

Geneva, January 28, 2022

**Ref: Copyright law review in South Africa: public consultation by the Portfolio Committee on Trade and Industry on Bill B13B/2017**

Dear Members of the Portfolio Committee,

The International Publishers Association (IPA) is the world's largest federation of national, regional and specialist book publishers' associations. Established in 1896, our membership comprises 89 organizations from 73 countries around the world. The IPA is based in Geneva and is an accredited observer at the World Intellectual Property Organization as well as an accredited non-governmental organization (NGO) enjoying consultative relations with the United Nations.

The IPA works closely with its member in South Africa, the Publishers Association of South Africa (PASA), and with our regional member in Africa, the African Publishers Network (APNET), which brings together national publishers associations and publishing communities from 42 African countries, to strengthen indigenous publishing throughout Africa.

The copyright framework is and always has been the foundation of the publishing industry. Adequate copyright protection entails a combination of enforceable exclusive rights and carefully calibrated exceptions and limitations, which must be defined upon the Berne Convention's 3-step test to preserve the integrity of copyright protection as a key condition for publishers' investments. Enforceable exclusive rights are fundamental to incentivize authors, publishers and other copyright owners to create, invest in, and make available to the public original and valuable works of authorship. Through these works, publishers drive inspiration, entertainment, education, and significantly contribute to both local and global economies.

We are grateful for the opportunity to provide comments on Bill B13B/2017 (hereafter the Bill). In doing so, we believe it is important to recall the essential role of copyright to support and reward creativity as a driver for copyright policy and law in South Africa. Economic studies by the World Intellectual Property Organization (WIPO) provide evidence that a strong copyright protection and enforcement framework is of key importance to sustain creative industries' contribution to local economies and is a necessary condition of investment in those industries.

#### **On due process and compatibility with international treaties**

Although the documents made available by the Portfolio Committee show some progress on a few aspects of the Bill (notably on protection of the exclusive rights of communication to the public and making available), which we welcome, IPA respectfully submits the Bill as it stands still falls foul of obligations set out in international treaties to which South Africa is a contracting party.

The version with all amendments shows an insufficient set of exclusive rights granted to published works, continued overbroad exceptions & limitations to copyright protection, resulting from a combination of an inadequate fair use provision with fair dealing and a large number of specific exceptions, and an enforcement

framework which, despite some progress, still requires strengthening to effectively prevent and deter massive digital piracy.

The few amendments now submitted to consultation are not enough to address these grave deficiencies. IPA reiterates our previous submissions, notably the recommendations that due process is required to address the unsurmountable challenges created so far by the several iterations of the copyright review in South Africa. The provisions on exceptions & limitations have been systematically opposed by all sectors of creative industries over the last 4 years, at national and international levels, and motivated constitutionality reservations by South Africa's President, but yet are kept in the Bill as presumably consolidated text.

**IPA is of the view that the process of keeping defective structural solutions while making small adjustments is not adequate.** The only way forward to achieve a balanced copyright protection framework is to start afresh, based on due process that enables a transparent and evidence based review of South Africa's copyright law, justified by a fair impact assessment and by a non-biased evaluation of needs, solutions and respective effects, in a way that ensures the survival and sustainability of South African creative industries.

**The most problematic aspect of the Bill remains the excessive and defective system of exceptions & limitations, that prevents the establishment of a fair marketplace for books and is especially penalizing for educational and academic copyrighted works.** In establishing exceptions and limitations to copyright protection, South Africa must conform to the existing international legal framework and in particular to the 3-step test as enunciated in the Berne Convention and in the WTO TRIPS Agreement, to which it is a contracting party. This will not happen if the Bill is kept as it stands.

Compliance with international norms requires that provisions setting out exceptions & limitations are clearly and narrowly defined, while preserving the integrity of exclusive rights. The 3-step test must also guide the application of legal provisions establishing exceptions & limitations, defining their boundaries, under the long-standing principle underlying the international legal framework as set out in the Berne Convention, the WIPO Copyright Treaty (WCT) and the WTO TRIPS Agreement: uses of copyrighted works require authorization. Exceptions are exceptions; they must not be set out as the rule to access copyrighted works - which is the result of overbroad provisions such as those included in the Bill.

