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Art.4(1)(b)

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Department of Trade and Industry  
For Attention: Art.4(1)(b)  
Private Bag X84  
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South Africa

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## DEPARTMENT OF TRADE & INDUSTRY COPYRIGHT AMENDMENT BILL 2015

This submission is made on behalf of IFRRO - The International Federation of Reproduction Rights Organisations – which is the main international network of collective management organisations – the Reproduction Rights Organisations (RROs) – and authors' and publishers' associations in the text and image sector, with 144 member organisations in 79 countries worldwide. The South Africa member organisations are DALRO (Dramatic, Artistic and Literary Rights Organisation) and PASA (Publishers' Association of South Africa). We also interact and collaborate frequently with ANFASA (Academic and Non-Fiction Authors' Association of South Africa).

We thank the Department of Trade and Industry for the opportunity to comment on the Copyright Amendment Bill 2015 ("the Bill"). We shall focus our remarks on the sections of most importance to the text and image sphere, and to collective rights administration in this sector.

### GENERAL

IFRRO supports the submissions made by DALRO, PASA and ANFASA. In addition, IFRRO submits:

#### **Locally created content is vital to cultural independence, the economy and employment**

The creative industries and the copyright-based sectors are fundamental to the digital economy as well as pivotal in sustaining national culture and cultural identity. Cultural and scientific materials produced locally are essential for a nation's ability to maintain sustainable cultural independency. It is also important in respect of enhanced readership and critical to the general transition into digital. For instance, at the World Summit on Information Society (WSIS) 2015, it was noted that, although most of the world lives within reach of an internet signal, mobile users in developing countries are deterred from going online because of lack of good local content<sup>1</sup>. Authors and publishers, assisted also by RROs, are crucial to helping develop a

<sup>1</sup> <http://www.ip-watch.org/2015/05/28/lack-of-locally-relevant-online-content-deters-mobile-users-in-developing-countries-wsis-panel-says/>

market for copyright works in developing economies by the protection of and facilitation of access to works of local creators.

The Bill, if adopted in its current wording, is likely to have a direct negative impact on locally-created content, insofar as it weakens the protection of copyright holders, and may be interpreted to allow enhanced use of copyright-protected works without prior authorisation of and remuneration to authors and publishers. There are no studies, which document positive correlation between exception and limitation and economic output, or the development of national cultures and cultural independency. On the other hand, there are uncontested reports, which document the positive impact on the production of cultural goods<sup>2</sup>, and on the economy and employment<sup>3</sup>.

The creation and publishing of new quality works nationally require that the creator and the publisher are protected from infringement and rewarded for their efforts. Changes to existing copyright rules should take account of this and ensure an appropriate equilibrium between the rights of authors and publishers, and user needs. We are not convinced that the Bill observes this the way it currently reads.

#### **The case of “fair use” in South Africa**

One of the main proposals put forward in the Bill is to introduce the concept of fair use into the South African copyright legislation. This issue warrants special assessment and comment.

Whereas IFRRO, in principle, has no issue with fair use, we question whether the Department of Trade and Industry’s proposal is based on a sufficient examination of this concept in relation to the South African context and legal traditions. Countries have various legal traditions and apply different concepts for exceptions and limitations. Fair use – contrary to the three-step test – is not an internationally recognised legal concept. The “fair use” doctrine arose out of U.S. case law and was codified in the U.S. copyright law in 1976, listing a number of purposes for which reproduction of a work may be considered “fair”. This U.S. doctrine has evolved considerably over the years and, as emphasised also by *Martine Courant Rife*, it is thanks to the role played by the judiciary and the many lawsuits that have taken place.<sup>4</sup>

<sup>2</sup> See for instance study carried out at Stanford University (USA): [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2505776](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505776)

