

International
Federation of
Reproduction
Rights
Organisations



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Caroline MORGAN

**Select Committee on Trade and International Relations,
National Council of Provinces,
South Africa**

For attention Mr Hlupheka Mtileni
hmtileni@parliament.gov.za

Brussels, 19 February 2019

RE: SUBMISSION ON THE SOUTH AFRICAN COPYRIGHT AMENDMENT BILL [B13-2017]

We thank you for the opportunity to make a submission on the Copyright Amendment Bill [B13B - 2017]. We also wish to hereby express our interest in making a verbal representation to the Committee.

This submission is made on behalf of IFRRO - the International Federation of Reproduction Rights Organisations - which is the international network of collective management organisations, called Reproduction Rights Organisations (RROs) and authors' and publishers' associations in the text and image sector. We have 150 member organisations in over 80 countries worldwide, and our membership includes RROs in developing countries in Asia, Africa and Latin America.

Our RRO member in South Africa is DALRO, and PASA, the Publishers Association of South Africa, is also an IFRRO member. We support the submissions of DALRO and PASA. IFRRO makes this submission on behalf of its members, including those in 14 other African countries.

Concerns not addressed by the National Assembly

We are disappointed to see that the concerns raised by rightsholders in South Africa, other African nations, and across the world, have not been addressed by the National Assembly of South Africa.

In July 2017, representatives from Collective Management Organizations in 14 African countries adopted a Resolution opposing the proposal to introduce fair use and broaden the exceptions as proposed in the bill: they noted that the proposal was "*severely prejudicial to the creative industries and the cultural sector which are fundamental to the digital economy, and pivotal in sustaining national culture and cultural identity*". In October 2018, IFRRO's Annual General Meeting unanimously approved a Resolution "*strongly urg[ing] the South African Parliament to protect authors' rights, support creativity, and to reject proposals that would weaken copyright protection.*" We are attaching these two resolutions.

We are concerned that this Bill, if enacted, will mean South Africa's approach will diverge from those of other countries, and not only weaken the South African creative industries, but also hamper the further development of a vibrant and sustainable African culture.

The concerns raised have disappointingly not been heard by the National Assembly, putting South Africa's creative industries and culture even more at risk of being severely harmed.

Fair use and fair dealing provisions

IFRRO notes the wide number of exceptions to and limitations on the rights of authors contained in the Bill. We reiterate our earlier submissions that the most flexible means of promoting access to works by education and at the same time rewarding authors for their creativity is to develop collective licensing solutions. In many countries in Africa, such as Malawi, Botswana, Zambia and Ghana, governments are working with both educational interests and with rightsholders to develop and establish collective licences which enable access by education and remunerate the authors whose works are used.

New sections 12A and 12B refer to the introduction of general exceptions (fair use) and specific exceptions for education. In IFRRO's view, these provisions are confusing, overlap and have the potential to lead to long and expensive litigation to establish their scope and interpretation.

IFRRO is not in favour of introducing a fair use copyright exception. We took this view in our initial submission in 2013, for reasons such as the lack of compatibility with the existing South African legal framework, and the time and financial cost of transferring the decision making about the scope of permitted uses to the courts. Despite decades of case-law, proceedings in relation to fair use continue to be lengthy and costly in the United States of America, as shown in the Georgia State University case (*Cambridge University Press v Patton*).

Compliance with international treaties

We congratulate the South African Government on its decision to accede to the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty and WIPO Beijing Treaty on Audiovisual Performances. We however submit that the Copyright Amendment Bill, at its stands, would partly conflict with provisions in said WIPO treaties. We are concerned that the Bill will place South Africa in breach of its international obligations and is out of alignment with the standards contained in these three treaties.

For example, we note that the specific exceptions for education in clause 12D are not subject to the relevant fairness factors set out in 12D(4), which reflect the requirements of the three-step test in the Berne Convention, which are incorporated in later treaties such as the WIPO Copyright Treaty. This gap in the legislation makes it very possible that the Bill will actually place South Africa in breach of its international bilateral and multilateral obligations.

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We draw the Committee's attention to the recently published paper by Dr Mihaly Ficsor, former ADG of WIPO, in which he explains why in his view, the current situation in Canada, in particular the addition of education as a fair dealing purpose, has put Canada in breach of its international obligations. A summary of this paper has been published here: <https://bit.ly/2DPoB4I>. Of particular interest to the Committee is his view that fairness factors should apply to all exceptions in legislation to ensure compliance with the Berne three-step test which is incorporated in the WIPO Copyright Treaty.

IFRRO also draws the Committee's attention to statements regarding the uncertainty and unpredictability of fair use by the Irish government in the Regulatory Impact Analysis published in response to their recent copyright law review: <https://bit.ly/2KFqzk4>.

Conclusion

Fair use, fair dealing, exceptions to copyright are complex issues and legislation should not be rushed through when it has the potential of undermining a country's culture and creativity for decades to come. We ask that more time be given to comment on a complex legislation like the one at hand and we ask for the opportunity to make presentations in person.

