IPA
international
publishers
association

The Director-General
Department of Trade and Industry
Government of South Africa

For Attention: Meshendri Padayachy
Email: MPadayachy@thedti.gov.za

Geneva, 15 September 2015

Dear Sir or Madam,

Consultation on the draft Copyright Amendment Bill published on 27 July 2015, extended response date: 16 September 2015

The International Publishers Association (IPA) is the international federation of national publishers associations, representing all aspects of book and journal publishing from around the world. Established in 1896, our 55 members are publishers associations representing book and journal, paper and digital publishers from over 50 countries. We are an industry association, but with an important human rights mandate: IPA's mission is to promote and protect publishing and freedom to publish, and to raise awareness for publishing as a force for economic, cultural and political development.

IPA has two particular areas of expertise: education and copyright. We regularly participate in copyright reform consultations in national, regional and international fora. The IPA's Educational Publishers Forum has also been monitoring educational copyright and procurement policy issues around the world since 2009. The IPA's annual 'What Works?' conferences are events dedicated to identifying public policies that actually improve educational outcomes. The next conference, to which you are cordially invited, will take place on April 12, 2016 in London.

We have carefully examined the aforementioned draft Copyright Amendment Bill that your Department has published for consultation.

We would like to highlight a few aspects of the Bill where our expertise with respect to education, international law and our experience with a range of copyright frameworks around the world may inform your considerations and the national debate in South Africa.

We also support the detailed submission made by our South African member, the Publishers Association of South Africa, PASA.

1. General Policy Objectives

South Africa rightly gives education and access to knowledge and culture a high policy priority. There is a strong interest in making sure that the citizens of South Africa have access to high-quality schoolbooks and that literacy and reading strengthens national identity and diversity. Copyright plays an important role here, and the current Bill includes policy measures that intend to broaden access. At the same time, many proposed measures will impact on the ability of South African authors and publishers to write and publish for South African readers, including students.

As it does in other jurisdictions, South African copyright law will strongly determine whether local writers and local publishers will choose to devote their careers and invest their resources into writing and publishing local books.

Weakened South African copyright laws that enable uses without reward for creators or that undermine copyright enforcement will foster a dependence on content from foreign countries where strong copyright laws encourage creativity and investment. Currently, the South African publishing industry is well placed to compete with other publishing industries — particularly in the English speaking, developing world. Becoming a net exporter of knowledge-based goods in the future is predicated upon enabling a national copyright framework that nurtures and drives forward strong, national publishing and creative industries.

Exceptions play an important role in copyright law. They ensure that rights do not unnecessarily impede insubstantial or common-sense reproductions. Copyright exceptions, however, are not intended to enable users to avoid purchasing works altogether, nor in other ways to avoid providing creators and their publishers with appropriate remuneration. As the photocopying, digitization and making available of substantial parts of works has become more widespread, collective management organisations, such as DALRO, have stepped in to enable reasonable copying while ensuring simple, fair and balanced remuneration. These fundamental principles must be borne in mind as South Africa changes its copyright law.

2. South African and International Copyright Law

South Africa is a contracting party of the Berne Convention and the WIPO Convention, and it signed the *WIPO Copyright Treaty* (WCT) in 1997. IPA welcomes the steps undertaken in the Bill to adapt national copyright law to international obligations with a view to acceding to the WCT. We also welcome all steps that will enable South Africa to accede to *the WIPO Performances and Phonograms Treaty*.

3. WIPO Marrakesh Treaty

We would strongly urge South Africa to take this opportunity to implement the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired*

or Otherwise Print Disabled. Thirty eight countries have already signed this Treaty and nine have ratified it. The World Blind Union and the International Publishers Association call for all WIPO Member States to ratify the Treaty as soon as possible. We are proud witnesses of the collaboration between national organisations representing persons with print disabilities and publishers in South Africa and believe treaty implementation can effectively complement that. The experience gained from such legislation and other technological and practical developments will inform policies that seek to improve access for other vulnerable groups.

4. Introducing a general copyright exception following the US 'Fair Use' doctrine

We take note that the Bill introduces the term 'fair use' into a number of copyright exceptions and also repeats wording from the current United States Copyright Act on 'fair use'. IPA strongly advises against the introduction of 'fair use'-type exceptions that follow the model of US copyright law.

'Fair use' is contentious even in the United States. It does not create legal certainty, but instead describes a legal battleground where the limits of what is and what is not allowed shift incessantly. 'Fair use' does not actually change the law so much as it opens the law to endless legal debate. The only true winners from such a move will be copyright and IP lawyers.

The current 'fair use' wording in US law reflects the state of judicial practice in 1976. But technology has changed, as have business models. Best practice in copyright has moved on: incremental uses can be conveniently licensed through collective licensing mechanisms; some corporations even predicate their business models on not needing to pay for the content to which their customers want to access.

Furthermore, not all scholars agree that the US 'fair use' doctrine, as it is currently applied and to the extent that its meaning in the United States is actually knowable, complies with the international obligations of the United States under international copyright law. The US Copyright Office's own complex and growing index on 'fair use'[1] clearly demonstrates the inability of the Copyright Office itself and its users to safely determine whether any specific act restricted by copyright law will or will not fall under this exception. The United States, a country with many court cases and with many well-funded, and occasionally litigious, stakeholders on either side of the debate, appears unable to provide stable judicial guidance towards something approaching legal certainty for the benefit of all concerned. The risks of legal uncertainty would be an even greater challenge for South African rightsholders and users alike.

