Copyright Amendment Bill [B13B-2017]: Submission of comments by the Academic and Non-Fiction Authors Association of South Africa (ANFASA)

In response to your invitation to submit comments on the Copyright Amendment Bill (the 'Bill') to the {Portfolio Committee for Trade and Industry (the 'Committee'), ANFASA is pleased to provide the following.

Introduction

The Academic and Non-Fiction Authors' Association of South Africa (ANFASA) is an independent nonprofit national organisation with some 500 members. ANFASA's objectives, as expressed in its Strategic Plan, are:

> To build a strong organisation to support and respond to authors' needs and interests and to enable their agency in directing their personal development as creative workers.
>
> To inform authors of their intellectual property rights and ensure that they are properly remunerated for their work, and to maintain good relationships with rightsholder bodies and other sectoral stakeholders with the objective of advancing the growth of a writing and reading society.
>
> To make a contribution to South African culture, heritage, economic and human development through the growth of a literate society, and to encourage and support written communication in the arts, sciences and humanities.

Despite its name, ANFASA does not exclude authors of fictional works from membership. The issues that concern authors – such as the protection of their rights; advice and guidance in publishing contracts; information about the book sector; book-related workshops, seminars and conferences and projects to enhance skills and encourage young authors – are common to both. It is notable, however, that a considerable number of ANFASA members write books for use in schools and universities.

This is why ANFASA objects to provisions in the Bill which encroach on authors' rights with the potential to **negatively affect their incomes**, discouraging them – and in some cases preventing them – from practising their chosen profession.

ANFASA does not hold a position 'against' the Bill in its entirety. The Copyright Act 98 of 1978 as amended has long been in need of revision and of updating commensurate with technological advance. Provisions for the visually impaired are a dire necessity and will enable South Africa to accede to the Marrakesh Treaty. The introduction of the artists' resale right is overdue (discussion of these aspects of the Bill are outside the scope of this submission).

The primary focus of ANFASA's objections is section 13 of the Bill amending section 12 of the principal Act. ANFASA responds 'to the Presidents' reservations in that various sections of the Bill, including section 12A, which deals with the fair use of a work or the performance of a work, was not put out for public comment before the final version of the Bill was published and that certain copyright exceptions may be unconstitutional.'

Fair use – section 12A of the Bill

> *Article 59 (1) of the South African Constitution:*
> *'The National Assembly must— (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees;'*

In sections 12A and 12D, ANFASA identified several problematic provisions that will impact authors. In the course of 2017 (leading up to, during and subsequent to public hearings) and in 2018, numerous submissions and letters were accepted by the Committee, among them one from ANFASA (attached here as APPENDIX 1), that spoke for and against revisions to section 12. On the basis of these communications from the public, the Committee made its decisions, which then appeared in the version of the Bill published on 15 November 2018. The Committee will have considered the public's recommendations – some of them favourably, some not (not one of the points made by ANFASA in APPENDIX 1 or in the public hearings of August 2017 ever saw the light of day in the final version of the Bill). The point is that the Committee – underqualified in copyright law – took

decisions of material effect, inserted them into the Bill and published them in November 2018 as the final Bill – without consulting copyright stakeholders including authors – in contravention of article 59 (1) of the Constitution.

The second revision of the draft Bill had been issued in May 2017. The third appeared in November 2018. In the intervening eighteen months, section 12A was subjected to extensive amendment of material effect. At its meeting on 31 May 2018, the Portfolio Committee, under the chairpersonship of Mr B Radebe (acting), reviewed the principles of fair dealing and fair use, the former (according to Dr Masotja from the Department of Trade and Industry) a closed list of specific exceptions and the latter an open list allowing 'use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder'. Dr Masotja continued that '[s]ome see fair use as too open to abuse as it permits the use of works without permission. On the other hand, it promotes innovation, access and transparency which can help an economy develop.[1]

The Committee agreed on a 'hybrid' model opening up the specific instances (the certain special cases) of fair dealing to an almost infinite list limited only by four factors determining whether the use qualified under fair use.

