



PRINT INDUSTRIES  
CLUSTER COUNCIL



PUBLISHERS' ASSOCIATION OF SOUTH AFRICA

**PICC REPORT**

**ON**

**INTELLECTUAL  
PROPERTY  
RIGHTS**

**IN THE**

**PRINT INDUSTRIES SECTOR**



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# ACRONYMS

AGOA	African Growth and Opportunity Act
APNET	African Publishers Network
AAP	Association of American Publishers
CAL	Copyright Agency Limited (Australian collecting society)
Cancopy	The Canadian RRO (now re-named Access Copyright)
CCC	Copyright Clearance Center (USA)
CIPRO	Companies and Intellectual Property Registration Office
CLA	Copyright Licensing Agency (UK)
CTP	Committee of Technikon Principals
DAC	Department of Arts and Culture
DALRO	Dramatic, Artistic and Literary Rights Organisation
DoE	Department of Education
DTI	Department of Trade and Industry
GDE	Gauteng Department of Education
IIPA	International Intellectual Property Alliance
IKS	Indigenous Knowledge Systems
INCP	International Network on Cultural Policy
IPA	International Publishers Association
IPACT	Intellectual Property Action Group
IPR	Intellectual Property Right
JISC	Joint Information Systems Committee
Kopinor	The Norwegian RRO
LIS	Library and Information Services
LSM	Learning Support Materials
NIICD	New International Instrument for Cultural Diversity
PA	Publishers Association
PAMSA	Paper Manufacturers Association of South Africa
PASA	Publishers' Association of South Africa
PICC	Print Industries Cluster Council
RRO	Reprographic Rights Organisation
SABA	South African Booksellers' Association
SACU	South African Customs Union
SADC	Southern African Development Community
SAMRO	Southern African Music Rights Organisation
SAPTO	South African Patents and Trademarks Office
SAUVCA	South African Universities' Vice-Chancellors' Association
SAWA	South African Writers' Association
TRIPS	Trade Related Aspects of Intellectual Property Rights Agreement
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

# EXECUTIVE SUMMARY

## THE BRIEF

This Report on copyright in the print industries sector was commissioned by the Department of Arts and Culture, through the Print Industries Cluster Council (PICC), as part of a broader initiative to identify policy and development needs in the cultural industries. The Report deals in particular with copyright as an aspect of Intellectual Property Rights (IPRs) and the impact of these rights on growth and development in the print industries sector. It therefore surveys the state of copyright as it relates to the written word and identifies ways in which copyright laws and practices in South Africa are aiding or inhibiting growth. Finally, it makes recommendations for further action that could contribute towards growth and development in the print industries sector.

The **purpose** of the Report is therefore to provide recommendations for:

- A policy and strategy framework for the management of intellectual property, in particular the management of copyright;
- Government consideration and implementation; and
- The formulation of strategies that would contribute to industry growth.

## THE REPORT

The Report provides the following **content**:

- A background on international best practice;
- A review of intellectual property rights issues and the status quo in the print industry sector in South Africa;
- Identification of what intellectual property issues are helping or inhibiting growth in the sector; and
- Recommendations for policy interventions and strategic actions.

This Report is the first step in the process of policy and strategy development. In line with the PICC strategic approach, the Report presents the perspectives and needs of rights owners in the industry sector. The Report therefore provides the foundation of information and industry knowledge that will be needed in order to engage in the second phase of the dialogue, between rights holders, nationally and internationally, government and rights users. It also provides the basis for informed strategic decisions that need to be made in the industry before such an engagement takes place.

The Report **concludes** that the industry sector needs to participate more actively in the promotion of intellectual property issues and that this would best be pursued in collaboration with other rights holders, in order to maintain a united front in pursuing the implementation of the necessary policy, legislative and strategic actions that need to be taken if the print industry is to prosper and grow.

## THE PROCESS

The following **steps** led to the finalisation of the Report:

- Research;
- Review of international and local environments;
- Initial drafting of the report;
- Preliminary conclusions and recommendations; and
- Review by and input from PASA and other PICC members.

Consultation took place over an extended period with a wide range of stakeholders, including industry participants and rights users, nationally and internationally.

## THE HEART OF THE INDUSTRY SECTOR

**Intellectual property** lies at the very **heart** of the publishing and printing industries. This Report should therefore provide the foundation for many of the core initiatives that need to be undertaken before the industry sector can exploit its full potential in delivering the sector's social and economic goals.

Instead of seeing themselves merely as book publishers, publishers could see themselves as **acquirers, custodians and managers of intellectual property rights in the process of exploiting these rights to the best advantage of themselves, authors and users**. With this wider view of who publishers are and what they do, they may come to see that **that** is their business even though it currently mainly takes the form of publishing books.

### More than just legislation

This Report cannot just be about legislation and infringement. Copyright is so central to industry development that issues of legislation and infringement cannot be divorced from **development agendas**. Policy approaches in countries studied recognise the need to create a climate of respect for intellectual property. It is important that copyright policy initiatives be linked to broader national policies for national development in the knowledge economy.

In developing countries, it is particularly important that legislation does not undermine the **local creative industries** and that steps taken to protect the right of access to information do not erode the viability and vitality of indigenous authors and publishing industries.

The argument that provision for **broad exceptions**, allowing for permission-free copying, is the best way to serve the needs of rights users in the country and contribute to developmental objectives is not sustained by a review of the provisions of other developing countries' legislations.

The broad RECOMMENDATIONS of the Report are that:

- The print industry sector needs to become more active in forging alliances both within the industry sector and with other copyright industries to promote copyright issues and to lobby for national policy initiatives and legislative reform. (RECOMMENDATION 1)
- However, the industry sector cannot achieve this alone. Active government engagement is needed, in a transparent and consultative process, to ensure the creation of an effective copyright regime that will
  - Foster the growth of the copyright industries;
  - Provide an effective framework for information and knowledge dissemination to meet national needs; and
  - Provide an enabling context for South Africa's international trade negotiations. (RECOMMENDATION 2)
- If the print industries are to make their maximum contribution to the country and its cultural and economic growth, attempts to improve the copyright framework in South Africa will need to be linked to:
  - Active programmes for the growth of a reading culture;
  - Support for and promotion of the rights of authors;
  - Educational programmes on the value of copyright; and
  - The expansion of library services. (RECOMMENDATION 3)
- From the perspective of industry strategy, this could include:
  - Initiatives to produce information and raise the profile of copyright issues;
  - The promotion of training in copyright for publishers and rights owners; and
  - Active interaction with readers and consumers to promote the value of copyright and copyright compliance. (RECOMMENDATION 4)

## Effective Copyright

A strong copyright regime contributes to the economic, cultural and educational strength of the country:

- Effective copyright protection ensures that creators are given due recompense for their efforts and encourages creative production.

- Copyright provides a framework for the dissemination of knowledge and creative work. It is about enabling access to creative works and knowledge products, rather than preventing access, as is often perceived.
- With the rapid globalisation and growth of digital media, an effective copyright regime is the essential underpinning of a country's participation in the global information economy.

## BACKGROUND – THE PRINT INDUSTRIES SECTOR

The Report identifies the **stakeholders** in the copyright industries that could participate in consultation processes. Rights owners include creative content creators; publishers; freelance workers; distributors and suppliers of products and services. Collecting societies are also important industry sector participants. Rights users, or consumers, include general readers, learners and educators, and libraries.

### Getting organized locally

International experience suggests that developmental goals for the growth of the copyright industries and for the provision of the knowledge and information needs of the country are best achieved by the **promotion of local industries**. This could be done by addressing a number of issues:

#### *Author and professional associations*

The presence of strong author organisations, working to protect the rights of authors, is an important feature of a strong national copyright regime. In fact, the presence of author organisations in national lobbies on copyright issues is an important measure of credibility. Authors need to have knowledge of copyright and contractual issues if they are to protect their rights and grow their financial stake in the industry sector.

#### *Collective licensing*

In the countries studied collective licencing often plays an important role in balancing the rights of rights owners and rights users and combating seemingly inevitable illegal photocopying.

#### *Research and information dissemination*

The dissemination of information and research on copyright and the active participation of rights owners in discussions with government on legislative issues are striking features of the countries reviewed.

#### *Government initiatives*

In order to create a copyright regime in line with national policy issues and international obligations, international experience suggests that the best approach to legislative reform, particularly in view of the changes being brought about by the advent of digital media, lies in Government-driven consultation with rights owners and users on copyright legislative matters.

## COPYRIGHT IN SOUTH AFRICA: AN OVERVIEW

South Africa has a well-established publishing industry sector. However, it is generally believed that there are high levels of copyright infringement. The situation is possibly not as bad as it is made out to be. There is still cause for **concern** at the very high levels of student copying in off-campus copy shops, increasing levels of illegal copying in schools, the losses this is incurring for publishers and the negative impact that this has on book prices.

Any efforts to grow the contribution of the print industries sector to the national economy will have to be accompanied by sustained efforts to bring **illegal copying** under control through **educational initiatives** among educators and learners and **effective prosecution** of offenders.

Other **shortcomings** regarding intellectual property rights in South Africa include:

- South Africa lacks compliance with TRIPS and needs to improve legislation to allow for more effective copyright enforcement;
- Enforcement is too difficult;
- The legislative environment is inadequate to stimulate industry growth;
- There are low levels of appreciation of the value of reading and of intellectual property rights; and
- There is no viable writers' organization yet.

If there is to be genuine growth and development for authors and publishers the creation of a **culture** of respect for creative and intellectual products will need to be accompanied by an effective legislative environment in which creative effort can be rewarded, copyright violations can be curtailed and piracy brought under control.

This should in turn lead to greater **economies of scale** for local publishing and resultant lower prices for consumers.

However, the legislative context is only one facet of the intellectual property regime in the country and this Report looks at the **cultural, social and developmental context** in which IPRs operate in the country.

## COPYRIGHT INDUSTRIES AND ECONOMIC GROWTH

Local and international trade issues cannot be divorced from one another. Economic growth in copyright industries depends upon the basis of a strong **national copyright regime** which is **compliant with international treaties**. A weak copyright regime will impact negatively on local industry growth and risks affecting international trading partnerships across a wide range of key export industries. Compliance with trade agreements is also important in positioning African industries in global markets and thus supporting cultural diversity.

The Report describes the nature of intellectual property rights and reviews a number of key issues in the international context, looking at countries like African countries, Australia and Canada, and not only the UK and USA, for examples of best practice in

copyright legislation and management. It also reviews international treaties and their impact on local copyright regimes.

If the protection of intellectual property is to work in favour of the development of local industries, then this development cannot be divorced from the international context.

Compliance with the **Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS)** and **other trade agreements** is also important in positioning **African industries** in global markets and thus supporting cultural diversity.

The Report reviews the **size and makeup** of the print and publishing industry sector in South Africa and its contribution to the national economy. The conclusions are that South Africa has a well-established publishing industry sector, turning over around R2 to R2.5 billion a year. The industry compares with Australia in the number of books produced per year and the number of employees in the industry. However, South Africa produces a much larger proportion of school textbooks as opposed to other publishing sectors, in common with the pattern in most developing countries. This has the added feature of creating a market in which the government, in the form of the Department of Education is one of the biggest consumers of books in the country. In the general trade market, there is a concentration of markets and distribution outlets in middle class urban areas.

Given that expansion is needed if these wider markets are to be reached, there is a need to explore ways of supporting **new business development** and, in particular, providing training in the management of copyright and contracts.

The Report makes the following general **conclusions** in relation to the **publishing** sector:

- If the South African book publishing industry is to increase its contribution to the economy, it will need to explore growth in the industry sub-sectors currently under-represented in relation to international indicators. In particular, local trade publishing seems to be seriously under-represented and the level of indigenous language publishing in the trade sector is very low; and
- This would also have implications for author development.

The role of **owners of creative content** also needs to be addressed:

- **Training** is needed for authors in copyright and contractual ways in which their work can be exploited. Writers, illustrators, translators and photographers need to be more explicitly recognised as contributors to the creative industries and their associations included in initiatives for industry sector growth.
- The print industries sector needs to create **rights alliances** with all rights holder in the sector to provide a united front for the development of strategies and policies for the development and growth of the sector.
- Because of the interconnectedness of print and digital media and the opportunities that digital media offer for the development of new products and new markets, it is important that issues relating to **digital copyright** be included in any discussion of potential growth in the contribution of the print industries sector.
- Any efforts undertaken to grow the contribution of the print industries sector to the national economy will have to be accompanied by sustained efforts to bring **illegal**

**copying** under control, through educational initiatives among educators and learners and effective prosecution of offenders.

Shortcomings in South African **legislation** that impede effective prosecution of offenders need to be addressed, if there are to be satisfactory growth rates in the sector.

## FACTORS INHIBITING ECONOMIC GROWTH

The **issues** that face rights holders in the PICC, from authors through to booksellers, include the lack of a reading culture; the lack of respect for copyright; a failure to realise the value of knowledge products; and a sense of entitlement which assumes that information should be available free of charge.

That the provisions of the **Copyright Act** are often ignored in educational institutions, in administrative offices, in companies and, indeed, throughout society, is not unique to South Africa, or even unusual. The ideal situation, from the point of view of authors and publishers, would be an effective legal system and a mature licensing system operating in all these spheres, such as exist, for example, in the Scandinavian countries, Canada and Australia, where intellectual property is respected and public awareness is high. That situation, however, is a long-term objective. In the meantime, rights owners' main concern is with the education and academic sectors, for that is where their heaviest losses are incurred.

While the introduction of blanket licences and campaigns for transactional licensing in universities has improved the levels of copyright observance, the **university sector** has lobbied for generous exceptions in South African legislation and has effectively stalled legislative reform.

The burning question is whether the balance between the conflicting needs and interests of creators and users should be accommodated in the law or by voluntary contractual arrangements between the parties. This Report takes the view that exceptions to the exclusive right in the law itself should be confined to the minimum and that the balance should be provided by voluntary contractual arrangements. This is what has worked in other countries and there is no reason to believe that South Africa is different. The voluntary system is entrenched in our law and is in line with the constitutional right to property whereas compulsory exceptions in the law usurp personal rights and are thus arguably unconstitutional.

The Report **RECOMMENDS** that:

If there is to be progress in dealing with the legislative and other policy issues causing conflict between rights holders and users in the Higher Education sector, and spilling over damagingly into other sectors, there is a need for government involvement in creating a conducive environment for an understanding to be reached on the desirable balance in South African legislation and practice. This can readily be achieved by:

- The promotion of a collective licensing priced to offer affordability and access to rights users as the most effective mechanism for addressing the problems faced by the Higher Education sector.
- Attention to the proposed regulations, along the lines of those gazetted for the music industry, which will define the government's approach to the accountability of collecting societies and will introduce and clearly delineate a regulatory mechanism

by which the collecting society's activities will be transparently exposed and at the same time legitimised.

- Urgent attention to the legislative amendments needed to remove ambiguity on the limits of photocopying for personal use and in the educational context; the strengthening of enforcement measures; the provision of a stable basis for policy-making on copyright for digital media. These would constitute a necessary first step preceding any of the issues listed below.
- Better communications between the DTI and industry stakeholders to ensure a balanced response to the submissions of the different sectors of society.
- Support for ANFASA to ensure balance in proposed legislation and policy, as probably the majority of authors writing non-fiction in South Africa are active in higher education. It is recommended that academic authors become more active in protecting their rights as authors and that educational campaigns on copyright and contract be provided for authors.
- Education and awareness programmes among students and lecturers on the value of intellectual property.
- High-level discussions between industry associations and SAUVCA on the most desirable policy environment for the development of academic publishing in South Africa and the creation of the best possible environment for access to knowledge and research information. (RECOMMENDATION 7)

A decade ago, publishers would have pointed to the proliferation of course packs in higher education institutions as the major problem. This is now coming under control as a result of the negotiation of **blanket and transactional licensing** through DALRO. There is a much greater awareness in higher education institutions of the need for copyright compliance and the risks of infringement. Although there are still gaps and there are undoubtedly still institutions and departments who do produce illegal course packs, this is no longer the major problem it once was.

If **course pack copying** is progressively being brought under control, the same cannot be said about the other prevailing form of infringement – the unlawful copying by students of whole books as a substitute for buying them. Most piracy takes place off-campus, in copy shops usually strategically situated near the gates of the university or technikon.

Further **research** is urgently needed to quantify the levels of illegal copying and the impact that this has on the industry and on its contribution to the national economy.

The levels of copying taking place in **schools** in South Africa are giving increasing cause for concern. Publishers are aware of schools in which entire textbooks are being copied and sold by teachers and cases taken up by publishers have revealed wholesale production of pirated, photocopied textbooks being supplied to state schools.

The print industries sector is concerned that such practices not only undermine the most important book market in South Africa and contribute to higher costs for school textbooks, but also that a pattern which undermines respect for the value of books in education is being established very early on in the education system.

In the first instance, the remedy for this kind of copying lies in **educational campaigns**, undertaken in conjunction with departments of education. In the longer run, when there is

a better climate of observance in the schools sector, the introduction of blanket licensing, as is practiced in a number of other countries, might be researched as a possible answer.

Problems in the **schools sector** include high levels of classroom copying of compilations, anthologies and even of whole books. It should be noted that in those cases where educators are copying published books and selling them to learners, whether at cost or for profit, they could be found guilty of criminal copyright violation in a court of law and, if found guilty, would have a criminal record.

Factors that have inadvertently led to **higher levels of copying** in classrooms include:

- The emphasis on the development of resources by classroom teachers, in the absence of well-stocked libraries and the availability of other resource materials for educators to draw on;
- Misguided statements in the early days of the new curriculum by Educational Department officials that textbooks were redundant in OBE; and
- Unrealistic deadlines for the development of guides to the new curriculum developed by education departments that left developers with little option but to copy existing published materials.

The Report RECOMMENDS that:

- Rising levels of illegal copying in schools can and should be addressed, in the first instance, through awareness and educational campaigns in schools. The positive levels of communication and understanding that now exist between the Department of Education and the publishing industry are encouraging and should help address the situation; (RECOMMENDATION 8)
- Factors in the educational system aggravating the trend towards copying should be addressed with the national and provincial departments of education and departmental cooperation sought in combating illegal copying; (RECOMMENDATION 9)
- Education departments and educators should be made aware of the risks attached to gross copyright violation; and (RECOMMENDATION 10)
- Following on policy initiatives on the ownership and accountability of collecting societies in South Africa, and in the wake of copyright awareness campaigns in schools, there needs to be an investigation, with the print industries sector, DALRO and the Department of Education of the desirability of introducing blanket licensing in schools for print and digital copying of resource materials. (RECOMMENDATION 11)

## INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE

As a signatory to international copyright treaties South Africa has **international obligations** to legislate within the required parameters. By implication, it acknowledges the need to balance the rights of copyright owners and users in the best interests of society as a whole.

South Africa is a signatory to the Berne Convention and the TRIPS Agreement. It has also signed but not ratified the WIPO Copyright Treaty (WCT) of 1996. The South African print industries sector, with government, need to examine whether South African legislation, in particular the Regulations promulgated under Section 13 of the Act, are in contravention of the Berne Convention's three-step test. It is RECOMMENDED that future legislative change conforms to those obligations.

