PASA Chairperson's Newsletter – June 2023

Where to with the Copyright Amendment Bill?

There are many important current issues about our sector, including the Creative Industries Master Plan; the National Book Policy Process; the delayed education textbooks catalogue; the longstanding but rather dormant Competition Commission Investigation and many others, but at the top of our mind and indeed that of our local and global partners, is the Copyright Amendment Bill (CAB), especially as the provincial hearings draw to a close. The question is where to from now and what decision will the portfolio committee and the lawmakers take, when. It is critical that as the industry and as an association, we begin to anticipate and plan for various possible outcomes.

We expressed our concern that the National Council of Province's consideration of the bill was a fate accompli and that they would just vote along the national mandate and pass the bill. However, the process has not been in vain. We made efforts to be represented at each provincial hearing and showed a strong presence at the Select Committee hearings. Through the Select Committee and the provincial hearings, we managed to articulate the problems with the bill and how it will affect authors and publishers, and users in the long run. What they do hereafter is something else, but we do not think that it will be out of lack of information and knowledge about the flaws of the bill.

Professor Owen Dean went beyond section 19D being found to be unconstitutional and unfit to be read into the current copyright law, to enhance access for people with visual impairment in the BlindSA case. He indicated that in addition to section 19D, there were 60 other instances of unconstitutionality in the bill. He boldly stated that if the bill was passed as is, the Portfolio Committee would have knowingly chosen to pass a problematic law.

We are very encouraged that in addition to the Western Cape rejecting the bill, calling for its redrafting and openly calling out the DTIC on the absence of the Social and Economic Impact Assessment Study (SEIAS), at least 5 other provinces have cited similar issues, including the fair use provision, and requested that these be addressed before the bill is passed. Despite these encouraging developments, it is too early to tell how the NCOP will decide, and it is therefore important for us to remain vigilant and plan for the future.

What are the main concerns with the Bill?

In addition to the demerits of the bill, that we have spelt out to the lawmakers in our submissions for a decade now, there are several other problems. To begin with, save opening the hearings in the National Council of Provinces, the president's concerns, including the unconstitutional provisions cited in his letter to the Speaker of parliament and lack of compliance with international copyright law, to name just two, have not been addressed at all. There is a huge chasm between those who support the bill and would like to have it implemented as is and those that have serious problems with it. A SEIAS report would have helped by spelling out the potential benefits and possible harm that the bill would bring. Despite our longstanding calls for such a SEIAS, there hasn't been one. It is a reasonable expectation that a law of this nature and its huge implication for the industry and society would be preceded by a SEIAS.

The submissions and complaints of the industry have generally been ignored. Whilst there have been concerns around the constitutionality of certain provisions of the bill among some of the lawmakers, an indication that at least section 19D would not pass constitutional muster and further indication that there are more problematic clauses in this regard, there is a determination to go ahead, buoyed more by the hope that no one would make a constitutional challenge on the bill, than any conviction that there are no such problems.

Though we had called for a scrapping and redrafting of the bill, we had hoped that there would at least be a review of the bill to address the major issues and those raised by the president. However, from the eagerness to conclude the process and the premature pronouncements of support for it, the bill is likely to be passed with no changes or with some cosmetic changes. Although we are pleased that in the feedback sessions the previous week, all but two of the provinces highlighted the defects of the bill and insisted that these must be attended to before it is passed, there was a disturbing trend among a few of these provinces. At least one indicated that they would withdraw their concerns if those concerns became a hindrance to passing the bill.

We are concerned that between now and when the Portfolio Committee meets in September, these provinces may be persuaded to abandon their principled positions and withdraw their concerns for the sake of letting the bill through. This would be disappointing and catastrophic. In this unfortunate but likely event, we would count on the president realizing that his concerns had not been addressed and referring the bill to the constitutional court (Concourt) for review himself. If this does not happen, it will unfortunately be left to the industry and the association to petition the Constitutional Court on the bill.

While the Concourt route is a long, expensive and uncertain process, there is no other option for the industry, if the bill is passed as is, and the presidency does not refer it to the Concourt. Initially we were eager to avoid the concourt for obvious reasons but the complete disregard for our input and concerns, the pronouncement of the same court on section 19D, the further

analysis of similar contentious provisions and the open admissions that have been made within the DTIC and the NCOP, it becomes a worthwhile and necessary step for the industry to take.

Some of the provisions of the Bill, including the 25 years copyright transfer limitation and the "fair use" provision, have the potential to turn the industry upside down and undermine private companies' investment in IP by handing it over to Tech companies on a silver platter. The fair use provision has the potential to open the floodgates further and drain whatever was left, considering the high levels of piracy and illegal copying that we see in sectors like higher education. The bill takes a more permissive route for users at a time when more protection is required. The 25-year limitation on copyright transfer makes a mockery of the long term investment that companies make in textbooks and general books. Many publications reach their maturity after 20 years of continuous investment and promotion and go way beyond the 25-year provision. This has the potential to wipe out the breadbasket of many companies, with no meaningful benefit for authors who will still need the input of their publishers for continued success and future earnings. The only potential beneficiaries of such a provision are the dominant tech companies that can make new offers to authors at the expense of publishers who will have invested in these titles for decades.