Section 12A as it appeared in November 2018:

> 12A. (a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:
>
> (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
> (ii) criticism or review of that work or of another work;
> (iii) reporting current events;
> (iv) scholarship, teaching and education;
> (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
> (vi) preservation of and access to the collections of libraries, archives and museums; and
> (vii) ensuring proper performance of public administration.
>
> (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
> (i) the nature of the work in question;
> (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
> (iii) the purpose and character of the use, including whether—

[1] Studies have indicated that innovation continues unabated in countries that have adopted fair use (such as Singapore, South Korea, Malaysia and Israel) and equally in countries that have declined to adopt it (such as the UK and the countries of the European Union).

(aa) such use serves a purpose different from that of the work affected; and
(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
(iv) the substitution effect of the act upon the potential market for the work in question.
(c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.

The fundamental difference between this and the previous version of the Bill is in the first sub-section of section 12A.

The Bill of May 2017:

(1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work:

The Bill of November 2018:

12A. (a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

It is the addition of the words 'such as' that turn a list of specific uses into mere examples of the kinds of uses that qualify and that open the door to uses that may indeed not qualify. Where fair dealing is specific, fair use is diffuse. Fair dealing and fair use are both defences to a charge of copyright infringement, but whereas the former lays out the specific acts acceptable as a fair dealing defence, the latter directs the intending user to the considerations he or she should consider before acting – and then, should he or she overstep the mark, a court of law will decide whether the fair use rules have been correctly followed. In other words, case law rather than statutory law will decide what fair use includes. ANFASA did not have a chance to respond because no further submissions were called for after November 2018.

The above process prompts ANFASA to ask the question: what was the game changer? Where did the words 'such as', that changed fair dealing into fair use, come from? The term was mentioned in the Committee meeting of 31 May by Dr Masotja but only in passing, referring to the Copyright Act of Singapore; but by the next meeting, on 5 June, according to the meeting report,

> It had been agreed that the Bill should use a hybrid approach to the fair use/fair dealing debate. The suggestion was that the Bill itself would refer to, or be anchored in, fair use. DTI would provide the wording for how the hybrid system would be presented, as well as a list of exceptions. The Singapore model was a

good one on which to base the clause. DTI would also refer to the WIPO website.

In October 2018 a letter was sent from Professor Tobias Schonwetter of the IP Unit at the University of Cape Town[2] to the chairperson of the Committee and copied to seven officials in the Department of Trade and Industry, 'urging' the addition of

> the words "such as" to the introductory language in the new proposed general exception in Section 12 of the Act, so that it reads: "In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work: . . ." This change would follow the examples of the U.S., Israel, Korea and many other countries in enabling the general exception for fair uses to be potentially applicable to fair uses of copyrighted content for any SA Copyright Amendment Bill 2 purpose, including those future uses that cannot be foreseen by the legislature at present.

On future uses, the letter went on to claim that 'an open fair dealing or use clause would provide the means for the law to protect uses for purposes that are as of yet unknown'. This is the claim of 'flexibility' that supporters of fair use rely on as a spur to innovation (despite numerous studies, articles and reports, the connection between 'flexible' exceptions and innovation has yet to be universally, or even generally, accepted).

Intellectual property, and therefore copyright, has been recognised by South Africa's courts as a right of property, protected by Section 25(1) of the Constitution.[3] The virtually uncontained fair use category occasioned by the insertion of 'such as' into section 12A will deprive authors of the power to prevent unauthorised use of their property. Their rights will have been curtailed.

Section 12D of the Bill

[2] With seven co-signatories: Caroline Ncube University of Cape Town; Denise Nicholson University of Witwatersrand, Johannesburg; Coenraad Visser UNISA; Sean Flynn American University Washington College of Law; Peter Jaszi American University Washington College of Law; Andrew Rens Duke University School of Law.

[3] André Myburgh, Advice on the Copyright Amendment Bill, No 13 Of 2017, revised as at 3 September 2018 for the Portfolio Committee on Trade and Industry.

12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose.
(2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.
(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.
(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook— (a) where the textbook is out of print; (b) where the owner of the right cannot be found; or (c) where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.
(5) The right to make copies shall not extend to reproductions for commercial purposes.
(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.
(7) (a) The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.
(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.
(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.
(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.
(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.
(8) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (6).''