There is a common view internationally that South Africa is in **violation of its TRIPS obligations** as a result of a failure to address relatively minor legislative issues that nevertheless have a major impact on the ability of the country to enforce the protection of IPRs.

Among the **TRIPS incompatibilities** listed by the Intellectual Property Alliance in the USA (IIPA) are:

- The South African Act includes no presumption of copyright. In other words, South African copyright holders have to prove copyright subsistence and ownership before they can pursue a case for infringement. This is regarded in TRIPS as an unnecessary burden on the rights holder and a barrier to enforcement of rights;
- Some overly broad exceptions to protection (a reference to the regulations for library and educational use);
- In addition, the IIPA recommends that *ex parte* searches (Anton Pillar orders) be made easier. These allow rights holder who have preliminary evidence that an infringement has taken place, to get an order for a search of the premises concerned. The IIPA believes that South Africa is not tough enough on the criminalisation of end-user piracy and that enforcement is inhibited by the fact that search orders are too difficult to obtain; and
- Finally, it recommends that, in order to be fully TRIPS compliant, South Africa needs to strengthen the penalties against copyright infringement in order to act as a sufficient deterrent.

**IIPA criticism** of South Africa further includes issues relating to enforcement in the criminal justice system:

- The inadequate allocation of resources to get the Department of Trade and Industry (DTI) special enforcement unit running effectively; and
- Occasional lack of expertise in the police and an over-burdened criminal court system with inadequate understanding among prosecutors and judges of the severity of the crime of piracy.

Whether or not South Africa is TRIPS compliant remains a debatable issue. It is clear, however, that there are issues, particularly relating to the effectiveness of copyright enforcement in South Africa, which will need to be addressed if South Africa is to develop its full strength as a trading partner in the global economy. South Africa is likely to come under pressure about its IP regime in the course of international trade negotiations. It needs to be recognised that these agreements are two-way processes and that the government needs to identify IP needs and act on them.

As far as the industry sector is concerned, there is a need to broker more active involvement in international trade issues and to work with IP rights owners' alliances to

bring pressure on government to deal with IP issues that hinder South Africa's position as an international trading partner.

## RECOMMENDATIONS

- There are a number of legislative shortcomings that need to be addressed if South Africa is to be able to enforce copyright effectively and conform to its international treaty obligations. These include the presumption of copyright; revision of the Section 13 regulations; easier access to Anton Pillar search orders for copyright plaintiffs; and stiffer penalties for copyright infringement, including statutory damages. (RECOMMENDATION 25)
- South Africa needs to ensure that its legislation is in line with international treaties if it is to provide a conducive trading environment for local industries and their international trading partners. This is particularly important in the light of international trade agreements currently being negotiated. (RECOMMENDATION 12)
- It is a matter of concern that a number of legislative amendments needed to bring South African legislation into line with international standards of protection and enforcement have been stalled for a number of years. The DTI is urged to take up its responsibilities in addressing these issues and resolving differences currently blocking legislative change. (RECOMMENDATION 13)
- It is equally disturbing that South Africa has fallen behind in addressing its international obligations in relation to electronic copyright issues and the DTI is urged to set up, as a matter of urgency, the inter-industry consultations needed to formulate South African policy on electronic copyright legislation. (RECOMMENDATION 14)
- Provisions in South African legislation for fair dealing and regulations governing exceptions for educational use are of particular concern and these need to be examined in the light of international treaty obligations. (RECOMMENDATION 15)

## THE LEGISLATIVE ENVIRONMENT

Over the last decade, the major **problems with legislation** articulated by the industry sector have had to do with barriers to effective enforcement. In general, publishers are hesitant to prosecute copyright offenders because of ambiguities in the legislation, the expense of bringing cases to court, the lack of effective penalties and inefficiencies in the criminal justice system.

There is no reason to compromise South Africa's status under international trade agreements and to compromise the viability of local industries for the sake of **relatively minor legislative reforms** that have been argued for by the South African and international rights communities for many years. What is very clear is that the legislative impasse that has resulted from resistance by the university sector to legislative reform needs to be resolved by government intervention to ensure a balanced and effective copyright regime.

The main **legislative weaknesses** identified by local and international publishers over the last decade include:

- Regulations governing exceptions for educational and library use;

- The lack of a presumption of ownership of copyright in South African law;
- Difficulties in securing evidence in the case of copyright infringement (in part dealt with by the promulgation of the Counterfeit Goods Act of 1997 that confers powers of seizure upon inspectors and certain members of the police);
- Inadequate penalties for copyright infringements;
- Ambiguities in the interpretation of fair dealing; and
- The lack of provisions for digital copyright.

In addition, the **DTI** has identified the creation of a regulatory framework for collecting societies as an issue, one with which the publishing industry would agree.

These issues are dealt with below.

## The Regulations

A major problem in South African copyright legislation, in the eyes of local and international rights holders, are the Regulations, promulgated in 1978, providing for exceptions for educational and library use. Not only are they poorly expressed and ambiguous, but they are arguably in contravention of the three-step test and are *ultra vires* the Act itself.

The problem, apart from the fact that they are poorly expressed and ambiguous, is that the regulations are framed by restrictions related to the Berne Convention three-step test, yet the list of what may be copied is in direct contradiction of this. As a result, publishers wishing to take action against infringements in educational institutions or libraries would be faced with lengthy and expensive legal arguments about the interpretation of these regulations.

Although there is general agreement that the regulations are ambiguous and contradictory, the publishing industry's attempt to revise them led to heated debate between the university lobby and the publishing industry sector. This needs to be resolved, but resolution is unlikely to be achieved by negotiations between rights holders and the universities. It is ultimately the responsibility of government to legislate.

As the regulations are ambiguous and contradictory and stand in the way of effective enforcement of rights owners' rights under SA copyright law, the print industries sector urges the DTI to review the submissions it has received and put legislative amendments back on track.

In the long run, a more comprehensive resolution of legislative issues relating to the balancing of the needs of rights owners and rights users is required in the context of a broader approach to the balancing of rights in print and digital media. This would include consideration of the role that could be played by a licensing body in providing the necessary balance, as in Canada and Australia, and the legislative action that would be needed to implement this solution.

## Statutory Damages and Evidentiary Presumption

South African rights holders complain that unnecessary barriers to enforcement of the rights in the courts are set up by the failure of South African legislation to allow for the presumption of the subsistence of copyright, which involves plaintiffs in unnecessarily burdensome and expensive procedures in proving their ownership of copyright in civil and criminal cases.

Moreover, the penalties that can be awarded are inadequate to compensate plaintiffs who bring cases to court, resulting in a reluctance to prosecute cases in South Africa's courts, in spite of high levels of infringement. Local and international associations have argued for some time for the introduction of stiffer penalties for copyright infringement, in particular for statutory damages as a way of compensating rights owners and providing a deterrent against copyright violations.

The print industries sector urges the DTI to review these legislative reforms in the light of submissions received and to put legislative reform back on track.

The industry sector regards this as an urgent matter that should not wait for a comprehensive review of South African legislation and the formulation of policies for electronic copyright, which would be likely to take some years.

## Legislative Process

As far as the process of legislative reform is concerned, the report argues that legislative reform cannot be achieved in South Africa by waiting for a consensus between rights owners and users, as the DTI appears to expect. The ambiguities of the existing regulations make this impossible – this is proven by more than a decade of failed attempts to reach agreement with the universities. There therefore needs to be government intervention to ensure that copyright legislation is in line with principles accepted by both parties, with international practice and with South African policy.

It is vitally important that these issues are cleared up in the print domain before South Africa can move towards legislating for digital media, where the issues are more complex and the problems more acute.

The report therefore urges the creation of a transparent consultative process as a necessary part of legislative reform. This consultation should include representatives of all the relevant industry organisations with a stake in copyright.

The Report RECOMMENDS:

- It is the belief of the print industries sector that the conflict between some users and rights owners in the sector is unlikely to be resolved through mutual agreement on legislative reform. Moreover, the impact of this kind of conflict is destructive and should be resolved as quickly as possible through the intervention of government to review stakeholders' submissions, resolve short-term legislative needs and put on track a regulated environment for collective licensing.

This would involve a three-pronged approach: amending the Copyright Act, revising the regulations and promulgating regulations for a supervisory mechanism applicable to all collecting societies. (RECOMMENDATION 16)

- The print industry sector needs to play a more active role, on its own account and in concert with other rights holders, to interact with government to ensure the implementation of a sound legislative regime. (RECOMMENDATION 17)
- There is a clear set of requirements for legislative reform, agreed by South African industries and their international partners. These include:
  - The regulations governing exceptions for educational and library use;
  - The lack of a presumption of ownership of copyright in South African law;
  - Difficulties in securing evidence in the case of copyright infringement (in part dealt with by the promulgation of the Counterfeit Goods Act of 1997 that confers powers of seizure upon inspectors and certain members of the police);
  - Inadequate penalties for copyright infringements;
  - Ambiguities in the interpretation of fair dealing;
  - The lack of provisions for digital copyright; and
  - The creation of a regulatory framework for collecting societies.

These need to be addressed by government. (RECOMMENDATION 18)

- The legislative impasse that has been reached concerning amendments to the Copyright Act and to the Regulations needs to be resolved through active participation and expert intervention by the DTI to ensure that the South African copyright environment is conducive to local and international trading and developmental needs. This is a matter of some urgency, as it is clear that deficiencies in legislation are impeding the growth and development of the copyright industries. (RECOMMENDATION 19)
- The industry does not believe that demands for multiple copying for educational use can be met by resorting to fair dealing provisions in copyright legislation without causing serious harm to the publishing industry and other copyright industries. Rather, it recommends the use of collective licensing agreements, priced to suit local conditions, with regulatory backing to ensure maximum participation. (RECOMMENDATION 20)
- It is vitally important that these issues are cleared up in the print domain before South Africa can move towards legislating for digital media, where the issues are more complex and the problems more acute. (RECOMMENDATION 21)
- The print industry urges the creation of a transparent consultative process as a necessary part of legislative reform. This consultation should include representatives of all the relevant industry organisations with a stake in copyright. (RECOMMENDATION 22)

The DTI's initiative to set in motion a process to create copyright policy is an admirable one. However, international examples show very clearly the value of consultative processes built into the development of such policy initiatives.

## Legislative policy

It is understood from the DTI that all future legislation is to be informed by policy, and that the government think-tank will eventually take a sober decision based on trade imperatives and on stakeholders' interests. There will be no legislative development until the policy document is finalised and has been accepted by the public.

However, Government considers that legislative **review** (where a law is simply 'bad' or unworkable) need not necessarily be neglected until the policy document is complete, whereas legislative **reform** must be informed by policy. Amendments to the Act such as a new definition of fair dealing and the introduction of statutory damages, as well as revision of the copyright regulations, straddle these lines. The door is therefore not entirely closed to renewed efforts to resolve these outstanding issues.

The DTI has said that only if the shelved amendments to the Act (statutory damages, proof of the subsistence of copyright and the criminalisation of end-user piracy) are of the utmost urgency – in that they might stave off immediate and likely losses to the publishing industry – would they be willing to make an intervention in the short to medium term. The print industry needs to make its own stand on this matter and it is important that it does so in concert with other rights owners affected by the shelving of legislative amendments, particularly the software industry.

It is also important that the print industries sector makes a strong input into the policy document, either at the drafting stage or when it comes before the public for comment.

The Report RECOMMENDS:

- While comprehensive legislative reform should await such a policy initiative, the print and publishing industries feel that legislative review has been stalled for too long and should not be delayed any longer. Legislative inadequacies are impacting negatively not only on the print industries, but on software developers and other IP stakeholders. Industry developments in strategic areas of crucial importance to the country are being hampered by inadequacies in copyright legislation; these are clearly recognised and agreed to by national and international stakeholders; and the print industries sector sees no reason for the process of implementing amendments to be delayed any longer. (RECOMMENDATION 23)
- The print industries sector needs to formulate its own objectives more clearly, spelling out for government the economic impact of a failure to amend the law at this stage. It is also recommended that rights owners in the print industries sector form alliances with other rights holders, to ensure a concerted approach to the formulation of copyright policy. (RECOMMENDATION 24)

Rights owners in developing countries generally do not accept arguments for the overriding of copyright laws for the sake of 'the public good'. Rather, they believe that the public good is best served by the fostering of strong local writing and publishing industries.

## ENFORCEMENT

If copyright is to function effectively to promote growth in creative and knowledge industries, there must be effective legislative measures to ensure that rights owners can enforce their rights and be protected against illegal copying and piracy. These measures

include adequate penalties for civil and criminal prosecution of offenders and criminal justice systems with an understanding of the importance of intellectual property to the national economy.

Effective copyright **enforcement requires:**

- An effective (TRIPS-compliant) **legislative system** that minimises the obstacles in the way of the prosecution of copyright offenders and provides sufficient deterrents to prevent recurring infringement;
- A section of the **police force** that specialises in the enforcement of Intellectual Property Rights, has sufficient capacity to enforce a wide range of IP rights, has an understanding of the importance of intellectual property to the country's social and economic well-being and is provided with regular training to allow them to be up-to-date and informed on IP issues and intellectual property enforcement;
- An effective **court system** with the capacity to prosecute cases of infringement, with an understanding of copyright and its importance, and armed with sufficient remedies in law to allow for penalties against infringers to act as an effective deterrent; and
- **Government and industry cooperation** in the creation of a climate of respect for and understanding of the value of copyright to the country.

The Report reviews an **Australian report** on effective enforcement measures and concludes that, if South Africa were to follow this example, there would be a need for:

- The introduction of the **presumption of copyright ownership** into South African law. This could be reinforced further by the introduction of discretionary penalties for defendants who abuse their right to challenge presumption of ownership;
- The creation of **small claims courts** for more minor copyright case;
- Making **Anton Pillar orders** for *ex parte* searches **less onerous** in copyright cases;
- The introduction of **statutory damages** into South African copyright law;
- Education and awareness **programmes** for public prosecutors;
- Awareness and education **campaigns** for rights owners and the general public; a joint responsibility of government and rights holders; and
- The consideration of **statutory licensing**.

The Report RECOMMENDS:

- The print industries sector needs to engage with the DTI as a matter of urgency to motivate for the enactment of legislative reforms that would remove obstacles to the successful prosecution of copyright violations. It is the responsibility of the government, in particular the DTI, to ensure that copyright legislation conforms to South Africa's international treaty requirements and that copyright enforcement is rendered more effective. (RECOMMENDATION 26)
- Civil prosecutions need to be made more effective and less onerous for rights holders, as this, rather than criminal prosecutions, should be the first line of defence

against copyright infringement, particularly given the overloading of the criminal justice system in South Africa. (RECOMMENDATION 27)

- Statutory damages need to be introduced into South African legislation as a matter of urgency to provide adequate compensation for victims of copyright violation and to act as a deterrent against further infringement. (RECOMMENDATION 28)
- Questions of capacity in the police force and courts need to be addressed to allow for the successful prosecution of cases of copyright violation. (RECOMMENDATION 29)
- There is a need for the introduction of training programmes for police, prosecutors and magistrates to increase awareness of the importance of copyright and the necessity for effective enforcement would be a valuable policy initiative. (RECOMMENDATION 30)

## COPYRIGHT AND DEVELOPMENT IN SA

An **effective copyright regime** which protects the creative efforts of authors is an essential underpinning for the development and growth of the cultural and knowledge industries in South Africa. This is important not only to economic growth, but also contributes to the **democratic and human rights culture** of the country.

In reviewing copyright and development, the report contests the arguments being advanced in some international quarters, notably UNESCO and the UK Commission on Intellectual Property Rights (CIPR), that the institution of **generous copyright exceptions** and **differential pricing** are the best ways of providing the balance between development needs for knowledge and information consumption and the interests of rights owners.

The Report RECOMMENDS:

- The print industry sector recommends that development needs be met in the first instance by the negotiation of collective licensing, backed by regulatory control by government, using the pricing of licences to ensure equitable access to information without eroding the rights of authors and publishers. (RECOMMENDATION 31)
- Any initiatives to address the need for access to knowledge and information should, in the first instance, ensure that relevant and affordable information products are available from a strong local publishing sector. Interventions that erode the capacity of the industry sector will ultimately work to harm access to affordable knowledge and information for the country as a whole. (RECOMMENDATION 32)

Policies and strategies for development in the print industries have to be linked to **broader strategic developmental issues** if there is to be a real chance to foster respect for copyright. Such policies and strategies should include efforts to improve the representivity of the sector, to foster the growth of authors and companies who can serve the whole community in South Africa in all its diversity.

One effective way of meeting the educational and cultural needs of the country would be the fostering of a copyright regime that encourages the **growth of local products** to meet the needs of local communities. The most effective way of achieving the low prices needed for wide information dissemination would be through the economies of scale that would come from the wider reach of print products. It is through a vibrant and diverse

print media sector, linked to an **effective library system**, that South Africa could most effectively meet its reading needs.

The arguments about intellectual property and development conducted in the developed world and at UNESCO seem to focus almost entirely on the **consumption** of knowledge and are driven by librarians and academics. It is therefore, perhaps, not surprising that the proposals emerging from these forums tend to focus on copyright exceptions rather than on the need to develop local writers and local cultural industries in developing countries.

In fact, the chapter on copyright in the UK CIPR report on intellectual property rights and development is dismissive of the capacity of developing countries to meet their own information needs and instead concentrates on the necessity for initiatives to get international information into these countries cheaply.

In a country like South Africa, it is vitally important that the development of **local culture and local knowledge** not be undermined or overwhelmed by such ostensibly well-meaning initiatives if the country is to deliver the aims so clearly articulated in NEPAD for an African presence in the global economy.

If the work of South African writers is not protected by an effective copyright system, the very necessary work of growing local authors and expanding local publication of creative writing in all languages will be compromised.

South Africa has competent writers and a viable publishing industry capable of producing educational materials which allow learners and students access to a South African perspective on the world and to locally relevant knowledge. This should not be compromised in an attempt to gain greater cost-free access to international information.

When it comes to **scholarly information and research**, the current situation is that the major research on African issues or by African scholars is published in the UK and the US. Africa thus re-imports a first world version of its own scholarship. The digital revolution offers opportunities for reversing this situation and a developmental approach to copyright in South Africa needs to protect the potential for the growth of African research and knowledge rather than strengthening the hegemony of the North.

As South Africa is a major player in the formulation of international policies on **cultural diversity**, through UNESCO's Cultural Diversity initiative, it is important that policy and legislative initiatives take account of the need to empower local content creators, ensuring that South Africa's voice becomes heard in the global dialogue.

International experience suggests that developmental goals for the growth of the copyright industries and for the provision of the knowledge and information needs of the country are best achieved by the promotion of local industries.

The argument that broad exceptions, allowing for permission-free copying, is the best way to serve the needs of rights users in the country and contribute to developmental objectives is not sustained by a review of the provisions of other developing countries' legislations.

The Report's RECOMMENDATIONS are that:

- The formulation of copyright policy, particularly those policies that seek to balance the rights of authors and users, needs to take cognisance of cultural diversity initiatives and the protection of national folklore heritage. (RECOMMENDATION 33)

- If South African creative writing, scholarly research and educational resources are to have a strong presence locally and internationally, and if South Africa is not to be colonised by international content, a copyright policy needs to be created that fosters growth in local writing and publishing. (RECOMMENDATION 34)

The most effective mechanism for ensuring access to knowledge and information is through the implementation of a collective licensing system, priced to suit local conditions.

