



**The Director General, Department of Trade and Industry
For Attention: Ms Meshendri Padayachy
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Pretoria
SOUTH AFRICA**

Email: MPadayachy@thedti.gov.za

16 September 2015

Dear Sir, Madam

**DRAFT COPYRIGHT AMENDMENT BILL, 2015:
SUBMISSION OF THE PUBLISHERS' ASSOCIATION OF SOUTH AFRICA (PASA)**

We respond to the various proposals made in the draft Copyright Amendment Bill published on 27 July 2015, the due date for submissions for which was subsequently extended to 16 September 2015.

PASA supports the submissions separately made by the Association of Non-Fiction Authors of South Africa (ANFASA), the Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd, the South African Federation Against Copyright Theft (SAFACT) and the South African Music Rights Organisation (SAMRO). Moreover, PASA supports the submission made by the International Publishers' Association (IPA), the International Association of Scientific, Technical and Medical Publishers (STM) and the International Federation of Reproduction Rights Organisations (IFRRO) from an international copyright context. In **Annexure I** to this letter, we set out some proposals for textual improvements to the draft Bill. Each of these proposals constitutes a whole draft and each proposed section should be incorporated as such, not selectively, in our respectful view.

Where PASA has not provided comments, this should not be understood as support or opposition. The time available being short, PASA has focused on areas where its members are directly affected. PASA does, however, also have an interest that is holistic, i.e. maintaining a supportive environment for creativity and innovation. Some of the proposed amendments are therefore needed and we commend the inclusion of these, while others would be highly detrimental to these objectives. The latter are the proposed amendments we focus on.

About PASA

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 field of non-fiction, fiction, education, academic and trade publishing. PASA's membership comprises the vast majority of South African publishing houses, for profit and non-profit, university presses, small and medium sized companies and multinational publishing enterprises. PASA is committed to creativity, development of literacy and the exchange of ideas and encourages a culture of reading. PASA promotes the contribution of literature in all its forms to social and economic development, both of communities and individuals through the contribution of intellectual property. PASA is a full member of the International Publishers Association (IPA), as are 60 other publishers' organisations from approximately 50 countries.

General Observations and Summary of Position

PASA welcomes a revision of Copyright Act, 1978 (the Act), among other things to enable South Africa to deal with the requirements of the digital age and thereby to ensure the livelihood of authors whose works are disseminated by the use of digital technology. We also welcome initiatives to deal with topics such as access to copyright works for the visually impaired and otherwise disabled, the use of orphan works and a resale right for artistic works, including works of craftsmanship. PASA also sees the rationale of finally devising a system that delivers benefits to both performing artists and producers of sound recordings; after all "needletime" has been part of our law for considerable time, but more work seems needed to implement the needletime provisions in the Act and the Regulations correctly.

That said, we are concerned about the way in which the draft Bill was conceived and drafted. Many of the updates needed to protect the rights and interests of creators, publishers and producers will be undone by new exceptions and defences not requiring permission or payment of royalties, resulting in the benefits intended to be granted to rights holders, especially authors, by the draft Bill being only apparent and not real.

Specifically the proposed exceptions and defences create a very real risk of copyright works being capable of being taken by entities with whom authors or their publishers have no relationship, without permission or payment, where those entities could have been legitimately served by commercial supply or where those entities even use works ultimately to advance their own business models.

Particularly technology platforms and multinational internet companies stand to benefit from a one-sided transplant of fair use from the United States (US) into South African law, without considering that the other copyright elements in South Africa, are not ready to make such a transplant a success or a balanced proposition: these elements include insufficient penalties, a court system ill-equipped to cope and manage a five-fold or even ten-fold increase of "fair use" litigious cases, compared to the well-established "fair dealing" concept.

In summary, PASA's view is that modernisation of copyright is desirable, but should not be rushed. The current draft Bill is ample demonstration that rushing the drafting of legislation not only leads to clerical errors, but errors in design and concept, which can only lead to faulty implementation.

For this reason PASA proposes firstly, a "Fast-Track Modernisation", i.e. adoption of some aspects of the current draft Bill and allowing for more time to consider more fully the impact and need of other proposed amendments, and secondly, a "Moderate Track to Modernisation" of the remainder of the draft Bill:

Fast-Track Modernisation (paras 1-3 below):

1. Performers' Protection and Producers' Protection for musical performances and sound recordings.
2. Introduction of an exclusive right of communication and, either subsumed in it an exclusive right of distribution, or preferably a distinct exclusive right of distribution.
3. Ratification of the Marrakesh Treaty and adoption of provisions for the visually impaired that allows the import and the export of accessible format files legitimately made or received into South Africa.

Moderate Track to Modernisation (paras 4-7 below):

4. A Resale Right applying both to Artistic Works and to Craft Works.
5. Exceptions and Limitations, Copyright Transfer and Licensing Provisions and Orphan Works;
6. Transient Copies, Safe Harbours, Technological Protection Measures and Rights Management Information Protection;
7. Enforcement Provisions and Administrative Copyright (Tribunal, Commission, Supervision of Collecting Societies).