[1] http://copyright.gov/fair-use/fair-index.html

5. Education exceptions

The Bill seeks to expand exceptions for 'educational activities'. The exceptions are broad, numerous, and definitions are ambiguous. The only real restriction on these exceptions is t6hat the allowed use may not be for profit or commercial gain. Given the importance of non-commercial providers in the educational sector, these exceptions will, therefore allow large scale, systematic and substantial copying of educational content without any compensation for rightsholders.

We ask that these exceptions be tightened with clear wording that limits uncompensated use to a small set of clearly circumscribed special cases, which in turn do not unreasonably prejudice the interest of authors and publishers.

Copyright exceptions are intended to allow a very limited set of uses. For example, special provisions in international treaties limit exceptions to 'illustration for teaching'. Implementing the Bill as currently worded creates a clear risk that South Africa will be in violation of its international obligations under the Berne Convention. Under no circumstances do international copyright treaties allow exceptions that intend to ensure that the regular supply of educational content is provided under copyright exceptions. Exceptions are not intended to reduce costs for commercial or non-commercial suppliers, nor are they meant to replace functioning markets.

The exceptions being contemplated also create a great risk that the market in South African education will shrink to the point that it will no longer be able to sustain a local educational publishing industry.

Canada is a prime example of the dangerous consequences of such an approach. A recent study by PricewaterhouseCoopers[2] has shown the dramatic impact that broad copyright exceptions can have on the provision of textbooks. The Canadian educational publishing industry has been dealt what many believe is a lethal blow. At least one Canadian education publisher has closed as a result, others are reducing staff, and the incomes of Canadian authors have been badly affected.

South Africa, with its unique culture, history, diversity and destiny has requirements that are unlike those of any other country. Such requirements are best satisfied by locally based, innovative and viable educational publishers who understand their readers and curricula, and know how to best deliver high-quality content. Our experience shows that a vibrant, competitive and open market is the best way to develop, produce and distribute such content effectively and efficiently, at an affordable price. IPA is not aware of a government anywhere in the world which can provide quality textbooks and secure their effective and efficient distribution at a price anywhere near the low cost that effective competition achieves in the most demanding global markets.

[2] http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf

6. Unenforceability of contractual terms

Article 39A of the Bill would make contractual terms that override copyright exceptions unenforceable. IPA would like to draw your attention to possible unintended consequences.

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 rightsholders.

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

A case could be made for specific exceptions to provide that unfair contract terms be unenforceable. Such cases could cover circumstances where a contractual relationship between the rightsholder and the user is foreseen. This should be carefully evaluated, exception by exception. In many cases where publishers provide content to philanthropic endeavours for free or at extremely low cost, this is done under licence terms. For example, libraries in United Nations-designated Least Developed Countries that are given free access under the Research4Life programmes are asked not to pass this content on to other users and organisations that do not qualify for this philanthropic programme. Should such terms become obsolete this would actually deprive the most vulnerable of access to these programmes.

Equally, where publishers provide libraries for persons with print disabilities with digital files so they can make accessible copies in time for a synchronised national or international publication date, it would be very unfortunate (and commercially threatening to rightsholders) if licences could not prevent any other uses of those digital files.

In other cases, contract terms can actually provide useful practical distinctions or clarifications that replace the at-times less clear legal regulations — allowing users to make more extensive use with confidence.

7. Compulsory translations

The Bill introduces new translation exceptions and compulsory licences. We are unaware of any country that has been able to make successful use of the provisions as set out in the Annex to the Berne Convention. Likewise, we do not know of any instances where such compulsory licences have led to a substantial increase in the supply of translated works.

This proposed provision suggests that there is a lack of willingness on the part of publishers to license translations into South African languages, and that the removal of this obstacle will

lead to more translations. In practice, however, authors and publishers are more than happy to license translations at very low cost. The greatest obstacles to the more availability of more translated works remain, firstly, a lack of market incentives for such translations and, secondly, the paucity of suitable translators.

Publishers provide an important skill set and are willing to work with governments on developing fair and inexpensive translation programmes, provided there are incentives for the production of quality translations.

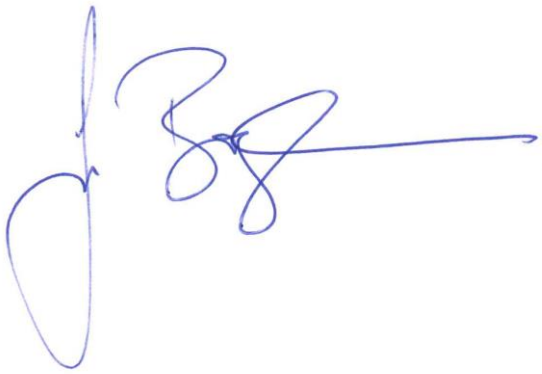
8. Criminalising Copyright Holders

IPA opposes the proposed 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 both from the point of view of copyright 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. And from the perspective of th3e criminal law, we submit that the proposed provision is so vague that it doesn't constitute a sufficient basis to create a criminal offence, particularly an offence that carries a penalty of imprisonment for up to 10 years.

The above are our main concerns. We fully support the submission by the Publishers Association of South Africa, and would welcome an opportunity to answer any questions you may have and present our perspective in more detail.

Yours faithfully



José Borghino
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