In approaching the need for the democratisation of **access** to printed and digital cultural and information products, the print industries sector stresses the vital importance of a well-resourced and comprehensive **library system**. Libraries have a crucially important development role and the neglect of the library sector in South Africa in recent years has a far-reaching negative impact on education, culture and economic development. Where poverty is acting as a barrier to access to culture and knowledge, it is through the availability of comprehensive and appropriate library resources that this could best be addressed.

Libraries also serve as an important market for local print industries and can be a factor in fostering industry growth in local cultural and knowledge products. Whereas the library system should provide a market for authors and publishers to reach a wide range of readers, and should equally ensure the availability of local creative works and local knowledge for these readers, this market has all but collapsed in the last few years.

The print industries sector would argue that increased resourcing of libraries would be the answer to these problems, along with increased opportunities for local content, rather than increased photocopying of international materials.

The Report RECOMMENDS:

- Although this is not directly copyright issue, the strength of the library sector does have a direct influence on the capacity of the country to meet users' needs and therefore indirectly works to reduce the potential for copying. (RECOMMENDATION 35)

## COLLECTING SOCIETIES

The **objective** of the collecting society for the collective administration of rights is to provide a vehicle through which rights users can more easily clear permissions and rights holders more effectively get their remuneration. It is not always practicable for rights users to clear permissions one by one. Collecting societies for literary works, correctly named Reproduction Rights Organisations, or RROs, provide users with an acceptable means of copying extracts from copyright-protected published works for internal use when the whole work is not required, and provide rights owners with monetary compensation when extracts from their works are used.

In addition, a collecting society can provide an important focus point for copyright issues, play a vital role in providing ease of access to information, provide research and policy information and generally play a development and educational role. Collecting societies are thus key players in the copyright environment.

**Licensing** can be *transactional*, requiring a separate transaction for each clearance, or through a *blanket licence*, which allows upfront comprehensive clearance for copying, within certain specified limitations with reporting carried out retrospectively. The degree

to which a country enforces statutory licensing depends upon national policy approaches, negotiated between government, rights holders and rights users, particularly educational institutions.

The **ownership** of collecting societies is an important adjunct to their policy role: in general, collecting societies are owned by rights owners, an important factor in their credibility in the eyes of rights users. Authors and other content creators are important stakeholders involved in collecting societies and their ownership.

Money collected through collecting societies can make an important contribution to the advancement of copyright awareness, as well as general **cultural development** through projects like publications and awareness programmes projects funded from rights income.

The Report reviews the different **models** for collecting societies and concludes that the Canadian model seems to be favoured by the South African government. The South African print industry sector needs to engage with the issue of collecting societies in order to determine its own stance on this issue and in particular study the Canadian model.

Valuable progress has been made in **collective licensing** in South Africa. However there are still a number of higher education institutions that do not yet license photocopying. In general, the issue of illegal course pack copying has been brought under control, although there are still pockets of infringement.

International examples such as Canada and Australia demonstrate the value of a collecting society in helping to create a **balance** between the interests of rights' owners and the needs of users. Moreover, in a context in which there is a high level of demand for customised content and for the ability to provide multiple copies for library and classroom use, a collecting society provides an effective way of achieving this without eroding the rights of authors and while still providing an affordable route for the user.

Government articulated policy outlines for collecting societies at a workshop in May 2001. However, the print and publishing industries have not yet responded formally to these proposals, or articulated in any detail industry sector policy in regard to further development of collecting societies.

Collecting societies can play a vital role in providing ease of access to information while ensuring fair rewards for authors and publishers. The degree to which a country enforces statutory licensing depends upon national policy approaches, negotiated between government, rights holders and rights users, particularly educational institutions.

The Report RECOMMENDS:

- The print industries sector needs to initiate discussion and consultation on collective licensing as a mechanism for balancing rights and ensuring that content creators and producers receive fair reimbursement for the exploitation of their works. The consensus from the PICC stakeholder workshop held in March 2004 is that the industry sector broadly supports the Canadian model of collective licensing as the most appropriate one for South Africa. (RECOMMENDATION 36)
- Responses to the DTI proposals for policy for the supervision and ownership of collecting societies need to be agreed, clarified and articulated and the print industry sector needs to press for the introduction of similar regulations for collective licensing in the print copyright industries. (RECOMMENDATION 37)

- PASA and DALRO should work together in exploring the potential for blanket licensing beyond the tertiary sector. In particular, the potential of blanket licensing in schools needs to be thoroughly surveyed. (RECOMMENDATION 38)
- PASA should consider its way forward in case, at some point in the future, there was rights holders' ownership of DALRO. (RECOMMENDATION 39)
- Information and education on the role and functioning of the collective administration of rights should be provided for industry members. (RECOMMENDATION 40)

## ELECTRONIC COPYRIGHT

Because of the importance of digital issues for national economic and cultural development, as well as the interconnectedness of print and digital media and the opportunities that digital media offer for the development of new products and new markets, issues relating to digital copyright should be included in any discussion of potential growth in the contribution of the print industries sector. It is also important for any country wishing to be a trading presence in the digital information market to address legislative issues that encourage creative and financial investment in digital media. The countries reviewed have engaged in addressing the provisions of the World Intellectual Property Organization Copyright Treaty (WCT) of 1996, and South Africa appears to be seriously out of line in this regard, as it has not yet begun the process of reviewing national legislation for compliance with WCT provisions.

In all the countries discussed, legislative reform to bring copyright laws into line with the WCT and national priorities for digital copyright was a high priority national policy issue. The process of legislative reform was the result of government-driven consultation, taking into account the needs of industry and rights users.

In all cases, consultation took place over an extended period with a wide range of stakeholders, including industry participants and rights users.

There were varying degrees of caution in approaching the demands of digital copyright legislation. Built into all the legislative regimes is recognition of the need for continual review and updating.

Coupled with the government-driven consultative process, independent negotiations also took place between rights owners and rights users, particularly in the context of higher education needs. However, while such negotiations might have regulated transactional relationships, legislative reform was government-driven and was linked to clearly identified national policy needs.

Legislative and policy approaches ideally take account of the circumstances of the country concerned: its trading relationships and its distance from international markets.

Policy approaches in these countries also recognise the need to create a climate of respect for intellectual property. In Australia, government and industry contribute to information dissemination and advice.

While the growth of digital media might at first sight seem to pose a threat to the print industries in South Africa, in fact digital dissemination of content offers great advantages and growth potential to authors and publishers. Media convergence, moreover, means

that print industry players are already extensively involved in digital media. It is urgently necessary to address questions of authors' and publishers' rights in this new context.

However, it is clear that South Africa has **fallen behind** badly in addressing policy and legislative issues relating to digital copyright. The DTI convened a workshop on the implementation of the WCT in 1999, but this has not been followed up.

There is a need for discussion and research on the best ways of addressing development needs and digital media, particularly, but not only, in the higher education sector. This discussion should include the identification of contractual and business solutions to digital information needs as well as legislative issues.

The desirable extent of the **author's monopoly** over digital reproduction, a matter of lively debate worldwide, needs to be addressed in South Africa, where both the health of local creative industries and the rights of information users are of critical importance to development.

The Report's RECOMMENDATIONS on digital media are:

- Because of the interconnectedness of print and digital media and the opportunities that digital media offer for the development of new products and new markets, it is important that issues relating to digital copyright be included in any policies or strategies for potential growth in the contribution of the print industries sector. (RECOMMENDATION 5)
- Given the importance of digital communications in national economic and cultural development, it is vitally important for any country wishing to be a trading presence in the digital information market, to address legislative issues hindering the creation of an intellectual property environment that encourages investment (creative and financial) in digital media. (RECOMMENDATION 6)
- While the growth of digital media might at first sight seem to pose a threat to the print industries in South Africa, in fact digital dissemination of content offers great advantages and growth potential to authors and publishers. Media convergence, moreover, means that print industry players are already extensively involved in digital media and it is urgently necessary to address questions of authors' and publishers' rights in this new context. (RECOMMENDATION 41)
- It is clear, in comparison with other countries, is that South Africa has fallen behind badly in addressing legislative issues relating to digital copyright. Nor has there been a consultative process to determine legislative needs, as has been the case in other countries. There is an urgent need to bring South African copyright legislation in line with the WCT, in order to ensure protection for those investing in the development of digital media, and to set up a proper consultative process within the industry sector. This will be a critical issue in the negotiation of international trade treaties. (RECOMMENDATION 42)
- It is noted that the basis for a sound regime in digital copyright is to be found in viable legislation for print copyright. Any deficiencies in traditional copyright law are likely to be exaggerated in the electronic domain. (RECOMMENDATION 43)
- The print industries are concerned at the lack of national initiatives to set in motion policy and legislative decisions relating to digital copyright in South Africa. It urges the creation of a broadly constituted Working Group on Digital Media that includes all industry stakeholders, including new ventures. (RECOMMENDATION 44)

- An informed discussion of legislative issues relating to digital copyright needs to take place as a matter of urgency. (RECOMMENDATION 45)
- The print industries sector needs to identify stakeholders within the sector with an interest in digital copyright to set up an industry wide focus group on digital copyright that can interact with stakeholders in other industry sectors. (RECOMMENDATION 46)
- The print industries sector argues that the proposals made in submissions by industry members in the context of the Electronic Commerce Act need to be put on the table and addressed in an urgent cross-sectoral review of digital copyright policies in South Africa. (RECOMMENDATION 47)

The following legislative issues are identified as needing attention in South African copyright law:

- **The right of reproduction**  
The right of reproduction should be extended to the electronic environment. However, where any electronic reproduction is not in conflict with the normal exploitation of the right holders' right, an exception should be allowed.
- **WCT**  
It is suggested that the guidelines that were set in the WIPO Copyright Treaty, the Digital Millennium Copyright Act and the European Commission be followed by the legislature in South Africa in such a way that it will act as an incentive for content creators to distribute their material electronically and at lower cost to more South Africans.
- **Digital Rights Management**  
The provisions proposed by the WIPO Treaty for the protection of digital rights management information need to be dealt with in South African legislation.
- **Territorial Rights**  
Territorial rights, exhaustion of rights and parallel importation are all areas in need of discussion and review in South Africa, in order to determine the regime that would be in the best interests of the country, both for rights' owners and consumers.
- **Technological Measures**  
The use of technological measures to protect copyright is already employed by many companies in South Africa and it is suggested that the protections offered by the WIPO Copyright Treaty should be incorporated into our law as a matter of urgency. As was stated above the international experience could be introduced into South Africa. However, the urgency of introducing these measures could not be overstressed – if not, South Africa will become a haven for copyright infringement and other forms of piracy. On the other hand, South Africa should avoid enacting legislation that is too sweeping and could result in absurd prohibitions of legitimate exploitation of intellectual property.

## CONCLUSION

The report concludes by quoting Betty Mould-Iddrisu, from the Ministry of Justice in Ghana:

There is a need to recognise that modern well-drafted copyright legislation is an indispensable tool in the protection of authors' rights. Most developing countries fail to see or realise the importance of vibrant intellectual property legislation. The copyright system, as it now exists in virtually every country in the world, is a vital part of modern society's infrastructure, serving the entire community. It is the foundation on which the world's publishing industry rests, bringing the written or recorded word, carrying knowledge, ideas, understanding and entertainment to every literate person, young and old, in the community.<sup>1</sup>

In short, the print industries sector in South Africa believes that South African rights owners deserve the same levels of protection as any other country in the world; and the growth of a local industry is the surest way to provide affordable and relevant cultural and knowledge products to serve the needs of the country.

The Report concludes that:

International experience suggests that developmental goals for the provision of the knowledge and information needs of the country are best achieved by the promotion of local industries. In developing policies and strategies to meet the information and knowledge needs in the country, a variety of issues need to be addressed, including the availability of an effective and affordable collective licensing regime and strong library systems in all sectors.

The print industries sector needs to work in collaboration with its collecting society, DALRO, government departments and other stakeholders, to disseminate information on copyright, raise public awareness of copyright issues and combat illegal copying.

The most effective way of meeting the educational and cultural needs of the country would be the fostering of a copyright framework that encourages the growth of local products to meet the needs of local communities. And the most effective way of achieving the low prices needed for wide information dissemination would be through the economies of scale that would come from the wider reach of print products to those members of the community who are not currently readers. It is through a vibrant and diverse print media sector that South Africa could most effectively meet its reading needs.

The print industries sector believes that if there is to be genuine growth and development for authors and publishers the creation of a culture of respect for creative and intellectual products will need to be accompanied by an effective legislative environment in which creative effort can be rewarded, copyright violations can be curtailed and piracy brought under control.

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<sup>1</sup> Betty Mould-Iddrisu, Chief State Attorney in the Internal Legal Division of the Ministry of Justice, Ghana.

# PREFACE

**T**HIS REPORT ON COPYRIGHT in the print industries sector from a rights users' perspective has been commissioned by the Department of Arts and Culture, through the Print Industries Cluster Council (PICC), as part of a broader initiative to identify policy and development needs in the cultural industries. The Report examines copyright as an aspect of Intellectual Property Rights (IPRs) and its impact on growth and development in the print industries sector, and it identifies ways in which copyright laws and practices in South Africa are aiding or inhibiting the growth and development of the sector. Finally, it makes recommendations for action.

The PICC describes the aims of rights management programmes within its overall strategy planning as the creation of a phased dialogue between copyright owners and users. This Report is the first step in the process. In line with the PICC strategic approach, **the Report presents the perspectives and needs of the rights owners in the industry sector** as a contribution to this debate.

Interestingly, in view of the fact that a dialogue is envisaged, one of the key findings of the Report is that there is an urgent need for the generation of more information on copyright issues in the print industries sector itself. Compared to a number of other countries, there seems to be too little informed debate and discussion on intellectual property in the sector, and many industry participants appear to lack in-depth knowledge on copyright issues.

In March 2004, the draft Report was presented at a PICC workshop attended by representatives of the stakeholder groups in the print industries value chain: organisations representing writers, publishers, printers, booksellers, librarians, as well as relevant government departments. At this workshop, key issues were identified and recommendations from the Report were made for the implementation of a strategy for the creation of a strong copyright regime in South Africa were ratified, amended or added to. These have been compiled into this report.

The purpose of the Report is therefore to provide for discussion and development:

- A draft policy and strategy framework for the management of copyright;
- Recommendations for government consideration and implementation; and
- The formulation of strategies that would contribute to industry growth.

In the strategic planning framework that the PICC formulated in 2002<sup>2</sup>, the industry sector goals are described as follows:

- Government and industry need agreement on the challenges facing the sector and ways of addressing these challenges.
- Strategy needs to be coordinated between different government departments, industry role-players and consumers, with clear roles and responsibilities defined for all.

A key goal of the PICC strategic plan is to encourage legislative development and institute public copyright awareness campaigns.

This Report addresses all the role-players who might be involved in the development of copyright policies and strategies. It has been formulated to cover as wide a range of issues as possible that might be of importance in delivering industry goals within the framework of national development goals. The issues tackled by this Report are therefore not only legislative and economic, but also social and developmental.

The Report concludes that the print industry sector needs to participate more actively in the promotion of intellectual property issues. This would best be pursued in collaboration with other rights holders, in order to maintain a united front in pursuing the implementation of the necessary policy, legislative and strategic actions that have to be taken if the print industry is to prosper and grow.

Intellectual property lies at the heart of the publishing and print industries. This Report should therefore provide the foundation for many of the core initiatives that need to be undertaken before the industry sector can exploit its full potential in delivering its social and economic goals.

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<sup>2</sup> Print Industries Cluster Council, *If it is not on the page, it is not on the stage*. Business Plan 2002/3. March 2002.

# INTRODUCTION AND BACKGROUND – THE PRINT INDUSTRIES SECTOR IN SOUTH AFRICA

## THE IMPORTANCE OF COPYRIGHT

**A** STRONG COPYRIGHT REGIME contributes to the economic, cultural and educational strength of the country:

- Effective copyright protection ensures that creators are given due recompense for their efforts and encourages creative production.
- Copyright provides a framework for the dissemination of knowledge and creative work. It is about enabling access to creative works and knowledge products, rather than preventing access, as is often perceived.
- With the rapid globalisation and growth of digital media, an effective copyright regime is the essential underpinning of a country's participation in the global information economy.

Copyright law has to strike a balance between the economic interests of those who produce the copyright-protected products, and the informational needs of those who desire access to them. The crucial question is, to quote a recent report on copyright and development:

... how to reconcile the public interest in accessing new knowledge and the products of new knowledge, with the public interest in stimulating invention and creation which produces new knowledge and products on which material and cultural progress may depend.<sup>3</sup>

From the perspective of the print industries sector in South Africa, the essential balance is between the need to ensure the health and growth of the industry sector, to the benefit of all stakeholders, while ensuring that the cultural and educational needs of the country are met.

The core argument of the print industries sector is that these two sets of needs are reconcilable.

The most effective way of meeting the educational and cultural needs of the country would be the fostering of a copyright framework that encourages the growth of local products to meet the needs of local communities. And the most effective way of achieving the low prices needed for wide information dissemination would be through the economies of scale that would come from the wider reach of print products to those members of the community who are not currently readers. It is through a vibrant and

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<sup>3</sup> Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*. London 2002.  
[http://www.iprcommission.org/papers/word/final\\_report/reportwordfinal.doc](http://www.iprcommission.org/papers/word/final_report/reportwordfinal.doc)

diverse print media sector that South Africa could most effectively meet its reading needs.

## THE PROFILE OF THE INDUSTRY SECTOR

### The Print Industries Cluster Council (PICC)

The PICC brings together a number of industries in the sector. Members of the PICC are:

- The Print Federation of South Africa (PIFSA)
- The Paper Manufacturers' Association of South Africa (PAMSA)
- The Publishers' Association of South Africa (PASA)
- The South African Booksellers' Association (SABA)

### *A Strategic Industry Sector*

As the PICC describes itself, the print industries are a strategic industry sector, with an importance to the economy and the development of the country well beyond their size. They:

- Originate, package and disseminate ideas and information through the print and electronic media;
- Are critical to politics, education, culture, entertainment, nation-building, trade and economic growth;
- Are the most effective means of education and communication;
- Are as central to the knowledge economy as they are to the industrial economy;
- Are essential to empowerment and social development;
- Are economically self-sufficient, employing tens of thousands of skilled and unskilled workers; and
- Are world class and by far the largest in Africa.<sup>4</sup>

Working towards the transformation and growth of the print industries, therefore, is not only a matter of economic growth and job creation within the sector, but of an increase in locally relevant products that are a vital underpinning for the growth and development of the country as a whole.

As these are industries that either produce or contribute to the production of copyright products, their survival and growth depends on the existence of a strong copyright regime. If the print industries sector is to effectively supply the cultural, educational and

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<sup>4</sup> Print Industries Cluster Council, *If it is not on the page, it is not on the stage*. Business Plan 2002/3. March 2002.

knowledge needs of the country this can only happen within an environment in which the rights of the creators of print products are respected and protected.

