



Geneva, July 9, 2021

**Ref: Copyright law review in South Africa: public consultation by the Portfolio Committee on Trade and Industry on clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) in relation to the Copyright Amendment Bill [B13B-2017].**

Dear Sirs,

The International Publishers Association (IPA) is the world's largest federation of national, regional and specialist book publishers' associations. Established in 1896, our membership comprises 86 organisations from 71 countries around the world. The IPA is based in Geneva and is an accredited observer at the World Intellectual Property Organization as well as an accredited non-governmental organisation (NGO) enjoying consultative relations with the United Nations.

The IPA works closely with its member in South Africa, the Publishers Association of South Africa (PASA), and with our regional member in Africa, the African Publishers Network (APNET), which brings together national publishers associations and publishing communities from 42 African countries, to strengthen indigenous publishing throughout Africa.

We welcome this opportunity to offer the views of the international publishing industry represented by the IPA on the importance of appropriate copyright protection as a key condition for the sustainable development of creative industries. We believe it is important to recall the essential role of copyright to support and reward creativity as a driver for copyright policy and law in South Africa. Economic studies by the World Intellectual Property Organization (WIPO) provide evidence that a strong copyright protection and enforcement framework is of key importance to sustain creative industries' contribution to local economies and is a necessary condition of foreign investment in those industries.

### **On due process**

President's Ramaphosa letter is very clear: it not only expresses several substantive reservations to the constitutionality of the Copyright Amendment Bill, as it clearly tasks the National Assembly to "consider the bills afresh".

It is therefore surprising and disappointing that stakeholders are invited to once again provide comments on unchanged sections of the Bill, despite they have been subject to fundamental constitutionality reservations by South Africa's President.

The provisions in consultation are not only among the issues underlined by the President as raising constitutionality reservations but have also been fiercely opposed by creative sector organizations and copyright owners, national and international, who participated in previous consultations providing evidence on how said provisions would undermine creative industries in South Africa. It is hard to

understand why the Portfolio Committee consults on ill and defective provisions, instead of initiating a new legislative process to consider the bills afresh, as prescribed by South Africa's President.

Given the limited scope of this consultation, IPA will abstain from providing comments on other defective aspects of the Bill, which include an inappropriate enforcement regime lacking adequate remedies for online infringement, impaired rights of communication to the public and making available, incompatible with WIPO's copyright treaties, and undue restrictions to contractual freedom. All these problems were evidenced by creative sector organizations in previous public consultations, regarding the negative impacts on creative industries and the effects on South Africa's compliance with international obligations arising from international copyright treaties.

IPA would like to invite the members of the Portfolio Committee on Trade and Industry to urgently conduct additional consultations with stakeholders and objective impact assessments before engaging in a legislative process to review South African copyright law.

Along these lines, the publishing industry strongly encourages the National Assembly of South Africa to take stock of President Ramaphosa's letter and start a fresh legislative process. In doing so, IPA respectfully recommends a thorough due process is established, including

- defining objectives to a future copyright review that align with sustainability factors required to maintain South Africa's creative industries (including strong copyright protection and enforcement frameworks) and availability of published works, national and foreign, for the benefit of South African readers.
- establishing a fair, objective, non-biased and transparent impact assessment of the needs that justify the proposed provisions and options to address those needs. A fair impact assessment must be based on offering at least two or three policy options to address each need. It must also measure the potential effects of policy options on creative industries, including the impacts on their economic contribution.
- conducting broad public consultations with creative industries and other stakeholders relying on copyright as the bedrock of their businesses to enhance the understanding of their needs and provide an opportunity for copyright owners to express their views on a fair, objective and transparent impact assessment.
- publishing a new draft Copyright Amendment Bill for public consultation, taking into account the outcomes of the impact assessment and public consultation processes.