Even if the ensemble of provisions on exceptions & limitations is not subject to consultation now, it must be said that **the maintenance of such a defective system will continue to compromise international compliance by South Africa and reduce the protection that must be granted by South Africa to copyrighted works originating from other Contracting Parties of international treaties.**

National and international publishers have already expressed grave concerns over the course of the last years, supported by economic and legal evidence, that a review of South African copyright law setting out exceptions & limitations in an over broad manner will undermine freedom to publish local, quality content, tailored for the needs of South African audiences, including teachers and students. The concerns expressed alert to the devastating effects said provisions would generate, including irreparable damages on South Africa's publishing industry. In addition, publishers have also demonstrated how the combination between an ill-defined fair use provision with overbroad specific exceptions would cause South Africa to fall foul of its international obligations, notably the respect of the Berne Convention's and TRIPS' three-step test and prevent the country from acceding to the WCT.

The Berne Convention's 3-step test sets out clear boundaries to Contracting Parties establishing exceptions & limitations to copyright protection. The IPA respectfully submits these boundaries are breached by the Bill as it stands because:

- Exceptions & limitations must be restricted to certain special cases only, whereas the draft Bill establishes an overbroad combination of fair use (through an open-ended provision) with fair dealing and additional specific exceptions. The outcome is a set of norms enabling certain categories of users to not only access, but also distribute and make available copyrighted works without permission from copyright owners on a systematic basis and in large scale.
- Exceptions & limitations must not conflict with the normal exploitation of the work. The combination of an extensive fair use provision with several overbroad specific exceptions not only conflicts, but in fact prevents publishers from selling and licensing their works in the marketplace. This is the case of educational books, as demonstrated in economic studies<sup>1</sup>.
- Exceptions & limitations must not unreasonably prejudice the legitimate interests of copyright owners, notably their ability to recoup investments and monetize their copyrights. As previously demonstrated in abundant evidence provided by our member PASA, the Bill as it stands gravely damages the legitimate interests of publishers with regards to the ability to sell, license and control the uses of their works, receiving appropriate commercial fees, especially in the context of academic, educational and cultural activities. The negative impacts for the publishing industry will inevitably disincentivize investments by national and international publishers and undermine South African authors' ability to be published and read across the world.

The "fair use" system proposed in South Africa will have no case law precedents and is much broader than set out in US law, where it originates. If enacted, the combination of fair use, fair dealing and several specific and often overlapping exceptions and limitations, will result in legal uncertainty about which uses of copyright works require licenses, affecting copyright owners and users alike, and facilitating abuse.

Legal uncertainty is one of the main factors that hinders investment. It will have negative repercussions in investments required for copyright owners to continue producing and distributing new copyright works and related services in South Africa. The overbroad exceptions & limitations resulting from the uncalibrated combination of multiple legal frameworks will decimate the legitimate markets for educational publishing (subject to both fair use and several specific exceptions) and discourage investments in publishing national authors. Combined with exceptions for personal uses and cultural institutions, it will condition production and online distribution of works in general.

We also note that our concerns about the impacts of overbroad exceptions resulting from this unjustified combination of 3 different legal systems cannot be assuaged by subjecting all those exceptions to a fair use provision that is defective in itself, as set out in Section 12A (d). Nor can that solution be claimed to implement the 3-step test as a condition to guide interpretation and application of said exceptions & limitations. The system as set out in the Bill is in itself inappropriate and incompatible with international norms.

The commercial availability of local and foreign literary works for South African readers, which can only be sustained by adequate copyright protection, must be considered when assessing the overall societal welfare of a

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<sup>1</sup> Study "The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry", by Price Waterhouse Coopers, July 2017, submitted as evidence in previous consultations by PASA. The study evidences "significant negative consequences" for the South African publishing industry should the proposed fair use provision and overbroad exceptions be adopted, notably predicting a 33% average decline in sales, implying reductions in GDP, VAT, and corporate tax revenue collections. In addition, 89% of publishers surveyed noted that the exceptions as set out in the Bill would negatively impact their operations, likely resulting in cutbacks and possible business closures.



fair use system. We recommend that an impact assessment is conducted to determine if fair use is the best option to achieve the objectives, or whether they can be achieved in other ways which reduce the impact on authors and burden on business. A fair impact assessment should also determine the effects of fair use in South Africa, taking into account the lack of legal tradition and of a solid body of jurisprudence to produce fair use interpretations and enable an adequate judiciary treatment of fair use applications. These facts are alarming. Absent those key mechanisms to deter and sanction abuses of a fair use system, abuses will in fact happen.