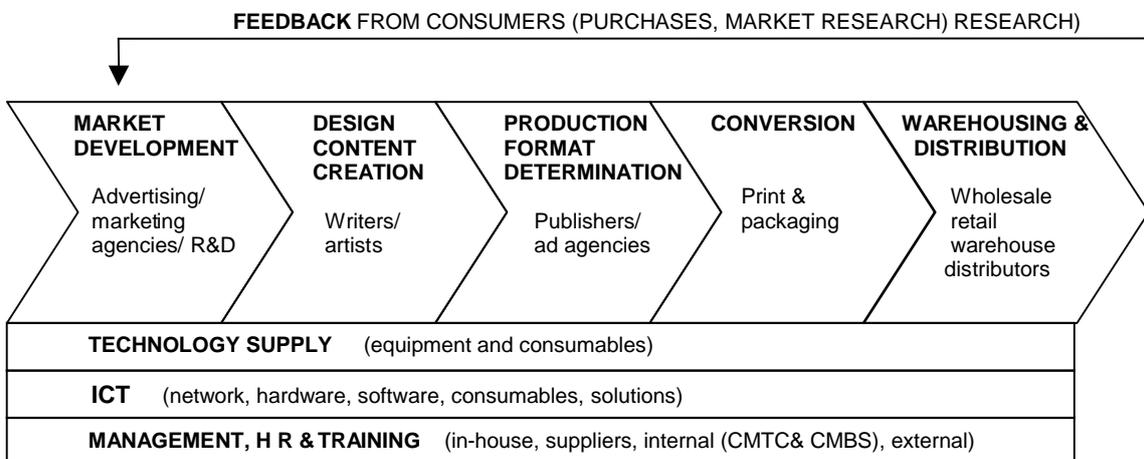
All the members of the PICC suffer real damage – including loss of turnover, reduced profitability and diminution in employment capacity – from copyright infringement through high levels of unauthorised reproduction. Of all the PICC members the greatest damage is caused to the book industry. The ramifications of losses due to excessive copying, however, reach much further than economic prejudice. In the print industries, low prices result from high sales volumes. Copyright infringement threatens the sector’s capacity to provide cultural, educational and knowledge products at affordable prices, for South Africa’s development.

## STAKEHOLDERS IN THE PRINT INDUSTRIES SECTOR

### The Print Industries Value Chain

In developing a strategy for the creation of a strong copyright regime in the print industries sector, with the aim of contributing to the growth of the sector, it is vitally important to recognise stakeholders across the whole value chain. Of particular importance are authors and content creators of all kinds. Copyright is intended, in the first instance, to protect the rights of authors, allowing their work to be published and disseminated without compromising their right to a fair reward for their labours.

**Figure 1. The Print Industries Value Chain**



### Stakeholders

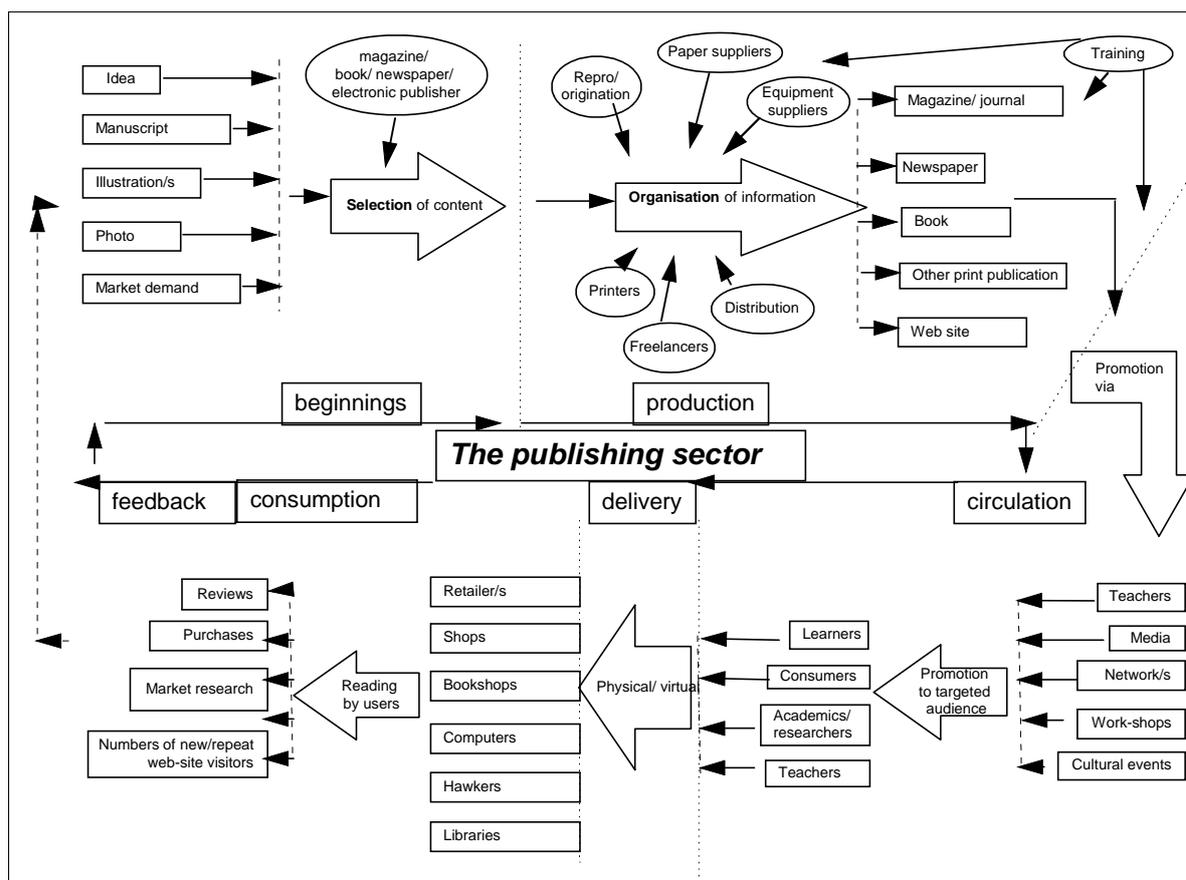
Stakeholders in the print industry value chain include:

- **Developers of markets:** advertising & marketing agencies, research & development agencies and marketing divisions of downstream companies.
- **Originators of content:** writers, journalists, photographers, artists, illustrators, and translators.

- **Producers of content:** the publishers of books, newspapers and magazines.
- **Packagers of content:** printers and paper-makers.
- **Deliverers of the packaged product to the consumer:** distributors and booksellers.
- **Suppliers to the sector:** Material and equipment suppliers, ITC, HR and Training suppliers.
- **Customers of sector:** Readers of books, magazines and newspapers, manufacturers and retailers of product and consumers/purchasers of packaged products.
- **Employees in sector:** Workers and their families within sector and related sectors.
- **Society within which businesses in sector operates**

A consolidated overview of the sector value chain would look like this:

**Figure 2: Consolidated Diagram of Print/Publishing Sector**



DAC: CIGS Report on Publishing

## Rights Owners

Stakeholders in the print industry value chain who benefit from copyright protection are originators of content, publishers, printers and distributors/booksellers, all of whom stand to lose from illegal copying. Although the levels of interest vary between the different groups, all support the principle of strong protection.

## Associations of Rights Owners

In general, countries with high levels of copyright compliance tend to be those with well-organised associations of authors, publishers and other copyright stakeholders: these generate copyright awareness and a greater culture of compliance within an effective legal system.

In addition to the industry organisations representing rights owners mentioned already as members of the PICC – publishers (PASA), booksellers (SABA) and printers (PIFSA) – there are organisations in South Africa representing scriptwriters, editors, translators, photographers, bibliographers and indexers.

The major gap, however, has been the absence of a properly functioning authors' association for the protection of their rights. Only recently have new authors' associations been launched – the South African Writers' Association (SAWA) and the Academic and Non-fiction Authors' Association of South Africa (ANFASA). In comparison, there are large and active authors' organisations in the countries of the North, and also in a number of developing countries, including African countries such as Nigeria, Ghana, Botswana, Namibia, Angola and Zimbabwe. At the upper end of the scale, the National Writers' Union in the USA – a trade union offering a wide range of services to its members – has 6 500 members and 17 chapters. The Authors' Coalition of America has 17 member organisations, united to manage and protect their reprographic reproduction rights. The Australian Society of Authors, founded in 1963 to protect the rights of authors and illustrators, has around 3 000 members. It sets minimum rates for pay and conditions for authors and illustrators, and publishes books, papers and lists for emerging and established writers, as well as a journal, the *Australian Author*, for members. It provides a contract advisory service, runs mentorships for new and emerging writers and offers advice about writing, copyright and publishing.<sup>5</sup>

Not all rights owners are involved in IP issues through the PICC. While there are effective industry organisations in the print industries sector to represent rights holders in South Africa, the absence of a strong authors' association that works towards the protection of authors' rights has been, until very recently, a notable gap.

Writers, illustrators, translators and photographers need to be more explicitly recognised as contributors to the creative industries and their associations included in initiatives for industry sector growth.

Organisations such as SAWA and ANFASA are indispensable partners in fostering respect and understanding for the importance of copyright and copyright observance in South Africa.

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<sup>5</sup> Australian Society of Authors.  
<http://www.asauthors.org/cgi-bin/asa/information.cgi/MenuItem?menu=level:asa>

## Rights Owners' Alliances

Rights owners' alliances, combining rights owners from different industry sectors, are important in providing a consolidated front to represent copyright interests to the government and the public. One of the most powerful rights owner organisations in the world is the International Intellectual Property Alliance (IIPA), based in the USA:

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1 100 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in both electronic and print media).<sup>6</sup>

The closest equivalent of the IIPA that South Africa has is the Intellectual Property Action Group (IPACT) which aims, according to its Mission Statement, 'to foster the implementation of an effective and efficient system for the protection and enhancement of intellectual property, and thus to promote economic prosperity in our country by means of liaising with and motivating government.' IPACT is a federation of bodies with a strong interest in the protection, commercial utilisation and enforcement of intellectual property rights in South Africa.

Members of IPACT include the Association of SA Music Industry (ASAMI), the Association of Advertising Agencies, the Motion Picture Association, the South African Chamber of Commerce, the Business Software Alliance (BSA), the Pharmaceutical Manufacturers Association (PMA), Print Media SA, the Dramatic, Artistic and Literary Rights Organisation (DALRO) and the Southern African Music Rights Organisation (SAMRO).

The print industries sector needs to create rights alliances with all rights holder in the sector, to provide a united front for the development of strategies and policies for the development and growth of the sector.

## Collecting Societies

Collecting societies can also provide the focus for alliances of the rights owners whose interests they represent. The Australian collecting society, Copyright Agency Limited (CAL), represents authors, journalists, visual artists, photographers and newspaper, magazine and book publishers as their non-exclusive agent to license the copying of their works to the general community. It funds the Centre for Copyright Studies Ltd, which undertakes and promotes research into copyright. It also supports the Australian Copyright Council<sup>7</sup> which assists copyright owners to exercise their rights effectively, raises awareness in the community about the importance of copyright, identifies and

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<sup>6</sup> <http://www.iipa.com/aboutiipa.html>

<sup>7</sup> [www.copyright.org.au](http://www.copyright.org.au)

researches areas of copyright law which are inadequate or unfair and fosters cooperation amongst bodies representing creators and owners of copyright.

In addition, collecting societies function as a mechanism for ensuring democratic access to knowledge and information, while ensuring some rewards for rights owners.

In South Africa, the collecting society for the publishing sector is the Dramatic, Artistic and Literary Rights Organisation (DALRO). DALRO works closely with PASA and with other stakeholders, such as SABA, not only in collecting and distributing payment for reprographic reproduction, but also in campaigning for copyright observance and combating copyright infringement, supporting rights owners in their actions against copyright violation and generally providing advice and information.

The print industries sector needs to work in collaboration with its collecting society, DALRO, government departments and other stakeholders, to disseminate information on copyright, raise public awareness of copyright issues and combat illegal copying.

## Rights users

Other stakeholders are rights users, or consumers – general readers, learners and educators, educational institutions and libraries.

Intellectual property products are not the same as other products and do have some legal restrictions placed on their use by the purchaser. Consumers purchasing a copyright-protected product do not assume full ownership and cannot deal with it in any way they wish. While purchasers of a book or a CD, for example, can sell or lend the book or CD, they do not acquire ownership of the protected intellectual property embodied in it. When someone owns a computer, subscribes to a service provider and pays electricity and telephone bills for online access, she does not own the intellectual property on the computer screen unless she has written it herself. For this reason, owners and users of copyright-protected products may not copy their content, except in restricted and defined circumstances.

The rights of the user communities to gain access to the information produced by the rights owners have necessarily to be circumscribed by the rights of the creator community. Nonetheless, users, particularly those in education and in libraries, are key stakeholders whose legitimate needs and interests must be respected if copyright is to benefit society as a whole.

South Africa, in common with other developing countries, differs from the industrialised nations in the makeup of its consumers. In countries of the North, the majority of print products are consumed by general readers in trade markets, with educational products usually making up less than half of the overall market. In African countries, educational products, particularly school textbooks bought by governments, dominate the market, making up the major part of print product sales. This means that the major consumer of books in South Africa, in common with its African neighbours, is, in fact, a government department. This is a particularly sensitive issue when it comes to government intervention in legislative and policy issues relating to copyright and to access to information.

International experience suggests that developmental goals for the provision of the knowledge and information needs of the country are best achieved by the promotion of local industries. In developing policies and strategies to meet the information and knowledge needs in the country, a variety of issues need to be addressed, including

the availability of an effective and affordable collective licensing regime and strong library systems in all sectors.



# 1 | AN INTRODUCTION TO INTELLECTUAL PROPERTY RIGHTS – A BACKGROUND

## THE NATURE OF INTELLECTUAL PROPERTY RIGHTS

**I**NTELLECTUAL PROPERTY RIGHTS (IPRS) are the rights granted by statute law to the originators of what might be referred to as ‘the products of the mind’, and which give the author, or creator, a qualified monopoly over the ways in which the created work might be used or exploited.

Intellectual property is divided into four branches: patents, trademarks, designs (so-called ‘industrial property’) and copyright. There are a number of fundamental principles common to all the intellectual property rights, but this Report, emanating as it does from the print industries, is concerned only with copyright as this is the branch of intellectual property which shapes the environment of those industries.

### General Principles

Although copyright legislation differs from country to country – sometimes fundamentally, sometimes merely in the detail – there are certain central principles which are universally agreed and enshrined in international treaties and national legislations:

- **Remunerating creators:** the fundamental principle of copyright is to provide an incentive to produce more creative works by providing creators with a fair return for their labours. Copyright is the indispensable remuneration for the creators’ work, allowing them rightfully to enjoy the fruits of the labour that created the work.
- **Encouraging creation:** copyright in theory allows the production of intellectual works of added intellectual value to be furthered by giving creators the assurance that the goods they create are protected, thus ensuring that they get a just reward for their work and providing a stimulus for creative investment. In this way, the supply of intellectual products and their appropriate distribution is enhanced.
- **Spreading ideas:** copyright is an instrument of cultural policy that is also designed to support the spread and movement of ideas and of culture. So considered, authors’ rights and the limitations on these rights are the two levers of this policy.<sup>8</sup> And so, at the same time as copyright confers rights upon authors, it places limitations on those rights in the interests of due access to information and knowledge. Copyright is not designed to prevent the dissemination of creative works and knowledge products; on the contrary, it is copyright legislation that ensures that these works are available, but in a way that protects the rights of their creators.

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<sup>8</sup> See the Keynote Paper, Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace (Infoethics 2000).

Lying behind copyright law is the recognition of the intrinsic difference between intellectual products and other products. The report by the UK Commission on Intellectual Property Rights sums up that difference as follows:

A characteristic of knowledge is that one person's use does not diminish another's (for example, reading this report). Moreover, the extra cost of extending use to another person is often very low or nil (for example, lending a book or copying an electronic file). From the point of view of society, the more people who use knowledge, the better because each user gains something from it at low or no cost, and society is in some sense better off. Economists therefore say that knowledge has the character of a **non-rival public good**.

The other aspect of knowledge, or products embodying knowledge, is the difficulty – often intrinsic – of preventing others from using or copying it. Many products incorporating new knowledge can be easily copied. Probably most products, with sufficient effort, can be copied at a fraction (albeit not necessarily small) of the cost it took to invent and market them. Economists refer to this characteristic as contributing to **market failure**. If a product takes a considerable effort, ingenuity and research, but can be copied easily, there is unlikely to be sufficient financial incentive from society's point of view to devote resources to invention.<sup>9</sup>

## Copyright as a Human Right

The creator's monopoly is based on a compromise between creators' interests and the interests of society at large, which demands the open movement of ideas, information and commercial exchange.<sup>10</sup> That compromise is a delicate balance, and one which will be kept in mind throughout this Report. If copyright can be viewed principally as a set of economic and commercial rights, it is also important to recognise that it also has political and social implications, for according to the United Nations, it is a fundamental human right. In 1948 the General Assembly of the United Nations passed the Universal Declaration of Human Rights. According to Article 27(2), 'Everyone has a right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author', balanced by the right of the community 'to share in scientific advancement and its benefits'.<sup>11</sup>

This balance, between the author's moral and economic interests and the requirements of society, provides an ongoing tension, which lies at the heart of nearly all the controversies regarding copyright. The role of the legislator is to fine-tune opposing – and often conflicting – positions, always maintaining the balance.

It is worth noting that, although South Africa has one of the most advanced and enlightened constitutions in the world, intellectual property rights are not recognised in the constitution as a fundamental right. The Constitutional Court has ruled that intellectual property rights are subsumed in the general property provisions of the Constitution. This is problematic, according to leading copyright lawyer, Owen Dean, given the essential differences between intellectual property rights and other property

<sup>9</sup> Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*. London 2002.

[http://www.iprcommission.org/papers/word/final\\_report/reportwordfinal.doc](http://www.iprcommission.org/papers/word/final_report/reportwordfinal.doc)

<sup>10</sup> Severine Dusollier et al., *Copyright and Access to Information in the Digital Environment*. A study prepared for the Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace (Infoethics 2000).

<sup>11</sup> United Nations, *Universal Declaration of Human Rights*, Article 27. UN, Geneva 1948.

[http://www.unhcr.ch/Huridoca/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2001.12.En?Opendocument](http://www.unhcr.ch/Huridoca/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2001.12.En?Opendocument)

rights.<sup>12</sup> It is arguable that a real commitment to the importance of intellectual property rights to South Africa's development should be reflected in the Constitution.

## Moral Rights

Moral rights are different from the economic rights that ensure the copyright owners' right to control the exploitation of the work.

Moral rights and rights of paternity are infringed if the author is not identified as the creator, and they are also infringed by someone distorting, materially altering or mutilating the work to the extent that the author's reputation is tarnished. In practical terms, a publisher needs to protect the integrity of the work in the publication process and not allow it to be changed in such a way as to harm the author's integrity or reputation.

