International Federation of
Reproduction Rights Organisations

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PRESIDENT
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Caroline MORGAN

Acting Chairperson: Portfolio Committee on Trade and Industry

Attention Mr A Hermans

Parliament of the Republic of South Africa

CAPE TOWN

28 January 2022

Dear Portfolio Committee Members,

Submission from IFRRO on Copyright Amendment Bill [B13B-2017]– Call for Public Submissions

1. Introduction

This submission is made on behalf of IFRRO – the International Federation of Reproduction Rights Organisations – the international association representing collective management organisations in the text and image sector.

IFRRO has 153 members in over 80 countries worldwide. Our members in South Africa are DALRO, the Dramatic Artistic and Literary Rights Organisation and PASA, the Publishers Association of South Africa. We endorse and support the submissions made by those two organisations as well as the submission made by ANFASA, the Academic and Non-Fiction Authors Association of South Africa.

We have also made submissions in earlier phases of this law review process (June 2017, July 2018, February 2019 and July 2021) and we would be happy to provide you with copies of those submissions if you would find them helpful.

2. General Comments

In our view the consolidation of the exceptions for various sectors such as education and libraries has simplified the structure of the Bill, and highlighted inconsistencies and areas of overlap. We thank the Portfolio Committee for initiating that restructuring.

However, we are of the view that the that Bill remains out of step with South Africa's international obligations, and to pass the Bill into law would risk legal uncertainty, lead to constitutional challenges and also possibly trigger international sanctions against South Africa.

In making this statement, we note that the exceptions framework as proposed in the Bill has not been subject to an appropriate impact assessment review and a thorough legal evaluation which, if they had been conducted would have highlighted such concerns. We urge the Portfolio Committee to commission these reviews without further delay.

In particular, IFRRO is concerned about the scope and uncertainty of the personal use provisions. The proposed unremunerated exception for personal or private use in South Africa is contrary to the direction being taken in close to half of the countries on the African continent, where a private copying levy has been introduced into law, or is currently being implemented. Between 2017 and 2020, the number of African countries with an effective private copying levy system more than doubled, as highlighted in the CISAC Private Copying Global Study.

In this context we note the recent successful introduction of a private copying levy in Malawi, the inclusion of a private copying levy in section 36 of the ARIPO Model Law, and the development of a Directive which will introduce a private copying levy in all 8 Member States of UEMOA.

The importance and value of a private copying levy to the cultural and creative industries has been highlighted during the pandemic, when due to the measures such as lockdowns and social distancing, the income from private levies became increasingly important to many creators around the world.

We urge the Portfolio Committee to support South African creators by incorporating a private copying levy in the draft Bill. We understand that WIPO could provide legislative assistance in developing these provisions.

3. Specific Comments

Our comments in this section follow the order in and are based on the "All Proposed Amendments" document circulated on 8 December 2021.

3.1. Amendments Related to Persons with a Disability

The Marrakesh Treaty deals specifically with access to print material such as books by print disabled persons. Its provisions, including the import and export provisions, are not applicable to persons with other disabilities as important as enabling access to copyright content of all types is for those persons.

As a result, section 19D is not consistent with the Marrakesh Treaty. We understand that Section 19D is currently also the subject of deliberations before South Africa's Constitutional Court and that any decision taken by that Court is bound to have a decisive effect on this future exception. As a result, we suggest that work on this section is suspended pending that Court's determination.

We also recommend that the section be narrowed to apply only to the print disabled and therefore be consistent with the scope of the Marrakesh Treaty. It is of course open to South Africa to implement a domestic exception for the benefit of persons with other disabilities, consistent of course with the requirements of the Three Step Test in the Berne Convention and the TRIPS agreement.

3.2. Amendments relating to Personal Copies and Ephemeral Rights

Firstly, IFRRO reiterates the view expressed in earlier submission that the translation exception in **section 12B(f)** goes beyond what is reasonably required to ensure that works can be read in all of South Africa's official languages. It is extremely damaging to the South African publishing community (including non-profit and community publishers and authors) and is a breach of South Africa's international copyright obligations.

We note that the Committee takes the view that the words highlighted in green in the Proposed Amendments are not material in nature and that therefore comment is not being sought. However, IFRRO is of the view that the proposed amendments marked in green in **section 12B (f)** are not only material in nature, they are poorly drafted, and they are confusing. We assume that the requirements are intended to be cumulative, however their drafting (in particular the use of the word "or" in 12B(f) (ii)) indicates that they may be intended to be independent. We submit that this be clarified and in particular, (iii) should be deleted altogether.

We also repeat our comments from earlier submissions that **section 12B (i)** is overly broad. We note that a judicial review of an equivalent provision in the UK quashed that provision and declared it to be unlawful because the evidence that the government had relied on to conclude that the uses permitted by the exception caused minimal harm was inadequate.

These Bills have been introduced without an appropriate impact assessment, and as a result we are of the view that the exception is based on faulty or misleading evidence, which could lead to a similar quashing by the Courts of this exception.

We urge the Portfolio Committee to withdraw the personal use exception and commission an impact assessment which includes an assessment of the impact of the introduction of a private levy. In this context we note that studies show that there is no discernible cost differential between levy and non-levy countries in the prices of subject devices. The latest evidence in this regard comes from France.

If private copying compensation in the form of a levy on devices is not introduced then the scope of this section must be narrowed significantly, and the words "including the use of a lawful copy of the work at a different time or with a different device owned by that natural person" removed. As the appropriate yardstick is whether the uses made under the exception comply with the Three Step Test in the Berne Convention and the TRIPS Agreement, we submit that the terms of the Three Step Test be specified in the section.