### **On compatibility with international treaties**

As stated by IPA on World Intellectual Property Day 2020, *"The copyright framework is and always has been the foundation of the publishing industry. Adequate copyright protection entails a combination of enforceable exclusive rights and carefully calibrated exceptions and limitations. Exclusive rights are fundamental to incentivize authors, publishers and other copyright owners to create, invest in, and make available to the public original and valuable works of authorship. Through these works, publishers drive inspiration, entertainment, education, and both local and global economies."*

South Africa is a contracting party to the Berne Convention, which provides for a set of mandatory exclusive rights that may be supplemented by additional rights. The WIPO Copyright Treaty (WCT) sets out additional rights, such as the making available right, which is fundamental for creative industries' digital business models. Despite South Africa is not yet a contracting party to the WCT, it is important to take into account the provisions of this important treaty. In addition, the making available right is

essential for digital business models and must be included in any forward-looking copyright law that is up to date with creative industries' business development needs. Although it is not the objective of this public consultation, the provisions setting out the rights of communication to the public and making available included in the draft Bill were incompatible with the WCT and would likely prevent South Africa from ratifying and acceding to said treaty.

In establishing exceptions and limitations to copyright protections, Contracting Parties must conform to the existing international legal framework and in particular to the 3-step test as enunciated in the Berne Convention and in the WTO TRIPS Agreement.

Consequently, provisions setting out exceptions & limitations must be clearly and narrowly defined, consistently with their nature as exceptions to exclusive rights. The 3-step test must also guide the application of legal provisions establishing exceptions & limitations, defining their boundaries, under the long-standing principle underlying the Berne Convention, the WCT and the WTO TRIPS Agreement: uses of copyrighted works require authorization. Exceptions are exceptions; they must not be set out by Contracting Parties as the rule to access copyrighted works, which is the result of overbroad provisions such as those now in consultation.

National and international publishers have already expressed grave concerns over the course of the last years, supported by economic and legal evidence, that a possible review of South African copyright law through the draft Bill as it was submitted to Presidential analysis sets out exceptions & limitations in an over broad manner. The concerns expressed alert to the devastating effects said provisions would generate, including irreparable damages on South Africa's publishing industry. In addition, publishers have also demonstrated how the combination between an ill-defined fair use provision with overbroad specific exceptions would cause South Africa to fall foul of its international obligations, notably the respect of the Berne Convention's three-step test, and prevent the country from acceding to the WCT.

The Berne Convention's 3-step test sets out clear boundaries to Contracting Parties establishing exceptions & limitations to copyright protection. The IPA respectfully submits these boundaries are breached by the provisions under consultation because:

- Exceptions & limitations must be restricted to certain special cases only, whereas the draft Bill establishes an overbroad combination of fair use with specific exceptions that enables certain categories of users to not only access, but also distribute and make available copyrighted content without permission from copyright owners.
- Exceptions & limitations must not conflict with the normal exploitation of the work. The combination of a broad fair use provision with several overbroad specific exceptions not only conflicts, but in fact prevents publishers from selling and licensing their works. This is the case of educational books, as demonstrated in economic studies<sup>1</sup>. In addition, the investments required to produce published works are impaired when exceptions & limitations undermine licensing and sales as is the case of the Bill, therefore preventing the production and distribution of future published works.
- Exceptions & limitations must not unreasonably prejudice the legitimate interests of copyright owners, notably their ability to recoup investments and monetize their copyrights. As previously demonstrated in abundant evidence provided by our member PASA, the Bill as it stands gravely

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<sup>1</sup> Study "The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry", by Price Waterhouse Coopers, July 2017, submitted as evidence in previous consultations by PASA.

damages the legitimate interests of publishers with regards to the ability to sell, license and control the uses of their works, receiving appropriate commercial fees. The negative impacts for the publishing industry will inevitably disincentivize investments by national and international publishers and undermine South African authors' ability to be published and read across the world.

In 2019, the Portfolio Committee asked a Panel of Experts to advise "on any technical or drafting issues pertaining to the Committee's amendments to the Copyright Amendment Bill", including "whether the clauses that address international treaties, correctly reflect the content of those treaties". The experts conveyed their opinion with regards to several defective aspects of the Bill, in addition to identifying issues that made the provisions of the draft Bill incompatible with international treaties.

IPA understands that, despite the experts were given a very short period of time to perform their role, hardly enough to enable an in-depth analysis, they did provide opinions offering specific suggestions on how Sections 12 B, 12 C, 12 D, 19 C and 19 D, the subject of the present consultation, can be reconsidered, deleted or amended to ensure South African copyright law be compatible with the Berne Convention's provisions.

