International Federation of Reproduction Rights Organisations
ifrro

PRESIDENT
Yngve SLETTHOLM

CH EF EXECUTIVE & SECRETARY GENERAL
Caroline MORGAN

The Honourable Mr. Duma Nkosi
Chairperson: Portfolio Committee on Trade and Industry

Attention Mr. A Hermans
Parliament of the Republic of South Africa
Cape Town

By email only to: ahermans@parliament.gov.za

Brussels, 16 July 2021

Dear Mr. Nkosi,

SUBMISSION BY IFRRO – COPYRIGHT AMENDMENT BILL [B13B-2017]

1. Introduction

This submission is made on behalf of IFRRO – the International Federation of Reproduction Rights Organisations – the international network of Collective Management Organisations called Reproduction Rights Organisations (RROs) in the publishing industry. IFRRO has 158 member organisations in over 80 countries worldwide. Our member organisations in South Africa are DALRO, the Dramatic, Artistic and Literary Rights Organisation, and PASA, the Publishers Association of South Africa.

IFRRO has had the opportunity to review the submissions made by PASA, DALRO and ANFASA (the Academic and Non-Fiction Authors Association of South Africa) to this review and we endorse and support those submissions. We have also made submissions in earlier phases of this law review process (in June 2017, July 2018 and February 2019). We would be happy to provide you with copies of those submissions if you would find them helpful.

We also ask to make an oral submission at the public hearings on 4 and 5 August 2021.

In this submission we will explain why the exceptions and limitations provisions in the Copyright Amendment Bill (the Bill) do not comply with South Africa's existing international obligations. We are also of the view that although the Bill seeks to align South Africa's national legislation with the requirements of other WIPO Treaties, it fails to do so.

In addition, we are of the view that the lack of a fairness assessment for the exceptions in sections 12A, 12B, 12D and 19B constitutes an arbitrary deprivation of property and opens the issue of a constitutional challenge to the Bill.

2. Compliance with International Obligations

We are pleased that the South African Government plans to accede to the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, WIPO Beijing Treaty on Audiovisual Performances and the WIPO Marrakesh Treaty.

We are however of the view that the exceptions and limitations framework in the Bill will conflict with provisions in those WIPO Treaties and also with South Africa's existing international obligations in the Berne Convention and the TRIPS agreement.

This is because the TRIPS agreement requires that exceptions and limitations in national legislation must comply with the Three Step Test in Article 9(2) of the Berne Convention. The Three Step Test provides:

> *"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] 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."*

In order to ensure compliance with the Three Step Test, exceptions and limitations must:

- be limited to certain special cases,
- not conflict with the normal exploitation of the work and
- not unreasonably prejudice the legitimate interests of the author.

To ensure Treaty compliance, some countries choose to include the exact wording of the Three Step Test in their legislation – see Section 200AB of the Australian Copyright Act, for example. Other countries include a number of factors that when applied correctly, ensure that uses permitted by the exception comply with the Three Step Test. This is the purpose of the four-factor assessment which is part of the fair use provision in section 107 of the US Copyright Act.

Although the proposed fair use exception in section 12A includes a four-factor fairness assessment, the South African exception is much wider in its scope than its US counterpart.

Moreover, the exceptions contained in sections 12B, 12D and 19C do **NOT** contain either a four-factor fairness assessment, or an explicit requirement that they must be interpreted consistently with the international binding yardstick, that is the Three Step Test.

This gap in the legislation means that in IFRRO's view, if the Bill were to be passed in its current form, South Africa would be in breach of its international bilateral and multilateral obligations, in particular the requirements of the Three Step Test.

3. Comments on Specific Provisions of the Bill

In this part of our submission, we comment on the specific provisions that are part of this review process, that is Clause 13 (section 12 A, 12B, 12C and 12D), Clause 19 (section 19B) and Clause 20 (section 19C).

We note that reviewing certain sections of the Bill in isolation is difficult, and also that our willingness to do so as part of this review does not imply that we consider all other aspects of the Bill to be appropriate or acceptable.

3.1. Fair Use (section 12A)

IFRRO is of the view that a fair use approach to copyright exceptions is not compatible with the existing South African legal framework and will not only create an environment of uncertainty, it will have a strongly adverse impact on the diversity and vibrancy of South African culture. We are of the view that there has been insufficient consultation as to the impact of the move to a fair use exceptions framework. We urge further that further consultation and a comprehensive economic impact study be conducted before a decision is made to make such radical shift.

