PASA Submission to DTI PC Final, 16 July 2021

The Hon. Mr D. Nkosi
Chair of the PC on Trade and Industry
National Assembly
Parliament of the Republic of South Africa
CAPE TOWN

ATTENTION: Mr A. Hermans
Parliament of the Republic of South Africa
CAPE TOWN

By email to the Committee Secretariat: [redacted]

Dear Mr Nkosi

Copyright Amendment Bill [B13B-2017] and Performers' Protection Amendment Bill [B24B-2016]: Submission of Comments by the Publishers' Association of South Africa (PASA)

INTRODUCTION

In response to your Committee's invitation to stakeholders to make written submissions in respect of the Copyright Amendment Bill, No B13 of 2017 (referred to in this submission as the "Bill"), which will be deliberated in conjunction with the Performers' Protection Amendment Bill, No B24 of 2016, the Publishers' Association of South Africa, PASA, herewith submits its comments.

In terms of the invitation for submissions, we address

* clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) in relation to the Bill

* the President's reservations that

** various sections of the Bill, including section 12A, was not put out for public comment before the final version of the Bill was published, and

** certain copyright exceptions may be unconstitutional

* the alignment of the Bill and the Performers' Protection Amendment Bill [B24B-2016] with the obligations set out in international treaties.

However, while noting that submissions must be limited to the President's reservations, we respectfully also note that in President's Ramaphosa's letter of referral of 16 June 2020 he "request[s] the National Assembly to consider these Bills afresh", which seemingly indicates that the Bills need to be considered in their entirety and from a clean slate.

Our submission below deals with publishers' concerns, although they are closely linked to those of other copyright holders like authors.

> '…the question to ask is why the Legislature would be hellbent on clipping the wings of South African rights-holders, while foreign rights-holders can fly like eagles.'
>
> – Dr Joel Baloyi of UNISA, Pretoria, expert advising the 5th Parliament Portfolio Committee (see ANNEXURE A)

PASA'S PARTICIPATION IN THE LEGISLATIVE PROCESS

The Publishers' Association of South Africa (PASA http://www.publishsa.co.za/) is the largest publishing industry body in South Africa. It represents book and journal publishers in South Africa in the fields of non-fiction, fiction, education, academic and trade publishing. PASA's membership comprises the majority of South African publishing houses, for profit and nonprofit, university presses, small and medium sized companies and multinational publishing enterprises. PASA promotes the contribution of literature in all its forms to social and economic development, both of communities and individuals.

PASA has been actively involved in responding to proposals to amend the Copyright Act, 1978, and the Performers' Protection Amendment Act, 1967, since the Draft National Policy on Intellectual Property of 2013. PASA commissioned PwC to carry out an economic impact assessment of the education exceptions and 'fair use' provisions of the Bill, which report was published in July 2017 and delivered to the Portfolio Committee on Trade and Industry. This PwC study remains the *only comprehensive economic impact assessment* of these provisions of that Bill.

PASA is a member of the Copyright Coalition of South Africa (CCSA) which covers a broad range of stakeholders including 14 trade and industry associations that represent local companies responsible for key investments in the creative and education sectors. This PASA submission is the publishing sector's contribution to the various submissions by the other member sectors of the CCSA and has the support of these sectors.

[redacted]

RESOURCES

There is an extensive range of resources the Portfolio Committee will have to deal with. In our submission, we often refer to and quote from some of the most recent publications, namely a seminal article by Professor Sadulla Karjiker (Anton Mostert Chair of Intellectual Property Law, Professor in the Department of Mercantile Law, Stellenbosch University) and a series of accessible – sometimes satirical – articles by Dr Owen Dean (specialist copyright attorney, and Emeritus Professor at the Stellenbosch University Law Faculty). See APPENDIX A for all these links.

In APPENDIX A you will also find links to previous PASA submissions and relevant documents, as well as links to the responses by the panel of experts – experienced copyright practitioners selected by the Portfolio Committee – who were asked in September 2018 to advise the Portfolio Committee. The contribution by adv. André Myburgh is possibly the *most complete and comprehensive overview and commentary* on this whole legislative process.

THE PRINCIPLE BASIS FOR OUR SUBMISSION

PASA welcomes and supports the need for reform of the Copyright Act to improve conditions for copyright holders like authors and publishers, and also for performers, and to bring South Africa's copyright into the digital age.

Terms of copyright exceptions must be clearly specified and specific terms may be required to ensure that the exceptions are applied in the spirit of the Three-step Test.

PASA abides by the words of the Chair of the first 1884 Berne Conference, Numa Droz, when he said[1],

> Whereas, for one thing, certain delegations might have wished for more extensive and more uniform protection of authors' rights, due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually in the so-varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses.

[1] WIPO. 1986. 'Minutes of the Sixth Meeting of the Conference for the Protection of Authors' Rights September 18, 1884'. In: *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986.* Geneva: International Bureau of Intellectual Property. https://www.wipo.int/edocs/pubdocs/en/copyright/877/wipo_pub_877.pdf. (Accessed 14 July 2021)

Copyright must therefore be fair and balanced to all concerned. This remains true for the digital environment.

Publishing functions in large national, continental and international ecosystems. These complex ecosystems include among many others, creators of various kinds, editors, producers, consumers, financial managers. Especially in developing countries like South Africa this is a delicate system in which sustainability is key to promote human development and wellbeing.

Strong, but still flexible, copyright protection and enforcement are essential to support, reward and sustain creativity and creative industries' contribution to local economies, and to provide a necessary condition for foreign investment.

Education, research, preservation and access to works for disabled persons are crucial public policy areas. A vibrant and diverse book culture contributes to policy goals in this area. This is particularly true for the publishing industry sectors that directly serve libraries, educational institutions and research facilities.

Copyright laws must recognize the public interest both in support of the institutions that require content, and the commercial and non-commercial publishers that provide the needed services. Lawmakers, in seeking to find the appropriate balance amongst all parties to best serve the interests of South African society, should first understand that sustaining creators itself serves the public interest. As such, lawmakers could reject arguments which portray balance between copyright on the one hand and the 'public interest' on the other – this is rhetorical oversimplification which poorly serves South Africa's interests in promoting creativity and the production of diverse cultural materials.

Modernization of copyright is desirable, but should not be rushed. The current draft Bills demonstrate that rushing the drafting of legislation not only leads to administrative and procedural errors, but errors in design and concept, which can only lead to faulty implementation.