Nevertheless, the Portfolio Committee is again consulting on the same draft version of the Bill, which does not take into account those suggestions. It seems clear from the experts' opinions the adoption of the Bill in its current form will conflict with South Africa's obligations under the Berne Convention and the WTO TRIPS Agreement, in addition to preventing South Africa from acceding to the WCT or to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

Along the lines of our previous comments, IPA recommends the Portfolio Committee takes stock of the numerous contributions made by the experts as an important step of future work to establish a fresh version of the Bill. Taking stock of the experts' contributions is a fundamental part of establishing a due process for reviewing South African Copyright Law, which must be fully compatible not only with the Berne Convention but also with the WCT, given South Africa's intention to accede to the treaty.

### **Exceptions & limitations: due process to measure impacts on creative industries**

The need for due process on the above captioned issue is very clear, given the strong opposition of creative industries to the provisions now in consultation, the constitutionality reservations raised by South Africa's President and the experts' opinions.

With regard to due process on setting out exceptions & limitations, we underline the need to conduct economic impact analysis regarding current and nascent market developments, to ensure that proposed exceptions address a market failure, serve a legitimate purpose, are suited to achieving this purpose, and objectively justified and proportionate according to a fair impact assessment.

A fair impact assessment is crucial to achieve a balanced copyright ecosystem. Notably, copyright laws must prevent that exceptions & limitations can be used as a basis for new digital or any other businesses to operate as exploiters of protected content which they have not invested in. If this is not safeguarded, fair use and other exceptions will inevitably violate the three-step test and undermine the establishment of sustainable, local publishing industries, in addition to limiting the legal offer of foreign works in South Africa.

The first response to access is provided by a vast array of licensing solutions made available by publishers for all types of users. Publishers understand the needs of their different audiences, including libraries, archives and education, and work closely with cultural institutions, schools and teachers to address those needs. Ignoring existing licensing solutions will inevitably prevent the economic exploitation of copyrighted works and cause irreparable damage to publishers, placing South Africa in breach of its international obligations arising from the Berne Convention.

In particular, educational publishers have always worked closely with governments and educational authorities to find ways to respond on the ground to challenges in education. Due to the current pandemic crisis, the main challenge now is to make digital learning available across countries in a sustainable way. Therefore, it is important to start deep discussions that help governments, schools and teachers find methodologies and learning materials that enable a quick response in a non-disruptive way. High quality locally developed educational content requires adequate copyright protection, so that publishers have the necessary incentives to invest in hiring the best authors, educational and pedagogical experts to produce local textbooks. Therefore, it is important that copyright law preserves the legal incentives required for publishers to invest and continue to partner with advancing education in South Africa.

It should be noted that free access to content or State publishing is not the answer to serve South African students and teachers with high-quality educational content that helps advancing South African education. Attempts to strip educational publishers from copyrights will have as sole effect decreased availability of quality, locally produced educational content, as investments will no longer be sustainable.

These and other aspects and implications of a copyright law review must be considered in a fair impact assessment before engaging in legislative solutions to create new exceptions & limitations.

### **Fundamental principles of exceptions & limitations**

The Berne Convention sets out that a Contracting State may permit, in certain special cases, reproduction without authorization, provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

In alignment with this important principle, the publishing industry strongly opposes any exceptions & limitations that:

- . Affect rights other than reproduction, such as exceptions impairing the rights of distribution and making available.
- . Are overbroad, notably as a result of combining a broad range of specific exceptions with fair use provisions, instead of being restricted to certain special cases.
- . Conflict with the economic exploitation of literary works. This is the case of exceptions that undermine the development of educational content, by enabling unauthorized reproduction, distribution or adaptation of copyrighted works for educational and research purposes. Balanced educational exceptions should only operate if and when licenses are not available and should not affect production of new works, so that copyright protection can continue to encourage production of local educational content. Exceptions that enable libraries and other cultural institutions to lend copies made under an exception may also conflict with the normal

- exploitation of the work. Reproduction by cultural institutions for purposes of preservation should be a separate matter. An exception for preservation should not be extended to lending.
- Are not subject to an impact assessment to measure how they affect the interests of copyright owners. For example, given the fast-paced developments on new markets such as e-books and audio books, and the constant investment by publishers in innovative online business models, over broad or inadequate interpretations of fair use can have important effects in deterring legal offers of content. Publishers will not be able to invest in legal distribution where they cannot recoup their investments due to inadequate fair use interpretations.