We are also concerned about the time and financial costs of transferring decision making about the scope of exceptions from parliament to the courts. This is a necessary component of a fair use approach. Despite decades of case-law precedent, legal proceedings in the USA in relation to fair use are lengthy and costly for the parties concerned, and adversely impacts those that cannot afford to pursue legal action to assert their copyright.

In the last decade, a number of countries with a fair dealing framework to exceptions have explored adopting a fair use framework. A significant number of those countries eventually decided not to do so.

For example, in 2011 in the UK, the Hargreaves Report recommended against the introduction of fair use. In Australia in 2017, the government did not accept a recommendation to implement fair use, rathe preferring to further consult on flexible exceptions within the fair dealing framework. In 2018, the Irish government rejected fair use due to its uncertainty and unpredictability – see the Regulatory Impact Analysis

We acknowledge that some countries have moved from a fair dealing to a fair use approach in recent years. Of those countries, most notably Singapore, a light touch approach was adopted. The existing fair dealing exceptions were converted into examples of fair use, and a series of fairness factors incorporated to enable the fairness of any particular/ future use to be assessed. We also understand that this approach has been taken in Uganda.

Overall, a very small number of countries that are parties to the Berne Convention have a fair use framework for copyright exceptions (around 11 of 179).

Of particular concern is that the proposed fair use clause in South Africa is far wider in its scope than the corresponding provisions in the USA or in Singapore as it provides an expanded list of examples of fair use, some of which currently require licensing or payment, giving rise to Constitutional concerns.

In addition, section 12A, the fair use provision, is accompanied by a parallel set of specific exceptions (sections 12 B – D) that do not require a fairness assessment of any kind to be made. This structure creates uncertainty, and also includes a very large number of additional exceptions that would not in any circumstances meet the requirements of the Three Step Test. No other country that we are aware of, other than South Africa, has proposed or implemented such an approach.

This combination of fair use and other exceptions to copyright has been called a hybrid approach, combining fair use and fair dealing. It is nothing of the sort. Sections 12B – D are not fair dealing provisions, as if they were, they would also require a fairness assessment of the use to be made rather than being an overly broad and extensive list of permitted purposes. We say more about this below.

In our view, there is a need for further consultation about the move to a fair use framework for exceptions to copyright in section 12A. In those consultations the overall approach to exceptions and limitations in the Bill (fair use plus additional exceptions) must be reassessed.

In addition, we are of the view that the enumerated list of fair uses must be narrowed to reflect the existing range of exceptions in the Act. Any further expansion of fair use to additional purposes should take place through the operation of the fair use provision itself.

3.2. Specific exceptions (section 12B)

We have two major concerns with this section.

The first is that there is no fairness assessment required for any of the permitted uses under the exceptions. In several provisions there is a requirement that the use is permitted to the extent justified by the purpose. This is merely a quantitative consideration and is also a subjective assessment by the user, and consequently is not sufficient to ensure that the use made is objectively fair.

In addition, some of the proposed purposes are expressed so widely that they would not ever qualify as permissible exceptions to copyright. Not only would they breach the Three Step Test (by not being a special case), they would very likely be unconstitutional as they would be considered to be an arbitrary deprivation of property.

They include but are not limited to the exception for translation in 12B (1) (f), and for personal use in 12B (1) (i). We comment specifically on those sections below:

- **Personal copies (section 12B (1) (i))**

The uses contemplated by the section are extensive, and include any non-commercial purpose. There are no restrictions on the number of copies to be made, the continuing ownership of the original, or other conditions that would limit the impact of an unremunerated exception on copyright owner's legitimate markets. The relationship between this provision and the proposed fair use for personal use is also unclear.

Although private copying is permitted in many other countries, because of the market harm that such provisions can cause, private copying is either remunerated by means of a levy system, or the uses permitted are extremely circumscribed. Further information about the number of private copying schemes in force or under active consideration is found in the CISAC / Stichting de Thuiskopie Study.

The UK experience is illustrative. In 2014 the UK government introduced a private copying exception which was later struck down as the evidence of its impact on the copyright owners' market was inadequate. Similarly, in Australia where private copying is permitted without remuneration, the uses permitted are extremely limited in order to avoid harming the copyright owner's markets.