**Should the Bill remain as it stands, the legal uncertainty generated for copyright owners will likely prevent investments be continued by national and international publishing companies, to the detriment of South African creative industries and audiences and countering the need to enhance cultural diversity and encourage young generation authors.** As IPA and our member PASA have alerted multiple times, the South African publishing industry relies on educational publishing to sustain investments in publishing South African authors. Depleting the educational publishing market, as will result from the Bill as it stands, will affect the whole industry, to the detriment of South African writers and readers.

A final word to highlight the need for full transparency and appropriate consultations. It is unclear from the documents now published for consultation whether grave deficiencies in previous iterations of the Bill have been effectively addressed or not. IPA has already communicated its concerns over these provisions in previous submissions. Our concerns relate to key Issues such as undue restrictions to contractual freedom resulting from unbalanced limitations to transfer of rights and to contractual terms & conditions. Or the need to strengthen online enforcement mechanisms to effectively implement WCT provisions and tackle digital piracy. We reinforce our call for the Portfolio Committee to consider our recommendation for a fresh legislative process, where all these important issues are considered in an appropriate manner, with the aim of effectively modernizing South African copyright law in compliance with international copyright treaties, and taking into account the needs of South African creative industries.

## COMMENTS ON SECTIONS PUBLISHED FOR CONSULTATION

### Section 12A: defective fair use provision

IPA reiterates our previous submissions that the adoption of a fair use system in South Africa is not suitable. Such solution requires further evidence regarding the need for such a system and whether the practical conditions to implement a fair use system exist, notably with regards to capacity of the judiciary system to handle a significant volume of highly specialized case law. In addition to the impacts on decreasing legal certainty and raising the level of risk for copyright owners' investments in South Africa's creative economy, the provision as set out in the Bill will certainly decrease the value of those investments as it enables undeterminable exposure to unauthorized uses.

We are of the view that fair use is not an adequate solution for South Africa's copyright ecosystem. We are also of the view that no evidence has been provided as to whether this system will function in South Africa. On the contrary: existing evidence suggests it will seriously undermine copyright protection and sustainability of creative industries relying on copyright protection.

However, if South African legislators were to insist that fair use must be adopted, we call on reasonable judgment and consideration of international comparative law and case law. The following aspects of S. 12A as presented in the consultation paper must be reviewed, as they are incompatible with the Berne Convention's 3-step test:

- The expression **"such as"** must be removed, as it extends the application of this already open-ended exception to an undeterminable remit of uses, instead of being restricted to certain special cases only.

- The **purposes of research, teaching, education, scholarship should be removed**, as those uses are subject to specific exceptions. The combination of fair use with broad specific exceptions will make copyright protection an exception instead of the rule for educational, academic and cultural uses. Consequently, it will curtail South African's publishing market, 80% of which is educational, and undermine the development of local quality educational content, damaging the legitimate interests of copyright owners and undermining sales and licensing of educational content.
- The argument above applies *mutatis mutandis* to the purpose of **access to the collections of libraries, archives and museums, which must be removed**, as it is also regulated by specific provisions.
- The 4<sup>th</sup> factor is incompatible with the three-step test, as it conditions the concept of normal exploitation of the work to an artificial substitution effect. US law prescribes the **need to assess the effect of the use upon the potential market for or value of the copyrighted work**. This formulation does not unduly restrict consideration of effects. In fact, the 3-step test requires that consideration is given to the damages caused to the legitimate interests of copyright owners and to their ability to exploit copyrighted works, independently of whether there is an effect of substitution or not. Hence, the **expression "substitution" must be removed**.

It is not clear whether some of these problems have been addressed already. While in the document titled "Proposed amendments for advertising: Copyright Amendment Bill" some of the problematic provisions mentioned above are still there (purposes of use as set out in S. 12A, (a), (i), (iv), (vi)), presumably as consolidated text, in the document titled "ALL PROPOSED AMENDMENTS" those provisions appear in green strikethrough, seemingly repealed. IPA welcomes those provisions be repealed in their entirety and would be grateful if this aspect could be clarified.