Once again, we thank you for the opportunity to make a submission and if you require any further clarification on any aspect of this submission please contact us.

Sincerely yours,

A handwritten signature in black ink that reads 'Caroline Morgan'. The signature is written in a cursive, flowing style.

Caroline Morgan
Chief Executive



Resolution adopted by the IFRRO African Development Committee Meeting on 26 July 2017

The 14 members of the African Development Committee of the International Federation of Reproduction Rights Organisations (IFRRO), at its meeting in Johannesburg, congratulate the South African government on its commitment to putting a copyright framework in place to enable the implementation of the WIPO digital treaties.

However, we strongly oppose the proposal to introduce fair use and to broaden the exceptions in the South African Copyright Act to allow the reproduction and making available of published works by educational institutions without prior consent or payment of remuneration. This proposal is severely prejudicial to the creative industries and the cultural sector which are fundamental to the digital economy, and pivotal in sustaining national culture and cultural identity.

In South Africa, appropriate and effective legal measures are already in place to ensure access to published works by education, including collective licensing by DALRO, the local copyright management organisation and member of IFRRO. There is no compelling reason to justify the proposed changes, which will lead to substantial loss of income to authors and publishers and a reduction in the quality of content available to South African students.

For these reasons, the IFRRO African Development Committee requests the South African Government:

1. not to proceed with the proposed change to the Copyright Act to broaden the exception in the South African copyright legislation to allow unauthorised copyright of greater portions of works without remuneration to authors and publishers,
2. engage in a dialogue with the stakeholders - DALRO, authors, publishers and their representative organisations, and educational institutions – to clarify the need of the educational establishments for reproducing learning resources, and to develop a flexible licensing framework, to the benefit of all stakeholders.

IFRRO has 146 members in 83 countries, representing the creative and publishing communities.



The members of the IFRRO African Development Committee are:

Bureau Burkinabè du Droit d'Auteur (BBDA),
Burkina Faso

Bureau Ivoirien du Droit d'Auteur (BURIDA),
Cote d'Ivoire

Copyright Society of Malawi (COSOMA),
Malawi

Reprographic Rights Organization of Ghana (CopyGhana),
Ghana

Dramatic, Artistic and Literary Rights Organisation (DALRO),
South Africa

The Reproduction Rights Society of Kenya (Kopiken),
Kenya

Reproduction Rights Society of Tanzania (KOPITAN),
Tanzania

Reproduction Rights Society of Nigeria (REPRONIG),
Nigeria

Rights Management Society (RMS),
Mauritius

Société Civile des Droits de la Littérature et des Arts dramatiques (SOCILADRA),
Cameroon

Société Sénégalaise du Droit d'Auteur et des Droits Voisins (SODAV),
Senegal

Uganda Reproduction Rights Organisation (URRO),
Uganda

Zambia Reprographic Rights Society,
Zambia

The Zimbabwe Reproduction Rights Organisation (ZimCopy),
Zimbabwe



IFRRO STATEMENT ON SUPPORTING CREATIVITY AND EMPOWERING AUTHORS AND PUBLISHERS IN SOUTH AFRICA

Resolution adopted by the IFRRO Annual General Meeting in Athens on 24 October 2018

The International Federation of Reproduction Rights Organisations (IFRRO), at its Annual General Meeting in Athens, strongly urges the South African Parliament to protect authors' rights, support creativity, and to reject proposals that would weaken copyright protection.

In South Africa, appropriate and effective legal measures are already in place to ensure access to published works by educational institutions, including collective licensing by DALRO, the local copyright management organisation and member of IFRRO.

The IFRRO Annual General Meeting opposes the proposal to introduce *fair use* provisions and to broaden the exceptions in the South African Copyright Act to allow the reproduction and making available of published works by educational institutions without prior consent or payment of remuneration. This proposal is severely prejudicial to the creative industries and the cultural sector which are fundamental to the digital economy and pivotal in sustaining national culture and cultural identity.

The proposed changes will lead to a substantial loss of income to authors and publishers and a reduction in the quality of content available to South African students.

IFRRO is concerned by reports of insufficient research and impact assessment in developing this proposal, and that it will be introduced to the National Assembly, despite warnings by copyright experts engaged by Parliament that the proposal in its current form will conflict with South Africa's obligations under the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights Agreement.

For these reasons, the IFRRO Annual General Meeting 2018 strongly urges the South African Government:

1. not to proceed with the proposed changes to the Copyright Act to broaden the copyright exceptions to allow more cases of unauthorised reproductions of copyright works without remuneration to authors and publishers
2. to engage in a dialogue with the stakeholders – DALRO, authors, publishers and their representative organisations, and educational institutions – to clarify the need of the educational establishments for reproducing learning resources, and to continue developing a flexible licensing framework, for the benefit of all.

About IFRRO

IFRRO has 150 members in 85 countries, representing the creative and publishing communities. The creative industries and the cultural sector are fundamental to the digital economy, and pivotal in sustaining national culture and cultural identity.