IFRRO submits that the South African government should introduce private copying remuneration to legitimise private use as has been done in Algeria, Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Ghana, Kenya, Malawi, Mali, Nigeria, Morocco, Senegal and Tunisia, and is being considered in Congo Brazzaville, Namibia, Uganda and Zambia. Regional

organisations in Africa have also taken steps to support the introduction of private copying remuneration, as seen in section 36 of the ARIPO Model law on copyright and related rights, as well as in the OAPI Bangui Agreement and in the work done recently by ECOWAS on private copying.

- **Illustration for Teaching (section 12B (1) (b))**

The scope of the proposed exception, permitting any illustration in a publication for the purpose of teaching is extremely broad. It would enable educators and government agencies to develop educational publications, using whole artistic and literary works within those publications without any requirement to pay permission fees to the owners of those copyright works, as a commercial publisher would have to do. Not only does the provision deprive both visual artists and text authors of legitimate income, it enables unfair competition by educators with educational publishers, who would not have the benefit of the exception when developing their own educational content.

Further, the provision overlaps with the uses permitted by sections 12D and 12A, creating confusion and further eroding copyright owners' rights, and threatening income streams for vulnerable creators.

Other areas of concern include the reproduction of press articles (section (e)) and translation (section 12B (1) (f) and (3)). Each of these exceptions erodes legitimate markets for copyright owners, and removing the rights of copyright owners to control these uses will result in a "race to the bottom" in which there will be no incentive for copyright owners to take a commercial risk in publishing and no expectation that the uses under the exception will be made, or be reproduced accurately. In fact, the impact of each exception will be the opposite of what was intended – fewer publications in minority languages, and a weakened press sector.

3.3. Educational and academic activities (section 12D)

We understand that the purpose of section 12D is to increase access to copyright content by education. However, we are concerned that by enabling such a broad spectrum of uses without payment, its implementation would in fact lead to a significant reduction in the number and type of resources available to South African students, and in particular reduce the number of South African originated titles as local publishers find it uneconomic to continue operating in such a hostile environment.

In addition, the provision completely ignores the successful collective licensing solutions offered by DALRO. These collective licensing solutions sustainably balance the rights of copyright owners to payment with the need of users for access to content.

Collective management organisations (CMOs) are an essential component of an effective copyright system. They operate in a number of cultural sectors, providing cost effective solutions to access to a wide repertoire of content for a diverse range of users.

IFRRO represents CMOs in the text and image sector, around the world and in Africa. We have 18 members in Africa, operating in Algeria, Botswana, Burkina Faso, Cameroon, Côte d'Ivoire, Ghana, Kenya, Malawi, Mauritius, Nigeria, Senegal, South Africa, Tanzania (Mainland and Zanzibar), Uganda, Zambia and Zimbabwe. DALRO in South Africa, is one of the leading CMOs in the text and image sector in Africa and contributes its expertise and experience to the development of the creative sector and collective licensing in other countries in Africa.

Educational institutions, particularly universities, are a primary licensing sector for CMOs in the text and image sector around the world. This is because the use of copyright content in these institutions is so extensive that remuneration by licensing is considered to be a normal exploitation of a work (a component of the Three Step Test, mentioned earlier). We refer you to

the ANFASA submission for an explanation of the way in which DALRO licenses course packs in universities in South Africa.

Our first concern with section 12D is the extent and scope of the exceptions. They are extremely extensive, and operate in addition to the availability of fair use in section 12A and the specific exceptions in section 12B.

The exceptions are far broader than those permitted for educational purposes in other countries, even in those countries with a compulsory or statutory licence for educational purposes such as Australia and Singapore. In those countries a licence fee is paid through a CMO to the copyright owner when similar uses by educational institutions are undertaken.

A further concern is the lack of a fairness assessment for the uses permitted by the section. This is counter to the prevailing position internationally.

A pertinent example is Canada. In that country there is an exception for educational uses, which requires a fairness assessment to be made before a use is permitted under the exception. There is litigation in that country, which has reached the Supreme Court of Canada, about the correct interpretation of the fairness assessment.

The lower courts in that litigation have held that the extent of copying by the university in purported reliance on the fair dealing provision is not fair, based on factors such as the extent of the use and its economic impact.