Section 12D is in effect a return to fair dealing in that it is specific about what may and may not be done in respect of a fair dealing for education. It covers the full range of circumstances in which books can be made dispensable. Sections 12D (2) permits unlicensed coursepacks. Section 12D (3) permits the reproduction of a whole or substantially a whole book 'if a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions'. This is not as restrictive a condition as it might seem. The copyright owners in a book are normally the author (copyright in the content) and the publisher (copyright in the published ediition); if the book in question is a compilation the contributors each hold copyright in their own article or chapter; if the book contains illustrations each artist or photographer would own copyright in their painting, drawing or photograph. Tracing them and securing a licence

would be an insurmountable obstacle – a school or university would, justifiably perhaps, claim that a licence was not available from the copyright owner. Further, a licence to copy a whole book would not be available from a collecting society because reproduction rights organisations are not mandated by rightsowners to license more than a percentage (usually 10%) of a work. An indigenous community or the spokesperson for such a community would inevitably be hard to locate. Finally, who is to determine, when there is a dispute, whether the terms and conditions offered are reasonable?

Ultimately, section 12D (3) permits the reproduction of a whole book, and authors receive neither a royalty based on the purchase price of the book nor a royalty payable for the use of a excerpt. It has been claimed by supporters of this provision that a school or university would be unlikely to buy a single copy of a book and make hundreds of copies for learners and students. The point, however, is that they *could*, in terms of the law.

The provisions of section 12D add up to a leniency that prompts questions about the ultimate purpose of their cumulative effect. It is an undisguised attempt to make redundant the licensed 'coursepack', a compilation of readings assembled by the lecturer as supplementary reading material for a specific course. In South Africa and internationally the ubiquitous coursepack is made under licence. A university holds a 'blanket licence' from a copyright management organisation and the licence fees collected are channelled back to the authors and publishers of the works included in the coursepack. This process meets the need of supplementary sources of information so that students need not buy the book when only a small portion of it is needed – and, importantly, so that authors receive some reimbursement for the use of extracts from their works.

The university is liable for the annual blanket licence fee which is calculated according to the number of students in the university. In 2020 the fee was under R150 per student per annum.[4] It is a balanced solution. Students gain access to information at a small fee. Authors and publishers receive royalties if their works

[4] A certain university, decrying the blanket licence fee, has objected to the 'millions' of rands it pays annually for copyright. This university also charges its students for copyright, and at a rate higher than that of the blanket licence.

are copied. For an author writing scholarly books for a niche market, these royalties are some compensation for the loss of sales. They make possible the publication of research materials, providing affordable access to information. They are a mainstay of university education worldwide.

Read literally, Section 12D will bring licensing to an end, which would be irreconcilable with the current international obligations South Africa must abide by and would also contradict the decision for South Africa to accede to the WIPO Copyright Treaty (WCT). It is not advisable to legislate provisions that according to the canon of interpretation in South Africa would have such a deleterious effect and could only be given a meaning reconcilable with international treaties through a purposive interpretation. Nor is it advisable to satisfy demands of the education sector that endanger the flow of information on which it relies.

One argument against licensing is that it results in the flow of money outside the country because foreign books and journals form the bulk of the material. The solution is to foster more knowledge production locally so that foreign works are used less. One of ANFASA's main objectives is to encourage and support the writing and publication locally of scholarly and research-based works. Not only will they reduce the money flow abroad; they offer the opportunity to lend weight to decolonised curricula and to expand and explore the African world-view. Having several times run workshops for authors on 'how to turn your PhD thesis into a book', ANFASA is already planning an expanded and structured programme, in partnership with the National Institute for the Humanities and Social Sciences, targeting young black post-doctoral researchers. South African authors, and in particular young black scholars and authors writing in the indigenous languages, have been marginalised, and will continue to be marginalised if they are denied the stimulus to write educational and academic books. The decolonisation of educational and academic curricula relies on the availability of new works. The incentivisation of authors – not decentivisation as is inherent in the proposed amendments to section 12 – is the crux of ANFASA's advocacy.

By contrast, free coursepacks and multiple free copies of books will discourage indigenous scholarship and South African students will continue to rely on knowledge flowing from the North.

In summary, despite the new sections 12A and 12D constituting material changes, copyright stakeholders whose incomes were on the line were not given the opportunity to comment. In the case of a material alteration, key stakeholders should be consulted. That they were not renders the provision constitutionally invalid. As the president put it:

> The relevant provisions as amended were not put out for public comment before the final version of the Bill was published. The changes made to this particular section of the Bill were material to the scheme as a whole and the failure to consult, in the face of such materiality of the amendments, could render the provisions constitutionally invalid.