PASA comments on specific clauses of the draft Bill

(Note – Paras 1-3 are to be understood as fast-track, while paras 4-7 as proposals for the moderate track to modernisation)

FAST-TRACK MODERNISATION (PARAS 1-3)

1. "Needletime" – Clause 9 of the draft Bill

PASA is not in a position to assess if the newly proposed amendments will succeed in creating a favourable "needletime" environment for domestic artists and record companies, consistent with international copyright norms, but in any event supports the effort to do so. PASA defers to the views expressed by the music copyright sectors: the composers, music publishers, performing artists and producers of sound recordings. PASA notes, however, that much of the value of licensing for the performing arts will depend on the efficiency of the court

system and the inability of would-be users to frustrate and delay entirely justified royalty payments. For this reason, some elements of enforcement may be part of fast-track “work in progress” throughout the first phase of modernisation.

For this reason, it is essential to preserve the sanctity of contract and to establish the basic principle that market value should be the starting point in the determination of any licensing fees to be adjudicated before a Copyright Tribunal. Would-be users should not be able to avoid payment altogether by lodging a claim or counter-claim against the amount or the rate of the licensing fees. A mechanism should be devised to make sure that a to-be-determined amount is provisionally paid to a Collecting Society (but not distributed) and that only an amount that is fairly placed in dispute is paid into Court and that interest accrues for the benefit of the party ultimately entitled thereto. Such mechanisms exist in other countries, notably in Germany, precisely to avoid any party lodging frivolous or dilatory claims purely to avoid and delay payment of due amounts.

2. The exclusive rights of Communication to the Public and Distribution - Clauses 4, 5, 7 and 8 of the draft Bill

PASA has a longstanding position that the rights granted by copyright need to be updated, specifically by adding an exclusive right of communication to the public for internet-based dissemination of works and services, as well as an exclusive distribution right, for e-commerce of tangible goods supplied offline (e.g. USB sticks, DVDs, e-book devices pre-loaded or cloud-based).

South Africa is one of those all too rare countries in the South that has enormous culture to share and a viable publishing and creative producer sector which is capable of doing it. In the digital environment and in an environment where e-book platforms establish a borderless competitive environment, it is key that South African authors and their South African publishers have a level-playing field and get the same protection as their international counterparts.

South Africa should build its copyright law playing to its strength, encouraging its creative innovation sector, rather than undermining this sector based on a dated claim of South Africans stuck in the role of passive receivers, needing “access” to a perceived uniquely Northern domain, called “knowledge”. Rather, South Africa should awake and engage in a dialogue leading to greater wisdom and confidently claim its place as an active contributor to global cultural diversity and ever greater universal knowledge.

For this reason, PASA reiterates its position in favour of acceding to the WIPO Internet Treaties, especially the WIPO Copyright Treaty (WCT).

3. Exceptions for the visually impaired and otherwise disabled – Clause 22 of the draft Bill and related definitions

PASA was taken aback by the view expressed at the Conference on 27 August 2015 that the DTI is sceptical about the Marrakesh Treaty. PASA has played a very active role and fully supports access for the visually impaired, be that through licensing agreements, commercially increasingly available “born-accessible” publishing products and services, and exceptions as a last resort (publishers will increasingly design their workflows such that “accessibility” by the print disabled is part of the initial design – hence the term “born-accessible”). Ratifying the Marrakesh Treaty fully, i.e. in such a way that permits South Africa not only to import accessible format copies but also operating a hub for export, seems highly desirable not only out of self-interest for the South African community of the print disabled, but also for South Africa taking its responsibility for the whole of the African Continent. At the Conference, it was said that the Marrakesh Treaty did not go far enough in the view of international harmonisation. Whether this is so or not, PASA considers that this is not a case where the DTI should allow its views to stand in the way of a perfectly good solution, consistent with human rights legislation for a key community, and on which consensus exists internationally.

The full ratification of the Marrakesh Treaty would and should in PASA’s view be another sound reason to accede to the WCT. We understand that the DTI does not recognise the immediate benefit of protecting South African rightsholders abroad as a sufficient reason to accede to WCT. From PASA’s standpoint, this is sufficient and the benefits of becoming an active international participant both in the Marrakesh and WCT would be even greater.

MODERATE TRACK TO MODERNISATION (PARAS 4-7)

4. Resale Right in respect of Artistic Works and Craft Works - Clauses 6 and 9(k) of the draft Bill and related definitions

In PASA’s view, an artists’ resale right is a justified right of copyright and would benefit living artists and the families of famous deceased artists. Recognising the right would also allow the repatriation of amounts collected for South African authors abroad.