## Duration of Copyright

The author's monopoly over the exploitation of the work is of limited duration. In the United States, the recent extension of the duration of copyright from 50 to 70 years after the author has died, generated controversy. Rights owners – more particularly the large corporations owning the lucrative rights in Walt Disney creations such as Mickey Mouse – were in favour of the extension. Members of the public, seeking for themselves the rights to such economic exploitation, were against it. The duration of copyright, however, is not an issue considered in detail in this Report. We raise it merely to demonstrate the delicacy of the balance which always has to be maintained taking into account the legitimate demands of the various sectors of society.<sup>13</sup> In South Africa the term of copyright is 50 years from the death of the author.

## THE STATE OF COPYRIGHT IN SOUTH AFRICA – A BACKGROUND

**W**HILE IT IS GENERALLY RECOGNISED nationally and internationally that South Africa's copyright legislation is reasonably sound, there are nevertheless issues that cause concern. There is consensus in government and among rights owners and some rights users that the position in South Africa is not satisfactory.<sup>14</sup>

### The South African Copyright Regime

Copyright in South Africa is governed by the Copyright Act No. 98 of 1978, and the regulations promulgated in terms of Section 13 of the Act. Legislation follows broadly the United Kingdom and Commonwealth copyright traditions.

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<sup>12</sup> Presentation at the PICC Copyright Workshop, March 2004.

<sup>13</sup> The US could put pressure on SA to extend its copyright duration during trade negotiations, as has happened in the case of Australia.

<sup>14</sup> Tsheko Rathsheko, then Deputy Registrar in the Patents, Designs, Trade Marks and Copyright Office, at a workshop in 2001.

## *Copyright Infringement*

South Africa is perceived by local and international rights holders as a country with high levels of copyright infringement, particularly regarding photocopying in schools, colleges, technikons and universities. The levels of copying are perceived to be high enough to threaten the viability of local industries and contribute to unnecessarily high prices for books, as a result of a considerable erosion of the economies of scale.<sup>15</sup>

As it emerges from copying practices encountered by industry members and international observers, it would seem that intellectual property is not highly valued by many South Africans and illegal copying is not always seen as reprehensible (see the discussion of copyright observance and infringement in Chapter 2).

Improvements are therefore not only a matter of legislation and enforcement (see Chapter 4), but of the creation of a national culture that recognises the value of the creative industries, in this case particularly the book industries, and the vital role of creators in national growth and development.

While justifications for photocopying are often based on the perception that book prices are too high, copying books instead of buying them is probably the single greatest factor in generating higher prices for locally published products, as economies of scale mean that higher print runs can create a dramatic reduction in price.

## *Enforcement*

Aggravating this state of affairs are legislative shortcomings that have been identified by local and international industry associations as inhibiting the effective prosecution of offenders, coupled with a lack of capacity in the criminal justice system for prosecution and enforcement.

A number of problems in South African copyright legislation have been raised in recent years by such bodies as the International Intellectual Property Association (IIPA) and local and international trade associations. These will be discussed in further detail below (see Chapter 5). The problems most commonly identified, and articulated in the 2003 IIPA report, are:

- The damages that can be awarded in criminal cases of infringement are insufficient to act as a deterrent to future infringement. Local and international industry participants have been arguing for some time for the introduction of statutory damages in criminal proceedings as a deterrent and as recompense for authors and publishers who suffer copyright violations.
- The requirements for providing evidence to prove ownership and the existence of copyright are onerous. This subjects copyright owners to overly costly and burdensome procedural hurdles, placing obstacles in the way of civil and criminal prosecution of piracy.
- A set of regulations providing concessions for libraries and educational institutions, which are ambiguous, contradictory and virtually unworkable in practice, further undermines the effectiveness of the law.

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<sup>15</sup> IIPA 2003 Special 301 Report: South Africa; correspondence and consultation between PASA and the Association of American Publishers and the International Publishers' Association; 1994 Trade Delegation report from the UK Publishers Association; anecdotal reports from PASA and SABA members on infringement levels in their markets.

As far as copyright legislation is concerned, the questions to be asked are:

- In what ways do the present legal and judicial systems inhibit the growth of South African writing and of the publishing industries?
- And what impact does this have on the ability of the print industries to deliver the country's need for affordable and relevant information and knowledge products and achieve the related targets for educational and cultural development?
- How can the identified failings be rectified and a more favourable environment be created and nurtured?

**These are the fundamental questions the Report will seek to answer.**

However, the state of copyright in South Africa is not only a matter of legislation and effective enforcement. This Report argues that the social, economic and cultural milieu in which the copyright industries operate is of vital importance. The existence of an effective copyright environment, leading to healthy growth in the cultural industries is reliant upon a context in which intellectual and creative products are valued.

It needs to be understood, however, that the legislative context is only one facet of the intellectual property regime in the country and this report will need to cast its net wider, to look at the cultural, social and developmental context in which IPRs operate in the country. Stakeholders in the print industry sector in South Africa feel that there is an urgent need for education and awareness campaigns on copyright in South Africa.

## Copyright in the Social Context

The development of local writing and knowledge production in a society depends to a large extent on a cultural and educational context that includes literacy levels, reading development and the value placed by society on intellectual products and intellectual property. South Africa's apartheid history has served to retard both literacy and appreciation of the value of reading, for the apartheid education system placed the emphasis on the acquisition of paper qualifications at the expense of learning. Moreover, books and reading became damagingly associated with the Bantu Education textbooks supplied to schools, often the only books to which many children ever had access.

It is commonly understood that only 5% of South Africa's population buys books with any regularity. The situation is aggravated by serious problems in the provision of library services, which should provide access to reading materials for poorer readers and should be a core contributor to the growth of a reading culture.

The low levels of reading also mean, of course, that there is considerable growth potential for print products in the South African market. The central problem identified by the PICC is that print products are not reaching the majority of the population, and the core strategic goal of the industry cluster is to expand access to and use of print products in South Africa to a much wider sector of the population.<sup>16</sup>

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<sup>16</sup> PICC Development Strategy/Policy presentation, December 2002.

## *Information and Education*

It is apparent from the numerous queries that regularly reach the authors of this report that authors and many publishers (particularly new publishers) have little understanding of copyright, how it works, its value and importance.

Perhaps it would not be going too far to comment that, generally, South African publishers' knowledge of rights issues is in need of improvement, and that publishers themselves recognise this to be so. This does not only affect the legal and professional relationship between publishers and authors, but also that between publishers and publishers. It all boils down to a failure in many cases to prioritise the management of intellectual property as one of the cornerstones of the publishing business.

A vital part of the print industry sector's strategy for a healthy copyright environment is therefore the encouragement of information and education campaigns, as well as training initiatives within the industry sector, to create a higher profile for copyright issues and a greater understanding of the value of copyright.

### **COPYRIGHT AWARENESS AND EDUCATION CAMPAIGNS**

*We are indebted, for the basis of the following notes and suggestions for such campaigns, to the paper 'Report on Copyright Awareness to the Copyright Committee on Copyright Awareness and Education', prepared by Amanda Kornfeld for the International Publishers' association in July 2002.*

The first steps in copyright awareness campaigns are to identify the message to be communicated and the target audience. A simple working definition of copyright awareness might be: existence, importance and consequences.

**Existence:** many people are completely unaware of the concept of copyright.

**Importance:** acknowledgement of the existence of copyright is worthless if people do not appreciate its value.

**Consequences:** the audience must be made to understand both the deleterious effect of infringement on creativity, and the punitive consequences to themselves.

The target audience:

**Local industry players** – if the IP industries do not fight for their intellectual property rights because they lack understanding of how copyright can help them, there is no lobby interest to support copyright development. Education in copyright issues for industry participants is therefore an essential component of a strong copyright regime.

**The general public** can be categorised according to whether they are engaged in work which can easily lead to infringement, or work involving intellectual property. The priority group includes policy-makers, the judiciary, the police, and the education sector. WIPO has suggested that a solid public awareness campaign requires private sector investment as well as private sector-government consultations and partnerships.

**The mass media** can play a useful role, as it has broad outreach to society at all levels but, again, needs to be educated in order to do so.

Finally, social and cultural obstacles need to be examined with sensitivity, and taken into account when planning a campaign.

There is a need for heightened copyright awareness and educational programmes throughout the industry and for strong rights owner organisations to drive them. It goes without saying that the general public is even more poorly informed. The thrust of

legislation and its enforcement depend ultimately on acceptance by the public, and thus broad-based awareness programmes supported by the industry sector and Government are not only necessary, but also long overdue.

## The Moral Basis of Respect for Copyright

It is important to recognise that legislation alone will not further the economic development of the creative industries and counter copyright infringement unless the consumer has the will to cooperate – the history of the software industry more than adequately demonstrates this. It is a trite point that unless public opinion is behind the law, enforcement is problematic.

What needs to happen in South Africa is that the value of the products of the mind to the country becomes widely recognised and copyright infringement becomes regarded as unacceptable and morally reprehensible – something that harms authors and impedes cultural and educational progress.

Discussions of copyright issues need to be related to the broader developmental issues that are at the heart of this Report. Writers need to be in the front line of awareness campaigns if the moral basis of respect for copyright is really to be understood by government and the community. Promotion of the value of the industry is needed if government and the community are to take the industry seriously and respond to its IP protection needs.

### *Copyright Awareness*

It is striking that in the print industries sector in South Africa, there is very little information available on copyright in South Africa and low levels of copyright awareness. In comparison, Australia has extensive copyright resources in print and on the Internet and these documents reflect a very high level of discussion and participation in copyright issues and campaigns in the publishing sector.<sup>17</sup>

## Industry/Government Interaction on Copyright Issues

A review of the recent legislative history of copyright issues in Australia demonstrates very active interaction between government and the copyright industries, with extensive stakeholder input into proposed legislative reforms, and government responses to these industry position papers.<sup>18</sup>

In contrast, communication between South African industries in the print sector and the Department of Trade and Industry, which is responsible for IP issues, has in recent years been poor (see Chapter 4). Copyright expert Owen Dean claims that copyright legislation in South Africa is in a state of paralysis and that urgent action is needed by industry organisations and alliances to get a momentum going.<sup>19</sup> There has been a lack of dialogue around copyright issues, with sporadic interventions by the DTI followed by periods of inaction and lack of communication. At the same time, the industry sector

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<sup>17</sup> See <http://www.org.copyright.au/>

<sup>18</sup> See, for example, the Australian House of Representatives, Federal Government, Standing Committee of Legal and Constitutional Affairs, *Cracking Down on Copycats: A report on the enforcement of copyright in Australia, 2001* and the Government response, 2003.

<http://www.aph.gov.au/house/committee/laca/copyrightenforcement/reportscript.pdf>

<sup>19</sup> PICC Copyright Workshop, March 2004.

itself has failed to put pressure on government, partly because of a lack of organisation on the part of rights owners.

The imperative for providing a protective legal environment for creative endeavour of course extends beyond the cultural and creative industries, and is of vital importance for national economic development in the context of the global knowledge economy. While this is acknowledged, to an extent, by the Department of Trade and Industry, in its creation of a Cultural Industries directorate, there appears to be little acknowledgement by the DTI of the urgent need to develop copyright legislation to support economic growth and global positioning.<sup>20</sup>

**The print industries sector believes that if there is to be genuine growth and development for authors and publishers, the creation of a culture of respect for creative and intellectual products will need to be accompanied by an effective legislative environment in which creative effort can be rewarded, copyright violations can be curtailed and piracy brought under control.**

## RECOMMENDATIONS

1. The print industry sector needs to become more active in forging alliances both within the industry sector and with other copyright industries to promote copyright issues and to lobby for national policy initiatives and legislative reform.
2. However, the industry sector cannot achieve this alone. Active government engagement is needed, in a transparent and consultative process, to ensure the creation of an effective copyright regime that will
  - Foster the growth of the copyright industries;
  - Provide an effective framework for information and knowledge dissemination to meet national needs;
  - Provide an enabling context for South Africa's international trade negotiations.
3. If the print industries are to make their maximum contribution to the country and its cultural and economic growth, attempts to improve the copyright framework in South Africa will need to be linked to:
  - Active programmes for the growth of a reading culture;
  - Support for and promotion of the rights of authors;
  - Educational programmes on the value of copyright;
  - The expansion of library services.

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<sup>20</sup> See, for example, the DTI's central vision statement which stresses 'A high degree of knowledge and technology capacity' as one of the seven core components of its vision for 2014 (<http://www.dti.gov.za/thedti/vision.htm>) and the DTI's Medium Term Strategic Plan, which, while identifying the need to 'advise the public about registration and protection of their trademarks and copyrights' (p. 29), does not discuss the value of IP protection for international trade and local innovation.

4. From the perspective of industry strategy, this could include:

- Initiatives to produce information and raise the profile of copyright issues;
- The promotion of training in copyright for publishers and rights owners;
- Active interaction with readers and consumers to promote the value of copyright and copyright compliance.

## COPYRIGHT AND ELECTRONIC MEDIA

**T**HE ADVENT AND RAPID SPREAD OF DIGITAL MEDIA in the last decades have posed a number of challenges in the copyright arena. The speed and ease with which digital media can transmit information across the globe undoubtedly offer opportunities for the lower-cost and widespread dissemination of information (at least where hardware availability and connectivity allow), but it also poses threats to rights owners because of the potential for creating limitless, untraceable copies at low cost. Digital content can also be altered very easily, posing threats to the moral rights of authors as well as making it difficult to track infringements.

On the other hand, rights users fear the erosion of fair dealing rights, given the potential to block access to free information with a pay-per-use supply model. Technology offers not only the potential for freer dissemination of content, but also for greater control of that content, leading many users to fear a loss of the rights that they have in relation to print products.

Across the world, different countries have grappled with the question of legislating for this new environment, debating the issue of necessary legislative change to deal with digital media and the challenges posed. Given the rate of growth of the digital knowledge economy worldwide, this is a matter of vital national importance for any country that wants to have its own voice in a rapidly expanding global information market.

South Africa has fallen badly behind in addressing the questions of digital copyright law. While the print industry sector believes that attention to the state of copyright law for the print media should be the primary concern in South Africa at the moment, it nevertheless urges stakeholders in the print industry value chain and Government to begin the process of creating policy for electronic copyright in South Africa.

The growth of digital media poses urgent policy concerns for countries wishing to develop their knowledge and technological industries. The Digital Divide can only widen in the absence, in a developing country, of a coherent intellectual property policy, linked to national initiatives for technological growth.

## RECOMMENDATIONS

5. Because of the interconnectedness of print and digital media and the opportunities that digital media offer for the development of new products and new markets, it is important that issues relating to digital copyright be included in any policies or strategies for potential growth in the contribution of the print industries sector.

6. Given the importance of digital communications in national economic and cultural development, it is vitally important for any country wishing to be a trading presence in the digital information market, to address legislative issues hindering the creation of an intellectual property environment that encourages investment (creative and financial) in digital media.

## CONCLUSION

This Report's primary concern is the development of the writing and publishing industries and its main objective is to map the copyright landscape in order to assess how South Africa rates in regard to the level of copyright protection accorded those industries and, more importantly, what strategy and policy initiatives and actions are needed to create an environment in which writing and publishing can grow to incorporate and reach the wider community in South Africa.

The achievement of economic growth in the copyright industries, leading to greater opportunities for all the stakeholders in the sector, including authors and other creative owners, is at the heart of the industry sector's strategy for an effective copyright regime in South Africa.



# 2 | COPYRIGHT INDUSTRIES AND ECONOMIC GROWTH

## THE ECONOMIC CONTRIBUTION OF THE PRINT AND PUBLISHING INDUSTRIES IN SOUTH AFRICA

**A**LTHOUGH THE PRINT AND PUBLISHING INDUSTRIES in South Africa are relatively small by international standards, they are by far the largest publishing sector in Africa and are unusual in sub-Saharan Africa in being a viable and self-sustaining sector, publishing fiction and non-fiction, school textbooks and resource material, academic and scholarly works and professional publications.

To evaluate the impact that a strong copyright regime could have in fostering economic growth in the sector, one has to look first at the current state of the sector; attitudes to copyright observance; and levels of infringement.

Statistics for the sector are unreliable as a result of reluctance on the part of companies to release what they fear will be sensitive competitive information. However, a recently commissioned project should see the publication of a more reliable statistical database from 2004 onwards.<sup>21</sup>

The book publishing industry is estimated to turn over around R2,5 to R3 billion per year, of which around R1,8 billion comes from local publishing. The industry employs around 3 000 permanent employees, as well as supporting a network of small companies and freelance workers – editors, designers, typesetters, illustrators and photographers. Numerically, it is estimated that these make up at least a further 3 000 workers.

By far the biggest sector in the book publishing industry is ***publishing for schools***. This sector, which is dependent upon government purchases, is currently estimated to be worth around R1.5 billion a year, most of this generated by sales of locally produced products.

Given the substantial numbers of books sold into schools, some authors of learning materials for schools can live off their earnings as writers. The progressive introduction of the new curriculum means that there is continuous and substantial work for schoolbook authors of all kinds. Translators, specialist editors and illustrators are also much in demand. This boom period will, however, end once the OBE curriculum has been introduced into all school grades.

**Trade publishing**, on the other hand, is dominated by imports. Of the annual turnover of around R600 million, around 20-25% of the books sold are published by local publishers. Increasingly, the large international trade publishing houses, with branches in South Africa, are publishing South African authors locally and internationally. Most

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<sup>21</sup> The PICC has commissioned the creation of an information database and the collection of statistics on the publishing sector from the Department of Publishing Studies at the University of Pretoria.

locally produced books are written by local authors, while a handful, mostly established fiction authors, but increasingly new talent as well, are published abroad. Very few fiction authors in South Africa – only those with international reputations – can live off their earnings. It should also be noted that very few trade books are published in the indigenous languages.

The trade-publishing sector possibly has the greatest potential for growth. It is estimated that only 1 million of the country's population of 45 million actually reads and probably only 500 000 are book buyers. There is a need to identify and promote expanding markets to create opportunities for a wider range of authors and readers.

**Academic, reference and professional publishing** is a relatively small sector, turning over around R300 million, of which 50% is from local publishers. The author base is, of course, highly qualified and specialised. Although turnover is relatively low, with most locally published academic textbooks selling under 5 000 copies per year, royalties for these authors are high by international industry standards, at 15% to 25% of net revenue. While the sector is relatively small, in comparison with schools publishing, it is strategically important, given the impact of research and scholarly information on national economic and social development.

## Growth Rates

### *Comparative International Figures*

Globally, in the developed countries that lead the publishing world, publishing industries are relatively static; with the increasing numbers of titles being produced not being reflected in equivalent increases in turnover.<sup>22</sup> However, South Africa, with its large untapped market of potential readers, should have the potential to generate some growth in the sector.

If one reviews the growth rate of book publication in the 1990s, while South African book production fell from 7 300 titles in 1990 to 5 500 in 1998, Argentina grew its book output from 4 915 in 1990 to 13 000 in 1999, and Brazil grew from 13 684 in 1990 to 45 000 in 2000. Australia, like South Africa, records a relatively steady book output.

