

16 July 2021

**Comments on the revised Copyright Amendment Bill (No B13B of 2017)
Submitted to the Portfolio Committee on Trade and Industry
For the attention of Mr A Hermans
(Committee Secretary: Portfolio Committee on Trade and Industry)
Per e-mail: [REDACTED]**

1. Introduction

PEN Afrikaans is an association of authors, journalists and publishers affiliated to PEN International, thus representing its members in an international context. PEN Afrikaans represents authors who write trade publications (fiction, nonfiction and books for children and young adults), educational works like school textbooks, as well as academic and scholarly publications.

PEN International, the world's leading association of writers, is aimed at promoting literature and defending freedom of expression around the world. PEN Afrikaans subscribes to these goals and is geared towards lobbying for the rights of authors, journalists and publishers if and where necessary.

PEN Afrikaans is convinced that many of the changes to the Copyright Act, 98 of 1978 (hereinafter "the Act"), envisioned by the Copyright Amendment Bill, no B13B of 2017 (hereinafter "the Bill") will have a direct and detrimental impact on its members, and indeed all South African authors. As such, PEN Afrikaans accepts the invitation by the Portfolio Committee on Trade and Industry to submit written commentary on aspects of the Bill. Thank you for the opportunity to do so.

PEN Afrikaans has participated in the legislative consultation process by way of written submissions throughout the years that the Bill has been in the making. We have also cooperated with two other authors' associations to facilitate an authors'

protest against the enactment of this Bill. In only one week in November 2018, more than 3000 individuals, many of them prominent and influential internationally or locally, and 125 organisations, foundations and businesses signed a petition against the adoption of the Bill.

- Individual signatories include the winner of the Nobel Prize in Literature, J.M. Coetzee, the winner of the Nobel Peace Prize, iconic playwrights John Kani and Athol Fugard, acclaimed poets Gabeba Baderoon and Breyten Breytenbach, and internationally celebrated novelists Wilbur Smith, Deon Meyer and the late Achmat Dangor. Other notable authors include Marlene van Niekerk, Lauren Beukes, Fred Khumalo, and cartoonist Zapiro.
- Organisations that signed on include the Southern African Freelancers' Association, the South African Booksellers' Association, the wRite Associates, the Puku Children's Literature Foundation, and Reader's Café Africa.

More information is available here: <https://www.litnet.co.za/press-release-authors-unite-against-copyright-amendment-bill/>

In this submission, we will comment primarily on the Bill's clause 13 (which introduces sections 12A, 12B, 12C and 12D into the Act), and on issues of constitutionality and compliance with international treaty obligations. We note that the Portfolio Committee has limited the provisions on which stakeholders may comment in this round of submissions, but also note that various commentators, including scholars, stakeholders and the honourable President Ramaphosa in his feedback to parliament, have asked the legislature to consider the Bill afresh. We implore the Committee to heed this call. In this regard, we respectfully also refer the Committee to Constitutional Court case law that states that it is incumbent on the National Assembly to hear all constitutional issues in relation to a bill that has been remitted by the President for concerns as to constitutionality.

Our view is that the subject matter of this round of submissions is more suited for independent legal analysis by an expert or panel of experts than for public consultation by stakeholders. Further, the timeframe for preparing and submitting comments has been extremely limited, even with the extension of one week granted upon our request. Nevertheless, we are submitting this commentary seeing as there

is so much at stake for our members and, by extension, for reading and writing in South Africa.

The thrust of PEN Afrikaans's concern is that, as it stands, the Bill, which ironically purports to benefit authors of copyright works, threatens their livelihood and drastically curtails their existing rights through the introduction of extremely wide-ranging exceptions to and limitations of copyright protection. We recognise the importance of exceptions and limitations, but we are concerned that the Bill goes too far; effectively expropriating existing property and disincentivising authors from creating new works.

With so much at stake for the literary landscape in South Africa, it is a source of great concern that Parliament has failed to undertake an independent economic impact assessment or a diligent legal inquiry into the copyright exceptions proposed by the Bill, evaluating whether each exception is in line with South Africa's Constitution and its international treaty obligations. The only impact assessment that exists was prepared by PwC in relation to the fair use provision and education exceptions. This assessment shows that the Bill will have a devastating effect on the local publishing industry and, by extension, the livelihood of authors. This is clearly an interference with the normal, commercial exploitation of authors' work, and as such shows a prejudice to members of PEN Afrikaans, and the larger writers' community in South Africa.

2. Fair use and other exceptions

PEN Afrikaans considers the new proposed section 12A as well as 12B(1)(f), 12B(1)(g), 12B(6), 12C(b), the whole of 12D (educational exceptions) and 19C (libraries), coupled with the indiscriminate contract override provision in 39B, to be prejudicial to our members' rights to their works and that it will unduly interfere with the normal, commercial exploitation of authors' work.