However, regardless of the eventual outcome of that litigation, what is important is that the fairness of a use under the educational exceptions can be assessed. The possibility for such an assessment to be made is entirely lacking in the proposed section 12D in South Africa.

A number of submissions in support of the proposed exceptions in section 12D use the fact that a significant proportion of the funds that DALRO collects are paid to foreign rightsholders as a reason for replacing DALRO's licences with unpaid exceptions. This is disingenuous.

DALRO's distributions to rightsholders are based on information provided to it by licensees. DALRO does not make decisions about which copyright owners receive payments, that decision is made by the universities when they choose which works to use.

The solution to the perceived inequity of distributions being made to foreign copyright owners, is not to dismantle a licensing system that also supports South African authors and publishers. The solution is to encourage the creation of more South African works by supporting local authors, through organisations such as DALRO.

We are of the view that further dialogue amongst the publishing sector, educational interests and DALRO is required to enable an effective and responsive framework for educational uses in South Africa to be developed.

Alternatively, we suggest that section 12D be made subject to a licence override, as is the situation in the UK, Jamaica and in a number of countries in Africa, for instance, in Section B,1,(b) of the revised Copyright Act of Kenya 2019, in Section 15 of the Copyright and Neighbouring Rights Act of Botswana, and similar provisions in the copyright laws of Ghana and Mauritius, as well as in Section 23 of the ARIPO Model law on copyright and related rights.

3.4. Libraries, Archives, Museums and Galleries (Section 19C)

We note that appropriate exceptions for libraries, such as for preservation purposes are part of a balanced copyright framework. However, the exceptions proposed as part of section 19C are far too extensive. In our view the provisions permitting general sharing of works with other libraries and library users are simply too broad to be acceptable unremunerated uses of works.

For example, there is no requirement that the use not be multiple (copying of substantially the same parts of a work at substantially the same time for substantially the same purposes) or systematic, and there is no fairness assessment required of the use. In our view, each of these factors must be assessed before a use can be permitted by the exception. We are also of the view that in making the fairness assessment, existing licencing markets, both by copyright owners directly and through collective licensing, such as DALRO, must be recognised.

We also note that there is no possibility for a Public Lending Right (PLR) scheme to apply, to allow authors (and publishers) to benefit from the lending of their works by libraries. Such schemes are widely accepted in Europe and in other common law countries, with the most recent country to implement such a scheme being a near neighbour of South Africa, Malawi. Further information about Public Lending Rights is available here.

IFRRO is also concerned that section 19C is vaguely drafted and may lead to interpretations that are not in conformity with international law, breaching international Treaty obligations. As an example, Section 19C (11) provides that:

"*A library, archive, museum or gallery may reproduce for preservation purposes, in any format, any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for scholarship, research* ***or any other legal use.***"

If interpreted literally, this would exempt a library entirely from the constraints of copyright, as long as it is not copying in pursuance of illegal uses. The section even in the absence of the last element in bold, goes too far as it would erode the market for works whose primary market or a substantial market is in fact the scholarly or research markets.

In addition, it completely disregards the moral rights of the author to withdraw a work from circulation.

Another concern we have is that the categories of eligible institutions is too broad, and undefined.

We also note that several of the proposed uses are limited to non-commercial purposes. In our view that is not sufficient protection for rightsholders, as many privately run museums operate on a "non-profit" basis. The current structure of the provision will encourage many more commercial organisations to structure themselves as libraries, galleries and museums in order to be able to rely on these provisions.

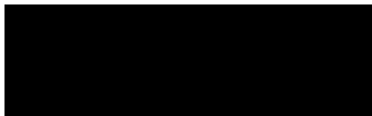
4. Conclusion

It is IFRRO's view that the sections of the Bill which are the subject of this review are in breach of South Africa's international Treaty obligations, as a result of their scope and extent and also because of the lack of a fairness assessment in sections 12B, 12D and 19C. It is very likely that these provisions are also unconstitutional.

We also hold the view that these flaws cannot be remedied by redrafting in committee. Rather, what is needed is for the committee to devise a roadmap for further stakeholder consultations, the conclusions of which will enable a committee of experts to redraft the legislation and position South Africa as a forward looking and vibrant economy, supporting its creative community and encouraging innovation.

We would be happy to contribute to that process.

Yours sincerely,



Caroline Morgan,
Chief Executive and Secretary General,
IFRRO