## Section 12B

IPA respectfully submits the following comments to this section:

- Section 12B, (1) (i) should be harmonized with the definition of lawfully acquired works now inserted on clause 1 of the Bill, thereby applying to the "use of a lawfully **acquired** copy" (addition in bold).
- Reproduction under this provision must be subject to the Berne Convention's 3-step test, per its article 9 (2), instead of being subject to fair practice, which is not a defined concept in the Bill and pertains free uses regarding quotations and illustration for teaching, regulated in article 10 of the Berne Convention. The following changes can address this issue: "Provided that the work was lawfully acquired and that such personal use shall be ~~compatible with fair practice~~ **restricted to 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.**" (deletion in strikethrough, additions in bold)
- IPA recommends that South Africa introduces a legal mechanism to remunerate copyright owners for private copy, following international best practice.
- Regarding S. 12B, sub-section (1), paragraph (f), IPA submits that its overbroad scope breaches the exclusive right of translation that must be granted to copyright owners of published works, insofar as it authorizes not only the translation but also the communication to the public of said translation, irrespective of commercial availability. This is not compatible with the regime set out in the Appendix to the Paris Act of the Berne Convention, which permits developing countries to implement limitations to the right of translation only under the form of non-voluntary licenses for translation and reproduction of works in certain cases only and under certain conditions. This regime includes the following provision, to safeguard a fair marketplace: "*If a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such translation is in the same language and with substantially the same content as the translation published under the license. Any*



*copies already made before the license terminates may continue to be distributed until their stock is exhausted. in connection with educational activities. In these cases, the described use is allowed without the authorization of the right holder, subject to the payment of remuneration to be fixed by the law.”*

- Section 12B, sub-section 4, is unclear and seemingly empties the right of adaptation, by giving a blank permission to produce adaptations, without any requirements or conditions of use. It should be deleted.
- Parallel imports must be forbidden to ensure the integrity of the right of distribution. The “exhaustion regime”, which sets out the rules for parallel imports of copyrighted works into South Africa, is of key importance to ensure that South African authors and publishers retain control over the commercial conditions under which their works are distributed in the country.

A national exhaustion regime prevents the unauthorized importing of international copies of books into South Africa, and therefore avoids said imports undercutting the domestic market. On the contrary, an international exhaustion regime could have far-reaching impacts for South African authors and publishers, who will not be able to stop copies of their books from around the world being sold, thereby undermining their investments. This will erode domestic sales where the majority of South African author income comes from, prompt a relocation of publishing away from South Africa and support online retail giants instead of creating the necessary conditions for South African publishers and booksellers to thrive. In addition, it might have unintended consequences of facilitating an influx of pirated copies, making it harder for authorities to exercise control.

We urge the Portfolio Committee to avoid these unintended consequences, which would only come to the detriment of the South African national economy and contribute to weakening its book sector. While we understand the rationale of the present copyright review process is to support the development of sustainable creative industries in South Africa, we believe the provision set out in S. 12B (7) will completely undermine those objectives. Along these lines, we respectfully submit the expression “*and internationally*” be deleted from the provision.

#### **Insufficient application of the 3-step test provision, limited to Section 12C, sub-section (2); Section 12D(1)(b), (c) and (d)**

IPA welcomes the insertion of the 3-step test in these provisions. We respectfully submit the 3-step test should be inserted in a stand-alone provision applicable to all other provisions setting out exceptions & limitations to copyright protection, as a fundamental principle of interpretation and application of said provisions, deriving from international copyright law. In alternative, the three-step test should be inserted in any provisions setting out exceptions & limitations.

Section 12C should further be reviewed to apply only to reproductions required to facilitate authorized uses, in order not to hinder enforcement efforts.

#### **Section 12D: overbroad exceptions for educational and academic activities**

This Section as it stands completely curtails the market of educational and academic publishing by granting users the ability to reproduce and make available entire works without permission from copyright owners. The insertion of the three-step test in Sub-Section (1), although welcome, is not enough to assuage concerns that it will undermine publishers’ investments in producing and distributing educational content.

The provision requires further work to narrow its scope of application. The Section as it stands enables educational and academic activities to systematically rely on unauthorized copies of textbooks and other educational materials instead of acquiring copyrighted works, by compromising the integrity of the exclusive rights of reproduction, distribution and making available. While these consequences may be unintended, they can severely affect South African publishers and the production of textbooks and other educational materials for the

benefit of South African students. As stated by IPA in previous submissions, the South African publishing sector produces mainly educational books and learning materials, which account for 80% of the industry's revenue. Therefore, a narrow exception for education is of key importance to maintaining a market for South African educational publishing companies.

IPA respectfully submits that the exception set out in S. 12D should be restricted to reproduction of small excerpts of certain works and that copies of said small excerpts are only distributed to students in a given classroom, if and when licenses are not available and against appropriate remuneration for copyright owners.