The trend in the entire world is for the recognition of an artist resale right and certainly those illustrators who work with book publishers are artists in their own right, and would benefit. **In PASA’s view, a similar right should be recognised for original manuscript of authors and their heirs.** In some cases, original manuscripts of authors, e.g. “*Long walk to freedom*” by Nelson Mandela, may be appropriated and sold in auction. The heirs should benefit or a public interest foundation designated by the heirs if they so choose (which frequently happens).

5. Exceptions and Limitations, Copyright Transfer, Licensing, Orphan Works

Copyright law, since its inception, has always striven for a balance. As Lord Mansfield cogently observed in 1785, [...] “*we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.*[...]”

(*Sayre v. Moore*, 1 East 361 n. (b), 102 Eng.Rep. 139, 140 n. (b) (K.B.1785), Register's Supplementary Report 13.)

PASA fully supports this view of copyright and recognises that carefully crafted exceptions and limitations are part of this equation. However, exceptions must not become the rule and where transaction costs are low, and where multiple copying risks depriving the South African publishing industry and other rightsholders, PASA cannot support overbroad exceptions.

Publishing in South Africa is 80% educational publishing and, therefore, the notion that copying is acceptable if it is done by a teacher or educational institution, or condoned by them if undertaken by a copy shop or by students, deprives the South African authors and publishers of their livelihood. Copying without permission erodes a viable publishing industry in South Africa: the effect will be that future generations will not obtain locally published or well-adapted texts, but South African authors will have to compete with foreign authors for the attention of distant publishers.

These dangers are real, as the example of Canada illustrates. Due to overbroad educational exceptions, an ever greater proportion of Canadian students does not purchase textbooks, but copies them. The consequence is that publishing in Canada for the educational market is becoming unviable. The damage in lost revenue will be considerable and very real (see attached memorandum, **Annexure II**). The same fragility goes for the booksellers: an increase in free copying reduces the viability of booksellers and reduces the wide availability of books.

5.1 Libraries and Archives - Clauses 15, 22 and 24 of the draft Bill

PASA notes that WIPO has published a study by Kenneth Crews on national library exceptions in more than 150 countries¹. Whilst not all national examples would be suitable for South Africa, it may be possible to find some useful examples on exceptions and limitations for the following purposes, which PASA would consider positively:

- a. Long-term preservation;

¹ http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_3.pdf

- b. On the spot consultation on dedicated terminals on library premises, subject to fair compensation in the absence of direct publisher licensing agreements;
- c. Virtual learning environments, subject to collective licensing fees;
- d. Orphan and Out-of-Commerce Works that form part of the cultural heritage, subject to acceptable collective licensing agreements;
- e. Accessibility for the visually impaired, implementing the Marrakesh Treaty for Visually Impaired Persons.

Assuming the existence of a sound copyright system that protects authors and the industries to which they provide their works, it is only for the cases where there is a *failure in the market* for the supply of copyright works or permissions to use such works in relation to exclusive rights granted by copyrights that the need for legislated exceptions or limitations may arise. For this purpose, it is necessary to determine the needs of the market and to determine if and how the market fails to supply such needs. From the perspective of international law, this principle is set out in the three-step test of both the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), to which South Africa is a party, namely that the exception must relate to a “special case” which does not conflict with the normal exploitation of the copyright work and that does not unreasonably prejudice the legitimate interest of the author or the right holder, as the case may be.

5.2 Distance Education – Clauses 13 and 14 of the draft Bill

Any new exceptions on distance education, educational uses or fair use must be without prejudice to existing functioning licensing markets. Similar to the change in the music market away from the whole LP to the single song, the reassurance that not whole books are copied is insufficient. Whenever licensing options are available for a substantial part of a work/book, licensing should take precedence over exceptions. Thus PASA opposes the overbroad exception relating to distance education, and copying in educational establishments and also the fair use exception as they apply to distance education. In relation to these exceptions, PASA provides **draft language** of its own in **Annexure I**.

5.3 Fair use - Clause 14 of the draft Bill

PASA opposes the introduction of fair use, as a transplant from the US that will lead to increased levels of litigation and legal uncertainty. If fair use were to be adopted, then US punitive damages and statutory damages should also be imported as these balance out the risk profile for infringements.

After careful evaluation, the UK did not introduce fair use, even though its many copyright exceptions are harmful to its creative sector. The reason was that the UK realised that, after fair use was codified in the US copyright legislation, well over 200

fair use cases had to be litigated in the US – and that is just since 1978. Meanwhile, the UK, with fair dealing exceptions similar to South Africa, in the same period had just over 20 cases before its court. Handing over determining public policy of what is falling under an exception to the courts will not promote democratic development in South Africa and should be rejected for that reason alone. In any case, it is an open question whether the South African court system would cope with a great number of contentious cases.