<sup>3</sup> More than 40 countries have finalised studies on the economic contribution of the copyright-based sectors to economy and employment using a methodology developed for the World Intellectual Property Organization (WIPO). ([http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic\\_contribution\\_analysis\\_2012.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf)). The WIPO Report shows that the copyright sector is among the most important contributor to a nation’s economy and employment, and that “There is a significant and positive relation between the contribution of copyright industries to GDP and the GDP per Capita”; “...a strong and positive relationship between the contribution of copyright industries to GDP and the Global Competitiveness Index.”; “Contribution to copyright industries to GDP exhibits strong and positive relationship with the Index of Economic Freedom” as well as with the freedom from corruption index; and “...a strong positive relationship between copyright industries’ contribution to the economy and innovation”. The economic contribution of the creative sectors is significant at any stage of development, and is likely to grow as the national economy develops in the knowledge era.

<sup>4</sup> Martine Courant Rife, *The fair use doctrine: History, application and implications for (new media) writing teachers* (2007) p. 164.

South Africa does not have the same case law background for the introduction of fair use in its copyright legislation and may thus have to depend on U.S. court decisions. There are no persuasive arguments in any of the documents that should lead South Africa to change its current copyright regime. Rather it seems appropriate to build further on its legal traditions, including the concept of fair dealing.

#### **Granting of exclusive right to rightholders; Adherence to the WIPO Internet Treaties**

We note that the Bill includes the granting of an exclusive right to rightholders to make a work available, or communicate it to the public, in addition to the already existing reproduction rights. To the extent that the proposed exclusive right of communication appears to include the exclusive right of distribution, which is in accordance with the requirements of the WIPO Copyright Treaty (WCT), we suggest that they be dealt with separately and that the exclusive right of distribution is specifically dealt with under its own subsection.

We also suggest that South Africa ratifies and implements the two WIPO Internet Treaties, the WCT and WIPO Performances and Phonograms Treaty (WPPT). We assume that South Africa wishes to offer the best possible protection to its creators and investors in locally created scientific, literary and artistic production, as well as in its rich traditional cultural expressions and folklore. This attracts investment and benefits the local culture and the South African economy. The WIPO Treaties provide the legal basis for a healthy legal electronic commerce and ensure protection of copyright works also outside national territories. With its rich production of cultural and scientific works, and traditional cultural expressions, South Africa should have an interest in adhering to the WCT and WPPT.

#### **Terminology: ‘Collective Management Organisation’ rather than ‘Collecting Society’**

The use of the expression “collecting society” does not reflect the role of such organisations, which is not limited to the collection of revenues but includes managing of the rights of their members beyond simply collecting and distributing. We believe that in the whole Bill, the expression “collecting society” should be replaced by “collective management organisation”. This is also the terminology used in the EU Copyright Collective Rights Management Directive<sup>5</sup>.

#### **SUBSTANTIVE PART**

##### **Educational Use**

We submit that copying under an exception, without obligation to pay remuneration to rightholders, should only be allowed when the primary and secondary (collective licensing) market do not function properly. A study made by the UK Authors’ Licensing and Collecting Society (ALCS) shows that a 10% decline in income from secondary uses for creators would result in 20% less output, whilst a 20% decline would mean a drop of 29% in output, or the equivalent of 2,870 nationally created works for education per year<sup>6</sup>.

<sup>5</sup> <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:32014L0026&from=EN>

<sup>6</sup> [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf), pages 5 and 87

Income from the secondary market through collective licensing agreements offered by RROs, such as DALRO is of major importance to the rightholders. According to a survey made by PwC in the UK, almost 25% of the authors derived more than 60% of their income from secondary licensing.<sup>7</sup> For publishers, the same PwC study revealed that loss of income from secondary uses, resulting, for instance, from the broadening of exceptions and limitations, would impact severely on the publishing houses' profit, potentially leading to job cuts and reduction of investments in new works and innovation<sup>8</sup>. The incentive to invest in new content development depends on the secondary income, which represents an average of 12% of their earnings, equating to around 19% of their investment in new works<sup>9</sup>. This represents a significant proportion of the funds publishers in the UK use to invest in content development.