Specifically, Section 12D as it stands should be amended as follows:

- Sub-section (1) should be harmonized with the concept of lawfully acquired work inserted in the Bill "including the use of a lawfully **acquired** copy of the work at a different time or with a different device owned by that person" (addition in bold).
- Sub-sections (2), (3) and (4) should be removed and replaced by a provision subjecting these uses to licensing. The broad formulation of these provisions will affect the right of distribution of published works in an undue manner, violating the 3-step test and enabling beneficiaries invoking the exception to act as distributors of educational copyrighted works, without permission from copyright owners.

The system adopted in the European Union and in the United Kingdom sets out that educational exceptions are subject to remuneration and may only apply if licenses are not available. In particular, licenses may be made available by publishers for textbooks and other materials created specifically for educational purposes. Limiting the exception in this way allows the market for educational books to be preserved. We call on South African legislators to acknowledge the importance of local quality content in advancing the educational system and how it is dependent upon adequate incentives for professional publishers to produce tailor made textbooks and educational content to serve national curricula.

Content is at the heart of education. Acknowledging this important reality, EU law shields textbooks and educational materials from unauthorized uses by incentivizing licensing solutions, because the production of these works is completely dependent on sales to schools as their sole market.

We believe South African teachers and students benefit from having tailor made educational content. For this to be possible, adequate incentives are vital. This is even more the case for digital educational materials offered through dedicated digital educational platforms, which we understand are being developed by publishers for the benefit of educational communities. S. 12D as it stands will likely prevent publishers from continuing to invest in those solutions, as the market will be served by unauthorized uses resulting from overbroad exceptions. While we understand that some publishing companies have already decided no longer to invest in South Africa, we urge the legislator to preserve the conditions for its local educational publishers to continue to develop their activities.

Along these lines, IPA recommends S.12D is revised to reflect the following principles, recently adopted in EU law, to carefully calibrate the exception and avoid devastating effects for educational publishers:

- (i) unauthorized uses enabled by an exception should be for the sole purpose of illustration for teaching, to the extent justified by this non-commercial purpose to be achieved. They must not be means of using copyrighted works for free or replace sales and licensing of educational works.
- (ii) the exception can only be invoked when uses take place under the responsibility of an educational establishment, on its premises or venues, or through a secure electronic environment accessible only by the educational establishment's enrolled pupils or students and teaching staff.
- (iii) unauthorized uses under the exception cannot be invoked in relation to specific types of works, such as textbooks and other copyrighted material that is primarily intended for the educational market, to the extent that suitable licenses authorizing the uses required to cover the needs and specificities of educational establishments, within the purpose of illustration only, are easily available on the market.



It should be noted that free access to content or State publishing is not the answer to serve South African students and teachers with high-quality educational content that helps advancing South African education. On the contrary, the effect will be decreased availability of quality, locally produced educational content, as investments will no longer be sustainable.

Educational publishers have always worked closely with governments and educational authorities to find ways to respond on the ground to challenges in education. High quality locally developed educational content requires adequate copyright protection, so that publishers can invest in hiring the best authors, educational and pedagogical experts to produce local textbooks and continue to partner with advancing education in South Africa.

### **Section 19C: overbroad exceptions for libraries, archives, museums**

The amendments made to this Section are insufficient to ensure compliance with the 3-step test and integrity of copyright owners' exclusive rights in a broad range of uses by libraries, archives, museums and their users. While legitimate preservation purposes might require exceptions & limitations, and uses in libraries' terminals are permissible under certain conditions in other jurisdictions, IPA respectfully submits this provision must be amended to

- ensure that libraries and other cultural institutions lend lawfully acquired copies of books only, instead of enabling libraries to lend reproductions made through the use of exceptions. Libraries and cultural institutions play an important role in supporting and stimulating authorship. Acquiring and promoting books must be included in their cultural mission.
- Delete sub-sections (13) to (15), which in practical terms enable that all cultural institutions are served through one copy only, completely eliminating the need for acquisitions, and further allows those institutions to supply copies to users under undefined circumstances. Each library should be permitted to make copies only of its own lawfully acquired catalogue, for its own preservation purposes. Instead, the provision as it stands enables an exchange mechanism to serve all cultural institutions in the country. Such an overbroad exception will deplete copyright owners from the ability of exercising their exclusive right of distribution *vis a vis* cultural institutions and their users, therefore affecting the conditions for a fair marketplace.
- Delete sub-section (5), (b), as it conflicts with the integrity of the right of communication to the public in an unjustified manner. Enabling cultural institutions to make copyrighted works available in publicly accessible websites without permission is unacceptable. This provision enables making copyrighted works in websites publicly accessible not only in South Africa but elsewhere. Therefore, it breaches South Africa's international obligations towards the Contracting Parties of WIPO international treaties, by enabling violations of exclusive rights of communication to the public and making available protected in other jurisdictions.