Australian book publishing had a turnover of US\$622 million in 2000, and employed 3 833 full-time employees. It would appear, therefore, that with roughly the same output of books and number of employees, Australian book publishers earn four times more revenue.<sup>23</sup> The higher financial contribution in Australia might well be a result of higher currency rates. What is interesting is the lower proportion of school textbooks, compared with trade titles in the overall mix in Australia. Where schoolbooks in Australia make up around 20% of publishers' turnover, in South Africa this is closer to 70%. Trade and children's' books make up around 15% of publishers' turnover in South Africa, while in Australia the proportion is 60%. Given the high illiteracy rates in South Africa, the local industry does very well by comparison with Australia.

In Australia, with a growth rate of 5,7%, the copyright industries are one of the fastest growing sectors of the economy.<sup>24</sup> The population of Australia is around half that of South Africa.<sup>25</sup>

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<sup>22</sup> *People in Publishing: Developing the Teams of the Future*. London, 2004. VNU Business Media.

<sup>23</sup> International Publishers Association. <http://www.ipa-uite.org/>

<sup>24</sup> The Allen Consulting Group, the Australian Copyright Council, and the Centre for Copyright Studies, *The Economic Contribution of Australia's Copyright Industries*. 2001.

<sup>25</sup> MSN Encarta.

By comparison with the other African countries recorded in International Publishers' association (IPA) statistics, South Africa has a highly developed publishing industry. For example, Kenya records the publication of 120 titles in 1998, as opposed to South Africa's 6 000.

When it comes to the balance of the different publishing sectors, the dependence of South African publishing on schools textbooks becomes clear.

### *The Growth Potential of the SA Publishing Industry*

These figures suggest that, if South Africa is to target a profile for its publishing industry that is more in line with those of developed countries, it will need to concentrate on growing local trade publishing and children's books and on developing and supporting fiction and non-fiction authors in this sector.

Given the low numbers of readers and book buyers in proportion to the population, there would appear to be substantial room for growth of the print industries sector, provided strategies are developed to expand traditional reading markets.

## Publishers as Rights Managers

Whether the industry is to grow through the development of new businesses or through the expansion of existing businesses, there is a need for training in copyright and contracts for businesses and staff members. It is not widely recognised that the core of a publishing business is the management of intellectual property and, as a corollary, the promotion of the intellectual property contained in the work through a variety of vehicles. As an international copyright lawyer puts it, in his advice to publishers:

Instead of seeing yourself as a book publisher, see yourself as an **acquirer of intellectual property rights**. With this wider lens of who you are and what you do, you may come to see that **that** is your business even though it currently takes the form of publishing books.<sup>26</sup>

The rights that publishers manage include not only the production and distribution of books into the local and international market, but also, among others, translation, photocopying, anthology and reprint rights and subsidiary licenses for co-publications in other territories.<sup>27</sup>

## Authors and Their Contribution

Although there are many authors of all kinds working in South Africa, there has been a very low level of author organisation. Only recently has an association specifically for non-fiction and scholarly writers been established. This is of vital importance, as it is this category of writer that suffers most from the high levels of illegal copying. The focus of the Academic and Non-Fiction Authors' Association of South Africa (ANFASA) will be rights administration.

The Norwegian Academic and Non-Fiction Writers and Translators Association (NFF) has funded the initial research and consultation leading to its establishment, and the

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<sup>26</sup> Ivan Hoffman. <http://www.ivanhoffman.com/>

<sup>27</sup> Ivan Hoffman. <http://www.ivanhoffman.com/>

DAC has expressed its willingness to fund the secretariat in the early stages. Further reference will be made below to the seminal role an association of this nature can play in a holistic and all-encompassing rights' administration regime. (See Chapter 7).

Authors are vital partners in the process of negotiating and lobbying for strong copyright protection, and the absence of sustained support from this quarter detracts from the credibility of the publishing industries which, while they endeavour to protect their authors' rights and interests, are all too readily seen primarily as profit-driven. This means the creation of authors' associations that exist not only to encourage new writing but also address the business, contractual and copyright issues that face authors. At present there appear to be low levels of understanding among South African authors of the way the publishing industry works – in other words of the ways in which their intellectual property can most effectively be disseminated and the ways in which authors can earn rewards for their work.

## Electronic Media and Economic Growth

The growth of electronic media offers new opportunities for authors to publish their own work without the considerable capital investment required for the production of print products. New models of publishing are emerging and new approaches to copyright management are emerging. Scholars and creative writers in particular are moving increasingly to open access publishing, either on their own account or through a variety of co-operative or donor-funded ventures. It appears, however, in the rhetoric surrounding demands for the freedom of information on the Internet, that there is little understanding of the fact that copyright is the enabling mechanism (and not the barrier to) the dissemination of writing. This is true even if writers give their work away free of charge, since even writers participating in open access ventures need to understand the copyright and contractual mechanisms needed to institute those levels of protection they want for the integrity of their work and the uses they choose to authorise.

There is general agreement in both developed and developing countries that economic growth in copyright industries depends upon the basis of a strong national copyright regime.

It is clear also that local and international trade issues cannot be divorced from one another. A weak copyright regime will not only impact negatively on local industry growth, but risks affecting international trading partnerships, not only in the cultural industries, but across a wide range of key export industries. This is of vital importance to South Africa as it negotiates bilateral international trade agreements whose success will depend on the existence of a strong copyright regime in national legislation, compliant with international treaty agreements.

## FACTORS INHIBITING ECONOMIC GROWTH

**H**IGH LEVELS OF ILLEGAL AND UNCOMPENSATED COPYING have a debilitating effect on the health of the industry sector and cause a serious downward drag on expansion and growth.

### The Impact of Illegal Copying on Economic Growth

The impact of illegal copying on the economic effectiveness of the publishing industry is compounded by the fact that economies of scale, through longer print runs, have a

dramatic effect on price in the print industries. Publishers need to amortise pre-press costs (design, editing and typesetting) incurred before printing can start and printers incur high set-up costs for every print run. As a result, longer print runs have a dramatic effect in reducing price.

The South African book market is predominantly a short-run market, because of a combination of low reading and book purchasing levels and high levels of illegal copying. A US publisher would regard a print run of 10 000 copies as the lower end of financial viability. By comparison, in South Africa, only some widely-prescribed school textbooks are likely to reach this level of annual sales; relatively few books sell more than 5 000 copies a year, while annual sales of under 1 000 are common. This means that books are more expensive than they would be were there higher levels of purchase. As an example, the price of a book that sells under 1 000 copies a year would halve if the publisher could sell between 5 000 and 10 000 copies a year. Moreover, the book price, in these higher print runs, is very often cheaper than the cost of photocopying.

These examples demonstrate that the losses incurred through excessive copying are not just losses to the industry, but that illegal copying has a knock-on effect that can push book prices upwards, impacting negatively on buying patterns and educational budgets.

South African publishers currently feel that deficiencies in provisions for enforcement in South Africa copyright legislation hamper their efforts to enforce the rights of their authors. Also of concern are shortcomings in the criminal justice system, where there seems to be little awareness of the importance of intellectual property protection among police and prosecutors and there is insufficient capacity for the prosecution of criminal cases. Penalties for copyright infringement are regarded as insufficient and the print industries sector would like to see the introduction of statutory damages, both as compensation for plaintiffs and as a deterrent for offenders.

## Copyright Observance

The issues that face rights holders in the print industry sector, from authors through to booksellers, include the lack of a reading culture; the lack of respect for copyright; a failure to realise the value of knowledge products; and a sense of entitlement which assumes that information should be available free of charge.

That the provisions of the Copyright Act are often ignored in educational institutions, in administrative offices, in companies and, indeed, throughout society, is not unique to South Africa, or even unusual. The ideal situation, from the point of view of authors and publishers, would be an effective legal system and a mature licensing system operating in all these spheres, such as exist, for example, in the Scandinavian countries, Canada and Australia, where intellectual property is respected and public awareness is high. That situation, however, is a long-term objective. In the meantime, rights owners' urgent concern is with the education and academic sectors, for that is where their heaviest losses are incurred.

## Copyright Infringement in South Africa

Copyright infringement in South Africa is not a matter – at least not yet -- of the mass piracy of trade books, like the pirated editions of Harry Potter titles that have appeared internationally, but of systematic copying of various kinds in the educational sector,

public sector and businesses. While piracy of this kind of DVDs being imported into South Africa is causing concern to international rights holders like the IIPA, popular books have not been the targets of similar piracy.

### *Illegal Copying in Tertiary Institutions*

#### Course Packs

In the recent history of copyright infringement in South Africa, levels of copying in the universities and technikons have been of particular concern to publishers. Infringement takes two forms. The first is the unlawful (that is, unlicensed) dissemination of supplementary reading material by the institution to the students. This typically takes the form of the 'course pack', a compilation of, say, one chapter from each of three or four books, two or three journal articles, and lecturers' own notes. The course pack may be photocopied in the institution's 'print room', or in the library, or on departmental photocopiers. In some institutions, a few loose-leaf copies will be placed on the reserve shelf in the library's short-loan collection for on-copying by students. This is a neat arrangement because the students pay the photocopy costs upfront with coins or 'smart-cards' (instead of the lecturer or departmental secretary having to collect money from them) and the high levels of use on the leased machines result in a discount to the institution. The drawback to the lecturers is that making the copies is at the students' discretion and the lecturer cannot ever be sure that they are acquiring the necessary material.

The drawback to the publishers is that they receive no recompense. The argument for **legalising** course packs (through a statutory amendment permitting compilations) is usually that since only small portions of the books were required, the whole book would not have been bought anyway, so the work has been normally exploited and there has been no unreasonable prejudice to rights owners. This is wrong. A book may be exploited in many ways through the kinds of rights deals mentioned above, and the income publishers expect to receive from licensing is often essential since it is ploughed back into the development of more titles, contributing to the creation of new works.

A decade ago, publishers would have pointed to the proliferation of course packs in higher education institutions as the major problem. This is now coming under control as a result of the negotiation of blanket and transactional licensing through DALRO. There is a much greater awareness in higher education institutions of the need for copyright compliance and the risks of infringement.

Although there are still gaps and there are undoubtedly still institutions and departments who do produce illegal course packs, this is no longer the major problem it once was and the extension of blanket licences to more higher education institutions would improve the situation even further.

#### Student Copying in Copyshops

If course pack copying is progressively being brought under control, the same cannot be said about the other prevailing form of infringement – the unlawful copying by students of whole books as a substitute for buying them. Most piracy (for this is what it is – the production of counterfeit copies of published works) takes place off-campus, in copyshops usually strategically situated near the gates of the university or technikon. The practice is of course not licensable. It will remain a serious problem, unlikely to

improve until the higher education institutions 'conscientise' their lecturing and student bodies into re-evaluating the role of the book as against that of the photocopy.

It is almost impossible to quantify the losses to publishers from students photocopying their prescribed textbooks instead of buying them. Even when the number of books sold nowhere matches the number of students in a class it is dangerous to make assumptions, for one has to consider that students often buy their books second hand, or work in a group with one student buying the book and the others sharing it. Nevertheless, reports often reach PASA and DALRO of students lining up at copyshops to purchase photocopies, and there are even copyshops which display notices advertising their cheaper 'versions' of the prescribed texts – cheaper, that is, than the genuine articles on sale in bookshops.

### Case Studies

One of the authors of this report was contacted by a bookseller serving one of the technikons. She was concerned that although she had ordered sufficient books to supply only half of a certain class, she had still not sold a single copy, and so she asked the lecturer whether he realised that none of his students possessed the required textbook. He undertook to make enquiries, and came back the next day to say that on the contrary, *every* student in the class had the textbook – it transpired that every student was in possession of a photocopy.

In 2000, it came to the attention of a Kwa-Zulu Natal publisher that a copyshop in Empangeni was copying large volumes of school, college and academic textbooks. It appears that this copyshop was supplying schools and other educational institutions across the province with pirated, photocopied books. An Anton Pillar order was obtained and the multiple copies of pirated books were seized. A group of publishers laid charges of criminal copyright violation and the copyshop owner was successfully prosecuted. The case took a considerable time to get to court and the publishers concerned made a major contribution in assisting the prosecutor in assembling expert evidence to lead the case. In spite of the fact that costs were awarded against the defendant, the publishers concerned nevertheless landed up substantially out of pocket. Although they considered the deterrent effect worthwhile, they nevertheless got no recompense for their losses, nor for the time and effort put into ensuring that the case was effectively prosecuted.

Late in 2002, it was reported to DALRO that a copyshop was operating right outside two higher education institutions in the Western Cape, supplying counterfeit photocopied books to students on a massive scale. Although the police were informed immediately, and took the information seriously, it was not possible to collect evidence and take action as the academic year was drawing to an end. Illegal activities started up again, however, with the opening of the 2003 academic year.

## **CONTAINER RAID IN THE WESTERN CAPE UNCOVERS ILLEGAL PHOTOCOPY OPERATION**

On Friday 28 March 2003 the Criminal Investigation Unit based at Bellville Police Station conducted a raid on shipping containers inside which a company, Budget Copy, was carrying out a photocopy operation seemingly offering students at two higher education institutions in Cape Town the opportunity to purchase photocopied textbooks. One set of containers was situated between the Unibell Station and the back entrance to the University of the Western Cape, ostensibly serving students at the University of the Western Cape, and the other was between Pentech Station and the back entrance to Peninsula Technikon, offering a similar service to students at Peninsula Technikon.

The raid was carried out by the police at the request of the legal firm of Spoor & Fisher, acting on behalf of their client the Dramatic, Artistic and Literary Rights Organisation (DALRO). The police confiscated 331 photocopied books awaiting collection by students, fast-feed 'master copies' from which the counterfeiters could easily run off duplicates and 8 large-capacity photocopy machines. Although some of the photocopied books had been published abroad, the majority of titles copied were from local publishers such as Juta, Butterworths, Heinemann, Van Schaik Publishers, Nasou and Oxford University Press Southern Africa, and there were multiple copies of many titles, especially law textbooks.

When the raid was over, and the containers emptied of both the counterfeit goods and the equipment used to produce them, a crowd of students gathered and demanded refunds. They had, after all, paid for the 'books'. Some had handed in their friends' books, or library books, to be copied, and now they were not going to get them back. The number of students in the crowd was a clear indication of how pervasive the practice had become, how good business was for the copyshop and how serious are the losses to the copyright owners – the authors and publishers. Bystanders confirmed that these businesses were 'gold mines' and had been running for years; at certain times of the year they were so busy that the machines ran into the night.

When the owner of Budget Copy turned up, he pretended to be ignorant of copyright law, yet a hand-drawn poster on one of the containers cautioned students that books were copied at students' own risk. Other posters advertised popular textbooks – actually listed by name – at special quoted prices.

There seemed to be some sympathy for the 'enterprising' owner of Budget Copy, as if he was trying to make an honest living, and one can only assume that those who expressed sympathy are ignorant of the law and of the damage caused. Annual losses to the South African publishing industry through copyright infringement are estimated at millions of rands, but it would be short-sighted to imagine that the damage stops there. If students choose to photocopy their prescribed texts instead of buying them the end result will be the failure of the local industry; indigenous scholarly writing will no longer have a local outlet and books will become even more expensive.

Although it has been argued that books are already too expensive and that students, many of whom are financially disadvantaged, cannot afford them, it is surprising that there has been so little condemnation of the copyshop owners who were, after all, making a handsome profit out of the students while supplying them with inferior counterfeit goods at the expense of the legitimate copyright owners. In effect, buying an illegally photocopied book instead of the real thing can be compared to receiving stolen goods.

It is well-known that copyshops operate near almost all the South African higher education institutions and that many students have no compunctions about saving a few rands by buying an unlawful photocopy rather than the book itself. Students and

copyshop operators should be warned. They can be certain that the 'container raid' was only the beginning and flagrant disregard for copyright will result in further action to root out offenders.

If found guilty, the copyshop owner in the Western Cape 'container raid' faces severe penalties, but the students who contributed to his profits will not necessarily be penalised. Students everywhere should realise that the long-term effects of photocopying textbooks will harm **them**, for it will drive prices up even further. Higher Education institutions should no longer tolerate large-scale copyright infringement operations on their doorsteps and it is hoped they will take note of this incident before they too suffer the embarrassment of a raid on a copyshop serving their students.

The owner of Budget Copy is liable to be charged with criminal activity under either the Counterfeit Goods Act or the Copyright Act. In terms of both these statutes a first conviction will lead to a fine not exceeding R5000 or to imprisonment for a period not exceeding three years, or both, **for each article to which the offence relates**. In theory, the owner of Budget Copy could face a fine of over a million and a half rands.

### The Causes of Student Copying

The causes of students' failure to buy books have been laid at many doors. One of them is said to be the lack, in many cases, of adequate bookshops on or close to university and technikon campuses for while campuses in urban areas are usually well-served, those outside major urban centres are usually not. However, although it would seem obvious that when students cannot easily buy their prescribed textbooks the first obstacle has been placed in their paths, the results of an informal survey conducted among librarians in nine higher education institutions contradicted the prevailing view that if only books were more easily accessible students would settle for photocopies less often.

More, better-stocked bookshops are therefore not the only answer. University and technikon authorities ascribe the photocopying of textbooks to their high cost and claim that if publishers reduced their prices students would buy more books. But, in researching book-buying for this report, we have found no evidence that cheaper books are bought more often than more expensive ones. Cheaper books are therefore not the only answer either. The call for cheaper books usually goes hand in hand with the cry that 'students are poor'. However, financially disadvantaged students are by no means the only ones who photocopy books instead of buying them. On the contrary, copyshops in the vicinity of institutions whose student body is substantially middle-class seem to be doing even more healthy business.

### Curbing Illegal Copying

The most obvious route for publishers faced with illegal copying is to take offenders to court. However, especially where the offenders are institutions that are important customers of the industry, court action is not always the most effective way of attaining respect for and compliance with copyright.

Pilot studies undertaken in Norway to examine the relationship between blanket licensing, copyright consciousness and book-buying have not as yet thrown up **conclusive** evidence, but what came out of the studies was that awareness campaigns and licensing together have served to curb piracy and to encourage the sale of more books.

The burning question is whether the balance between the conflicting needs and interests of creators and users should be accommodated in the law or by voluntary contractual arrangements between the parties. This Report takes the view that exceptions to the exclusive right in the law itself should be confined to the minimum and that the balance should be provided by voluntary contractual arrangements. This is what has worked in other countries and there is no reason to believe that South Africa is different. The voluntary system is entrenched in our law and is in line with the constitutional right to property whereas compulsory exceptions in the law usurp personal rights and are thus arguably unconstitutional.

The publishing industry, while recognising the importance of the availability of information in a society such as South Africa's, does not believe that it is the role of a private sector industry group to subsidise the education of poorer students by effectively offering them free study material. Nor can it take responsibility for shortcomings in university library budgets. It therefore suggests exploration of the provision of textbooks to disadvantaged students, including ring-fencing bursary funds for books.

