

Ms J Hermans

Acting Chairperson: Portfolio Committee on Trade and Industry

Parliament of the Republic of South Africa

Attention:

Mr A Hermans, PO Box 15, Parliament, 8000 Cape Town

28 January 2022

Dear Ms J Hermans and Members of the Portfolio Committee

Call for public submissions and comments in respect of additional definitions and clauses in relation to the Copyright Amendment Bill [B13B-2017]: Submission by the Academic and Non-Fiction Authors' Association of South Africa (ANFASA),

Introduction

This submission is on behalf of the Academic and Non-Fiction Authors' Association of South Africa (ANFASA), which represents some 500 authors. Despite its name, ANFASA welcomes as members authors of fiction as well as non-fiction. Nevertheless, a majority of the members are authors of educational and academic works.

ANFASA, which is registered as an NPO, is a national association with members in all the provinces. The objectives of the organisation, in developing authors and authorship, are as follows:

- 1.** To encourage the personal development of aspiring and emerging academic and non-fiction authors and to offer guidance in all aspects of their writing; and to provide support and solidarity in lobbying for crucial issues that affect authors, such as intellectual property rights.
- 2.** To inform authors of their rights and ensure that they are properly remunerated; to promote sound professional and legal relationships between authors and publishers and to assist authors in negotiating fair publishing contracts.

3. To promote members' publications and to raise the profile of the organisation through effective communication platforms.

4. To contribute to South African culture and heritage through encouraging the writing and publication of new literary works especially those which tackle themes of striking relevance.

Authors and publishers: The Creative Industries Masterplan

The ANFASA copyright team members have asked me to submit comments, as requested by the Portfolio Committee. In this we join the other stakeholders, some who share and others who oppose our opinions. ANFASA and the Publishers Association of South Africa (PASA) are entirely separate and independent organisations with different constituencies; nonetheless our positions on the potential harm to writing and publishing in South Africa caused by the Bill are similar, and we therefore support the submission by PASA.

We draw your attention to the 'Draft Creative Industries Masterplan. Annexure 3. Publishing. Key Action Plan of September 2021'. This provides statistics about the growth and potential of the South African publishing industry and lays emphasis on its value (now and even more so in future) to the country's economic development. It is the firm conviction of the industry, based on the economic impact assessment it commissioned in 2018, that the Copyright Amendment Bill, if passed into law in its present form, will have a significant adverse effect on the advancement of scientific and cultural thought and its expression through the written word and a negative impact on trade in such products.

ANFASA has been a member of the team developing the 'Creative Industries Masterplan' with the Departments of Sport, Arts and Culture; Trade, Industry and Competition; and Small Business Development. It stands to reason that the departments activating the Masterplan would support the growth and development of those industries, and yet the DTIC has tabled a bill that will do the opposite to publishing. **We ask the Portfolio Committee members to take this contradiction into account when making their decisions.**

Fair use

Without providing further detail, ANFASA agrees with and supports PASA in questioning the specific introduction of the fair use provision in 12A(d). Fair use is not up for discussion in this latest round of comments. It has been the most hotly contested subject of debate and ANFASA is only one of the many stakeholders who have argued against it, in written submissions and oral hearings. Despite the rationality of ANFASA's arguments, and the rigorously argued research articles by experts such as Professors Owen Dean and Sadulla Karjiker, it is the pro-fair use lobby (led by the American emissaries of Google) that have carried the day – although their arguments (such as that fair use is 'future proof' and will lead the way to technological innovation) have not been tested. ANFASA asks the Portfolio Committee members to ask the crucial question about fair use: **Qui bono? Who benefits?**

The three-step test

The core of ANFASA's submission concerns the insertion of the three-step test in section 12C (2) (a), (b) and (c); and 12D(1) (b)m (c) and (d), followed by 12D(2).

Berne Convention - Article 9

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

In explaining the incorporation of the three-step test, the parliamentary legal adviser Adv Charmaine van der Merwe started with the admission that:

'the three-step test as provided for in Article 9 of the Berne Convention (revised) is premised on ensuring that the legitimate interests of authors are not prejudiced'.

