

March 2019

## **COPYRIGHT AMENDMENT BILL: TALKING POINTS FOR PUBLISHERS AND AUTHORS**

The Copyright Amendment Bill is detrimental to publishing and authorship in South Africa, and should be rejected. The few benefits introduced by the Bill are outweighed and undermined by its provisions that place constraints on authors and publishers, that allow far more free uses of their works by others, and that fail to support enforcement of their rights.

The main issues that the literary and publishing sectors have with the Bill can be categorised into the following six points:

### **1. Regulation of publishing contracts**

The Bill will lead to the Minister for the Department of Trade and Industry being able to prescribe the terms of publishing contracts. This will create a rigid and inflexible system that interferes with freedom of contract between authors and publishers, taking bargaining power away from authors and interfering with the healthy competitive environment for the best authors. As a result, authors may end up choosing more often than not to publish overseas.

The Academic and Non-Fiction Authors' Association of South Africa (ANFASA) and the Publishers' Association of South Africa (PASA) have agreed on a charter of what should be covered by publishing contracts (see <http://www.publishsa.co.za/file/1541603357tll-apact2016.pdf>).

### **2. Royalties as remuneration, discouraging other forms of remuneration**

The backers of the Bill promise authors a better share in the income from their works, but the Bill will do this by ministerial declaration of royalty rates. This mechanism will have a major impact on publishing decisions, for instance being more selective and placing less emphasis on other forms of remuneration which are standard in the industry, such as advances, simply because of the nature of the risk taken in publishing and the Bill's apparent, mistaken assumption that every publication is a commercial success.

### **3. Over-broad exceptions for educational as well as other purposes**

The Bill creates new copyright exceptions for education as part of the so-called ‘hybrid model of copyright exceptions grounded in a fair use model’. These new copyright exceptions are more expansive than in most countries in the world, being justified by a simple statement by South Africa’s Minister for Trade and Industry, with no research to back it, that educational materials are ‘too expensive’.

As in other African countries, 80% of publishing in South Africa is educational publishing. Copyright exceptions that are too broad cut authors and publishers off from being remunerated for their work. Being under-remunerated, they will have to carry the cost of works used by the educational system. Another indirect consequence is that publishers who publish educational as well as other titles for leisure reading, or specialised titles, will no longer be able to cross-subsidise such titles.

The detrimental economic impact of these provisions was the subject of an economic impact assessment by PwC (at <http://publishsa.co.za/file/1532283880bpc-pwcreportoncopyrightamendmentbill-31july2017.pdf>). This impact assessment has not been taken into account by the decision-makers.

### **4. A new ‘fair use’ defence to copyright infringement coupled with general and specific copyright exceptions leading to intensive litigation or unwilling agreement**

The Bill changes fair dealing exceptions in the current Act into general exceptions no longer qualified by the principles of ‘fairness’. It adds new special exceptions, and side-by-side with those, a new statutory defence against infringement called ‘fair use’, claimed to be based on an equivalent provision in US law, but actually much wider than that.

Since exceptions are cases where copyright works can be used by others without permission and without remuneration, this means that authors and publishers will be cut off from the economic benefits of new ‘transformative’ ways of propagating their works.

South African authors and publishers will be at a disadvantage, since the Bill does not import mandatory statutory damages, a key factor that balances out ‘fair use’ with the interests of copyright holders in the US. Authors and other copyright owners who do not want to start this kind of litigation against infringers who claim ‘fair use’ may well end up having to unwillingly acquiesce to unauthorised uses of their works.

In important cases, there will be litigation between publishers and their traditional customers who may believe that copying will be allowed for all educational uses and will be for free. This is of course unsustainable, as 80% of the market in South Africa IS for educational use of educational books. The litigation costs will have to be borne not only by publishers but also by the very educational institutions that the exception is meant to benefit. The net result will be unbudgeted legal expenses and years of litigation – to the detriment of improving the educational environment and further prejudicing the young generation of learners.

## **5. Parallel imports**

The Bill allows so-called parallel imports – meaning if books are available in, for example, India or Malaysia at a price lower than in South Africa, the books may be imported from there. This is perhaps intended as a pro-consumer exception, but will hit the book trade very hard. South Africa is not a reading nation yet and harming booksellers in this way is highly detrimental and ill-advised for the structure of the book trade.

## **6. Transfers of copyright capped at 25 years**

The Bill caps transfers of copyright at 25 years. To a lay person that may seem a long time, but publishers often invest in their authors, supporting their further development. This may take a lot of time – it is not uncommon for the first book of an author to start selling after only the 5th, 6th or 7th title of the same author is available, which could easily be after 25 years. There is no fairness in allowing another publisher – or Amazon – walking up to the author and free-riding on the first publisher’s effort.

The Bill as adopted by the National Assembly on 5 December 2018 is at [https://www.gov.za/sites/default/files/gcis\\_document/201811/copyright-amendment-bill-b13b-2017.pdf](https://www.gov.za/sites/default/files/gcis_document/201811/copyright-amendment-bill-b13b-2017.pdf).

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For more information on PASA's position and previous submissions on the Copyright Amendment Bill, see: <http://www.publishsa.co.za/copyright/pasa-and-the-copyright-amendment-bill>