Regarding the key contentious issue of 'fair use' being introduced into the South African legal system through the 'hybrid fair dealing / fair use' model: In addition to the unpredictability of 'fair use', to its weak generalizability and to the costs and time involved in litigation, the danger exists that 'fair use' creates an opening *for courts to determine public policy* and decide what is in the public interest. Courts will hereby appropriate the exclusive powers of parliament and the executive to do so. We refer you to the seminal critique of 'fair use' by Professor Sadulla Karjiker, 'Should South Africa adopt fair use?

Cutting through the rhetoric'[2]. This article should be of key interest to all stakeholders, whether in favour of or opposed to the current version of the CAB. Professor Karjiker refers to,

> …the fundamental concern that fair use amounts to giving the courts – with all due respect to judges – the right to determine public policy in the realm of copyright law… (page 249)
>
> …what is the constitutional basis for giving the courts the competency to determine copyright policy within our constitutional framework? Proponents of fair use need to provide the basis for such an extraordinary step. (page 249)
>
> Issues of public policy must, ideally, involve public participation and debate, and be approved at the appropriate legislative level in a democratic society, namely, parliament. (page 255)

These principles lead PASA to propose that there are specific issues to be raised regarding certain aspects of the Bill, but that the Bill as a whole is inherently defective in so many aspects, that a comprehensive redrafting, in cooperation with copyright experts, is required.

THE NATURE OF COPYRIGHT

Professor Owen Dean states the nature of copyright as follows[3]:

> THE ESSENCE OF COPYRIGHT
>
> Copyright is a statute-based body of law, which provides creators of written and other works with the power to exercise control over the commercial exploitation of their works. The rationale is to place authors in a position to derive material benefits from the fruits of their labours in creating original works, thus providing them with a means for deriving income and incentivizing them to create more and better works for the benefit of all. In practice this is commonly achieved by enabling authors to charge royalties for the commercial exploitation of their works.
>
> However, this power of authors has the potential to inhibit the general availability of works, which can be contrary to the public good in some circumstances. It is thus necessary to weigh up the private rights of authors (bearing in mind the purpose of copyright) against the public interest. The outcome is that copyright legislation places

[2] Sadulla Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Pages 240–55.
[3] Owen Dean. 2021. 'Reconstituting the Copyright Amendment Bill'. 14 June 2021. https://blogs.sun.ac.za/iplaw/2021/06/14/reconstituting-the-copyright-amendment-bill/. (Accessed 8 July 2021)

limitations on the exclusive right of authors in certain defined circumstances in which it is deemed that the public interest outweighs the merits of the right of authors.

This copyright regime is recognized, approved world-wide, and regulated in various international treaties, the most important of which are the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), a World Intellectual Property Organization (WIPO – an agency of the United Nations) instrument, and the Agreement on Trade-Related Aspects of Intellectual Property Right (TRIPS), an instrument of the World Trade Organization (WTO). South Africa is a party to both these international treaties and is bound by them.

NEW EXCEPTIONS INTRODUCED IN THE BILL

The Copyright Amendment Bill proposes the introduction of new exceptions of a general nature, rather than work-specific ones, as well as an unprecedented broad range of specific exceptions.

The new section 12A introduces an exception based on 'fair use', and section 12B sets out specific exceptions that will apply to all works. Section 12C allows temporary reproduction and adaptation, while section 12D allows reproduction for educational and academic activities. Additional new exceptions are introduced by the new sections 19B and 19C.

We deal with these sections in turn below, with a focus on their compliance with the Berne Convention Three-step Test.

Section 12A

Section 12A introduces a 'fair use' defence to copyright infringement applying to an extended range of purposes. The section substantially reduces the degree of protection a copyright owner has over property (copyright) and the degree to which the owner is able to benefit from that property. It does this in two key respects.

1. The section introduces five new purposes for which works may be used without constituting infringement: those listed at section 12A(a)(i) and (iv) to (vii):

> 12A(a)(i) … personal use, including the use of a lawful copy of the work at a different time or with a different device education"
>
> (iv) scholarship, teaching and education;
>
> (v) … 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.

[redacted]

Previously, copyright owners were entitled to remuneration if their works were used for education or governmental purposes: Under the Bill, they are not.

However, not only has the list of items been extended compared to the Copyright Act, the intention of the user is also given wider latitude. As Dr Dean points out[4], the Bill in 12A(a)(i) allows for,

> … the making of a personal copy of a work for non-commercial purposes, without qualification and irrespective of whether the individual acts reasonably, fairly or otherwise.

2. The list of purposes for which work may legitimately be used changes from a closed one (as is the case in section 12 of the current Act) to an open, illustrative one.

Previously, a work could only be used, without permission, for a closed list of purposes. Now, copyright owners will not be entitled to remuneration whenever their work is used for a purpose *similar to those* actually listed in section 12A(a).

These purposes do not appear in the current 'fair dealing' provisions of the Act, nor in the US 'fair use' provision in section 107 of its Copyright Act.

According to Dr Dean[5],

> It is clear that, as a consequence of the words 'such as', the specific examples given of fair use are simply illustrative (and not a closed list), and gives the court an extremely wide discretion to exempt any uses of whatsoever nature of a copyright work… The net result is that tremendous uncertainty is created as to precisely what a copyright owner can actually prevent… If anything, it only serves the interest of certain large technology companies, who have an interest in diluting the rights of copyright owners.

The expropriatory nature of these provisions are constrained by Section 25 of the Constitution, the property clause of the Bill of Rights. No justification for these expropriatory clauses, as required by Section 36 of the Constitution, is apparent. (See below, Section 9. UNCONSTITUTIONALITY OF CERTAIN COPYRIGHT EXCEPTIONS: ARBITRARY DEPRIVATION OF PROPERTY.)

If the Bill is enacted, in important copyright cases there will be litigation between publishers and their customers who may believe that copying will be allowed for all educational uses

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[4] Owen Dean. 2021. "Written submissions on Copyright Amendment Bill B13B-2017". Page 2–3. https://blogs.sun.ac.za/iplaw/files/2021/07/Written-submissions-on-CAB-Submitted.pdf. (Accessed 8 July 2021)
[5] Owen Dean. 2021. "Written submissions on Copyright Amendment Bill B13B-2017". Pages 6. https://blogs.sun.ac.za/iplaw/files/2021/07/Written-submissions-on-CAB-Submitted.pdf. (Accessed 8 July 2021)

and will be for free. The litigation costs will have to be borne not only by publishers but also by the very educational institutions that the exception is meant to benefit.

Authors and other copyright owners who do not want to start this kind of litigation against infringers who claim 'fair use' may end up having to unwillingly acquiesce to unauthorised uses of their works.