The notion that a broadly flexible regime of exceptions in copyright, including fair use, is good for economic growth is disputed. It is a myth that has recently been **discredited** in a response to a study by the **Lisbon Council**² – a “think-tank” funded by large corporations, including Google. In his response to the Lisbon’s Council’s *IP Index Report*, **Professor Ford dismisses it as “junk science”**.³ He concludes:

“The IP Index Report’s conclusion that “[c]ountries that employ a broadly ‘flexible’ regime of exceptions in copyright also saw higher rates of growth in value-added output throughout their economy” has zero support. In fact, given that the results can be fully explained by random variation, the results presented in the IP Index Report are better and more honestly interpreted as evidence of no relationship between copyright flexibility and economic outcomes.”

From the answers given at the various meetings hosted by the DTI in August, there is no indication that the DTI has received any legal opinion in respect of the introduction of the kind of fair use and the broad exceptions for education proposed in the draft Bill, especially in relation to South Africa’s obligations under the Berne Convention and the TRIPS Agreement. There are no persuasive arguments that should lead South Africa to change its current copyright regime. Rather it would be appropriate to build further on its own legal traditions, including the concept of fair dealing.

DALRO has provided a balanced solution on licensing for moderate fees and at reasonable costs for course packs, e-reserve and other related uses of works lawfully available within libraries.

² B. Gibert. 2015. “The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs, and Prosperity, Innovation Economics Center” The Lisbon Council. Available at:

<http://www.lisboncouncil.net/publication/publication/122-the-2015-intellectual-property-andeconomic-growth-index.html>

³ Prof George S Ford, PhD. 2015. “The Lisbon Council’s 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder”. Phoenix Center for Advanced Legal & Economic Public Policy Studies. June 29, 2015. Available at:

<http://www.phoenix-center.org/perspectives/Perspective15-03Final.pdf>

5.4 Compulsory Licences for Reproduction and Translation - Schedules A and B to the draft Bill

“Compulsory licence” for print works not available in South Africa

From the outset, we point out that the new definition of “reproduction” is erroneous, in that it has the effect, which we can only assume is unintended, of removing the existing definition in relation to all other types of copyright works. The introduction of this erroneous definition would undermine the proposed Schedule B.

Although not entirely clear from the proposed Schedule B, it seems to create the framework for a compulsory licence for the republication by reproduction of works which are out of commerce in South Africa.

Other countries, notably in the European Union, are coming to grips with the making available of out of commerce works. The European Union favours a licensing solution, the European Commission having presided over a Memorandum of Understanding concluded between library associations, publishers and copyright collective management societies for the reproduction of out-of-commerce works for libraries and archives. France has recently passed legislation to facilitate the republication of out-of-commerce French works, subject to the right holder having a right of first refusal to do so. In both cases, the licence relates only to works first published in the country concerned, not to all works. Germany has similar legislation for German works. South Africa should thus focus and consult primarily with stakeholders on South African works first, before attempting to devise a scheme for all works in the world, consistent with international obligations.

There is no indication that the DTI has taken legal advice on the compliance of this proposed legislation, which in essence amounts to the framework for a compulsory licence, insofar as it relates to South Africa’s compliance with the Berne Convention and the TRIPS Agreement, especially considering that works first published in other Convention countries are covered, indeed targeted, by this compulsory licence provision. For this reason alone, we submit that this amendment should not be proceeded with in the next version of the Bill.

5.5 Copyright Transfer

5.5.1 State Copyright Law – Clauses 3 and 26(a) of the draft Bill:

In PASA’s view the extension of state copyright and prohibiting its assignment is highly detrimental and will negatively affect private public partnerships in the cultural sector. We understand that the Department of Science & Technology also requests

DTI to reconsider this extension. We urge the DTI not to carry the amendments of sections 5 and 22(1) forward into the next version of the Bill.

5.5.2 25-year Barrier to Assignment – Clause 26(b) of the draft Bill:

In PASA's view the transplant of a right of termination into South African law (US law includes such a right after 35 years) should only be undertaken after careful consideration. The risk is that South African publishers are driven to recommend to authors to enter into agreements with foreign publishing houses that do not have such a barrier. The issue deserves greater study, even if well-meaning. Any provision should also not have retroactive effect on existing licensing and copyright transfer agreements. Otherwise litigation may result. The new provision also needs to be read with the new s39A, which purports to make any negotiated settlement void. A retroactive effect of limiting an assignments effect would lead to great legal uncertainty and increased litigation.

5.6 Licensing Provisions – Clause 37 of the draft Bill

In PASA's view the sanctity of contract should prevail. The Roman-Dutch principle of “pacta sunt servanda” – contracts voluntarily agreed upon must be binding, underlies the entire legal system and tradition of South African law. In some cases, the law can skew the principle to protect a party and courts should have the power to disregard grossly unreasonable terms. However, the blunt instrument proposed in the draft bill's revised section 39A, to declare contracts unenforceable would have terrible consequences.

The proposed Section 39A, importing a blanket unenforceability of all contractual terms purporting to prevent or restrict the doing of an act which would not infringe copyright or which purport to renounce a right or protection afforded by the Act, should be removed, and in its place, contract override should be considered on the basis of exception by exception.