In a recent academic article by Professor Sadulla Karjiker,¹ incumbent of the Anton Mostert Chair in Intellectual Property Law at Stellenbosch University, the possible introduction of fair use into South African copyright law is subjected to peer-reviewed, specialist legal analysis. In this seminal article, which we implore the Committee to take heed of, Karjiker finds that fair use fails to satisfy the requirements set out in the Berne Convention and the TRIPS Agreement, particularly as it relates to the well-known three-step test for copyright exceptions and limitations which we will elaborate on below.

Even if one were to assume that Karjiker is incorrect in his interpretation of fair use as contrary to the Berne Convention, which we do not agree with, one must recognise that section 12A introduced by the Bill differs from the fair use provisions contained in section 107 of the United States' Copyright Act. It goes much further, allowing consumptive uses by technological platforms and state institutions. For instance, there is a permitted fair use for "proper performance of public administration", which is not part of US fair use. In the absence of an explanation or demarcated definition of what this entails, we are concerned on behalf of our members that this represents a free licence for state use of copyright works for a potentially wide array of purposes. This would represent an instance of expropriation of property and would especially impact on authors writing for the academic and education markets.

The fair use clause is not only an expanded version of what is allowed under the few copyright dispensations that have adopted it internationally, but it is not brought in check by corresponding limitations like statutory damages (under US law).

Proponents of the Bill tend to argue that the factors the Bill lists for determining whether a fair use defence against copyright infringement will succeed provide the required legal certainty *and* flexibility with which to welcome the future and its technological developments. Unfortunately, this is far removed from reality. Having regard to how the four factors have been applied in US case law, Karjiker expounds

¹ S. Karjiker. 2021. 'Should South Africa adopt fair use? Cutting through the rhetoric'. *Journal of South African Law*, 2021:2. Pages 240–55.

in the article mentioned above that, in practice, these four factors do not provide legal certainty or clear guidelines at all seeing as each of the listed four factors leaves too much room for subjective determination. Lengthy legal proceedings abound in the absence of legal certainty as to what is allowed under “fair use” and what qualifies as an actionable infringement of an author’s exclusive rights. Instituting and seeing through legal proceedings is a costly exercise that most authors are simply unable to undertake.

“The claimed flexibility that fair use may offer comes at a price. That price is uncertainty, and is too high a price, not to mention that fair use may breach South Africa’s international obligations,” writes Karjiker (2021:243).

Further, PEN Afrikaans considers the qualification of moral rights by insertion of the words “in so far as it is practicable” in the context of the copyright exceptions introduced by the Bill as an unwarranted and unsubstantiated disregard for the moral rights of the author. It deprives the author of firm legal ground upon which to assert his/her moral rights (i.e. claim authorship *inter alia*) where copyright exceptions apply. We implore the legislature to remove the words “in so far as it is practicable” from section 12B(e), 12D(8) and 19D(4). The author is the cornerstone of copyright law and should be entitled to acknowledgement.

The limitation of moral rights in section 19 is especially incomprehensible seeing as the object of this provision is to make the works of authors, like members of PEN Afrikaans, available in accessible formats for the disabled. There is no justification for not crediting or recognising the author in this instance. We are quite sure that disabled readers would want to know whose work they are reading. Respectfully, it should always be practicable to acknowledge the author in this context. We implore the legislature to remove this undue qualification of moral rights.

3. Constitutionality and treaty compliance

Especially regarding the overbroad fair use and other copyright exceptions, we feel that the Bill neglects to take proper account of the constitutional framework in which

the law operates, particularly in respect of the property clause. Section 25(1) of the Constitution of the Republic of South Africa, 1996, requires all property-related law to be non-arbitrary, meaning that the burden being imposed on property owners must not be disproportionate or ungrounded. A proportionality assessment in the constitutional setting means that the limitation must be investigated for its impact on the rights that are thereby limited.

It is submitted that the rights of authors, especially of educational works, are to a large extent obliterated by the wide-ranging exceptions introduced by the Bill. These exceptions extract the incentive for authors and publishers to perpetuate the business of especially educational publishing. On any realistic view, the right to authorise a reproduction of a copyright work is central and paramount to the economic exploitation of a work. In certain scenarios contemplated by section 12D, this core right is entirely extinguished in all meaningful ways and will strike at the very heart of copyright owners' property rights in their works created for the education market. This carries the dangerous potential to destroy the fundamental basis for creating works for educational purposes.

Many authors earn their living from writing for the education market – expending their time, skills and labour in imparting their knowledge for the ultimate benefit of society. In exchange, they should be entitled to fair remuneration and acknowledgement. This will not be the case if the Bill is passed into law. The Bill allows copying of whole works, reproducing works in course packs, and disturbs the copyright ecosystem which authors rely on. It creates a climate within which freely copying copyright works for a wide range of purposes is permitted.