Note that 'education' and 'teaching', in their generic sense, cannot be regarded as a 'special case' under the Three-Step Test. Instead, the Berne Convention makes special provision elsewhere for exceptions for specific educational purposes, namely in Article 10 for 'illustration for teaching' and in the Appendix, where there is a special dispensation for developing countries relating to making of reproductions and translations.

As stated above, Section 12A in the Bill clearly is not about introducing 'fair use', as it is understood in the United States and the few other countries in the world that have this statutory defence to copyright infringement. We list as evidence:

Section 12A introduces many more purposes for the 'fair use' defence than is found in those other countries, thereby allowing more permission-free, and therefore remuneration-free, uses of copyright works than in those countries.

Section 12A would apply side by side with other over-broad exceptions, notably Section 12D and 12B and it is unclear whether if a user fails to meet the requirements under those already too broad exceptions, the user cannot take a 'second bite at the cherry' by arguing that the use is covered under the SA expanded version of fair use in 12A. In the aggregate the exceptions read together most certainly are out of line with international standards and practice. They amount also to an erosion of copyright in terms of arbitrary taking of property and denial of the freedom to do business and engage in trade in copyright protected works.

The Bill does not introduce any balancing mechanisms, which exist in those other countries. For instance,

- the balancing mechanism in the United States is the availability of statutory damages even for infringements undertaken in good faith, thereby serving as an important deterrent to ill-considered arguments based on fair use (section 504(c) of the US Copyright Act), and
- the fair use defence clause in the Republic of Korea is preceded by a recital of the Three-Step Test.

This failure causes a material risk of South Africa coming into conflict with its obligations under the Berne Convention and TRIPs, and also that South Africa will not be ready to accede to the WIPO Copyright Treaty.

Karjiker concludes[6],

> …there is no peer-reviewed research in South Africa indicating why fair use, as proposed by the bill, would be consistent with South Africa's obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Given the clear language of the three-step test, and how different our legislative history and systems of litigation are from those of the United States, it is submitted that there has to be a proper legal basis for the introduction of fair use in South Africa. That simply has not been provided.

(See below, Section '6. LACK OF OPPORTUNITY FOR PUBLIC COMMENT ON THE FINAL VERSION OF THE BILL' for a further discussion of the introduction of 'fair use'.)

Section 12B

The following sections apply to 'authors' in a broad sense. We regard them as problematic.

Section 12B(1)(a)(i), which provides that copyright shall not be infringed by any quotation. This is not work-specific: The quotation exception that currently exists in section 12(3) of the Act applies only to literary or musical works. Section 12B(1)(a) applies also to visual artistic works, which cannot, by their very nature, be 'quoted' without reproducing them in their entirety.

Section 12B(1)(a)(ii), where there is no basis for removing the moral rights of authors by qualifying the obligation to name the source and author with 'to the extent that it is practicable'.

Section 12B(1)(c), which permits reproduction by broadcasters. This also is not work-specific: The broadcasting exception that currently exists in section 12(5) of the Act applies only to literary or musical works.

Section 12B(1)(e)(i), which permits any reproduction in the press, or in a broadcast or other communication to the public of an article in the press, whenever the reproduction, broadcasting or communication has not been expressly reserved. In addition, by requiring formalities as a condition for copyright protection, this subsection is also not compliant with Article 5(2) of the Berne Convention.

Section 12B(1)(f), which permits translation of a work.

We are of the view that at least the above provisions will not meet the requirements of the Three-step Test. See for example the exception for illustration for teaching in Section 12B(1)(b) in as much as it is defined by the third party's purpose and not 'fair practice'. See secondly the translation exception in Section 12B(1)(f), noting that in terms of Article 2(3) of Berne, the protection of a translation of a work cannot prejudice the copyright in the original

[6] Sadulla Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Page 252.

work and that in terms of Article 8 of Berne, copyright expressly includes the exclusive right of making and of authorizing translations.

Dr Dean's critical view of the drafter(s) of the Bill with reference to 12B can be illustrated by these comments[7]:

> Section 12B(3)
>
> What is the purpose of this provision? It just seems to provide for uncertainty, or an even wider, unwarranted, dilution of copyright. This provision should be deleted.
>
> Section 12B(6)
>
> This subsection is incomprehensible in its present form and should be re-drafted. It demonstrates that the person(s) responsible for the drafting lack understanding of the applicable law and the relevant legal principles.

Sections 12C and 12D

Compliance with the Three-step Test was not clarified in relation to the following specific exceptions and exclusions from copyright protection:

Section 12C(b), allowing format-shifting, even from illegitimate copies (it also contains a layout error with a proviso – 'as long as there is no independent, economic significance to these acts' – that should also apply to Section 12C(a))

The exceptions for education purposed in Section 12D(1) and (3), 12D(2), 12D(4), 12D(6), 12D(7).

In 12D(6) the term 'assignment' is confusing – it is regularly used in copyright law to mean 'transfer of the ownership of copyright'. Here, however, it seemingly refers to a written or other assignment by a student under instruction. This is another example of drafting error.

[7] Owen Dean. 2021. "Written submissions on Copyright Amendment Bill B13B-2017". Page 9. https://blogs.sun.ac.za/iplaw/files/2021/07/Written-submissions-on-CAB-Submitted.pdf. (Accessed 8 July 2021)

Section 19C – Specific exceptions and exclusions from copyright protection

The following library exceptions fail compliance with the Three-Step Test:

Section 19C(3), which provides for a library, archive, museum or gallery to provide "temporary access" to a copyright work to a user in another library (complicated by the fact that the meaning of 'access' is not clear – this is explained in the next paragraph). Read literally, the library giving access does only have to have itself 'lawful access', temporary or otherwise – this makes the provision portable: a library having been given 'temporary access' in this way can give access to another library. As a result, what is temporary through aggregate action will become permanent access. Also, the library giving access does not have to purchase a copy – it merely needs to have lawful access. This is a clear violation of the principle that there should be incentives to selling copyright works to the library market, in hard and electronic copy. The effect will be more harmful to SA publishers than large overseas publishers as typically they only provide access to SA libraries from their overseas databases. If a library goes too far, an overseas publisher may be able to cut their losses, but not a local publisher. This is discriminatory in effect. Regarding items behind a paywall: It could also prejudice the operations of local publishers and local suppliers of content (etailers). Coupled with the guidelines and move to provide more South African content, the risk is borne entirely by local publishers and library suppliers.