A blanket contract override is, in our submission, not only unwarranted but will also interfere with the normal trading in copyright works. We question whether the blanket application of contract override in combination with certain broad exceptions being proposed, will impact on the Constitutional right of South African citizens to the freedom of trade occupation and profession.

Conflict between licensing terms and the scope and reach of exceptions which override contracts will create uncertainty. If copyright exceptions were allowed to overrule commercial terms, it is quite probable that this will lead to cases where there are disagreements between users and rights holders over the scope and reach of exceptions. For instance, some users may feel that a contractual provision limits an exception, when the rights holder believes the

use does not fall within the scope of an exception. In such a scenario, the contract would actually reduce the risk of misunderstanding and provide legal certainty where an exception cannot.

Contracts, specifically licensing, are the mechanism by which digital products are made available to consumers. A blanket contract override provision covering all conceivable provisions of the Act allowing certain uses will make licensing unmanageable by virtue of the uncertainty it creates.

Often the demand for contract override in exceptions is based on the incorrect notion that rightsholders employ contracts to override specific exceptions. There is no evidence that such a practice is common or even exists. On the contrary, there are many uses under exceptions where there is no contract between the rightsholder and the user (for example for quotation, criticism and review and reporting on events).

Contract override would not only affect licences, which give access to copyright works, but also other contracts where copyright is the subject, even settlement agreements concluded to resolve disputes concerning copyright infringement. It is not uncommon that, in a dispute as to whether the exclusive rights of copyright apply or not in the light of an exception, the parties, for the purpose of settlement, agree to disagree on the applicability or not of the exception. Statutory contract override will make such settlements impossible due to key clauses, if not the whole agreement, being made unenforceable, thereby compelling the parties to proceed with litigation.

A case could be made out for specific exceptions to provide that unfair contract terms be unenforceable. Such specific would be for circumstances where a contractual relationship between the rights holder and user. As mentioned before, this should be carefully evaluated, exception by exception.

5.7 Orphan works - Clauses 2, 25, 27 of the draft Bill and related definitions

Clause 2 of the draft Bill, amending Section 3 of the Act, provides for perpetual copyright subsisting in orphan works, as defined. From the outset we must point out that this provision has no rationale in resolving the question of orphan works and holds great risk of unintended consequences. This clause should not appear in the next version of the Bill.

PASA believes that the resolution to the questions surrounding the use of orphan works are not answered by the draft Bill, nor are confiscatory provisions the solution. PASA believes that the key three questions necessary to resolve in the case of orphan works are:

- (i) What is the liability of a user engaging in a use of a work wrongly classified as an orphan work? In other words, the legislation should deal with “false positives”. In PASA’s view, any user having engaged and documented a diligent search, should be

- liable only prospectively, i.e. should only be subject to the right to prohibit and damages from the moment the erroneous status is discovered.
- (ii) What uses can be made of (true) orphan works? In PASA's view, a collective licensing agency should be entrusted with the right to issue licences in lieu of the absent owners and act as "good steward" of the "parents" of the work that cannot be found or are unknown. There is no need for the State to become the designated owner or administrator for such works.
 - (iii) What should happen in the event of the "return of the rightsholder"? Firstly, rightsholders should always be able to return and claim their role in relation to a work temporarily administered as an orphan. Authors and their assigns should not forfeit this right, ever. Secondly, authors returning should only be given the ability to control rights prospectively (absent bad faith on the part of the user): Where a user has greatly invested and promoted the orphan work, their rights should vest in some rare cases and be allowed to continue for a finite period to recoup the investment (e.g. for 3-5 years into the return), but already during this time the returning owner should be accorded a reasonable royalty.

6.1 Transient copying – Clause 15 of the Bill

The provisions on transient copying ("Temporary reproduction") are vague and highly detrimental. These should be omitted. There is actually at present no legal uncertainty over the treatment of transient copies and the issue is best left alone.

6.2 Technological Protection Measures and protection of copyright management information

The provisions should be brought in line with the WCT. The current draft is insufficient and too narrow to be effective.

7.1 Need for a Presumption of Subsistence of Copyright in Legal Proceedings

PASA supports DALRO'S submission regarding the need for such presumptions and supports the draft language submitted and incorporate into **Annexure I** hereto.

7.2 Damages

PASA supports DALRO'S submission regarding the need for such presumptions and supports the draft language submitted and incorporate into Annexure I hereto.

PASA also supports the submissions of SAFACT and of DALRO regarding amendments to Section 26 and 27 of the Act.

