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SUBMISSION TO THE PUBLIC CONSULTATION ON THE COPYRIGHT AMENDMENT BILL (B13 – 2017)

This submission is made on behalf of IFRRO - The International Federation of Reproduction Rights Organisations – the international network of Collective Management Organisations called the Reproduction Rights Organisations (RROs) in the publishing industry – and authors' and publishers' associations in the text and image sector. IFRRO has 146 member organisations in 83 countries worldwide. Our RRO member organisations in South Africa are DALRO, the Dramatic, Artistic and Literary Right Organisation, and PASA, the Publishers Association of South Africa.

IFRRO has had the opportunity to review the submissions made by PASA and DALRO to this review and we endorse and support those submissions.

IFRRO congratulates the South African government on deciding to put in place a copyright framework that will enable the implementation of the WIPO digital treaties, in particular those particularly relevant to our sector, the WIPO Copyright Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled. IFRRO is also pleased to see the introduction of a resale royalty scheme, which will bring benefits to the visual artist community.

However, IFRRO is concerned that the wide and unremunerated exceptions for education, libraries and private copying contained in the Bill, will put South Africa in breach of its existing Treaty obligations under the Berne Convention, and have a severely negative impact on South Africa's publishing sector which is an important contributor to the South African economy, supports educational outcomes and has a strong export potential.

Copyright reform is an important element of developing the digital economy, and achieving the right balance between the interests of copyright owners and users can take time and effort, and require a careful analysis of the impact of the proposed changes. In IFRRO's view the **right** balance is one that encourages market based solutions, is flexible and responsive and ensures access to content on reasonable terms. That is not achieved by the Copyright Amendment Bill, which if implemented in its current form would have a severe impact on South Africa's production of creative and informational content.

IFRRO submits that the aspects of the Bill dealing with exceptions, fair use and reproduction for education and libraries, private copying, translation licences and orphan works (sections 10, 11, 12, 18, 22, 34) be withdrawn, and that further review, analysis and consultation be undertaken before those aspects of the Bill are reconsidered.

IFRRO makes the following comments on the Bill.

1. Support for local creative industries

IFRRO notes that in the Memorandum on the Objects of the Copyright Amendment Bill it is stated that the purpose of the amendments is to *protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities.*

In IFRRO's view the Bill has the opposite effect. Of course, in copyright, balancing the interests of often opposing groups is important. However, the provisions of this Bill are unbalanced, and if enacted it would create a situation that devastates local authors and publishers.

IFRRO's concern is further compounded because as far as we are aware there has not been an impact assessment undertaken of the economic impact of the new exceptions on existing and future markets of authors and publishers. We urge the South African government to conduct a thorough impact assessment before any further consideration of the Bill.

IFRRO reminds the Committee that the creative and cultural industries are an important part of the South African economy, contributing significantly both to GDP and to employment. A 2012 WIPO study -

http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf showed that the cultural and creative industries contributed approximately 4% to each of GDP and employment in the South African economy. The study also showed that this sector was a significant contributor to exports, with significant prospects for growth in the future.

In addition, the cultural industries, such as publishing also support other important public policy objectives, such as building and growing literacy and the achievements of enhanced educational outcomes – which are important to an innovative, connected community and economy.

Locally produced educational materials underpin teaching and learning activities in schools and universities. South African authors and publishers provide an important service to the education sector by producing affordable locally produced, culturally relevant books and other content for students, schools, universities and other educational colleges.

Unfortunately, the Bill, if implemented in its current form, will destroy existing licensing markets and reduce the range of educational content available to South African students, and the significant export potential to the South African economy of quality educational materials.

As such, IFRRO is of the view that the central policy objective of the Bill should be to promote and protect South Africa's cultural and creative community. The Copyright Act should also encourage access for education through encouraging flexible licensing solutions to be developed, through mechanisms such as *license override* which provide that exceptions only operate if no licensing solution is available. The effect is to encourage stakeholders to negotiate a flexible and adaptive solution that works for all parties concerned, rather than a set-in stone inflexible exception.

We note that a number of other African countries have adopted a *license override* approach in their legislation – notably Ghana, Mauritius and Zimbabwe.