The use of 'access' is an oversimplification of a complex interaction between libraries, publishers and other elements of the supply chain. Access alone does not determine the use of works. Discoverability and relevance of search drives library usage. The increase in both usage and acquisition of works is closely tied to a work's presence in the supply chain. Even Open Access metrics are focussing on including the value added by supply chains (for sale). The proposed options here do not consider the valuable interaction between library and retail systems. Here's a report (April 2021) on this https://www.ce-strategy.com/news/ce-final-oa-monograph-supply-chain-mapping-report-released/ arguing for a closer continued engagement between Open Access and the supply chain.

19C(4) which provides that a library, archive, museum or gallery may permit a user to view or listen to a whole work, for educational purposes, on its premises, in a classroom or over a computer network. Section 19C(4) needs to limit the exception to a single patron by replacing 'a user', with 'patron of the library'. If this clarity is provided, there is then no requirement for an exception as where there is no act limited by copyright, there is no room for inserting Section 19C(4). Inserting the provision as is, may open room for misinterpretation in such a way it can turn libraries, archives, museums and galleries into cinemas where they play films without permission or remuneration so long as they do not charge the patrons for it (even though the limited definition of "commercial" would entitle them to fund their showings by advertising revenue).

19C(5)(b): The rationale for the provision as it relates to the copying of works for back-up and for preservation from publicly accessible websites is unclear. The exception should

be limited to permit the reproduction of such works only in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work. Publicly accessible websites contain copyright works belonging to copyright owners, therefore granting the library a general unfettered right to the website, without compensation to the rightsholders or limitation on when such copying for back-up is done could unreasonably prejudice the legitimate interests of the author. Furthermore, no impact assessment was conducted in this regard.

19C(9): This provision is too broadly framed, and is in reality an orphan works provision. Orphan works provisions require due and diligent search. A clear provision allowing mass digitization of collections, including of orphan works in the collections should be considered.

19C(11) allows a library, archive, museum or gallery or other beneficiary to give access to an out of commerce or orphan work 'for any other legal use'. It is submitted this is not a special case under the Berne Convention Three-Step test. The section is so wide that virtually any use other than an illegal use would be enough, and would allow for substitution of the market entirely. This would for example hamper several digitisation projects currently underway to provide access to legacy South African works.

19C(15 – delete) This section allows a beneficiary under section 19C to get a second bite at the cherry in using works of authorship without authorization, under section 12A (hybrid fair use) or any other section. Section 19B and C should be the only sections librarians are able to rely on as otherwise the exceptions in their aggregate nullify the library market entirely for publishing of literary works.

all as read with Section 19C(1).

Possibly not surprisingly, 19C(4) and 19C(7) are more instances of drafter uncertainty about copyright law: None of these uses need to be subject to exemptions as they are not restricted by copyright. What is right, need not be exempted. Similarly, the reference to 'indigenous communities' in 19C(9) has no grounding without the Intellectual Property Amendment Act being in force[8]. 19C(14)(b) may also be mentioned in this regard: Dr Dean explains[9],

> …if the work is in the public domain, there is no copyright protection, and it is incorrect to make reference to 'the copyright work'. In addition, the Act only protects copyright and not 'related rights' (whatever this may mean) and such reference is inappropriate and should be deleted. Accordingly, the phrase 'the copyright work, or material protected by related rights' should simply be replaced by 'the work'.

[8] On 5 June 2018 the Portfolio Committee decided to take the contingency approach whenever 'indigenous communities' were referred to in case Indigenous Knowledge legislation was not passed timeously. (From André Myburgh's expert opinion timeline)

[9] Owen Dean. 2021. 'Written submissions on Copyright Amendment Bill B13B-2017'. Page 14. https://blogs.sun.ac.za/iplaw/files/2021/07/Written-submissions-on-CAB-Submitted.pdf. (Accessed 8 July 2021)

LACK OF OPPORTUNITY FOR PUBLIC COMMENT ON THE FINAL VERSION OF THE BILL

Public participation is a prerequisite for legislation to be constitutionally valid[10]:

> Chapter two of the Constitution outlines the right of all citizens to have their basic human needs met. Section 195(1)(e) further states that 'people's needs must be responded to, and the public must be encouraged to participate in policy-making'. This far-reaching statement alone puts a huge obligation on the state to ensure that members of the public are not left out of the policy formulation and implementation processes. It is thus essential for all organs of state to comply with this requirement, and desist from treating public involvement as merely 'courtesy' on the part of government to the people. Public participation is a duty commanded by the Constitution.[11, 12]

In Constitutional Court case *Doctors for Life International v Speaker of the National Assembly and Others*, decided on 17 August 2006 Judge Ngcobo said[13],

> [1] This case concerns an important question relating to the role of the public in the law-making process. This issue lies at the heart of our constitutional democracy…
> [129] What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process.

Judge Sachs commented on 'the special meaning that participatory democracy has come to assume in South Africa'[14],

> [235] A long-standing, deeply entrenched and constantly evolving principle of our society has accordingly been subsumed into our constitutional order. It envisages an active, participatory democracy. All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators

[10] SA Constitution, 59.1 and 72.1
[11] Department: Public Service and Administration. No date. *Guide on public participation in the public service*. http://www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf. (Accessed 14 July 2021) Page 13.
[12] Also see: Legislative Sector Support. June 2013. Public Participation Framework for the South African Legislative Sector. https://www.sals.gov.za/docs/pubs/ppf.pdf. (Accessed 14 July 2021)
[13] http://www.saflii.org/za/cases/ZACC/2006/11.html. (Accessed 14 July 2021)
[14] http://www.saflii.org/za/cases/ZACC/2006/11.html. (Accessed 14 July 2021)

> must have the benefit of all inputs that will enable them to produce the best possible laws. An appropriate degree of principled yet flexible give-and-take will therefore enrich the quality of our democracy, help sustain its robust deliberative character and, by promoting a sense of inclusion in the national polity, promote the achievement of the goals of transformation.

The most obvious proof of the lack of public participation and consultation in the process being discussed is the new section 12A(a). There was a material change to the wording of section 12A(a) on which further consultation was necessary. Failure to consult on the wording change renders the provision constitutionally invalid.

The version of section 12A(a) put out for public comment read as follows:

> '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 final version of section 12A(a), reads as follows:

> 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:…' [PASA's emphasis]

The events leading up to this change were described by André Myburgh in his expert opinion as follows[15]:

> Following the instruction that parties represented in the Portfolio Committee should obtain decisions from their caucuses on the question of flexible exceptions being based on 'fair use' or 'fair dealing', the ruling party member reported at the meeting on 31 May 2018 that it would support a 'hybrid' model permitting both 'fair use' and 'fair dealing'" on the basis that in some cases 'fair dealing' is appropriate, in other cases 'fair use' is more appropriate. It was also decided that the 'hybrid model' would be 'anchored in 'fair use'.'
>
> This decision followed the presentation of the 'technically revised version' of the Original Bill, in which the words 'such as' were inserted before the illustrative list of purposes in Section 12A(1), introduced by Clause 13. This revision, which has a key impact on extending the scope of the 'fair use' clause, was not presented to the public for comment.