7.3 Criminalising Copyright Holders

PASA in strongest terms opposes section 27(4)(d) of the Act, which would create a criminal offence for “unreasonably” withholding a copyright permission. The wording of the section is vague, but its basic tenet is wholly unsupportable from the point of view of copyright – in fact it denigrates copyright as a concept – and the point of view of criminal law. From copyright point of view this is a provision in violation of Article 9(2) of the Berne Convention – a disproportionate limitation of the exclusive right of the author. From a criminal law perspective, the provision is so vague that – it is submitted – it does not constitute a sufficient basis to create a criminal offence (with a hefty penalty of prison up to ten years).

Finally, in our view the provision is also unconstitutional, because the freedom to publish also includes the freedom NOT to publish and the criminal offence is a disproportionate intrusion into that essential freedom.

7.4 Copyright Tribunal, Collective Licensing

Due to the short time period afforded to submit written comments on the draft Bill, PASA is unable to consult sufficiently with its members about the possible effect of the provisions dealing with a broader jurisdiction of a Copyright Tribunal and rules and supervisory authority on Collecting Societies. PASA therefore refrains from expressing a view, but would ask that these provisions also be put on a more Moderate Track to Modernisation.

On the Intellectual Property Tribunal, we note the broad scope of the jurisdiction of the proposed Tribunal and that its functions may usurp the role of the Courts, our principal concern is that the amendment has resulted in the original function of the Tribunal, namely the adjudication of licensing schemes, having been lost by the proposed repeal of Sections 30 and 31 of the Act.

We submit that the complaints that there may have been about the operation of the existing Tribunal in the past do not justify the extent of the overhaul proposed by the draft Bill and that, in the absence of a need identified by the public for a Tribunal with such extended powers, we submit that the amendments in terms of the draft Bill should not be proceeded with and that the present provisions relating to the Tribunal should remain, and that any deficiencies that may have been found in the procedures of the Tribunal should be corrected by passing appropriate regulations in terms of Section 29(3)(a) of the current Act.

Consultation process

We take this opportunity to express concerns about the process in which the dti’s intentions with copyright legislation have been communicated to us and to other stakeholders and question, whether in the context of the reform of copyright, this amounts to consultation.

We have seen that recent (since 2011) consultations on the review of copyright in the United Kingdom, Australia and the European Union, and a current consultation of reforming aspects of copyright in the United States, have undertaken a very different route than that currently undertaken by the dti. What has been common in all these consultations is an expert committee researching the needs, calling evidence, consulting individually with stakeholder groups, coming up with a report and gathering feedback on the report before draft legislation is introduced. This is often a process that takes two years or more.

Our comments above note various instances where there has been no consultation, or even research on the needs for reform, with the notable exception of the Copyright Review Committee chaired by Mr Justice Farlam, whose report was delivered in 2011 and released to the public in 2012.

The initially proclaimed consultation period was a mere 30 calendar days from 27 July to 26 August, later extended to 16 September. (This compares to the 3 month consultation period given by the Department of Justice on the new Cybercrimes Bill published shortly after this draft Bill.).

Thus, the brevity of the consultation period has not enabled us to consult with our many members, all of whom are directly affected by the many proposals in the draft Bill. The only reason why we have been able to communicate this position to our members at all is because our Annual General Meeting just happened to have been held within the extended consultation period – had the consultation period not been extended, not even this opportunity would have been available to us. A further effect of the short consultation period is that constructive proposals which we wish to make in relation to certain matters cannot be drafted and circulated for support from our membership.

We believe that the absence of a proper consultation on, firstly the issues, then policy proposals and then, as a final step, on text of legislation, means that the opportunity to contribute to good legislation has been lost insofar as the draft Bill is concerned, and that the solution to remedying key policy issues will lie in the approach of prioritising some of them for fast tracking and leaving others for later, as proposed in this submission.

PUBLISHERS' ASSOCIATION OF SOUTH AFRICA (PASA)
16 September 2015

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Mpuka Radinku', with a stylized flourish at the end.

Mpuka Radinku, Executive Director, PASA

ANNEXURE I: SPECIFIC SUGGESTIONS FOR IMPROVED TEXT OF THE BILL

For an electronic copy, please contact Mpuka Radinku by email: mpuka@publishsa.co.za>

The exclusive right of Communication to the Public

Sections 6, 7, 8, 9, 11A, 11B and 27(1) of the Act to be amended

The exclusive right of Distribution and its corollary exception of Exhaustion

Sections 6, 7, 8, 9, 11A and 11B of the Act to be amended

Replace clauses 2, 3, 4, 5, 7 and 8 of the draft Bill with the following:

Amendment of section 6 of Act 98 of 1978

[x]. Section 6 of the principal Act is hereby amended:

(a) by the addition after paragraph (e) of the following paragraphs:

“(eA) the issue to the public of copies of the work, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the work not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;

(eB) communicating to the public of the work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access the work from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (g) of the following paragraph:

“(g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (eB) **[(e)]** inclusive.”