The first few years after the bill and indeed after the Concourt has ruled either way, will be characterized by precedent-setting where users, their representatives and the tech companies will push the exceptions to the limit. It is important that the industry and the association prepare to push back on detrimental precedent setting and ensure that the interpretation and provisions of the law establishes a fairer balance between the interests of users and rights holders. Unfortunately, there will be a disproportionate and expensive burden of proof for the industry, especially without punitive measures in the law. Some of the opponents in this precedent setting war will be well heeled tech companies. There is a likelihood that smaller companies will rather let their rights be violated than defend them. As an industry, we should not allow that to happen and should find ways of defending those rights, for the sake of the industry and the future.

Beyond the Bill and the law

South Africa has become a frontier for a global onslaught against copyright. I do not like conspiracy theories, but I just cannot ignore this one. The CAB was a major point of discussion and interest at the just ended London Book Fair. I participated in a discussion on global threats to copyright with Maria Pallante, president and CEO of the Association of American Publishers (AAP), Dan Conway, CEO of the United Kingdom's Publishers Association and Isobel Dixon, past president of the United Kingdom's Association of Authors' Agents (AAA), chaired by Porter Anderson, Editor-in-chief of *Publishing Perspectives.*

For years now, there has been a growing call at WIPO for a global Treaty on exceptions for Education, research, libraries, archives and people with disabilities, sponsored mainly by the Africa Group and supported by the Group of Latin American and Caribbean Countries (GRULAC). Some of the countries in Africa have openly pointed out that they have been told by tech companies that copyright as it stands now is a hindrance to access and that if this hindrance was dealt with, they would be able to use their platforms to achieve universal access, hence the call for exceptions through a global instrument. This campaign, which gained momentum after the Marrakech Treaty, which was signed in 2014, has generally been opposed by most member countries at WIPO. Sponsoring countries have been encouraged to look at their national legislation to accommodate their local needs, within the framework of global instruments. So countries in Africa, including South Africa, Namibia and Nigeria have done just that. “Fair use” and the other exceptions have been a common element of these national copyright reforms.

An interesting characteristic of these national and regional campaigns has been the active participation by the same international campaigners for “fair use” and exceptions, that we encountered at WIPO. They have just taken the fight to national copyright reform. It was acknowledged in the London Book Fair session that their strategy is to achieve global “fair use” and other exceptions, even without a global instrument, through national copyright reform like we are seeing today in South Africa, Namibia and Nigeria. These campaigners are well organized and participate in national copyright discussions in support of local copyleft campaigns. It is imperative that the global copyright initiatives and campaigns show an equally organized and active national presence and fight anti copyright campaigns in the geographies where the fight is raging.

As publishers and PASA, we support copyright reform to take care of the changes in technology, including the role of AI. It is imperative that reforms enable society and the sector to benefit optimally from the technology advances. However, this cannot be achieved at the expense of copyright, the cornerstone of creativity itself. It is important that legislators’ understanding of public good and access, goes beyond enhanced access to learning materials and information, to include creating and protecting sustainable local production of the content. It is important that legislators have a broader understanding of the causal links between access to information, funding and proper management of the funds and do not rush to lump all ills of access on copyright. This limited view will result in a disproportionate burden of access being lumped on rights holders and the destruction of the publishing and creative sector, down the line. A simple comparison of the schools and TVET sectors, where adequate funding is provided and managed with the higher education one, where funding is inadequate and mismanaged, demonstrates the argument that copyright protection is not the culprit, but poor funding and mismanagement of funds.

It would be unproductive for us as a sector to take a simplistic view that looks at lawmakers as wantonly seeking to destroy the industry, but as public representatives that are confronted by a real challenge of access. That to resolve this wicked problem, they end up creating worse problems that are laden with unintended consequences, is another matter, but wantonness is not. It is important that we take a proactive effort to help resolve the access problem in other sectors, as we have effectively done in schools and Tvet and also protect our rights as publishers and authors, by all means necessary. To this end, the industry and the association must continue working with the global community to deal with this global challenge; protect our rights as rightsholders, including by petitioning the presidency and the Concourt on CAB, should the disregard for our concerns continue, while at the same time participating fully in the growth initiatives like the Creative Industries Master Plan and the National Book Policy processes.

We also need to ensure that we create and develop strong institutions along the value chain. These institutions must go beyond the publishers' associations to include authors' associations, which can work with us to protect and promote the rights of their members. This will help create self-regulating mechanisms to protect all participants along the value chain and avoid the overreach by government, that is evident in the CAB. Initiatives like the ANFASA-PASA agreement on contract terms (APACT), between ANFASA and PASA should be encouraged as a way of creating common and mutually beneficial standards among participants along the value chain. A sector where negotiations take place among various representative bodies to develop common standards across the value chain is capable of selfregulating and minimizing the need for undesirable state intervention.

Nonetheless, confronting the CAB and defending copyright and the rights of authors and publishers remains the biggest and most immediate task for us. Extensive work has been done with legal counsel to map out the options for the sector. We are very grateful to all members that have supported these efforts, the chair of the Legal Affairs Committee and his committee and the executive director and members of our legal team for their tireless work. We are also grateful to different members and authors who took time to make submissions and attend the provincial hearings and those who wrote very helpful articles on the bill. The Concourt path is one long one that will require us to go with the rest of the Copyright Coalition of South Africa (CCSA) community and as such, we will be coordinating our efforts accordingly. In the meantime, we hope and continue to work towards an amicable conclusion to the bill.

Thank you.

Brian Wafawarowa

PASA Chairperson

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