With respect, the provision of learning materials falls within the availability and adequacy metric of the state's positive duties under the Constitution and this should be provided without resort to arbitrary deprivation of private property.² A lack of available state resources for education does not permit the state to neglect its constitutional duties or shift these duties onto non-state parties. It is submitted that

² See in this regard the *International Committee for Economic, Social and Cultural Rights* General Comment 13 'The Right to Education (art 13)' UN Doc E/C12/1999/10 (21st Session, 1999).

the proposed sections 12A and 12D, especially but not exclusively, are open to a constitutional challenge as they represent disproportionate, and thus arbitrary, deprivation of the intellectual property rights protected by section 25(1).

Although a strong case could be made that this Amendment Bill comprises an uncompensated expropriation and is thus constitutionally invalid by virtue of section 25(2)-(3), this argument will not be made here for fear of tautology as the proposed regulation will not survive a basic section 25(1) analysis. Notwithstanding, it should be noted that the claims of arbitrary deprivation and uncompensated expropriation are but two of the numerous constitutional lapses that this Bill evinces.

South Africa is a party of the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which both set out the three-step test that copyright exceptions must adhere to in order to be in line with treaty obligations. In addition, South Africa has already decided to accede to the WIPO Copyright Treaty in which the three-step test also appears. This test requires that any exception must be confined to “certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holder”.³

A key concern about section 12A is the addition of the words “for purposes such as” in this version of the Bill. In essence, this renders all the purposes listed in this section – and these are numerous – as mere examples of an open-ended list of exemptions. This falls foul of the requirement under the three-step test that exceptions must be limited to certain, special cases to be in line with international copyright treaties. Such a broad, open-ended exception will not satisfy the first step of the test.

³ Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (9-9-1886) 1161 UNTS (1886). The substantive provisions of the Berne Convention have also been incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), to which South Africa is signatory.

Similarly, the wide-ranging exceptions to copyright for education (provided for in 12A and 12D) will certainly conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the rights holder, i.e. not satisfy the second and third steps of the test. The education market is an established, effective, and central market for authors to be able to make a living from their work by granting rights for use in the educational sphere.

The nature of the reproduction right is self-evidently at the core of the copyright bundle and all other rights can be said to stem from it. Considering that the proposed measures will not only frustrate, but virtually obliterate, the right to authorise reproductions of copyright works for certain purposes (e.g. educational), this would effectively crush the primary and sole market for the work.

The three-step test is an outflow of the national treatment principle, which specifies what exceptions and limitations to copyright may be applied to rights holders of other member states. Therefore, to the extent that the exceptions are not in line with the three-step test, it will not be binding on foreign rights holders. The result is that it is South African authors, including members of PEN Afrikaans, that will be treated less favourably than foreign rights-owners, while foreign works will not bear the brunt of the over-broad exceptions introduced by the Bill.

We would like to draw the Committee's attention to authoritative commentaries to the effect that the Bill's treaty compliance has not been sufficiently considered.

The work of a panel of experts appointed by the then Portfolio Committee in 2018 (Michele Woods, Joel Baloyi, André Myburgh).

Please see:

- Michele Woods, WIPO
https://legalbrief.co.za/media/filestore/2019/03/Letter_AF_Myburgh_to_Minister_R_Davies_Mr_E_Makue_14Mar2019.pdf.
- Joel Baloyi, UNISA
<https://legalbrief.co.za/media/filestore/2018/10/Baloyi.pdf>,
- André Myburgh
https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf.

Input by foremost copyright scholars at the Anton Mostert Chair for Intellectual Property Law at Stellenbosch University:

<https://blogs.sun.ac.za/iplaw/2021/07/02/cip-written-submissions-on-copyright-exceptions-in-the-copyright-amendment-bill-2017/>

4. Conclusion

From the perspective of PEN Afrikaans and its members, and without prejudice to what other stakeholders from the creative communities may contribute,⁴ it is clear to us that sections 12A, most of 12B, 12C(b), 12D and 19C as well as 39B have no place in South African copyright legislation. In addition, the qualification of moral rights in sections 12B, 12D and 19D must be removed entirely.

PEN Afrikaans welcomes the revision of the Copyright Act but implores the legislature to consider the impact of the proposed provisions on the creative industries that authors are dependent on. It is our opinion that the Bill, as it stands, does not pass muster on constitutional compliance, legal certainty, and on truly protecting and enhancing the interests of authors whose livelihood depends on the ability to commercialise their work. Authors deserve better than the far-reaching deprivation of rights that the Bill proposes.

Yours sincerely,

A solid black rectangular box redacting the signature of Marga Stoffer.

Marga Stoffer
(Chairperson: PEN Afrikaans)

⁴ PEN Afrikaans only has an interest in those provisions that apply to authors of literary works.