

15 September 2015

The Director General, Department of Trade and Industry
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Dear Sirs

South Africa - Draft Copyright Amendment Bill

We are writing to you in connection with the Department of Trade and Industry's Draft Bill, Government Gazette – Government Notice No 646, Government Gazette No 39028, 27 July 2015, the period for comment on which was subsequently extended to 16 September 2015.

Our association, the International Association of Scientific, Technical and Medical Publishers ("STM"), is the leading global trade association for academic and professional publishers. It has over 120 members in 21 countries, who each year collectively publish nearly two thirds of the global annual output of research articles and tens of thousands of print and electronic books and references works.

STM publishers originate and disseminate books, journals databases and individual articles and contributions of a multitude of South African and international scientific, medical and technical authors and scholars, both online and in print.

STM publishers distribute their scholarly and scientific journals, books and databases for and to the research and education communities, communities that therefore constitute their most significant audiences and markets.

1. Basic Position:

Whilst there are many facets of the draft Bill STM could provide comments on, the present submission will deal with three thematic areas of close interest to its membership:

- Unwarranted expansion of State copyright
- Freedom of contract: counter-productive State interference
- US-style fair use exception: a benign legislative concept in need of a successful transplant, or a burdensome transfer of power to the judiciary?

We would like to preface a detailed discussion of the above points with the following broad principles that, in STM's view, should guide any copyright reform in the 21st Century:

- The author's freedom to choose when, where and how to publish his or her works is pivotal. This applies to works that are authored, privately, as part of public-private efforts or resulting from wholly or partly State-funded creative or research endeavours. This is consistent with copyright as a human right, as recognised in Article 27(3) of the UN Universal Declaration of Human Rights, as well as other important rights and freedoms, eg academic freedom, freedom of expression, free exercise of (intellectual) property rights.
- Maximising the exposure and use of works requires well-placed stewards that make sure a work shines not only at one moment in time, but is available well into the future. Ownership allocation of copyright works, as well as transferability of ownership, should be decided upon with this maximisation and need for stewardship in mind. State ownership of copyright is only appropriate to the extent that the State is in fact able to play the role of "good steward", of actively managing and maximising use of works. More often than not, it is prudent for the State to minimise its role as "steward of last resort", ie only undertake this endeavour where the market place leads to under-supply of works (market failure), where no private-public partnership is possible and where self-regulation is leading to inadequate results.
- The Berne Convention Three-Step Test for exceptions and limitations must be respected, as the protection of copyright in a digital networked work is only as strong as the weakest link in the chain. South Africa, as one of the leading countries on the African continent, should also be cognisant of its role and responsibility for sound copyright protection and participation in the international community. Moreover, exceptions and limitations must take account of the increased risk of digital dissemination.
- Special markets and how they are served by specialised right holders must not be eroded by a too broad or general exception or limitation, and specifically, recognition must be accorded to the development by publishers of innovative online scholarly and scientific resources that are hugely beneficial to researchers and society.
- Licensing is the "smart" route to provide access to knowledge and preferred over exceptions and limitations, especially in the 21st century and where markets develop at a fast pace, eg digital content, social web, cloud and analytical research tools and services.
- Exceptions and limitations must take into account cultural diversity and legal traditions. A transplant of one legal tradition into another needs many safeguarding and supporting measures, including avoiding legal uncertainty that discourages investment.

2. Detailed Position:

2.1 State Copyright / State-Controlled Copyright

2.1.1 We note that the draft Bill proposes to add the words “or funded” to the definition of State copyright in section 5 of the Copyright Act (98 of 1978). STM urges you to delete this amendment. Declaring all works that receive unspecified State funding to be State-owned works, will greatly increase locally the volume of works deemed to fall under the control of the State. STM also urges the DTI to assess the broad economic and financial impact such an allocation of private rights in the hands of the State would have: the State would actually be responsible to manage these rights across all government departments and may be the recipient of multiple licensing requests touching on almost all aspects of life in South Africa or connected to South Africa.

The provision will also lead to contradictions with other provisions of the Copyright Act that allow for works to subsist in the person who commissions a work or in an employer where a work was generated in the course of an employment relationship. The Act also remains silent on how the State would manage co-owned works – the number of co-owned works would also dramatically increase, each time a partly State-funded South African author collaborates with foreign authors, or non-funded or privately funded authors.