Amendment of section 7 of Act 98 of 1978

[x]. Section 7 of the principal Act is hereby amended:

(a) by the addition after paragraph (d) of the following paragraphs:

“(dA) the issue to the public of copies of the work, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the work not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of

copies of a work does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;

(eB) communicating to the public of the work, by wire or wireless means, including the making available to the public of the work in such a way that members of the public may access the work from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (f) of the following paragraph:

“(f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (dB) **[(d)]** inclusive.”

Amendment of section 8 of Act 98 of 1978

[x]. Section 8 of the principal Act is hereby amended:

(a) by the addition after paragraph (d) of the following paragraphs:

“(dA) the issue to the public of copies of the film, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the film not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a film does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;

(eB) communicating to the public of the film, by wire or wireless means, including the making available to the public of the film in such a way that members of the public may access the film from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (f) of the following paragraph:

“(f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (dB) **[(d)]** inclusive.”

Amendment of section 9 of Act 98 of 1978

[x]. Section 9 of the principal Act is hereby amended –

(a) by the substitution for paragraph (e) of the following paragraph:

“(e) communicating the sound recording to the public^[.] by wire or wireless means, including the making available to the public of the sound recording in such a way that members of the public may access the sound recording from a place and at a time individually chosen by them;”

(b) by the addition after paragraph (e) of the following paragraph:

“(f) the issue to the public of copies of the sound recording, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the

copyright owner and the act of putting into circulation outside the Republic copies of the sound recording not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a sound recording does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic.”

Amendment of section 11A of Act 98 of 1978

[x]. The following section is hereby substituted for section 11A of the principal Act:

11A. Nature of copyright in published editions

“Copyright in a published edition vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Making a reproduction of the edition in any manner;
- (b) the issue to the public of copies of the edition, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the edition not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of an edition does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;
- (c) communicating to the public of the edition, by wire or wireless means, including the making available to the public of the edition in such a way that members of the public may access the edition from a place and at a time individually chosen by them.”

Amendment of section 11B of Act 98 of 1978

[x]. Section 11B of the principal Act is hereby amended –

(a) by the addition after paragraph (e) of the following paragraphs:

- “(eA) the issue to the public of copies of the program, including the act of putting into circulation in the Republic copies not previously put into circulation in the Republic by or with the consent of the copyright owner and the act of putting into circulation outside the Republic copies of the program not previously put into circulation in the Republic or elsewhere; provided that the issue to the public of copies of a program does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation or any subsequent importation of such copies into the Republic;
- (eB) communicating to the public of the program, by wire or wireless means, including the making available to the public of the program in such a way that members of the public may access the work from a place and at a time individually chosen by them;”

(b) by the substitution for paragraph (g) of the following paragraph:

- “(g) doing, in relation to an adaptation of the computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (eB) **[(e)]** inclusive;”

Amendment of section 27(1) of Act 98 of 1978

[x]. Section 27(1) of the principal Act is hereby amended by the addition after paragraph (f) of the following paragraph:

"(g) communicates to the public for the purpose of trade or for any other purposes to such an extent that the owner of the copyright is prejudicially affected,"

Fair Use

Amendment to Section 12 and new Section 12A of the Act

Subsections to be inserted into section 12 and/or 12A, as the case may be:

“subsection XXX Copying and use of extracts of works by educational establishments:

(i) The copying of extracts of a relevant work by or on behalf of a pupil, the staff or an educational establishment does not infringe copyright in the work, provided that—

(aa) the copy is made for the purposes of instruction for a non-commercial purpose, and

(bb) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

(ii) Copyright is not infringed where a copy of an extract made under subsection (i) is communicated by or on behalf of the educational establishment to its pupils or staff for the purposes of instruction for a non-commercial purpose.

(iii) Subsection (ii) only applies to a communication received in or outside the premises of the establishment if that communication is made by means of a secure electronic network accessible only by the establishment’s pupils and staff.

“(iv) Not more than 5% of a work may be copied under sections 12 and s12A by or on behalf of an educational establishment in any period of 12 months, and for these purposes a work which incorporates another work is to be treated as a single work.

“(v) Acts which would otherwise be permitted by this section are not permitted if, or to the extent that, licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that fact.

“(vi) The terms of a licence granted to an educational establishment authorising acts permitted by this section are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted by this section.

(vii) If a copy made under this section is subsequently dealt with—

(aa) it is to be treated as an infringing copy for the purposes of that dealing, and,

(bb) if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes.

(viii) In this section “dealt with” means—

(aa) sold or let for hire,

(bb) offered or exposed for sale or hire, or

(cc) communicated otherwise than as permitted by subsection (iii) hereof.”.