## RECOMMENDATION

7. If there is to be progress in dealing with the legislative and other policy issues causing conflict between rights holders and users in the tertiary sector, and spilling over damagingly into other sectors, there is a need for government involvement in creating a conducive environment for an understanding to be reached on the desirable balance in South African legislation and practice. This can readily be achieved by:
  - a. The promotion of collective licensing priced to offer affordability and access to rights users as the most effective mechanism for addressing the problems faced by the Higher Education sector.
  - b. Attention to the proposed regulations, along the lines of those gazetted for the music industry, which will define the government's approach to the accountability of collecting societies and will introduce and clearly delineate a regulatory mechanism by which the collecting society's activities will be transparently exposed and at the same time legitimised.
  - c. Urgent attention to the legislative amendments needed to remove ambiguity on the limits of photocopying for personal use and in the educational context; the strengthening of enforcement measures; the provision of a stable basis for policy-making on copyright for digital media. These would constitute a necessary first step preceding any of the issues listed below.
  - d. Better communications between the DTI and industry stakeholders to ensure a balanced response to the submissions of the different sectors of society.
  - e. Support for ANFASA to ensure balance in proposed legislation and policy, as probably the majority of authors writing non-fiction in South Africa are active in higher education. It is recommended that academic authors become more active in protecting their rights as authors and that educational campaigns on copyright and contract be provided for authors.

- f. Education and awareness programmes among students and lecturers on the value of intellectual property.
- g. High-level discussions between industry associations and SAUVCA on the most desirable policy environment for the development of academic publishing in South Africa and the creation of the best possible environment for access to knowledge and research information.

### *Illegal Copying In Schools*

The levels of copying taking place in schools in South Africa are giving increasing cause for concern. Publishers are aware of schools in which entire textbooks are being copied and sold by teachers and the KwaZulu-Natal case mentioned above revealed wholesale production of pirated, photocopied textbooks being supplied to state schools.

Members of the publishing industry who are parents of children in public schools have reported that classes are supplied with 'textbooks' that are compilations of extracts from different published textbooks. Illegal anthologies of poems, short stories and extracts from novels have long been a feature of South African classrooms.

Publishers in the Western Cape, reviewing textbook buying patterns, have come across instances where very low book purchasing budgets are accompanied by very high photocopying budgets. Similar patterns have been identified by the Gauteng Department of Education.

The overwhelming majority of school textbooks are locally produced. Textbooks are purchased by provincial government departments, leading to a situation in which the government is in fact the major book purchaser. In this arena, therefore, the purchaser is not the end-user.

Schoolbooks are the staple of the South African publishing industry. When the schoolbook market falters, as it did in 1997, the ripple effect – downsizing, job losses and demoralisation – affects the whole industry. The growth and development of publishing, writing and reading in South Africa thus depend very critically on viable markets in school textbooks.

Problems in the schools sector include high levels of classroom copying of compilations, anthologies and even of whole books. It should be noted that in those cases where educators are copying published books and selling them to learners, whether at cost or for profit, they could be found guilty of criminal copyright violation in a court of law and, if found guilty, would have a criminal record.

In a successful prosecution of a copyshop in KwaZulu-Natal conducted by a group of publishers, large volumes of pirated books were seized, apparently intended for sale to schools throughout the province.

Although some teachers compile and distribute compilations of their own learning materials together with extracts from published sources (school versions of course packs)<sup>28</sup>, this was not in the past the primary source of publishers' losses because the majority of teachers especially in rural schools are ill-prepared to devise their own teaching materials and have preferred to rely on textbooks.

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<sup>28</sup> With, initially, the encouragement of the departments of education when, at the onset of the implementation of Curriculum 2005, there was a move away from published learning support materials.

However, now educational publishers fear, with some justification, that in many schools books are not being bought because they are photocopied instead, purportedly to save money. When a school orders one or two copies of a title for a whole class, or when its paper spend exceeds its book spend,<sup>29</sup> suspicions are justifiably aroused. Publishers' sales representatives and parents are increasingly reporting that schools are using the promotional copies supplied to them and then photocopying and selling these pirated copies of books to parents. These products are likely to be inferior in quality to the published books and also more expensive.

Educational specialists in the publishing sector also complain at the pedagogical problems created, and the undermining of the intentions of the new curriculum, by teachers who misguidedly copy extracts from various textbooks, carefully conceptualised by their authors to provide coherence in approach, assuming that these are the 'resources' needed by the new system. Instead, this illegal copying not only undermines the viability and the cost-effectiveness of the publishing industry, but also undermines the integrity of published works and detracts from the appreciation of books as a source of enrichment.

The publishing industry has not yet been able to quantify the levels of such alleged infringements or of losses to the industry, and this report is unable to provide statistics either, for none exist. The best the authors of this report could do was try to gain insights about the extent to which publishers are being cheated and what the attitudes are of the leading education departments.

### The Effects of Illegal Copying in Schools

Ironically, high levels of copying, often carried out with the aim of reducing costs, has the opposite effect. Low prices for textbooks depend primarily on the length the publishers' print runs – the higher the print run the lower the cost. In general, photocopying a school textbook is likely to be more expensive than buying the book in cases where substantial print runs have led to economies of scale and low prices.

It is therefore not only in the interests of school authors and publishers, but also of the provincial education departments to cut back on excessive copying in schools.

### Copyright Awareness Campaigns in Schools

In the Gauteng Department of Education (GDE), the Copyright Forum, an informal grouping of teachers, librarians and officials of the Library and Information Services (LIS) and Learning Support Materials (LSM) drafted a policy document for its schools on the Copyright Act, which is distributed as a manual for use by school principals. The basis of GDE policy is that excessive photocopying inhibits creativity whereas teachers should be encouraged to develop their own, original materials where feasible; a further motive is the fear of legal action against a school, for which the Department would be ultimately liable.<sup>30</sup>

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<sup>29</sup> An official of the KwaZulu-Natal Department of Education told the author of this Report that when schools in that province were asked what they needed most, the most common answer received was 'a photocopier'.

<sup>30</sup> In reply to a letter stating the problem and seeking comment, Vivian Davids replied: 'It is GDE policy (through its circulars and memos) not only to encourage educators to operate within the letter and spirit of the law ... but also to support schools to procure LSM (through its monetary allocation for LSM to each public school in Gauteng) and also to develop educators so that they develop their own LSM (through workshops that it coordinates on a regular basis with educators).' The publishing industry feels, however, that this still undermines book sales.

The development of this policy is admirable; however, implementation is altogether more difficult. To stimulate copyright awareness is important, but to control infringement is difficult, and the GDE admits that the means of control in its schools are lacking. The Department has no hard facts and no statistics. It has, however, noticed bloated stationary allocations in some schools and is already investigating.<sup>31</sup>

As far as the schools are concerned, therefore, publishers do not believe that the short- or medium-term solution to the problem of copyright infringement lies with the law (although they would vigorously oppose any initiative to relax the current legal provisions).

The best solution would seem to be campaigns on copyright awareness, with the print industries and the National Department of Education working together to promote an understanding of the value of relevant locally-produced textbooks. The ultimate goal would be the negotiation of licensing agreements, with statutory backing.

The print industries sector is concerned that such practices not only undermine the most important book market in South Africa and contribute to higher costs for school textbooks, but also that a pattern which undermines respect for the value of books in education is being established very early on in the education system.

### Collective Licensing in the Schools Sector

In other countries (the United States, the United Kingdom, Europe, Australia and New Zealand, for example) schools hold blanket licences, negotiated through departments of education, and far more is collected from them for disbursement to rights owners than from higher education institutions.

DALRO has reported that two provincial education departments in South Africa<sup>32</sup>, having investigated the principles of blanket licensing, are in favour of it. South African publishers, however, are wary of extending blanket licensing to schools right now because they fear that in the current situation, with very low levels of copyright understanding in schools and little respect for copyright, the system could be abused. Moreover, none of the provincial education departments has the infrastructure, at present, to administer licensing.

Nevertheless, the door should not be closed on the extension of blanket licensing to schools, as international experience, in countries like Australia, Canada and Norway, suggests that this is the most effective way of providing for classroom needs for supplementary materials while ensuring protection for the rights of authors and publishers.

There is cause for concern at the levels of illegal copying in schools, the losses this is incurring for publishers and the negative impact that this has on book prices.

Rising levels of illegal copying in schools can and should be addressed, in the first instance, through awareness and educational campaigns in schools. The positive levels of communication and understanding that now exist between the Department of Education and the publishing industry is encouraging and should help address the situation.

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<sup>31</sup> Although the GDE would prefer to ascribe excessive paper purchase to teachers developing and disseminating their own materials (which was discovered through the retrieval process when some schools replied that they had no books to hand back because they didn't distribute any, having bought paper instead), the Department is enquiring into the reasons.

<sup>32</sup> Gauteng and Mpumalanga.

## RECOMMENDATIONS

8. Rising levels of illegal copying in schools can and should be addressed, in the first instance, through awareness and educational campaigns in schools. The positive levels of communication and understanding that now exist between the Department of Education and the publishing industry are encouraging and should help address the situation.
9. Factors in the educational system aggravating the trend towards copying should be addressed with the national and provincial departments of education and departmental cooperation sought in combating illegal copying.
10. Education departments and educators should be made aware of the risks attached to gross copyright violation.
11. Following on policy initiatives on the ownership and accountability of collecting societies in South Africa, and in the wake of copyright awareness campaigns in schools, there needs to be an investigation, with the print industries sector, DALRO and the DoE of the desirability of introducing blanket licensing in schools for print and digital copying of resource materials.



# 3

## SOUTH AFRICA – THE LEGISLATIVE ENVIRONMENT

### INTERNATIONAL TREATIES GOVERNING COPYRIGHT

**W**ORLDWIDE, INTELLECTUAL PROPERTY PROTECTION rests on national, not international legislation. However, an international system is necessary to avoid the conflict of laws. International intellectual property treaties regulate relations between governments and comprise international case law and custom as well as the bilateral and multilateral agreements, or treaties, negotiated by governments and ratified by national legislatures and through which governments develop their legislative frameworks in conformity with global standards.

This system is particularly important in the information age, with the blurring of international boundaries and the explosive growth of trans-border information dissemination, across a multiplicity of national legislations. Such a system is provided by the international treaties, which ensure that member countries' laws conform to certain, mutually agreed, minimum standards. The most important of these (as far as publishing is concerned), are the Berne Convention and the TRIPS Agreement.

As a member nation of the Berne Union, a member of the World Intellectual Property Organisation (WIPO), and a signatory to the Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), South Africa has international obligations concerning the legal environment in which copyright is protected and in which that protection is enforceable. It has to be recognised, too, that many trade relationships and agreements are dependent upon a sound intellectual property framework in a country and, most particularly, preferential trading agreements with the United States for duty-free access to the United States market for South African goods. Investment in South Africa can also be dependent upon the perception that the country provides a sound intellectual property environment.

The importance of this aspect of South Africa's international obligations is recognised by the South African government as being of key importance in its international trading relationships. The Chief Executive Officer of the Companies and Intellectual Property Registration Office (CIPRO) has articulated this as being a central concern:

As far as intellectual property is concerned South Africa is in a fairly unique situation in that we are leaders in Africa as far as the recognition of these rights are concerned and the feeling is that we should avail ourselves of the situation in order to expand South Africa's influence in this field in Africa and the rest of the world ... it is our view that much can be done to promote the prestige of South Africa in this regard. I submit that this would also serve to increase international regard for South Africa as a country with refined intellectual property laws and recognition of these rights. This should also increase the international investor confidence in our country.<sup>33</sup>

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<sup>33</sup> DTI website: [www.dti.gov.za](http://www.dti.gov.za)

## The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886, last revised in Paris in 1971 and amended in 1979, is the principal international treaty regulating copyright protection. In setting the minimum standards for the protection of copyright, it guarantees to authors and publishers the protection of their rights in all countries party to the treaty.<sup>34</sup> The principle of national treatment as expressed in Article 3 means that a country's copyright laws have to grant the same level of protection to creators in other countries of the Berne Union as they do to their own. It does not prescribe how such protection should be provided but, rather, sets out which principles and provisions should and should not be implemented in national laws.

Most importantly for publishers and authors, the Berne Convention, in Article 9(2), provides a number of exclusive rights to the author<sup>35</sup> in the economic exploitation of the work. Of these, the most important is the following:

Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form. (Article 9 (1))

The Berne Convention then allows member states to introduce exceptions to the exclusive right of the author, in their national legislations:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (Article 9 (2))

### *The Three-step Test*

These conditions are often referred to as ***the three-step test***, which is of fundamental importance to rights owners.

Under the three-step test the reproduction must be a special case, *and* it may not conflict with a normal exploitation of a work, *and* it may not unreasonably prejudice the legitimate interests of the rights owner. As can be imagined, a number of interpretations can be placed on 'special cases', on 'a normal exploitation of a work' and on 'legitimate interests'. International agreement, however, is that 'special cases' refer to personal or private copying by an individual, usually for the purposes of scholarship or research or of criticism or review; the 'normal exploitation of a work' refers to both sales and exploitation through sub-licensing; and 'legitimate interests' are the economic benefits due to the rights owner in respect of his or her work.

The 'special cases', therefore, provide society with a safety valve and pertain to copying for personal and private use, for scholarship and research, for criticism and review and for reporting current events. It is also up to national legislatures to provide for exceptions in the case of educational institutions and of libraries, provided that they do not contravene the three-step test. The narrow line copyright law has to tread lies in balancing the rights of the author with the needs of society.

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<sup>34</sup> The text of the Berne Convention is available on the CIPRO website: [http://www.cipro.co.za/info\\_library/acts\\_treaties.asp](http://www.cipro.co.za/info_library/acts_treaties.asp)

<sup>35</sup> The term 'author' is taken to refer to the maker of a work, and is not limited to authors in the commonly-used sense of the word. Publishers, therefore, can also be the 'authors' of their works where they hold rights over those works.

The importance of Article 9 (2) of the Berne Convention to rights owners cannot be over-emphasised. Moreover, South Africa is bound to observe the three-step test in its national legislation, not only by virtue of Article 9 (2) but also in view of having signed the World Trade Organisation TRIPS Agreement, since Article 13 of TRIPS reiterates Article 9 (2) of Berne.

### *Fair Dealing*

This balance between the monopoly for authors and rights owners over the exploitation of their works, and the social goals of wide dissemination of and access to knowledge requires certain limitations on authors' monopoly in respect of their works. The doctrine of 'fair dealing', which provides a safety valve in the interests of society in general, permits a certain amount of copying without the authorisation of the rights owner. This is one of the 'special cases' referred to in Article 9 (2) of the Berne Convention.

South African copyright legislation follows broadly the UK system. In the UK system, which applies in other countries, like Canada, Australia, New Zealand, and Hong Kong, fair dealing allows for limited copying, without permission, for:

- Private study;
- Research;
- Criticism; and
- News reporting

Such copying should follow the 'three-step test' of the Berne Convention (see above). The foundation of the concept depends upon the meaning of the word 'fair' and depends as much upon common sense as upon legal definition. In part, it is a deliberately 'fuzzy' concept that allows for the kind of small-scale copying that is necessary for free expression and that would not erode the rights of the author or compromise the author's rightful earnings.<sup>36</sup>

As defined internationally, fair dealing can only be carried out where there are no commercial interests involved. In other words, the fair dealing activity has to be not-for-profit and in Australia, could not, for example, involve a commercial copyshop.<sup>37</sup> In the UK, it would be permissible to ask a librarian to make a copy for private research purposes if the user cannot make the copy herself.

Legislation in the UK systems tends to avoid spelling out the limits of fair dealing – for example, how much may be copied. In the UK, Canada and Australia, individuals are permitted to make a **single copy** of a '**reasonable proportion**' of a work for fair dealing purposes.

Only in Australian law is this 'reasonable proportion' spelled out as 10% of a published work of 10 pages or more; or one article from a periodical.<sup>38</sup>

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<sup>36</sup> Jessica Litman, *Digital Copyright*. Prometheus Books, Amherst 2001, p. 84; Lessig, *passim* on the similar concepts lying behind the UK system of Fair Use.

<sup>37</sup> See the Australian Copyright Council *Fact Sheet on Fair Dealing*, [www.copyright.org.au](http://www.copyright.org.au)

<sup>38</sup> See the Australian Copyright Council *Fact Sheet on Fair Dealing*, above, and the UK Government on fair dealing exceptions, [www.intellectual-property.gov.uk](http://www.intellectual-property.gov.uk)

In America, the concept is different and the term 'fair use' is adopted. The US fair use system is an open-ended one, which does not impose a scope limiting copying, but instead asks that four factors be observed<sup>39</sup>:

In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for, or value of, the copyrighted work.

The fair use doctrine requires considerable discretion to be exercised by the user, who has to judge, from a multiplicity of perspectives, whether the use is fair or not. For this reason, it has been subjected to criticism by rights users and rights owners alike. Multiple copies can be made, for classroom use, but if this is to fall within the fair use provisions, it has to meet the criteria of brevity and spontaneity. The copying has to take place close to the time of its use – the idea being that this is a short-term, spontaneous need, without time to ask for permission – and the act of copying cannot be repeated – in other words, the same extract cannot be used again in another semester.

Fair dealing is a deeply nuanced doctrine, which has been the subject of much controversy among legal experts worldwide, and is examined in detail in Appendix 4, *Fair Dealing and Literary Works*.

In South Africa, the publishing industry has argued that there is a need for clarification of certain of the fair dealing definitions and provisions in the Copyright Act.

## The TRIPS Agreement

As described above, in the context of copyright and international trade, South Africa is a signatory of the TRIPS Agreement, which covers the enforcement of copyright, and provides for a dispute prevention and settlement procedure between member states.

As we have seen, TRIPS requires signatory countries to have a range of effective and accessible measures to ensure enforcement; procedures that aid enforcement; expeditious processes for the prosecution of infringements; and remedies that act as a deterrent to further infringements.

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<sup>39</sup> US Government Copyright information website: [www.gov.copyright+fair+use](http://www.gov.copyright+fair+use)

## The WIPO Copyright Treaty (WCT)

South Africa has also signed but not ratified the WIPO Copyright Treaty (WCT) of 1996. The fact that eight years have elapsed since signature, without significant moves to address legislative issues relating to digital copyright, is cause for concern and puts South Africa well behind most if not all of the major trading nations and a number of its African partners.

The WIPO Copyright Treaty (WCT) was adopted in Geneva in 1996 and is mainly aimed at providing copyright protection on global information networks, such as the Internet. It tackles the major issues confronting national legislatures in addressing the impact of digital media on their IP systems.<sup>40</sup>

The WCT establishes a new exclusive right, the right of on-demand communication to the public, and provides for obligations concerning technological measures of protection and rights management in the digital environment. It complements the Berne Convention with provisions on the scope of protection, the protection of computer programmes and original databases, the right of distribution, the right of rental and the duration of protection of reprographic works.

Most importantly, the WCT reaffirms the application of the three-step test to exceptions and limitations in the digital environment.

The WCT was adopted before any countries had enacted specific legislation to deal with copyright in the digital environment. Since 1996, a number of countries have grappled with the issues and enacted legislation, either creating entirely new legislative instruments, or amending existing copyright acts. The treaty, having reached its 30<sup>th</sup> ratification or accession, has entered into force as of 6 March 2002.