In South Africa, DALRO offers collective licences to facilitate certain legitimate legal access to published works. IFRRO notices that the Copyright Review Commission Report of 2011 found that both the tariffs charged by DALRO, where the blanket licence tariff was negotiated with the Higher Education institutions in collaboration with the Department of Education, and the commission DALRO charges, "appear acceptable". There is thus no need to broaden the exception in the South African copyright legislation to allow more 'free use' in education, without remuneration to authors and publishers. Legitimate user access is already provided, and the consequences on the South African publishing sector and society of reducing, or outright removing, the remuneration to authors and publishers for usages, which are currently contributing to authors making a living and to publishers investing in the dissemination of literary and scientific works, has not been analysed.

Several of the issues contemplated in the new exceptions (specifically in the new sections 12(14) and (15) and 13B), are already being licensed by DALRO to Higher Education institutions in South Africa.

We therefore ask that the proposed new sections 12(14) and (15), 13B, 15(4), 16(1), 17, 18, 19A and 19B be withdrawn. The same goes for the proposed sections 12A(2) and (3), which are overbroad and will prejudice the legitimate sale of books by publishers and licensing by collective management organisations. The effect of the proposed changes would then only be to deprive authors and publishers from just income for usages for which authors and publishers are rewarded in a large number of other countries. To the extent that more exceptions for education are introduced, we submit that such exceptions should only apply to the extent that a licence from the publisher or a copyright collective management organisation like DALRO is not available.

This approach was followed in respect of exceptions recently introduced in the United Kingdom. Article 36(6) of the UK Copyright, Designs and Patents Act includes an exception

<sup>7</sup> [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf)

<sup>8</sup> This is what has happened in Canada following an interpretation by educational institutions of the new legislation that more uses under exceptions are allowed

<sup>9</sup> [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf)



override: *“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.”*<sup>10</sup> (The same mechanism exists in the legislation in a number of other countries, both within and outside Africa and Europe, where the country’s copyright legislation is inspired by that of the UK.) During the recent review of the UK copyright legislation, it was discussed whether to abandon this approach; the conclusion was to keep it.

We would also like to draw the Director General’s and the Ministry’s attention to the Price waterhouse Cooper (PwC) study on the impact on the publishing industry of changes in the Canadian copyright legislation, which led to users to believe that the law allows for broader exceptions to the exclusive right of rightholders, In addition to the legal uncertainty that the changes created, national production of copyright works have decreased; departments in publishing houses have been closed, especially for the production of textbooks; and personnel has been laid off<sup>11</sup>. The result is that significant harm has been done to the Canadian educational publishing sector, to the extent of jeopardizing its future. The inevitable consequences include increased dependency on import of educational material. We chose to believe that this is not a development, which the Ministry and the Director General, wish for South Africa. We therefore ask for the proposed contract override clause in section 39 to be removed.

### **Libraries, Archives and Digitisation**

In conformity with what we have said earlier in this submission, we think that library exceptions in the South African copyright legislation could be based on the existing concept of fair dealing. It is appropriate that the legislation provides an exception or limitation to the exclusive rights to allow certain not-for-profit libraries and similar institutions to reproduce, including in digital format, for preservation purposes, and to complete or replace a destroyed work they already had in their collections. The reproduction should be made subject to copies not being commercially obtainable.

We further observe that the articles on inter-library document supply (13C) lack specification on authorised uses, users and the purposes of the use. This needs to be rectified. Uses authorised under 17(5) and 17(6) should be made subject to a licensing agreement not being available from the authors or publishers directly, or from DALRO. We ask that “or their representatives” be added to articles 17(1) (c) and (d).