The effect of this amendment is that, whilst the original text provided for a closed list of purposes for which a work could be used and be considered 'fair use', the final version

15 André Myburgh. 1 October 2021. "Advice on the Copyright Amendment Bill, No 13 of 2017, Revised as at 3 September 2018 for the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa". Page 30.

provides for an open list. The purposes enumerated in section 12A(a)(i)-(vii) are no longer the only purposes for which a work may be used under the provision – they are now only illustrative of the sorts of purposes that may be taken to constitute 'fair use'.

This is a material change: The change in wording in section 12A(a) in effect shifts the nature of the exception from being one more akin to the existing 'fair dealing' exception in section 12 of the Copyright Act, to one that is closer to the type of 'fair use' exception used in US law.

Karjiker in the above-mentioned article aptly explains the differences between 'fair dealing' and US 'fair use':

Fair dealing	Fair use
Whether a defendant is able to rely on any of these exceptions [in the Copyright Act] involves a two-stage enquiry: first, establishing whether the particular use (e.g. reproduction) was for the exempted purpose (e.g. research), and, second, whether the use was fair. If the particular use of copyright material was not for the exempted purpose, there can be no question of such use being exempted. Importantly, as mentioned, the list of exempted purposes is an exhaustive, or closed, list. The determination of whether a particular use is fair is for the court to determine – objectively – and involves a value judgment, depending on the particular facts or circumstances, determined at the time of dealing. It is a matter of fact, degree and impression. (Page 242)	…the fair-use approach is not confined to uses that are specifically provided for in the legislation, and any unauthorised use of copyright works may be considered to be permissible, if a court considers the particular use to amount to fair use, in accordance with the stipulated four factors. (Page 242) Unlike fair dealing, fair use provides no certainty concerning the type of use that may be permissible. (Page 244)

Karjiker concludes[16]:

[16] Sadulla Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Page 48.

[redacted]

> The introduction of fair use does not simply involve changing the text of our legislation; it could have serious economic consequences for our copyright owners, artists and musicians, who the government claims need more protection, but would potentially expose them to increased risk of litigation, and lower levels of remuneration.

As has already been done by various commentators, we reiterate that South Africa will not have the mechanisms balancing the interests of copyright owners and the consumers of their products that are features in the 'fair use' and 'fair use'-like provisions in for example the US. Myburgh explains in his expert opinion[17],

> Section 107 of the US Copyright Act is a codification in 1978 of, and therefore dependant on, case law going back to 1841. Being a common law country, courts in the United States has the practice of being bound by the precedents set by earlier decisions in the same or superior courts. This enables the courts to develop the law, yet maintain some level of certainty. The United States Copyright Office has developed a Fair Use Index out of the decided case law.[33] In the United States, 'fair use' cases are often described as being 'fact-specific', in determining what the defendant's conduct with the copyright work was in order to be able to argue that the conduct was 'fair use' or an infringement. Big 'fair use' cases often result in many interest groups wanting to be admitted as amici curiae, since the decision of a higher court, being precedent-setting, has the same impact on practices with copyright works as legislation. There is also a substantive downside for being unsuccessful with a 'fair use' defence, namely the risk of considerable statutory damages, meaning that a 'fair use' defence will not be considered lightly.

Commented Myburgh that beneficiaries, if the Bill gets enacted[18],

> … will no doubt be technology companies whose business models rely on being able to reproduce copyright works without the need for permission or remuneration.

LACK OF CONSULTATION: EXPERT OPINIONS

The response by the Fifth Parliament to the advice of the Panel of Experts should be noted, as explained below.

Those persons who were appointed by the Portfolio Committee to the Panel of Experts who responded with advice on the Bill were Ms Michele Woods of WIPO but responding in a

[17] André Myburgh. 1 October 2021. "Advice on the Copyright Amendment Bill, No 13 of 2017, Revised as at 3 September 2018 for the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa". Page 38.

[18] André Myburgh. 1 October 2021. "Advice on the Copyright Amendment Bill, No 13 of 2017, Revised as at 3 September 2018 for the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa". Page 41.

personal capacity, Dr Joel Baloyi of UNISA, Mr Wiseman Ngubo of collecting society CAPASSO and copyright expert adv. André Myburgh.

The members of the Panel of Experts worked independently, and each prepared their own comments on various provisions of the Bill. Each indicated in some way or another that, due to the short period of time available to undertake their work (three weeks, with no prior notice) that they did not have sufficient time to comment on all the provisions of the Bill.

To the extent that the comments from the members of the Panel of Experts did not relate to copyright exceptions and exceptions to the protection of technological protection measures, a number of them were taken up by the Portfolio Committee in their final redrafting of the Bill during October – November 2018, leading up to the passage of the Bill by the National Assembly on 5 December 2018.

Inasmuch as the comments related to the exceptions, very few of the comments of the Panel of Experts were taken up. Sections 12A, 12B, 12C, 12D, 19B and 19C, referred to above, remained nearly unchanged from the version presented to the Panel of Experts in September 2018 to the version that was adopted by the National Assembly on 5 December 2018 and subsequently adopted by Parliament.

Considering that the comments and proposals for changes in relation to these clauses were all based on obligations under the Treaties and that in turn happen to relate to provisions that under South African law are considered to be deprivation of property (*Laugh It Off Promotions CC v SAB International (Finance) Bv t/a SABmark International 2006 (1) SA 144 (CC)* and *Moneyweb (Pty) Ltd v Media 24 Ltd and Another 2016 (4) SA 591 (GJ)* at para 108), this was very surprising.

Even more disconcerting were statements in the dti presentation to the Select Committee on Trade and International Affairs on 6 March 2019, that the Panel of Experts supposedly ‘cleared’ or ‘verified’ certain of these provisions. This was not true. The Legalbrief Today service reported on 21 March 2019 that the Deputy Director-General of the dti said at the Select Committee meeting on 20 March 2019 that the Panel of Experts in fact had not cleared the Bill.

UNCONSTITUTIONALITY OF CERTAIN COPYRIGHT EXCEPTIONS: ARBITRARY DEPRIVATION OF PROPERTY

The background to this discussion is that the education market provides a normal economic opportunity for publishing and trading. There is no reason in South Africa to regard education as a ‘certain special case’ as understood in the Three-step Test and which should be

exempted from copyright. A violation of authors' and publishers' interests in publishing for education should be scrutinized as a potential deprivation of property.

