyright by way of assignment.”

Conclusion: The report of the Copyright Review Commission (2011) is an antecedent of the Bill that contains researched proposals for legislative reform by independent professionals. However, it is not an impact assessment of the Bill and it has no recommendations for the text of specific clauses to appear in the Bill. It has no recommendations for ‘fair use’ or the other copyright exceptions that the Bill proposes to introduce.

5. Other documents mentioned in the development of the Bill are not impact assessments of the Bill

Reference has been made in the course of presentations to Parliamentary committees and correspondence about other studies that are meant to be impact assessments of the kind that stakeholders have called for.<sup>19</sup> Two are identified below and discussed.

At the outset, it is important to bear in mind that *none* of these studies were undertaken after the first version of the Bill was published or after the dti undertook to stakeholders to have a regulatory impact assessment carried out in 2015. None of these studies contain textual proposals for legislative amendments to the Copyright Act. None of them are expressly referred to in the 30 May 2017 Document.

The two studies are:

- 2011: “The Economic Contribution of Copyright-Based Industries in South Africa” by Prof. A. Pouris and Mrs Roula Inglesi-Lotz of the Institute for Technological Innovation of the University of Pretoria. This research formed part of a WIPO compilation called “National Studies on Assessing the Economic Contribution of the Copyright-Based Industries.”

According to the foreword written by the then-Minister of Trade & Industry, Dr Rob Davies, a study was initiated to “indicate whether there are any benefits coming from copyright-based industries in South Africa. The reason for commissioning these studies was solely based on the fact that South Africa wants to accede to treaties in the area of copyright and the South African Parliament indicated that before any

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<sup>19</sup> See for example footnote 6 with the extract from the presentation by the dti to the Select Committee on Trade & International Relations on 6 March 2019.

treaty could be acceded to the country needs to know what benefits come from these treaties as becoming a signatory to a treaty entails attracting obligations and amending the legislation.”

The study’s true purpose was to estimate the economic contribution of copyright-based industries. However, the author of the study then gratuitously gave his personal opinion on the desirability of additional copyright exceptions and ‘fair use’ based on a recommendation of the Gowers Review in the United Kingdom in 2006 on the basis that copyright exceptions have the potential to create value. The plea for the introduction of exceptions appear in its introduction and its recommendation, but the main body of the study itself contains no impact assessment of introducing new exceptions.

The question whether exceptions create value (and, in a different context, support innovation) is certainly not settled, and it is to be noted that the United Kingdom expressly decided not to adopt ‘fair use’ after the Gowers Review and the later Hargreaves Report.

For these reasons and the reasons given in the introduction to this para. 5, the 2011 study for WIPO cannot be considered to be an impact study of the Bill or of the ‘fair use’ and copyright exceptions in the Bill.

- 2014: Regulatory Impact Assessment on the 2013 Draft National Policy on Intellectual Property (“Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa”) by Genesis Analytics.

This study has not been published by the dti or by Genesis Analytics and is therefore not publicly available. It was obtained pursuant to a FOIA request.

The Genesis Analytics report recommends that South Africa avail itself of the flexibilities of the Berne Convention. It makes three recommendations for copyright exceptions and limitations (from p.79 onward), namely expanding the existing exceptions for teaching, allowing parallel importation and introducing statutory licences for reproductions and translations as allowed to developing countries under the Appendix of the Berne Convention. The report is therefore not authority for the many other copyright exceptions proposed to be introduced by the Bill.

Inasmuch as it has proposed introducing the statutory licences under the Berne Convention Appendix, it is noted that the Minister of Trade Industry and Competition has stated that it was incorrectly done by an expansive set of licence conditions in Schedule 2 of the Bill that go beyond the flexibilities that the Berne Convention Appendix allows and that it was incorrectly anchored in provisions relating to formalities for licences.<sup>20</sup>

The proposal in the 2013 Draft National Policy for the introduction of 'fair use' was determined to be "vague, poorly articulated or poorly evidenced" and requiring further attention. The report therefore does not make out a case for 'fair use' or the 'fair use' clause in the Bill.

For these reasons and the reasons given in the introduction to this para. 5, the 2014 Genesis Analytics report supports only some copyright exceptions, but it does not assess or propose specific text and it, too, cannot be considered to be an impact study of the Bill.

Conclusion: The "Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa" prepared by Genesis Analytics for the Department of Trade and Industry dated 31 July 2014 and "The Economic Contribution of Copyright-Based Industries in South Africa" prepared for the World Intellectual Property Organization WIPO by Prof. Anastassios Pouris and Mrs Roula Inglesi-Lotz of the Institute for Technological Innovation of the University of Pretoria in 2011 – were not intended to be and were not in fact impact assessments of the Bill.

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<sup>20</sup> Presentation by the Minister of Trade Industry and Competition to the Portfolio Committee on 9 November 2021, PowerPoint slide no 43.