[Note: Wording based on new Section 36 of UK Copyright Patents and Designs Act, 1998 (as amended in 2014) available at:

<http://www.legislation.gov.uk/ukxi/2014/1372/regulation/4/made>]

Need for a Presumption of Subsistence of Copyright in Proceedings

Amendment to Section 26 of the Act, new sub-section (4)

Section 26(4)

(a) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

(i) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and

(ii) the author, performer, producer or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

(b) Where any matter referred to in subsection (4)(a) is at issue and an assignment of the copyright, or an exclusive licence granting an interest in the copyright, has been proven to exist between the author, performer, maker or broadcaster, the assignee or exclusive licensee named in that licence shall be presumed to be the owner or exclusive licensee of the copyright in respect of the transferred or licensed rights in question, provided that this presumption shall not apply in any dispute between the author, performer, producer or broadcaster and the named assignee or licensee.

[Note: adapted from Section 34.1 of the Canadian Copyright Act, adapted to the South African context where save for cinematograph films there is no copyright registration for works, assignments or exclusive licenses.

See: <http://laws-lois.justice.gc.ca/eng/acts/C-42/page-40.html#docCont>

Exceptions for the visually impaired

New definitions in Section 1(1) and new Section 19D of the Act

Amendment of section 1 of Act 98 of 1978 (herein after referred to as “the principal Act”)

x. Section 1 of the principal Act is hereby amended by -

(z) the insertion before the definition of “adaptation” of the following definition:

“**accessible format copy**’ means a copy of a literary work in an alternative manner or form which gives a visually impaired person access to the said work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability; provided that the accessible format copy is used exclusively by visually impaired persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;

(z) the insertion after the definition of “adaptation” of the following definition:

“**authorised entity**’ means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations

(z) the insertion after the definition of “performance” of the following definition:

“**visually impaired person**’ means a person who is blind, has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability, or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;”

Insertion of section 19X in Act 98 of 1978

x. The following section is hereby inserted in the principal Act after section 19B:

“19X Multiple copies for visually impaired persons

(1) If an authorised entity has lawful possession of a copy (“the master copy”) of the whole or part of—

(a) a published literary work, or a print or text-based version of a dramatic, musical or artistic work; or

(b) a published edition,
it is not an infringement of copyright in the work or of the published edition for the authorised entity to make, or supply, accessible format copies for the personal use of visually impaired persons to whom the master copy is not accessible because of their impairment.

(2) Subsection (1) does not apply if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it.

(3) Subsection (1) does not apply in relation to the making of an accessible format copy if, or to the extent that, copies of the work or the published edition are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.

(4) Subsection (1) does not apply in relation to the supply of an accessible format copy to a particular visually impaired person if, or to the extent that, copies of the work or the published edition are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(5) An accessible format copy made under this section must be accompanied by—

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(6) If an authorised entity charges for supplying an accessible format copy made under this section, the sum charged must not exceed the cost of making and supplying the accessible format copy.

(7) An authorised entity making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.

(8) If the master copy is in copy-protected electronic form, any accessible format copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the same, or equally effective, copy protection, unless the copyright owner agrees otherwise.

(9) If an authorised entity continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.

(10) If an accessible format copy which would be an infringing copy but for this section is subsequently sold or let for hire or offered or exposed for sale or hire or communicated to the public

—
(a) it is to be treated as an infringing copy for the purposes of that dealing; and

(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

Exception for reproduction of transient copies as part of a technical process

New Section 13A of the Act

Insert text based on Article 5(1) of the EU Copyright Directive, 2001/29

Section 13A

(1) Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or of a performance protected under der Performers' Protection Act 1967 to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 6, 7, 8, 9, 9A of the Act.

(2) "Temporary", "transient or incidental acts of reproduction" shall mean, reproductions that are inseparable and not stored for any length of time exceeding the technological process of which they are a part of; for avoidance of doubt, this definition shall be without prejudice to and not detract from any requirement contained in the Electronic Communications and Transactions Act, 2002, in terms of which a service provider or search engine is obliged to remove content to avoid liability.

Damages for infringement
New Section 24(4) of the Act

24(4). Remedies for infringement: Damages and profits

(a) In General. — Except as otherwise provided under this Act, an infringer of copyright is liable for either —

(i) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (1); or

(ii) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits. — The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages. —

(i) Except as provided by clause (b) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than Rand 7,500 or more than Rand 300,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(ii) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed wilfully, the court in its discretion may increase the award of statutory damages to a sum of not more than Rand 1,500,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than Rand 2,000. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 12A, if the infringer was: (i) an employee or agent of a non-profit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or sound recordings; or (ii) a public broadcasting entity which or a person who, as a regular part of the non-profit activities of a public broadcasting entity infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(c) (A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed wilfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered wilful infringement under this subsection.

(d) Additional Damages in Certain Cases. — In any case in which the court finds that a defendant proprietor of an establishment who claims as a defence that its activities were exempt under section 12(1) or section 12A(3) or section 13(C) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

[Note: Based on Title 17, §504 of US Copyright Act of 1976
<http://www.copyright.gov/title17/92chap5.html#504>]

ANNEXURE II – SEPARATE DOCUMENT

“AAP (American Association of Publishers): Canadian fair dealing exception chills investment in educational content”