2.1.2 New sections 22(1) and 22(3) of the Copyright Act would disallow the assignment of any right of copyright by the State. Moreover, all assignments are made to be effective for a period not exceeding 25 years. Both provisions further exacerbate the State’s interference in contractual relations. This will be detrimental and may prevent contracts not only beneficial to authors, but to society at large being concluded. Where a public-private partnership, for instance, results in a co-owned work, it should be possible for the State to assign its share, provided the contractual conditions make such a decision advantageous. Many more examples are imaginable. It is also not clear why the draft Bill presumes that the State itself cannot look after its own licensing needs well enough to avoid entering into imbalanced agreements.

The provision in s 22(3) is presumably intended to protect authors as first rightsholders against unfavourable contracts with producers or publishers. However, the provision appears to apply irrespective of how favourable or unfavourable a contract is and seems to ignore practicalities: in the STM environment, a research article typically has between 4-5 authors from two or more countries. The conventional method of transferring rights is by way of assignment or exclusive licence to the publisher as custodian and steward of the rights of the contributing authors. If a share in the copyright now reverts for any participating South African author, but remains in place for other authors, according to many countries’ copyright laws, it becomes impossible to continue licensing a work without seeking the consent from the South African author. This may lead to a lesser visibility of South African authors due to a false sense of paternalism for their rights.

Moreover, the well-intentioned protective effect may also not be effective to address agreements that are deemed overly long, as authors may be able to assign works consecutively, or may be able to assign the future interest in a reversion of copyrights in any case. Many permutations are imaginable.

STM also questions whether it is necessary to provide for this maximum duration in the case of copyrights owned and/or controlled by legal entities or assignments that occur downstream (ie after an initial assignment, there may be a subsequent transfer). The encroachment on the freedom of contract seems disproportionate and should in STM's view be deleted.

In STM's view, section 22(1) should be deleted, while section 22(3) should also be deleted, but in any event not apply to authors who have contributed to a collection, database, periodical or newspaper or magazine, or a collective work, including authors who are contributing their works to any other multi-author work, whether as co-authors or individual authors.

2.1.3 Orphan Works and Out-of-Commerce Works

STM is concerned that the rules on orphan works may produce a system that will not remedy the peril with orphan works: an undersupply of such works as a result of the inability of users to licence these works. In STM's opinion a limitation of liability approach would be far preferable.

STM also notes provisions that appear to introduce a compulsory licence for translations and reproductions. The provisions may be inspired by the Berne Appendix but could also be interpreted as provisions dealing with the phenomenon of licensing "out of commerce" works, ie works not available through the ordinary channels of trade within a reasonable time. STM is itself party to a Memorandum of Understanding on Out-of-Commerce Works in the European Union and stands ready to elaborate on an implementation of the MoU which has for instance been undertaken in France, Germany and Nordic EU countries.

STM believes that this issue may well be relevant to the South African context, especially to preserve and utilise the rich cultural heritage during the country's liberation struggle in the 20th century. However, STM believes that South African citizens would be better assisted with a light-touch orphan works and out-of-commerce regulation than with an administrative burdensome process both for securing permission of orphan works through a Commission, especially created, or through mechanisms of compulsory licensing in the fashion of the Berne Convention Appendices, which have not proven very effective in other parts of the world.

STM also believes that there is no evidence that local or international rightsholders would outright refuse translation or reproduction licences where needed. In fact, through the local collective management agency, DALRO, licences are available from a broad range of territories.

2.2 Encroachment upon and Interference with Freedom of Contract

2.2.1 STM is very concerned about proposed section 39A which would make the validity of licensing agreements dependent, as a general rule, on copyright exceptions and even vested positions of copyright law. The provision would make it that much harder to offer preferential access in legally certain ways to deserving groups for fear of not being able contractually to exclude on-copying. To give an example: under s 39A, it may not be possible to provide the community of the blind with advance copies of copyright-protected

works, on restrictive legal terms, as legally it would not be permissible to prohibit the licensee from on-copying parts of the works made accessible for purposes falling under unrelated copyright exceptions (eg for personal and private study of third parties who are not in fact visually impaired, or indeed for distance education – one of the main markets generally for the works in question).