She continued:

‘The three-step test as contained in international instruments such as the Berne Convention and the TRIPS Agreement sets limits for domestic copyright exceptions and limitations, thereby creating an international standard against which national copyright exceptions and limitations are to be judged. More specifically, the test stipulates that national exceptions and limitations (like 12A) must:

- be confined to certain special cases;*
- not conflict with the normal exploitation of the copyright work; and*
- not unreasonably prejudice the legitimate interests of the rights holder / author.’*

There is no doubt, then, that the DTIC supports and upholds the three-step test as an international regulatory instrument. **ANFASA agrees with its incorporation into the Copyright Amendment Bill.**

However, ANFASA is bound to pursue the wording of the first of the three conditions and to question whether the condition in 12D(1)(b) ([a reproduction may only be made in the cases stipulated in this section](#)) has the same meaning as ‘certain special cases’. The term ‘certain special cases’ warrants some investigation. Although the Berne Convention does not spell out what those certain special cases may be, it is universally accepted that they are all instances where an exception is in the public interest: personal or private use, education and teaching, the reporting of news, quotation, criticism and review of a work – in other words, the cases listed in section 12A(a). Education and libraries have been shifted to sections 12D and 12C respectively, but are still among the certain special cases.

The wording of the first of the three steps in the three-step test should conform to that in Article 9 of Berne. That it does not, in the Copyright Amendment Bill, raises the question of the reason for this discrepancy.

The welcome addition of the three-step test in 12C and 12D (but why not in 12A?) is to ensure that the legislature of Berne member countries does not overstep the reasonable exceptions that protect the balance between the interests of the copyright

owner and the needs of society. But, then, how does one account for section 12D(2) which side-steps the three-step test by granting educational institutions the right to incorporate copies made in compliance with the three-step test into 'printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction' – which do not comply with the third of the three-step test's conditions, and are most certainly not a special case?

Course packs made under licence provide authors of academic and scholarly works with a source of secondary income – not 'pocket money' but often a welcome substitute for the loss of royalties when sales of the book drop because students cannot afford them (the removal of a books allocation from the National Student Financial Aid Scheme (NSFAS) grant resulted in a massive reduction in the reading and learning materials bought by students).

The blanket licence issued by the Dramatic, Artistic and Literary Rights Organisation (DALRO) enables an educational institution to compile course packs for students at a cost in 2020 of under R200 per student. Licensing is a system in use worldwide. DALRO holds bilateral agreements with Reproduction Rights Organisations (RROs) in numerous countries – not only do authors receive royalties when extracts from their works are reproduced locally in course packs but they also benefit when their works are used similarly overseas.

Criticism of licensing takes the form of complaints that funds leave the country to remunerate authors and publishers abroad. This is disingenuous when all know that imported goods have to be paid for, but the real and constructive response is the development of writing and publishing locally to reduce the number of imported works – and this is exactly what is unlikely when local writing and publishing are undermined by fair use.

The recommendations of the 2011 Copyright Review Commission (Farlam Commission) served as a basis for the drafting of a copyright amendment bill as far back as 2013, and have been incorporated into the Bill. The report of the Commission described licensing thus:

There is a great need for this service in the Higher Education (HE) sector, where study material is compiled and disseminated to students by way of course packs and handouts or institutional Intranets or electronic reserves. All public HE institutions have obtained licences from DALRO to provide their students with supplementary study materials reproduced in terms of blanket (i.e. pre-authorised) or transactional (i.e. pay as you copy) licences.

Despite the approval of the Farlam Commission, and despite a system that provides study material to students at minimal costs, course packs appear in section 12D(2) as a special case deserving of an exception. ANFASA stringently questions this. Again, who benefits from the destruction of the system of licensing in order to make course packs free? This is an important issue for discussion by the Portfolio Committee.

Section 12D(2) is not in blue font, thus not up for comment, but section 12D(1) (b), (c) and (d) **are** in blue and linked to 12D(2). **Section 12D(2) must therefore be revised and course packs excluded**, for the reasons given above and because they are a clear violation of the three-step test.

A major problem arising from the DTIC's amenability towards suggestions made by certain members of the public with privileged access to the DTIC in the drafting process is that those members of the public failed to consider the unintended consequences of their additions. Section 12D(3):

(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.

Section 12D(3) makes possible the copying of whole, or substantially the whole, of a book or journal issue. It puts copyright owners, collecting societies and indigenous communities in a straightjacket: if they refuse to grant a licence (make a licence available) the educational institution may go ahead and legally make the copy without authorisation or payment. **12D(3) must be deleted.**

Conclusion

It is impossible to ignore what is glaringly evident: these further amendments to amendments create more issues of confusion and ambiguity than they resolve.