### **S. 19D: Implementation of the Marrakesh treaty**

This Section should be developed in accordance with the Marrakesh Treaty<sup>2</sup>, which authorizes production and distribution of accessible format copies by authorized entities representing beneficiary persons under certain specific conditions. Notably

- additional provisions are required to establish the process to recognize authorized entities, better define those entities with regards to their mission of serving people with visual impairments and set out their obligations when performing the uses authorized in the treaty. We welcome the publication and consultation on future regulations, as set out in S. 39 (2).

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<sup>2</sup> <https://wipolex.wipo.int/en/text/301019> - Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.



- Treaty provisions setting out separate regimes for authorized entities and for persons acting on behalf of visual impaired persons should be implemented (articles 4.1 and 4.2 of the Marrakesh Treaty).
- the mechanisms to enable exchanges of accessible format copies should not affect the right of distribution, by unduly authorizing imports and exports of accessible format copies. Furthermore, the mechanisms set out in the Treaty aim at facilitating access by visually impaired persons only and should not be replicated in other circumstances.

WIPO provides technical assistance to implement the Marrakesh Treaty and has created a service to facilitate its practical application, the Accessible Books Consortium, which includes IPA among other stakeholders. The ABC Book Service allows an authorized entity in one country to find and obtain accessible books produced by an authorized entity in another country, and to provide them to beneficiaries in their own jurisdiction. To support this process, the ABC book service features a shared catalogue of accessible books produced by participants, a system to manage permissions, and a secure facility for requesting, uploading and downloading files.

IPA respectfully recommends South Africa seeks assistance from WIPO in refining S. 19D and other provisions implementing the Marrakesh Treaty.

## **Section 27: Protection of technological protection measures (TPM)**

IPA welcomes the aim to review in the **definition** of TPMs. This definition, contained in **Clause 1 of the Bill**, is of key importance in order to make South African copyright compatible with the WIPO Copyright Treaty and enable accession.

However, the definition as proposed in the Bill remains problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. This could facilitate abuses. Because TPMs are a crucial enabler of digital businesses and in that sense might not be designed to have the effect of preventing infringement, but rather to enable access. If that is the case, circumventing TPMs might no longer be an infringement, therefore impairing the level of protection set out in the WCT.

IPA submits the definition in Clause 1 be removed and replaced as follows: *“Technological Protection Measure means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation is designed to one to effectively protect a right of a copyright owner in a work or effectively control access to a work.”*

The Bill continues to include provisions (Sections 28P and 28S, which are not subject to consultation but are nevertheless made available in the consultation documents, arguably as consolidated text) that limit significantly the protection granted to TPMs through the application of several exceptions, enabling breaking a TPM for non-infringing purposes.

These provisions may place the burden of proof of infringement on copyright owners, without them having a real possibility to detect infringing acts and facilitates abuses in bad faith by opening a general loophole. Instead, we submit that the approach to be adopted should not undermine TPM protection. Wording from existing legislation in other jurisdictions could be a source of more balanced solutions to replace those Sections. For instance, the EU Infosoc Directive 2001 ensures that solutions offered by copyright owners have to be sought as first recourse, instead of giving users protection from infringing liability through the application of general exceptions.

We conclude by calling on the Portfolio Committee to immediately start a due process to consider the bills afresh, thereby rejecting the version now subject to consultation. We further call for a new approach to the provisions opposed by all creative industries sectors and by South Africa's main trade partners, which have motivated numerous suggestions of amendments by a committee of experts and constitutionality reservations by South Africa's President. Insisting on the same solutions is a mistake. IPA is of the view that the only way forward is to start a new process that allows a transparent, evidence based and non-biased review of South Africa's copyright law, in a way that ensures the survival and sustainability of South African creative industries.

We thank you for your time and consideration and remain available for any additional information that you may require.

Yours sincerely,

Jos  
Secretary General