Further, the president singled out the new sections 12A and 12D, inter alia, as possibly constituting 'reasonable grounds for constitutional challenges because they may constitute arbitrary deprivation of property and 'may further run the risk of violating the right to freedom of trade, occupation and profession'.

The president expressed concern that the sections may be in conflict with certain international treaties and, finally, he referred to 'the contention that the Copyright Bill breaches the Three-Step Test first established under Article 9(2) of the Berne Convention to which South Africa is bound in terms of section 231(5) of the Constitution.' A few comments on the three-step test, and South Africa's obligation to abide by the international treaties to which it is bound, follow later in this submission.

A case study – Canada

Attached here, as Appendix 2, is an account of what happened to writing and publishing in Canada after the copyright reform of 2012. I have said, above that good copyright law balances the interests of content creators with those of content users. This does not mean that ANFASA or its members seek to deny students access to published works. Authors write to be read, but they also write

in order to make a living. Good copyright law does not allow one of the two intentions to outweigh the other.

In South Africa, the book publishing industry depends for its market largely (according to estimates by as much as 70%) on educational materials. The country's writing and publishing sector is fragile, and susceptible to severe damage if its domestic market is reduced – as it will almost certainly be if section 12D is implemented. It is paradoxical that a Creative Industries Masterplan is in development by the Department of Small Business Development with the aim of expanding sales of cultural products (including books) locally and embarking on a drive to stimulate international trade – at the same time as the Copyright Amendment Bill could potentially destroy local writing and publishing.

The three-step test

> *Article 9 (1) and (2) of the Berne Convention:*
>
> *Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.*
>
> *It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in* ***certain special cases****, provided that such reproduction does not conflict with a* ***normal exploitation of the work*** *and does not unreasonably prejudice the* ***legitimate interests of the author*** *[our emphasis].*

In calling for the submission of comments on the Bill, and while restricting such comments to certain of the president's reservations about constitutionality, the Portfolio Committee has also invited comments on the alignment of the Bill with international treaties. ANFASA will confine its comments to the three-step test of the Berne Convention that is also contained in the TRIPs Agreement and other international treaties to which South Africa is a signatory or intends to become one, such as the Marrakesh Treaty and the WIPO Copyright Treaty (WCT).

Each one of the cumulative conditions is tested by fair use. The open-ended category of acceptable uses is incompatible with 'certain special cases'. Authors writing textbooks or academic works would expect them, normally, to be exploited in an educational setting. The legitimate interests of authors – to be

paid for their knowledge and their labour in expressing it – is denied by section 12A and in particular section 12D.

ANFASA is aware of the longstanding arguments over the three-step test. This submission is not going to participate at length in that discourse. It is enough that there is a big question mark over the legitimacy of the fair use provisions in section 12 in respect of the three-step test, and the possibility that South African legislation has violated it. So far, the emphatic denials that the fair use provisions contravene the three-step test have come from stakeholders and interested persons with connections to American high tech companies that stand to gain from the weakening of copyright. ANFASA urges the Committee to rely on expert local and foreign advice such as that from the WIPO in order to come to this crucially important decision. If the weight of opinion and evidence confirms that the president was right to be concerned on this point, then sections 12A and 12D will have to be reconsidered and amended.

André Myburgh, who was appointed in 2017 as an expert adviser to the Portfolio Committee, contended in his final report that the Legislature had ostensibly not considered South Africa's obligations under the three-step test in devising the numerous copyright exceptions in the Bill. His instructions had been to critique only technicalities, but he could not always avoid mention of the policy behind them.

> [I]t [is] clear that the Bill is not capable of correction by the mere amendment of certain clauses, as required by the Portfolio Committee's instruction. The underlying flaws in the Bill caused by non-compliance with the Three-Step Test have far deeper implications.

Comments on the fair use clauses in the Bill from authors writing in indigenous languages

> Article 6 (2) of the South African Constitution:
> Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

In reality, instead of taking such 'practical and positive' measures, the state is proposing to hinder the use of the indigenous languages by discouraging their writing and publishing. This is unconstitutional, a violation of article 6 (2) above.