ANFASA was very encouraged by the DTIC's willingness to admit to faults in the Bill and its attempts to correct them, but it is still not working and demands, at the very least, some considerable re-drafting.

One imagines that the members of the Portfolio Committee are eager to fulfil their mandate by coming up with a workable Copyright Amendment Bill, but this is not it. On behalf of authors, ANFASA seeks a thorough reconsideration of the Bill, and an impact assessment to judge what the future might hold.

It is unconscionable that South African copyright legislation should detrimentally affect the country's place on the world stage in terms of its trade, its knowledge and its culture. We ask the Portfolio Committee not to be satisfied with sub-standard law. It is worth the extra effort to get it right.

Monica Seeber, ANFASA Copyright Team Leader

Prof Sihawukele Ngubane, ANFASA Chairman and Copyright Team Member

Prof Keyan Tomaselli, ANFASA Board and Copyright Team Member

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Andrew Joseph, Copyright Team Member

Samukelisiwe Mfuphi, ANFASA National Coordinator and Copyright Team Member

E-mail sent on Tuesday 26 January 2022

Dear Members of the Portfolio Committee

On behalf of ANFASA I am preparing the latest submission in respect of certain proposed amendments to the draft of the Copyright Amendment Bill and according to your call for comments.

The ANFASA response is being finalised and will be e-mailed to Andre Hermans, secretary to the Committee, on the due date, Friday 28 January. However, it will be ***limited*** to those of the proposed amendments up for further consultation (in blue font) which will have an ***effect on the incomes, motivation, output and careers of authors***.

The narrow confines of the call for comments give us little opportunity to stress yet again that the rights of authors have become the casualty of increased exceptions to copyright. There is a lobby group which has been vocal in its support of the fair use provisions in the Copyright Amendment Bill and emphasises as part of its rationale that authors, academic authors in particular, are less concerned about their rights than about the free dissemination of their works.

ANFASA contends that this is no more than wishful thinking by those who would rather not pay for their use of educational and scholarly materials.

The link below is to a news article about a retired professor in China who objected to the unauthorised availability of his numerous works on a database of academic journals and research papers. His works were reproduced freely; he was neither informed nor did he receive any payment for the use of his intellectual property. He only found out about it when a student told him that he had downloaded the professor's book and paid a fee to the database. The professor, who had received nothing, then sued the database for copyright infringement – and won.

<https://www.universityworldnews.com/post.php?story=20220120075127354>

The news article is quite long and you may not have time to wade through it (but it is rather interesting, and relevant). My purpose is to use it to make two points:

1. The professor's colleagues were amazed that he won. They had been aware of (and angry about) the practice but felt helpless against the might of the powerful (privately owned) database. Their approval of the court's decision challenges the view that academic authors are content for their works to be disseminated and reproduced for free – and so it should.

In South Africa, young scholars at the start of their careers as producers of knowledge must be encouraged and rewarded if they are not to be lured away from the academy.

2. Were fair use to be adopted in South Africa, the Chinese professor's legal action would probably fail because the database would claim that its activity fell within the bounds of fair use. The potential for large-scale deprivation of authors' anticipated and justified rewards is a contravention of the three-step test in Article 9 of the Berne Convention – as ANFASA will show in its submission.

What will be the effect on the growth of scholarship if authors can no longer control the use of their intellectual property? ANFASA and other rightsholder organisations have repeatedly claimed that the Bill must be subjected to an impact analysis.

During one of last year's sessions, Portfolio Committee members declared: "We are the lawmakers". The making of laws requires consideration of their effects on societies. It is more than ensuring that the terminology is correct.

This is why ANFASA wishes to make the point that it is insufficient to restrict comments to the amendments in blue font in the hope that ironing out these few glitches will turn the Copyright Amendment Bill into good law. ***Only an impact assessment will reveal whether it is good or bad law.***

We therefore urge the Committee to take a holistic approach and recognise that the decisions they make now will have a long-lasting effect on authors, on publishers and on the future of South Africa's part in global knowledge production.

With kind regards

Monica Seeber

ANFASA Treasurer, ANFASA Copyright

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