Other aspects of the Bill introducing provisions to regulate collective management organisations and establish a Copyright Tribunal (one of the functions of which is to determine the royalties or terms of licence agreements) create an environment which would support a balancing mechanism such as *licence override* operating in the exceptions framework. In this regard we note that South Africa has a well developed and effective collective management sector, another important component of a *licence override* approach to access to content.

Introducing *license override* for educational and library exceptions would demonstrate the South African government's support for the collective licensing framework being established by the Bill.

2. New Exceptions for Education

IFRRO is concerned at the number of new exceptions for educational purposes in the Bill (proposed sections 10(1)(a), 12A(1)(b), and 13B of the principal Act). The scope of use permitted by these exceptions is wide and far reaching, and subject to different assessments of their possible fairness. In one provision, section 13B, the uses are permitted without any fairness assessment being required.

IFRRO opposes the introduction of such a variety of unpaid exceptions for educational use of copyright content. IFRRO reminds the Committee that all exceptions to copyright, including those

for education must comply with the three-step test in the Berne Convention– *apply only in certain special cases, not conflict with the normal exploitation of the work and not unreasonably prejudice the legitimate interests of the rightsholder.*

The wide and unremunerated use permitted by the exceptions would breach the three-step test in the Berne Convention and place South Africa in breach of its international Treaty obligations. In addition, including such a number of new exceptions for education will create uncertainty about permitted uses, jeopardise a functioning collective management system, and severely impact local publishers and authors.

IFRRO notes that most uses permitted by the proposed exceptions are already being licensed by DALRO. In 2011 the Copyright Review Commission considered that both the negotiated tariff and the commission charged by DALRO to be acceptable. Because of the existence of an effective and efficient licensing regime through DALRO, access by the education system to quality education content at a reasonable price is already assured. Disrupting the existing balance by introducing new exceptions will impede the delivery of quality education in South Africa.

As a comparison, exceptions for education were introduced into Canada in 2012. The immediate impact of the introduction of the new exceptions was the reduction of collective licensing revenue for publishers and authors and the closure of several educational publishers, both local and international, reducing the quality content available to Canadian students. Ongoing and expensive litigation to establish the scope of the exceptions, creating uncertainty about permitted copying is now the norm in Canada. The result is that significant harm has been done to the Canadian educational publishing sector, the inevitable consequences of which are an increased dependence on imported educational content. We believe that the South African government would not want a similar outcome for South African students and teachers.

Here, we reiterate our earlier comments about adopting a *licence override* approach to exceptions, particularly those for education.

3. Private Copying

IFRRO notes section 11 of the Bill proposes to introduce a new section 12A (1) (j) into the Copyright Act as a private copying exception. The uses contemplated by the provision are wide, and include any non commercial purpose. There are no restrictions on the number of copies to be made, the continuing ownership of the original, or other conditions that would limit the impact of an unremunerated exception on copyright owner's legitimate markets.

Although private copying is permitted in many other countries, because of the market harm that such provisions can cause, private copying is either remunerated by means of a levy system, or the uses permitted are extremely circumscribed. Further information about the number of private

copying schemes in force or under active consideration is found in the WIPO publication, *International Survey on Private Copying - Law and Practice 2016* - <http://www.wipo.int/publications/en/details.jsp?id=4183>

The recent experience in the United Kingdom is useful to note. In 2014 the UK government introduced a private copying exception which was later struck down as the evidence of its impact on the copyright owners market was inadequate - <https://www.gov.uk/government/news/quashing-of-private-copying-exception>

Similarly, in Australia where private copying is permitted without remuneration, the uses permitted are extremely circumscribed, in order to avoid harming the copyright owner's markets - http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s43c.html

IFRRO notes that in earlier consultations the South African government considered introducing a private copying levy to compensate copyright owners and to ensure that consumers could make copies of their legally acquired content without fear of infringement.

IFRRO submits that the South African government should again consider introducing a private copying levy to legitimise private use as we understand has been done in Nigeria, Cameroon, Ghana, Burkino Faso and is being considered in Kenya, Uganda, Senegal and Congo Brazzaville.

4. Exceptions for Libraries

IFRRO notes the extensive list of activities that libraries, museums, archives and galleries will be authorised to undertake in the new sections 19C of the Copyright Act (section 18 of the Bill), as well as the insertion of a fair use provision for libraries to preserve and provide access to works in their collection in section 10 of the Bill, amending section 12 of the Copyright Act.