We submit that, in particular, Sections 12A and 12D constitute arbitrary deprivation of property, and would be constitutionally invalid if assented to in their current forms.

As with the 'fair use' exception contained in section 12A, the effect of the educational use exception in section 12D is that copyright owners are afforded far less protection for their works than they previously had. This, in turn, means that their rights to benefit from those works are limited. This substantially limits the owner's entitlement to exploit that work and constitutes a deprivation of property.

In addition, this deprivation is arbitrary: It appears that the purpose of section 12D is to promote access to copyright material for educational purposes. However, the extent of the deprivation caused by section 12D casts the net far too wide, and is entirely disproportionate to the end sought to be achieved. The extent of the deprivation caused by section 12D is extreme. Not only does it provide for extracts of copyright works to be reproduced verbatim in course materials, but it also permits the wholesale copying of an entire textbook, in a wide variety of circumstances – including that the user considers the copyright owner's licence terms to be not 'reasonable'. What constitutes an 'unreasonable' licence term (12D(3), justifying what would otherwise be serious infringement of copyright, is not specified in section 12D – opening the door for unscrupulous users to ignore copyright entirely.

In addition, section 12D fails entirely to recognise that education is, in many instances, a commercial enterprise. South Africa has a large number of private educational institutions, which exist to make a profit. Section 12D effectively permits these institutions to reduce their business costs, by removing the obligation to pay licence fees, and thereby enhance their profits at the expense of copyright owners. This does little or nothing to further the purpose of enhancing access to education.

The new copyright exceptions for education that the Bill creates as part of the so-called 'hybrid model of copyright exceptions grounded in fair use' are more expansive than in most countries in the world. They are justified only with a simplistic and unsubstantiated assumption that educational materials are 'too expensive'.

As in other African countries, 80% of publishing in South Africa is educational publishing.

Copyright exceptions that are too broad cut authors and publishers off from being remunerated for their work. Being under-remunerated, they themselves will still have to carry the cost of works used by the educational system …and the risks of those costs to their businesses.

Therefore, we submit that section 12D constitutes an arbitrary deprivation of property, and would be constitutionally invalid if assented to in its current form.

ALIGNMENT WITH INTERNATIONAL TREATY OBLIGATIONS

The Bill conflicts with international treaties on copyright and the protection of intellectual property to which South Africa is a party (the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS)), as well as treaties to which Parliament has resolved that South Africa should accede (the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (WPPT)).

This is made clear by the recent decision of the Constitutional Court in *Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) BCLR 329 (CC)*, where the court held that the President is bound by even undomesticated treaties as a representative of the state and thus is required to act in accordance with them.

Under a 'fair use' regime, with court judgments made on a case-by-case basis, every case could become a 'special case' for a specific purpose in the jargon of the Three-step Test – which clearly is not the intention of the Berne Convention. This is explained by a World Trade Organisation Panel[19]:

> …an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective.

Myburgh explains further[20],

> In the context of Berne (and thus also of TRIPs and the WCT, into which its relevant provisions have been included by reference), the protection of the exclusive rights of authors is the main objective and rule and the exceptions to and limitations of those rights are just as they are called: limited exceptions and limitations.

Karjiker is scathingly critical of the often-mentioned view that the US complies with the Three-step Test[21]:

> The fact that there has been no direct World Trade Organisation challenge to the United States' fair-use approach serves to demonstrate the United States' global

[19] Quoted by Sadulla Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Page 252.
[20] André Myburgh. 1 October 2021. "Advice on the Copyright Amendment Bill, No 13 of 2017, Revised as at 3 September 2018 for the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa". Page 52.
[21] Sadulla Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Pages 253–54.

> influence, rather than suggesting that it complies with the three-step test. Its accession to the Berne Convention was reluctant, and it disregarded aspects of the Berne Convention that it found unsuitable.

The reference by Karjiker to the World Trade Organization stems from a decision by a Panel established by the WTO Dispute Resolution Body in 1999 to resolve an issue relating to the application of the US Copyright Act. The Panel's decision is still a landmark guideline on the application of the Three-step Test[22]:

> 6.97 Article 13 of the TRIPS Agreement requires that limitations and exceptions to exclusive rights (1) be confined to certain special cases, (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder. The principle of effective treaty interpretation requires us to give a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of the conditions to 'redundancy or inutility'. *The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied.* Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed. Both parties agree on the cumulative nature of the three conditions. The Panel shares their view. It may be noted at the outset that *Article 13 cannot have more than a narrow or limited operation*. Its tenor, consistent as it is with the provisions of Article 9(2) of the Berne Convention (1971), discloses that it was not intended to provide for exceptions or limitations except for those of a limited nature. [Italics added.]

Karjiker explains that the US did not fully comply with the Panel's conclusions and can therefore not be said to comply fully with the Three-step Test.

In a detailed analysis of the Bill and a description of the principles of international law on the interpretation of treaties and the objects and purposes of these treaties, André Myburgh concludes[23],

> The only conclusion that can be reached… is that not only does the Bill place South Africa at risk of being non-compliant with its existing obligations under Berne and TRIPs, but that, despite the statements to the contrary in the Explanatory

[22] World Trade Organization. 15 June 2000. 'United States – Section 110(5) of the US Copyright Act. Wt/Ds160/R'. (Report of the Panel established by the WTO Dispute Resolution Body). Page 31. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/160R-00.pdf&Open=True (Accessed on 14 July 2021)

[23] André Myburgh. 1 October 2021. "Advice on the Copyright Amendment Bill, No 13 of 2017, Revised as at 3 September 2018 for the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa". Page 65.

> Memorandum, the Act, as to be amended by the Bill, will not make the Act compliant with the requirements of WCT, WPPT and the Beijing AVP Treaty.

FRESH CONSIDERATION OF THE BILLS

Dr Owen Dean summarizes his views of the Bill as follows in a wide-ranging and thorough analysis[24]:

> It is a matter of grave concern that the Portfolio Committee's approach remains an attempt to 'panel beat' the Bill, which, from the first draft released for comment to the public in 2015, is very poorly drafted, and contains some deeply problematic proposals… if the Portfolio Committee should recommend the passing of the Bill by parliament, it is, arguably, not exercising its oversight function, but rather more doing a 'sales pitch' in respect of its own handywork.

In addition to the above concerns as responses to the President's referral, PASA wishes to state that *the Bills should be revised in their entirety and put up for public comment and consultation*. We highlight the following problematic issues which illustrate the kinds of features lurking in the pages of the Bill:

Transfers of copyright capped at 25 years

The Bill caps transfers of copyright ('assignments') at 25 years. Publishers often invest in their authors, supporting their further development. This may take time – it is not uncommon for the first book of an author to start selling only after further titles of the same author are available, which could easily be after 25 years.