The marginalisation of authors writing in the indigenous African languages is the legacy of apartheid. In the apartheid era the readership of fiction and non-fiction (apart from the bible) in these languages was very small, and consequently few such books were written. Those that were written were published by large educational publishers connected to the Department of Education and Training (i.e. Bantu Education) for use as readers in schools. Authors were reluctant to venture into subject matter other than what was deemed suitable for learners. Not much has changed in the democratic era. The market for books in the indigenous languages has hardly increased. Schoolbooks are still the 'best sellers'. Authors have testified to ANFASA that unless their books are adopted for classroom use they cannot make a living by writing them.

Suspecting that these authors, who are often located in rural areas, may not have been informed about the Bill or fair use, ANFASA conducted a small survey, asking for comments on the proposed fair use provisions in section 12A. A sample of the information provided and a selection of their responses are enclosed as APPENDIX 3. Although the responses were few they were unanimous. Shocked by an apparent lack of interest by the Bill in the rights and welfare of authors writing in the indigenous languages and in the provinces, ANFASA has organised an authors' convention, taking place on 23 July, to fully brief them and encourage them to make their voices heard.

The responses indicating that authors in the provinces have not been consulted about fair use is in contravention of clause 59 (1) of the South African Constitution, which holds that 'The National Assembly must facilitate public involvement in the legislative ... processes of the Assembly and its committees'. The new section 12 of the Act is therefore unconstitutional.

Conclusion

In conclusion, ANFASA reiterates that good copyright law achieves a balance between the interests of rightsowners and the needs of society. Such law should clearly define exceptions and limitations to authors' exclusive right to carry out certain acts in respect of their works – but the exceptions must observe authors' legitimate interests (see the three-step test) regarding exploitation. The majority of expert local and international opinion agrees that the Copyright Amendment Bill does not comply with the three-step test.

ANFASA has complied with the instruction to confine this submission to section 12A of the Bill, but that doesn't mean we are in agreement with the rest of the Bill as it affects authors of literary works. The Bill is heavily weighted in favour of access (especially by students in higher education institutions). ANFASA is in complete agreement that knowledge must be accessible and affordable, but without consideration authors will no longer produce that knowledge in book form. Licensing is the only fair and balanced solution to providing knowledge at low cost.

The parliamentary Portfolio Committee for Trade and Industry, and its predecessor, have been exercised in dealing with the Bill for over two years and it still causes argument if not controversy. It is clear that this Bill is never going to fly. After the president's reservations about the constitutionality of certain sections have been confirmed, as they will be, surely the Committee could be relieved of its responsibilities and hand it over to a new committee of experts with experience in actually *practising* copyright law as it pertains to musical, artistic and literary works (noting that there are significant differences between them). The current Committee members have struggled valiantly to draft complex and technical legislation, but they would probably be the first to admit that they are not copyright experts – that many of the technicalities of copyright have had to be explained to the Committee is evidence. Who has done the explaining is also a contentious issue. Interested persons with suspected links to foreign technology companies offered to conduct workshops to explain and promote the introduction of US-style fair use.

The drafting of copyright law should be stripped of bias. Members of the committee should be experts in copyright who also understand the machinery of the cultural and creative industries. They should eschew emotional or ideological considerations to carry out the task according to its governing policy framework.[5] Among the members of such a team would be arguably the most prominent copyright lawyer in South Africa, Professor Owen Dean. The committee should be headed by a prominent and widely respected individual. Judge Richard Goldstone has been mentioned in this respect.ANFASA supports the proposal of an expert committee headed by Judge Goldstone, and urges the chairperson and members of the Committee to give favourable consideration to this suggestion for the neverending saga of the Copyright Amendment Bill.

Finally, ANFASA asks for a slot in the virtual public hearings in early August so that we can report back on the virtual authors' convention, scheduled for 23 July, at which delegates will discuss the prospects of writing books in the indigenous languages when the law appropriates their property and denies them payment.

[5] That the most recent IP Policy (of 2018) is still a work-in-progress and contains no reference to copyright on the grounds that copyright is an 'existing concern' and covered by an 'existing initiative' (presumably a reference to the as yet unsigned Copyright Amendment Bill) is a problem; a chicken and egg situation in which the amended Copyright Act should conform to the country's IP policy but the IP policy on copyright and related rights has stalled until the 'existing initiative' (the amendment of the Act) has been completed.