These risks are even more significant in jurisdictions where legal tradition and a solid body of jurisprudence to produce fair use interpretations are not available, thereby generating increased legal uncertainty. The commercial availability of local and foreign literary works for South African readers, sustained by adequate copyright protection, should be considered when assessing the overall societal welfare of a fair use system. Therefore, we recommend that an impact assessment is conducted to determine if fair use is the best option to achieve the objectives, or whether they can be achieved in other ways which reduce the impact on authors and burden on business.

In addition, unlike other jurisdictions, South African copyright law lacks the mechanisms to deter and sanction abuses of a fair use system, which are likely to happen given the introduction of such system is not accompanied by structural measures that enable an adequate judiciary treatment of fair use applications. These facts are alarming. Should the Bill remain as it stands, the legal uncertainty generated for copyright owners will likely prevent any investments be continued by national and international publishing companies.

In addition to an overbroad fair use provision, the draft Bill introduces a number of other overbroad, new exceptions and limitations to copyright protection, which have the potential to adversely impact the legitimate markets for educational works, but more broadly the markets for locally distributed works, and online works in general. The combination of an overbroad fair use provision with overbroad and numerous exceptions makes it impractical to determine whether literary works can be sold or licensed, thereby generating legal uncertainty and a legal environment that is adverse to creative industries. It is not possible for publishers to invest if they are unsure they will be able to sell or license their works. This will increase uncertainty and risks, and therefore introduce a factor to discourage or diminish investments, especially in local and young authors, which works pose bigger challenges to recouping investments than international best-sellers.

The previously mentioned study by PricewaterhouseCoopers evidences “significant negative consequences” for the South African publishing industry should the proposed fair use provision and overbroad exceptions be adopted, notably predicting a 33% average decline in sales, implying reductions in GDP, VAT, and corporate tax revenue collections. In addition, 89% of publishers surveyed noted that the exceptions as set out in the Bill would negatively impact their operations, likely resulting in cutbacks and possible business closures. IPA calls on the South African Parliament to take stock of this study and enhance its understanding of the industry.

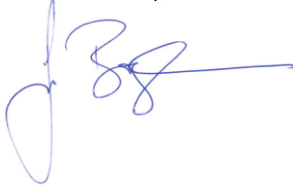
Educational publishing is not only impacted by overbroad specific exceptions under Section 12D, but also by the possibility of users invoking fair use (even if this novel idea is not adopted in any other fair use jurisdiction, including the United States where it originates from). The combination of both exception systems will render impossible any sales or licensing of educational works by their legitimate copyright owners, while enabling free access by any educational users and granting them with the possibility to make new works out of publishers’ owned content, despite licensing solutions being

available. Pursuing this legislative option will render South Africa's loss of its educational publishing industry and will undoubtedly place South Africa in breach of its international obligations, under the Berne Convention and the WTO TRIPS Agreements. This is unacceptable and IPA stands ready to support its member PASA in extracting the full legal consequences should such damage be inflicted on South African publishers. More importantly, IPA respectfully expresses its availability to engage in constructive discussions with South African members of Parliament to help enhance their understanding of the irreparable damage such option will cause.

We conclude by calling on the Portfolio Committee to immediately start a due process to consider the bills afresh, thereby rejecting the version now subject to consultation. Given the current draft is not only opposed by all sectors of creative industries, but has also motivated constitutionality reservations by South Africa's President, IPA is of the view that the only way forward is to start a new process that allows a transparent, evidence based and non-biased review of South Africa's copyright law, in a way that ensures the survival and sustainability of South African creative industries and the distribution of foreign works to the benefit of all South Africans.

We thank you for your time and consideration and remain available for any additional information that you may require.

Yours sincerely,



**José Borghino**  
**Secretary General**