The clause will probably have one main beneficiary: Amazon. The US big tech company will surely applaud if this section is introduced: Amazon will be able to come and harvest where it has not sown and is surely not planning to re-invest. Amazon will probably take the top-ten percent of SA bestsellers and lure them away. The local publishing houses having built them up will be short-changed and will not be able to re-invest the revenue generated in the next crop of authors. Amazon also will not do so. This will effectively have the effect of a locust swarm passing over the land.

As a counter-measure, many publishers will set up publishing houses outside SA and have to contract at least 'rest of the world' rights outside SA with publications first appearing there and then South Africa just being a licensed-in territory. This will contribute to brain drain.

[24] Owen Dean. 2021. "Written submissions on Copyright Amendment Bill B13B-2017". Page 2. https://blogs.sun.ac.za/iplaw/files/2021/07/Written-submissions-on-CAB-Submitted.pdf. (Accessed 8 July 2021)

The economic effect of the provision is not actually to benefit authors or their heirs: It will curb advance payments to best-selling authors as all investment is capped at 25 years. It will be impossible to turn books into films as film companies require optioning film rights beyond 25 years.

Quoting Dean again[25],

> In other words, by enacting a provision that is apparently to the benefit of the author (but making compulsory something that the author can in any event voluntarily transact), the drafters are impairing the market value of an assignment and compelling an author to use a model for the exploitation of her work that is not the optimal one, and may not be of her choosing…
>
> On the one hand, the drafters purport to have granted 'benefits' to authors, and the CAB is being touted as being a major fillip to authors. On the other hand, the CAB decimates the protection given to authors' copyright by means of providing numerous extensive and far-reaching exceptions, which will reduce authors' capacity to earn royalties and gain financial reward from the exploitation of their works. When one weighs up the one factor against the other, the scale tilts significantly against the welfare of the author. Is this the act of a friend?

Regulation of publishing contracts

The Minister for the Department of Trade, Industry and Competition will be able to prescribe minimum standards for publishing contracts. This will create a rigid and inflexible system that interferes with freedom of contract between authors and publishers, taking bargaining power away from authors and interfering with the healthy competitive publishing environment for the best authors. A charter of what should be covered by publishing contracts was in fact agreed on by the Academic and Non-Fiction Authors' Association of South Africa (ANFASA) and PASA (see http://www.publishsa.co.za/file/1541603357tll-apact2016.pdf).

Royalties as remuneration, discouraging other forms of remuneration

The Bill is intended to give authors a better share in the income from their works but will do this by ministerial declaration of royalty rates. This mechanism will have a major impact on publishing decisions, for instance being more selective and placing less emphasis on other forms of standard remuneration, such as advances, simply because of the nature of the risk taken in publishing. The Bill apparently assumes – mistakenly – that every publication is a commercial success.

[25] Owen Dean. 31 May 2021. 'Authors, you've got a friend? https://blogs.sun.ac.za/iplaw/2021/05/31/authors-youve-got-a-friend/. (Accessed 9 July 2021)

Parallel imports Section 12B(6)

Section 12B(6) purports to allow so-called parallel imports. The damage to the publishing industry is that grey goods and illegal goods are hard to separate out. This will potentially increase the piracy and counterfeit goods coming into the country. The economic damage to the local publishing industry is that sometimes a US publisher is given the right to mass or bulk print low-quality books that are then remaindered, i.e. put up for bulk sale at a vastly reduced price. The books are actually then just dumped in the South African market. An economic study needs to be done about how this could wipe out sections of the publishing industry.

The language in the Bill also makes it harder to sell rights abroad as a South African publisher may sell rights to India, Brazil, China, African countries or the USA but now must fear the books are being 'round-tripped' back to SA. Probably some publication projects will simply be migrated abroad to avoid this outcome altogether.

Legislation and policy should be based on socio-economic impact assessment

Besides for the lack of proper public consultation as indicated above, other prescribed processes required for law-making have been neglected, namely a proper, independent socio-economic impact assessment and subsequent policy development. As stated by Neil Turkewitz, expert at international law and treaties and CEO at Turkewitz Consulting Group[26],

> Neither economic impact assessments nor independent academic studies were undertaken in the initial process, leading to the many procedural and substantive problems of the earlier text – in particular a failure to fully consider the economic implications of the proposals on creators and other affected communities, and the relationship of the proposed exceptions to South Africa's international obligations under the Berne Convention and other instruments. It is critical that these defects be remedied as consideration of a new draft proceeds.

Section 19D – General exceptions regarding protection of copyright work for persons with disabilities

Much attention and legal action is aimed at the needs of print-disabled persons, especially of blind persons. PASA has frequently expressed its support for South Africa's ratification of the Marrakesh Treaty for visually and otherwise disabled persons. PASA is also in regular contact with various institutions and organisations working for and with the blind. It is from this perspective that we offer and support the suggestions by Dr Owen Dean in his article,

[26] Neil Turkewitz. 2021. 'Copyright Reform in South Africa: Moving Beyond Rhetoric & Hyperbole'. https://medium.com/@nturkewitz_56674/copyright-reform-in-south-africa-moving-beyond-rhetoric-hyperbole-d9e22dea2e13. (Accessed on 9 July 2021)

[redacted]

'Copyright Blind Spot', in which he suggests a way to decouple the provisions for disabled persons in the Bill from the current Bill and provide for such needs in the interim.[27] Essentially, Dr Dean's proposal is for the Minister of Trade, Industry and Competition to draft and publish expeditiously regulations in terms of Section 13 of the Copyright Act conforming with the Marrakesh Treaty.

Karjiker also explains[28]:

> Whether the law is responsive to changing needs depends more on a well-functioning custodianship of copyright law by the executive and legislative arms of the state. In fact, legislative amendments can be brought about more quickly than a particular matter can be resolved through litigation, which is, in any event, necessarily limited to the particular facts of the case at hand.

RECOMMENDATIONS

Our submission amply shows the shortcomings of the current version of the Bill and illustrates our view that what is required is a thorough, step-by-step drafting of a new version of an amendment bill. We therefore recommend:

1. Follow the constitutional requirements for proper legislative processes and best legislative practices.

2. Appoint a committee of experts with knowledge of IP law and broad experience in practising it to support the responsible government departments. Critically, appoint a suitable chairperson for such a committee.