### **Compulsory Licences as set out in Schedules A and B against remuneration**

We fail to see that the proposed Schedules A and B, which introduce compulsory licences when a work is not available in the market, or when rightholders refuse, or create barriers to allow the exploitation of their work, is in conformity with international treaties that South Africa is party to. There are different reasons why the rightholder does not want a work to be reproduced, made available or distributed to the public: there may be moral rights involved as

<sup>10</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447212/Copyright\\_Designs\\_and\\_Patents\\_Act\\_1988.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447212/Copyright_Designs_and_Patents_Act_1988.pdf)

<sup>11</sup> [http://www.accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://www.accesscopyright.ca/media/94983/access_copyright_report.pdf)

the author no longer defends or upholds certain ideas, the old edition may compete with a new one, etc.

Whatever the reason, it is a fundamental principle in copyright legislation embedded in international treaties as well as in national copyright legislation in countries parties to them, that the rightholder shall have the exclusive right to reproduce or authorise the reproduction of the work, and that exceptions are allowed under certain conditions only. It is difficult to see how a general authorisation by law to make use of a work on the basis of the conditions stipulated in Schedules A and B can avoid prejudicing unreasonably the legitimate interest of the authors, or not be in conflict with the normal exploitation of the work. We also question whether it could be described as a “special case”, as required by, for instance, Article 9.2 of the Berne Convention.

We therefore respectfully urge that the South African government refrains from introducing Schedules A and B in the copyright legislation, and rather stimulates and facilitates stakeholder dialogues in which DALRO, the collective management organisation for text and image works in South Africa, should also be included to devise voluntary solutions to address the issues raised in those articles. IFRRO offers to share information from other countries where stakeholders have developed solutions to address similar issues on a voluntary basis.

### **Orphan Works**

Although we do not have objections to the proposal of an orphan works exception, we are of the opinion that the preferred solution is through collective licensing. We therefore strongly support the proposal that orphan works, as an alternative, may also be included in such schemes. This will bring the South African legislation on this point in line with that of most other countries which have established an orphan works regime.

Also, the definition of an ‘orphan work’ should be brought in line with the generally accepted definition of such works, by adding “or identified” to the proposed definition in Article 1(6) of the Bill.

We also suggest that guidelines for diligent search and that an orphan works registry be established. Examples of such guidelines are found, for instance, in the voluntary stakeholder established guidelines in Europe<sup>12</sup> and in the EU Orphan Works Directive. The stipulations in Article 27, in particular, 27(2) and 27(6) do not appear to us to be sufficient.

Moreover, it is important that the legislation clearly provides reappearing rightholders with the right, at any time to put an end to the orphan works status of their works. Reappearing rightholders should also be entitled to a fair compensation, regardless of the commercial or non-commercial use of their works, and the compensation should depend on the type of use. The right of remuneration, as set out in Article 22A (12), should not be subject to the filing of a

<sup>12</sup>[http://www.ifrro.org/upload/documents/i2010%20Appendix%20to%20Joint%20report\\_sector%20report.pdf](http://www.ifrro.org/upload/documents/i2010%20Appendix%20to%20Joint%20report_sector%20report.pdf)  
<http://www.ifrro.org/upload/documents/i2010%20Sector%20specific%20guidelines%20orphan%20works.pdf>

legal suit, as proposed in Article 22A (12) but to evidencing authorship as under Article 22A (13).

**People who are blind, visually impaired, or otherwise print disabled**

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

In respect of the Bill, we submit that it should specify the beneficiaries of the exception in the legislation to those specified in the Marrakesh Treaty. Also, permission under Article 19D(1) should be made subject to the work not being available on the South African market within a reasonable time and for a reasonable price and may be located with reasonable efforts.

We thank you for taking IFRRO's comments into consideration in the further work on the consultation. We will be pleased to provide additional comments, information and explanation, and expand on this submission, as required. Also, given the relatively short time limit for the submission of comments, IFRRO may wish to make further observations on the Bill at a later stage when we have had the opportunity to conduct a more in-depth study of it.

Yours sincerely,

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