Although recognising the important role of libraries and similar institutions in preserving and transmitting cultural heritage, IFRRO is concerned at the scope of these provisions. Again, IFRRO reminds the Committee that all exceptions to copyright, including those for libraries must comply with the three-step test in the Berne Convention— *apply only in certain special cases, not conflict with the normal exploitation of the work and not unreasonably prejudice the legitimate interests of the rightsholder*.

IFRRO notes that in the USA, where the doctrine of fair use originates, that copying for library purposes is not considered fair use, and the specific provisions for library copying are quite limited.

Given the long list of activities enumerated in the proposed section 19C, IFRRO submits that the proposed fair use section 10(1)(vi) be deleted altogether, as it is difficult to see what legitimate

library activities could be authorised by the section that are not already spelt out in proposed section 19C. IFRRO is concerned that the existence of parallel provisions with different tests as to the permitted usage and eligible institutions will lead to uncertainty and confusion, with the opposite effect to that intended.

In respect of proposed section 19C, IFRRO notes that the current test for eligibility is that the activity must not be for commercial purposes. IFRRO submits that this restriction is not sufficiently clear, may breach the three-step test in the Berne Convention and may lead to the interpretation that for profit organisations can rely on the provisions. This would lead to the situation in which copies supplied to users by libraries in commercial organisations will substitute for a copyright owner's market.

IFRRO submits that a better test would be *is not used for direct or indirect commercial gain or advantage*. In addition, the libraries able to rely on the section should be limited to *non profit* libraries and the works available to be used must be restricted to works legitimately acquired by the non profit library.

In addition, we urge the South African government to introduce a *licence override* provision into the library exceptions.

IFRRO also notes proposed section 19C (9), enabling the use of works when permission cannot be obtained, an orphan works provision. This overlaps with the specific regime for the use of orphan works in proposed section 22A of the Copyright Act (section 22 of the Bill), and will create confusion and a lack of clarity as to the possible use of orphan works. IFRRO submits that a single regime should apply and that proposed section 19C (9) should be deleted. We comment on proposed section 22A below.

5. Exceptions for persons with disabilities

IFRRO supports ratification of the Marrakesh Treaty on improved access to published works for persons who are blind visually impaired or otherwise print disabled. We participate actively in the WIPO initiative Accessible Books Consortium to facilitate such access and to implement the Treaty.

IFRRO supports our member PASA's submission on the proposed drafting of an exception to copyright for the visually impaired.

6. Orphan Works

IFRRO notes the orphan works exception in proposed section 22A of the Copyright Act (section 22 of the Bill). We are disappointed that the South African government has not chosen to explore a

solution of licensing orphan works through collecting societies. This is a well accepted and flexible model that has been adopted around the world.

We are also concerned that several of our proposed amendments, such as establishing guidelines for what is a diligent search and enabling the copyright owner to claim the royalties without having to recourse to expensive litigation have not been adopted.

IFRRO recommends that this orphan works exception be removed from the Bill and further consultations around orphan and out of commerce works be conducted, to ensure a flexible and responsive orphan works regime can be established – without the onerous administrative requirements of the current proposal.

7. Compulsory Licences for Translation

IFRRO queries the inclusion of this wide ranging compulsory licence in the Copyright Amendment Bill. Compulsory licences must be a last resort and only apply if market failure can be shown to have occurred. IFRRO is unaware of any unmet demand in South Africa for licences for translations. We have asked our members, DALRO and PASA if they are aware of any issues in respect of translation licensing and been advised that they are not.

If the supply of local translations for educational purposes is a problem, then IFRRO submits that a better approach would be to provide for a compulsory licence to be administered by the relevant collecting society – which would be in a position to calculate the proposed royalty and also to identify and locate the relevant copyright owners to provide payment.

We thank you for taking IFRRO's comments into consideration in your review of the Copyright Amendment Bill. We would be pleased to provide additional comments, information and explanation as you might require. We are also happy to participate in any public hearings you might be undertaking.

Yours faithfully,

Art.4(1)(b)

Caroline Morgan,
Chief Executive and Secretary General of IFRRO