3. Finalise the IP policy as a basis for amending the Copyright Act.

4. Commission an independent socio-economic impact assessment.

5. Facilitate public participation.

6. Facilitate further expert consultation.

ORAL SUBMISSIONS

[redacted]

[27] Owen Dean. 19 April 2021. 'Copyright Blind Spot'. https://blogs.sun.ac.za/iplaw/2021/04/19/copyright-blind-spot/. (Accessed 9 July 2021)
[28] Sadulla Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Page 255.

PASA hereby requests an opportunity to make an oral submission to the Portfolio Committee to reinforce our written submission on a number of complex issues and allow the Committee to clarify points raised in the submission.

[redacted]

APPENDIX A

RESOURCES

Article by Professor Sadulla Karjiker

Sadulla Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Pages 240–55.

Articles by Dr Owen Dean

Dr Owen Dean wrote a series of brief articles covering the issues being discussed. These articles have been published on the IPSTELL Blog operated by the Chair of Intellectual Property Law at Stellenbosch University. Access at https://blogs.sun.ac.za/iplaw/news-3/from-ipstell/ or search IPSTELL on the Google search facility.)

The articles are:

'Reconstituting the Copyright Amendment Bill' (Published 14-06-2021)

https://blogs.sun.ac.za/iplaw/2021/06/14/reconstituting-the-copyright-amendment-bill/

Discusses the flaws in the Bill in general, with emphasis on the Exceptions, and recommends redrafting

'Authors, you've got a friend?' (Published 31-05-2021)

https://blogs.sun.ac.za/iplaw/2021/05/31/authors-youve-got-a-friend/

Examines the effects of the Bill, particularly the Exceptions, on authors and their rights

'Copyright Blind Spot' (Published 19-04-2021)

https://blogs.sun.ac.za/iplaw/2021/04/19/copyright-blind-spot/

Discusses the Exceptions and how the present Act can be used to grant acceptable exceptions, especially in the case of the Blind

'Copyright Dark Forces' (Published 24-06-2021)

https://blogs.sun.ac.za/iplaw/2021/06/24/copyright-dark-forces/

Analyses the motivation of those advocating excessive Exceptions, and the effects that they can have.

'The Use Fair' (Published 24-06-2021)

https://blogs.sun.ac.za/iplaw/2021/06/24/the-use-fair/

Discusses the undesirability and untoward consequences of the excessive Exceptions

[redacted]

‘Amending Copyright – Footing the Bill’ (Published 05-07-2021)

https://blogs.sun.ac.za/iplaw/2021/07/05/amending-copyright-footing-the-bill/

Analyses how the excessive Exceptions are in contravention of the international treaties and the Bill of Rights

PASA submissions and relevant documents

https://www.publishsa.co.za/copyright/pasa-and-the-copyright-amendment-bill

Panel of experts’ submissions

A panel of experts – experienced copyright practitioners selected by the Portfolio Committee – was asked in September 2018 to advise the Portfolio Committee “on any technical or drafting issues pertaining to the Committee’s amendments to the Copyright Amendment Bill”, to focus on amongst others “the appropriateness of the terminology used in the Bill, when considering the Copyright law terminology currently used in South Africa”, “whether the wording of the Bill reflects the policy objectives as agreed to by the Committee” and “whether the clauses that address international treaties, correctly reflect the content of those treaties…”.

The following responses were received:

Ms Michele Woods of WIPO, Geneva, Switzerland

Quote: “While I have tried to cover as many points related to the multilateral copyright treaties as possible in the time available for this review, there are likely additional points within this category that could be addressed…Given the instructions and the relatively limited time period for undertaking the requested review, I have not commented on a number of areas…However on the subject of collective management and several others identified in the comments, including the incorporation of the provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired and Otherwise Print Disabled and the Appendix to the Berne Convention (Paris Act 197l), the International Bureau of WIPO would be available to provide further advice and assistance if requested to do so.”

Attached to:

https://legalbrief.co.za/media/filestore/2019/03/LetterAFMyburghtoMinisterRDaviesMrEMakue14Mar2019.pdf

Dr Joel Baloyi of UNISA, Pretoria:

[redacted]

Quote: "…I was asked to focus on issues relating to the music and film industries…The most pertinent question to ask here is whether the proposed limitations and exceptions under these clauses were subjected to a three-step test, as required under the Berne Convention, the TRIPs Agreement and other international treaties...In this regard it needs to be reiterated that where the minimum rights guaranteed under international treaties are eroded by national law, such erosion shall only affect the rights of the nationals of the country concerned, and not those of other countries who are members of the same treaty. In this regard the question to ask is why the Legislature would be hellbent on clipping the wings of South African rights-holders, while foreign rights-holders can fly like eagles."

http://legalbrief.co.za/media/filestore/2018/10/Baloyi.pdf

Mr Wiseman Ngubo of CAPASSO, Johannesburg:

Quote: "…some clauses within the Bill have no policy informing them nor have they been debated in parliament, thus the review was without much needed context…The introduction of general exceptions within the Bill requires a more extensive impact assessment. The SEIAS report does not cover any objections raised by the stakeholders, in fact it states that the stakeholders had accepted the policy issues despite how contentious these provisions proved to be. This showcases a fatal flaw in the report…the introduction of the general exceptions as currently articulated seems contrary to the policy objective which is to ensure the protection of authors and copyright owners in the digital environment…Further, the Berne Convention (to which South Africa is a signatory) established the 3 step test in relation to the implementation of exceptions and limitation of copyright. This test is also articulated in the TRIPS Agreement (to which South Africa is a signatory) as well as the WIPO Internet Treaties which South Africa intends to ratify…"

http://legalbrief.co.za/media/filestore/2018/10/Ngubo.pdf

Adv. André Myburgh, of Lenz Caemmerer, Basel, Switzerland:

Quote: "The legal issues raised by the Bill and by the process it took to get to this point, are substantial and material, whether from the perspective of compliance with the Constitution, South Africa's meeting of its obligations under the international treaties to which it is a party, and the conceptualisation of its provisions arising from the policy considerations that underly it. This advice shows that the Bill has material flaws in all these respects, very few of which can be corrected by mere changes in the wording of the clauses of the Bill… [T]he entire framework of copyright exceptions introduced in the Bill, especially what has been described as the 'hybrid model grounded in fair use' comprising Sections 12A, 12B, 12C(1)(b), 12D, 19B and 19C introduced by Clauses 13, 19 and 20, has not been measured against the

Three-Step Test, thereby resulting in a material risk of South Africa coming into conflict with its obligations under Berne and TRIPs."

http://legalbrief.co.za/media/filestore/2018/10/andremyburgh.pdf

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[redacted]