A further specific drafting concern is the confusing use of the two terms "lawfully acquired" and "lawful copy". Are they intended to have the same meaning? In IFRRO's view the phrase "lawfully acquired" should be used consistently.

We are also of the view that for the sake of clarity all of the exceptions in clause 12B should clearly state that they only apply to the extent that the uses are compliant with the Three Step Test in the Berne Convention and the TRIPS Agreement.

3.3. Amendments to Make the Fair Use Factors applicable to exceptions on sections 12B, 12C, 19B and 19C

IFRRO supports the restructuring of section 12A to remove personal use, teaching and education and libraries from the ambit of fair use and consolidate them into tailored exceptions for these sectors. In our view this minimises possible overlap between section 12A and the other exceptions. We note that as a consequence of that restructuring the second part of (b)(iii) (bb) should be removed.

However, we continue to question why section 12A is necessary at all in light of the extremely extensive exceptions contained in other parts of the Bill. We maintain our position that South Africa should not adopt fair use, or even the so called "hybrid" fair use approach and that a fair dealing approach is more appropriate given South Africa's legal framework and history.

We have the following further comments on section 12A:

Relationship of section 12 A with the Specific Exception Provisions

The words "such as" should be deleted from the opening words of the section as they are too vague and also may lead to continuing confusion between the uses permitted under section 12A

and those permitted under the specific exceptions provisions (sections 12B, 12C, 12D, 19B and 19C).

In this regard we also suggest that in order to avoid "double dipping", that section 12 A explicitly provide that it does not cover uses of copyright material undertaken for the purposes of the specific exceptions listed above.

We note that in its submission, DALRO has made drafting suggestions to achieve this outcome and we support their proposal.

Public Administration

"Public administration" should not be a permitted purpose in section 12A. Indeed, some uses of copyright works in public administration may be permissible under exceptions because of their strong public policy objectives. However, there are many uses of copyright works in public administration which are licensed uses in many countries. An example of such a licensing market is newspapers and newspaper articles provided by media monitoring services. Such articles are intensively used in government, are necessary for the proper performance of public administration and their reproduction and communication should be done under licence. There are many other examples, including the use of journal articles in government departments.

Impact on the Market

We are of the view that in considering the specific factors to be applied in assessing if a use for one of the specified purposes is fair, the impact on the potential market is not only a substitution question but requires a broader analysis. Therefore, we suggest that the word "substitution" in section 12A (b) (iv) should be replaced with "effect of the use upon the potential market for or value of the work in question".

3.4. Amendments related to adding the wording of the Three Step Test

Section 12C: Temporary Reproduction

IFRRO submits that section 12C (1) (b) be deleted as the uses described there are not temporary reproductions as contemplated. As a consequence of this deletion, section 12C (2) should also be deleted.

The Three Step Test should be replicated in its entirety in section 12C (2), not paraphrased. This is essential to ensure that when the section is interpreted it is clear that the Three Step Test is intended to apply, not a truncated version of it. Consequently, section 12C 2 (a) should read "only be made in certain special cases within the purposes stipulated in subsection (1)".

Section 12D: Reproduction for Educational and Academic Activities

IFRRO rejects the entirety of section 12D. The exceptions as proposed will undermine current legitimate markets for South African and foreign authors and publishers, including those currently offered by DALRO.

Further, such broadly expressed exceptions for education and academic activities can never be "certain special cases" within the meaning of the Three Step Test in the Berne Convention and the TRIPS Agreement. If it is retained, the entirety of section 12D must therefore be expressed to be subject to the Three Step Test to ensure compliance with the international framework.

In addition, the restructuring of the Bill highlights that:

- section 12D (3) is at odds with international treaties and with the provisions of 12D (1) and 12D (4). Section 12D (3) must be reworded and narrowed as follows: "Educational institutions shall not incorporate **extracts as envisaged under Section 12D(1) or whole or substantially the whole of a book or journal issue, or a recording of a work, as envisaged under 12D(4),** unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions." **(clarified new text in bold)**;
- section 12D (9) is also unnecessary, as any uses contemplated by it would already be permitted by section 12D (1). Alternatively, the operation of section 12D (9) should be made subject to a licence override to recognise the role copyright licensing plays in providing access to copyright content in the educational sector.

The way a "licence override" provision works is that the educational institutions are permitted to copy works under the exception, except if a licence is offered by the copyright owner or their agent in which case the educational institution must instead copy under the licence.

The approach was devised by the Whitford Committee in the UK in 1977, with the objective of encouraging copyright owners to develop flexible and responsive licences for educational users of their content. Explaining its reasons for doing so the Committee said that "the fact that education is a good cause is not of itself a reason for depriving copyright owners of remuneration." That objective remains as current today as it did in 1977, and the "licence override" approach to educational exceptions has been adopted not only in the UK, but also in Jamaica and several other African countries.

3.5. Amendment IRO A Duplication

We appreciate that substantive comments are not being sought on section 19C, however we propose that in order to ensure consistency of drafting within the Act, the exceptions in 19C must be explicitly made subject to the Three Step Test in that section, instead of amending section 12B to introduce a fair use factor analysis into the section.

We thank you for the opportunity to contribute to this important law reform process and would be happy to answer any questions you may have about our submission.

Best Regards

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Caroline Morgan

CEO and Secretary General