2.2.2 The draft Bill seems to envisage overbroad and overlapping exceptions, especially in the field of education and private study and uses by libraries (for the pros and cons of introducing US-style fair use see below para 3). In a country where 80% of publishing is related to education, and where high quality availability of educational resources and textbooks is vital, exceptions for education have the potential to erode the normal market of especially the local publisher. STM sees a number of problems with the current draft and the wording:

- (i) The three layers of exceptions are not clearly subject to the availability of licensing agreements. Moreover, they seem to cover areas of licensing that are currently the subject of individual and collective licensing: distance education and electronic access is as a matter of course an activity licensed by STM's member publishers. DALRO, the collective licensing agency in South Africa has for many years administered a collective licensing scheme permitting both "blanket" licensing or the purchase of transactional licences for course-pack, e-readers, e-reserve needs and many ancillary uses that may be made at educational institutions (eg preparing digital carriers to deliver reading materials to a distant campus that has poor connectivity or is struggling with power-outages).
- (ii) The exceptions for libraries go well-beyond long-term preservation, back-up copying and long-term archiving and cover areas that are often collaboratively tackled by publishers and libraries. Licences for document supply, for instance are widely available in South Africa either directly from publishers, or via the local collective rights agency, DALRO. The exception in favour of business entities rendering "business advice" is glaring as for consultancies the clearing of copyright permissions is simply part of the cost of doing business.

STM urges the DTI to bring clarity and to carefully craft and simplify the exceptions and limitations. One needed simplification would be to state that the exceptions are without prejudice to existing and future licensing agreements that permit the uses in question.

2.2.3 Yet, the above provisions are not the only obstacle to a sound licensing environment for wide access to copyright works. The proposed s 23(4)(d) of the Copyright Act would make it a criminal offence, punishable with imprisonment of ten years (or less), unreasonably not to accede to a licensing request. STM recommends deletion of this criminal offence as entirely disproportionate: the free exercise of a right of copyright by the rightsholder is not only part of South African legal tradition, but an international treaty obligation. Criminalising, in very general and subjective terms, the exercise of exclusive rights in certain cases, is counterproductive to the wide availability of works, as it may be more "reasonable" not to licence a work on request in cases where the rightsholder has decided not to issue any licences of his or her work, full stop. Thus, the provision would even put a chilling effect on licensing. STM urges the DTI to reconsider this provision in the light of the prevailing rights and freedoms of authors and publishers in South Africa.

3. US-style fair use exception: a benign legislative concept in need of a successful transplant, or a burdensome transfer of power to the judiciary?

STM publishers operate globally and, in our experience, it is possible for a fair use or a fair dealing system to be implemented in practice that is consistent with the international copyright framework.

However, STM questions whether South African legislation that not only creates overlapping exceptions, but also exceptions that appear to be declaring certain uses as “fair use”, is providing for over-broad exceptions that are no longer consistent with South Africa’s binding international obligations.

Even without addressing the question of international compatibility, in STM’s view the draft Bill fails to consider safeguarding measures that would need to be in place to accompany a successful transplant of US-style fair use into South African law. The fair use system relies on a long tradition of case law and pre-2004 has been relatively stable and predictable. Since then, a number of cases have been pending, particularly relating to so-called “transformative” use that have rendered fair use even more volatile. In addition, the US legal system relies on a federal court system that is used to handle a large volume of copyright-related cases and on a copyright law that provides punitive and statutory damages that significantly alter the equation for any would-be infringers, likely to engage the courts.

The present draft Bill does, firstly, not provide for punitive and statutory civil damages that would deter a would-be infringer: any potential claimant of fair use could easily decide to claim fair use in order to defer a payment into the future of, at worst, what the payment would have been, had the user taken out a licence. Secondly, the court system in South Africa, including the new provisions of an Intellectual Property Tribunal, will effectively have to make policy decisions weighing the rights of copyright owners and the interest of the wider public. The South African court system may or may not have the resources to do this successfully and may or may not have the tradition of making policy decisions that in most other jurisdictions are made with greater democratic justification by Parliament.

We urge the South African government to consider the above factors when deciding if and how to implement a general exceptions clause for certain special uses that must not be allowed to erode the market for works needed for education, science, art and culture in South Africa.

We applaud the DTI for its intention to update South Africa’s copyright laws and for the opportunity to participate from the very beginning in a wide and open consultation.

We sincerely hope that any new copyright regime that may be adopted eventually is not detrimental to authors and publishers and in line with international obligations.

STM stands ready to amplify or otherwise assist in any way that would be appropriate and conducive to sound South African copyright legislation.

Yours faithfully,

A handwritten signature in black ink that reads "Michael Mabe". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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