## RECOMMENDATIONS

12. South Africa needs to ensure that its legislation and is in line with international treaties if it is to provide a conducive trading environment for local industries and their international trading partners. This is particularly important in the light of international trade agreements currently being negotiated.
13. It is a matter of concern that a number of legislative amendments needed to bring South African legislation into line with international standards of protection and enforcement have been stalled for a number of years. The DTI is urged to take up its responsibilities in addressing these issues and resolving differences currently blocking legislative change.
14. It is equally disturbing that South Africa has fallen behind in addressing its international obligations in relation to electronic copyright issues and the DTI is urged to set up, as a matter of urgency, the inter-industry consultations needed to formulate South African policy on electronic copyright legislation.
15. Provisions in South African legislation for fair dealing and regulations governing exceptions for educational use are of particular concern and these need to be examined in the light of international treaty obligations.

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<sup>40</sup> <http://www.wipo.int/edocs/trtdocs/en/wo/wo033en.htm>

# SOUTH AFRICAN COPYRIGHT LEGISLATION

**I**NTERNATIONAL TREATIES such as Berne, TRIPS and the WCT require national legislatures to meet certain minimum standards in their national legislation.

One of the primary objectives of this Report is a comprehensive evaluation of the entire copyright legislative environment in which the South African print industries sector operates, identifying deficiencies where they exist. Only then can the industry even begin to contemplate solutions. Many publishers perceive that copyright is a 'problem'. Does the problem lie with the law itself, with enforcement of the law or with ignorance of the law? Or is it a matter of divergent needs in the industry sector? Or even of the social and cultural context in which the copyright regime exists?

## The Copyright Act

Copyright in South Africa is regulated by the Copyright Act, No 98 of 1978 as amended, and the Regulations promulgated in terms of Section 13 of the Act.<sup>41</sup> Under the Act, literary works are protected, as are musical works, artistic works, sound recordings, cinematograph films, sound and television broadcasts, programme-carrying signals, published editions and computer programmes. Without authorisation from the copyright owner, no-one may perform certain restricted acts in respect of these protected works, such as reproducing them, adapting them, publishing them, performing them in public or broadcasting them. Copyright is of limited duration, after which works enter the public domain.<sup>42</sup> In South Africa the duration of copyright is the life of the author plus 50 years after the author has died.

### *The Regulations – Exceptions For Educational And Library Use*

The copyright regulations promulgated in terms of Section 13 of the Copyright Act came into effect in 1978. They appear to have been in part prompted by the impact of the anti-apartheid academic and cultural boycotts in place at the time and were an attempt to mitigate the impact of the boycotts on education. Almost since their promulgation, they have been seen as problematic. Not only are they poorly expressed and ambiguous, but they are arguably in contravention of the three step test and *ultra vires* the Act itself.

They follow the lines of the United States Voluntary Classroom Guidelines – though they lack the requirements of brevity and of spontaneity – which are formulated in terms of Section 107 of the United States Copyright Act, the so-called 'fair use' provision (for a more detailed explanation, see p. XXX, above). Regulations are intended to add clarity and certainty to an Act<sup>43</sup>, but since fair use and fair dealing are not identical doctrines the indiscriminate grafting of an explanatory instrument from one onto the other has led to confusion.

Moreover, the words of Section 13, which echo those of Article 9 (2) of Berne, explicitly prohibit uses that would conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interest of the rights owner. Since the detailed provisions of the

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<sup>41</sup> Copies of the Copyright Act and the Regulations can be found on the CIPRO website: [http://www.cipro.co.za/info\\_library/acts\\_treaties.asp](http://www.cipro.co.za/info_library/acts_treaties.asp)

<sup>42</sup> This is an integral part of the aforementioned balance, qualifying and limiting the copyright owner's monopoly over his or her creation.

<sup>43</sup> The Section 13 regulations offer neither clarity nor definition (as anyone who has tried to make sense of them can confirm) and therefore fail utterly in the purpose for which they were intended.

regulations formulated under Section 13 could indeed conflict with a normal exploitation of the work or conflict with the copyright owner's legitimate interests, they are arguably *ultra vires* the Act as well as in contravention of Berne.<sup>44</sup>

For example, while the list of permissible copyright levels spelled out in the regulations, taken in isolation, might lead educators to believe that multiple copying is permissible, the framing text, which applies the Berne Convention three-step test as an overall limitation governing classroom exceptions, contradicts this perception. For the publishing industry, litigating against infringement on the basis of these regulations would therefore be likely to be difficult and expensive.

PASA has long seen the regulations as problematic and has been pressing for their amendment for more than a decade. While it could be argued that they do not in fact, in their strict interpretation, confer the right to cumulative multiple copying, their very ambiguity has undermined the effectiveness of the law. As a result, publishers wishing to take action against infringements in educational institutions or libraries would be faced with lengthy and expensive legal arguments about the interpretation of these regulations.

### The Provisions of the Regulations

The copyright regulations which offer certain concessions to educational institutions and libraries have been promulgated under Section 13 of the Act.

A reasonable portion of a work ('reasonable' having regard to the totality and meaning of the work and as both a qualitative and quantitative judgement) may be reproduced if the cumulative effect of the reproduction does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal and moral rights of the author. 'Cumulative effect' is defined as *not more than one short poem, article, story or essay, or two excerpts, copied from the same author, or more than three short poems, articles, stories or essays from the same collective work or periodical volume, for the purpose of instructing a particular class during any one term, and not more than nine instances of such multiple copying for one course of instruction to a particular class during any one term.*

Multiple copies may not exceed in number one copy per pupil per course; they may not be used to create or replace anthologies, compilations or collective works; they may not include works intended to be ephemeral such as workbooks, exercises, standardised tests and answer sheets; they (the same materials) may not be used for the same class from term to term; and they may not be used as a substitute for the purchase of books or periodicals.

By stating that the cumulative effect must not conflict with the normal exploitation of the work, the legislator has not given a green light for the reproduction of the amounts listed above. A further test must be used, and that is that those amounts must not be used as a substitute for the purchase of books or periodicals. It is a mistake, therefore, for educators to assume that multiple copies not exceeding the amounts set out in the definition of 'cumulative effect' are automatically permissible.

The library privileges permit the making of a copy, by an employee of a prescribed library, of one article from a collection or a periodical, or a *reasonable* part of a work, provided that it is made for the person requesting the copy, and the library has had no notice that it is to be used for anything but that person's private use or study. The *whole*

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<sup>44</sup> Appendix 3 contains detailed references to the regulations.

work, or a *substantial* part of it, may be copied only if the library has determined, on the basis of a reasonable investigation, that another copy cannot be obtained at a fair price, further conditions attached to this being that the copy becomes the property of the user and is intended only for his/her private study and that the copyright warning is displayed next to the photocopying machine.

A single copy, made under the above conditions, may be made on separate occasions, but not if the library employee is aware, or has substantial reason to believe, that multiple copies of the same material (whether made all at once or over a period of time) are intended for aggregate use by more than one person or intended for separate use by the individual members of a group. A library or its employee may not, therefore, engage in the systematic reproduction of single copies, or make multiple copies, other than of periodical articles of a scientific nature.

Sometimes, educational and library privileges are confused with the free use permitted under the fair dealing principle. South African law, by dealing with the latter under Section 12 of the Act, and the former under the Section 13 regulations, clearly and unambiguously separates them.

### *Fair Dealing in South African Law*

It is true that where the law allows of more than one interpretation<sup>45</sup> of fair dealing, arguments are bound to arise. It has been asserted in a number of forums that fair dealing is a 'contentious issue' in South Africa. In the case of fair dealing rather a good deal is at stake since some voices in higher education believe that it may be possible to meet students' informational needs under this exception – either by each and every student making for himself or herself a fair dealing copy, or for the institution to make the copies on behalf of its students. Those were the voices that objected when an attempt was made to confine the person making the copy, in Section 12(1)(a) of the Act, to a 'natural person'.

In brief, the points of contention relating to fair dealing in South African law are whether or not copying can be carried out by a third party; and whether multiple copying can be allowed under fair dealing provisions.

The effect of and objections to the proposed changes to Section 12 as they affect fair dealing, are dealt with in the Appendix B, "Fair Dealing and Literary Works", appended to this report. In short, the publishing industry, locally and internationally, supported the amendments proposed by the government, as providing much-needed clarity, making it clear that fair dealing is a matter of personal, and not institutional copying. The right to make multiple copies, as has been argued for by the SAUVCA Copyright Committee, is not appropriately dealt with through fair dealing provisions, but should be dealt with through regulations for classroom use, or through collective licensing.

## The Counterfeit Goods Act

The Counterfeit Goods Act No. 37 of 1997 introduced measures against the trade in counterfeit goods so as to protect owners of copyrights and trademarks. The Act confers powers of search and seizure upon the police so that, for example, in cases of book piracy premises could be raided and infringing copies, as well as copying or

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<sup>45</sup> Only a court can determine what is 'fair' depending on the facts and circumstances of each individual case, and thus the law cannot presume to set out the limits to be observed. Those limits that have arisen have done so through case law and international acceptance.

printing machinery, could be seized, pending the outcome of civil or criminal proceedings.<sup>46</sup>

The Act also provides for the seizure by the Department of Customs and Excise of counterfeit goods entering the country.

The Counterfeit Goods Act has recently been used in a case of illegal photocopying of academic textbooks in the Western Cape (see The Container Raid, above, p. XXX)

## The Legislative Context

The government department responsible for intellectual property is the Department of Trade and Industry (DTI), where copyright legislation is handled by the Director for Commercial Law and Policy (formerly, before DTI reorganisation, the Registrar for Copyright in SAPTO – see below). The Companies and Intellectual Property Registration Office (CIPRO), a recent merger between the former South African Patents and Trade Marks Office (SAPTO) and the Company Registration Office, manages company registration and intellectual property registration and management.<sup>47</sup> CIPRO is set up as a self-funding company, providing services to the business community and the DTI. The Registrar for Intellectual Property in CIPRO manages copyright affairs.

Traditionally, the Registrars for the different branches of IP in South Africa have been supported by Advisory Committees consisting of legal and industry experts. It has, in the past, been the Copyright Advisory Subcommittee that has provided expert advice on legislative needs as well as being responsible for the drafting of legislative amendments.

In recent years, at least in the case of copyright, the Advisory Committee structure appears to have all but collapsed. Industry commentators see this collapse as a contributing factor to the state of paralysis in copyright legislative reform.<sup>48</sup> In the late 1990s the Registrar of Copyright dissolved the Copyright Advisory Committee and there was a long hiatus before a new Committee was constituted in 2002. However, this Committee has not met and indications are that the department responsible for formulating copyright legislation does not intend to use it at all in its traditional role as an advisory body on legislative reform.<sup>49</sup>

## Legislative Reform

The main legislative weaknesses identified by local and international publishers over the last decade (see the discussion of the IIPA report above, p. XXX) include:

- The regulations governing exceptions for educational and library use;
- The lack of a presumption of ownership of copyright in South African law;

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<sup>46</sup> The text of the Act can be found on the CIPRO website:  
[http://www.cipro.co.za/info\\_library/acts\\_treaties.asp](http://www.cipro.co.za/info_library/acts_treaties.asp)

<sup>47</sup> [www.cipro.co.za](http://www.cipro.co.za)

<sup>48</sup> Owen Dean, PICC Copyright Workshop, March 2004.

<sup>49</sup> Ibid.

- Difficulties in securing evidence in the case of copyright infringement (in part dealt with by the promulgation of the Counterfeit Goods Act of 1997 that confers powers of seizure upon inspectors and certain members of the police);
- Inadequate penalties for copyright infringements;
- Ambiguities in the interpretation of fair dealing;
- The lack of provisions for digital copyright; and
- The creation of a regulatory framework for collecting societies.

**A NOTE: THE CATEGORISATION OF THE PRINT INDUSTRIES WITHIN THE DTI**

A problem that the industry sector faces in interacting with the DTI on questions of legislative reform is the fact that, in the overall categorisation of industry sectors in South Africa, the print industries are included in the Agri-processing sector. As this provides an inappropriate policy environment for the print industries, **it is recommended that the print industries motivate for re-categorisation as part of the cultural industries, which are a priority area for government intervention and growth and which include a number of IP industries.**

*The Print Industry Sector and the DTI*

Over the last decade, the major legislative needs articulated by the print industry sector have had to do with provisions for reprographic reproduction in educational institutions and with barriers to effective enforcement. In general, publishers are hesitant to prosecute copyright offenders because of ambiguities in the legislation; the expense of bringing cases to court; the lack of effective penalties; and inefficiencies in the criminal justice system. The publishing industry has been the protagonist in discussions around legislative issues and submissions on proposals for legislative reform – however, up until now, authors have not been active on the copyright front.

While the publishing industry has enjoyed cordial relations with the Director for Commercial Law and Policy and his office at the various workshops that have been convened from time to time, and there appears to be agreement over a number of issues, interaction over legislative reform has been less happy. The Director has not responded to submissions from the industry sector, locally and internationally, and industry representatives have had difficulty in getting responses to queries about the state of legislative reform.

In recent years, the DTI has attempted to promulgate amendments relating to the Regulations, in 1998, and further amendments in 2001, relating to fair dealing; evidentiary presumptions in court cases; and statutory damages. It has held workshops on the Regulations governing exceptions; on the WCT and electronic copyright; and on the regulation of collecting societies, but none has resulted in any legislative action, at least in the case of the print industries. Some amendments to copyright legislation have been passed dealing with needle time in the music industry and draft regulations for collecting societies in the music industry have recently been tabled<sup>50</sup> – both of these interventions as a result of vigorous lobbying by the music industry.

The legislative reforms that have been gazetted by the Director's office in recent years have been stalled by the intervention of the South African University Vice-Chancellor's

<sup>50</sup> Regulations: Establishment of Collecting Societies. *Government Gazette* No. 26167, March 2004.

Association (SAUVCA), supported by the Minister of Education, and the publishing industry has been unable to set up a dialogue with government, or to get legislation back on track.

### *Government Policy*

Radical restructuring in the DTI in the context of government transformation has broadened the field of influence of intellectual property to encompass not only the four traditional branches (copyright, trade marks, patents and designs) but additional domains such as database protection, traditional knowledge, trade secrets and global energy issues. In this context it can be seen that copyright occupies only part of Government's intellectual property concerns. Nevertheless, the print industry sector believes that an effective copyright regime is an essential component in South Africa's national and international trading development and that the concerns of the industry need to be taken seriously.

The print industry sector understands from the Director, Commercial Law and Policy that all future legislation is to be informed by policy, and that the government think-tank will eventually take a sober decision based on trade imperatives and on stakeholders' interests.<sup>51</sup> According to the Director, the policy document, which is under construction and discussion internally, is not yet ready for public consumption and comment; *ipso facto* there will be no legislative development until the policy document is finalised and has been accepted by Cabinet and the public.

However, industry informants understand that legislative **review** (where a law is simply 'bad' or unworkable) need not necessarily be neglected until the policy document is complete, whereas legislative **reform** must be informed by policy. Possible amendments to the Act such as a new definition of fair dealing, subsistence of proof of ownership, and the introduction of statutory damages, as well as revision of the copyright regulations<sup>52</sup>, in particular, straddle these lines. The door is therefore not entirely closed to renewed efforts to resolve these outstanding issues as a matter of urgency.

The Director has said that only if the shelved amendments to the Act (revision of the Regulations; statutory damages; proof of the subsistence of copyright; and the criminalisation of end-user piracy) are of the utmost urgency – in that they might stave off immediate and likely losses to the publishing industry – would they be willing to make an intervention in the short to medium term. The print industry needs to make its own stand to demonstrate that they **are** urgent and it is important that it does so in concert with other rights owners affected by the shelving of legislative amendments, particularly the software industry.

However, the print industry sector wishes to make the point, forcibly, that a policy process that operates behind closed doors, without consultation with industry stakeholders, is likely to be flawed. It is vitally important that the industry sector makes a strong input into the policy document, preferably at the drafting stage or, at worst, when it comes before the public for comment. Examples of local and international best practice would indicate that the most effective route to policy formation in this complex and strategically important area is through a transparent and informed consultative process, followed by the formulation of policies that have a good chance of acceptance

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<sup>51</sup> Discussions with MacDonald Netshitenzhe, Registrar of Copyright.

<sup>52</sup> It would appear that the main reason for rejection of the copyright regulations is that consultation took place after the event so to speak. In future, legislative amendments must have been subjected to consultation before they appear in the Government Gazette. What this appears to mean in practice is that any new set of regulations should have been agreed upon by PASA, DALRO and SAUVCA.

by all parties concerned. In such a consultative process, it is normally the role of government to act as a mediator between conflicting viewpoints, using expert advisors to arrive at a solution that best reflects that national interest.

### *The Recent History of Legislative Reform*

The recent history of reform in copyright legislation in South Africa has not been happy. A pattern appears to have been established, in which the DTI gazettes, unannounced, proposals for legislative amendments and calls for responses; industry stakeholders broadly support the amendments; the universities oppose the amendments; and the DTI then withdraws the amendments or stops the legislative process. This situation has been further complicated by the intervention of the Minister of Education, on behalf of the universities, in asking for the withdrawal of proposed amendments in 2001. The result has been that legislative reform has effectively been stalled since 1999.

Although the then Registrar of Copyright has tried, from time to time, to canvass stakeholder opinion, for example in the convening of a workshop in 1999 to consider stakeholder input into amendments of the Regulations, this appears to have stalled the legislative process, rather than advancing it. Faced with conflicting views between local and international industries in the print sector and the universities in South Africa, the DTI has chosen to step back rather than attempting to resolve the conflict.

Moreover, a pattern has developed in which, given a lack of action from government in promoting legislative reform, stakeholders have taken their own initiatives in proposing and drafting legislative amendments. This is an unhealthy situation, which, if anything, is merely increasing the polarisation between rights users and rights owners and, in particular, the universities and the publishing industry.

### *Legislative reform internationally*

A review of the international copyright scene would suggest that such conflicts between universities, libraries and the publishing industry are by no means unusual and have been encountered and overcome in different ways in all the countries reviewed for this report. What appears to be required is a legislative process that calls for stakeholder input in the form of position papers and discussion workshops, but which then turns to government expertise to design legislative proposals that weigh up the differing viewpoints in order to arrive at a solution. The interests at stake could be national and international trade requirements, or developmental issues. In either event, the countries studied have brokered different compromises, according to the circumstances of the country, in order to arrive at effective legislation.

An example of such a process can be followed in the introduction of legislation to deal with digital media in Australia, and in particular, the question of fair dealing and library and educational exceptions in digital media. There was extensive input from rights owners and rights users, all of which can be followed in online documentation.<sup>53</sup>

What has to be recognised is that the differences of opinion between rights owners and rights users are not always reconcilable, and that compromise has to be achieved in the best national interest. Moreover, where there are solutions, these are not always a matter of legislation. Very often, the issues at stake are in reality questions of the price that has to be paid for access to knowledge. In the case of Canada and Australia, for example, this has been resolved through the negotiation of a collective licensing

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<sup>53</sup> [www.copyright.org.au](http://www.copyright.org.au)

regime that provides advantageous prices to the users, on the one hand, and exerts pressure on rights owners to participate.

### *South African Legislative Reform – The Regulations*

Attempts to reform the Regulations promulgated in terms of Section 13 bear out the general pattern for legislative reform in South Africa described above. In the early 1990s, PASA tried to reach agreement with the universities on the desirable extent of exceptions for educational and library copying, but these discussions stalled when the universities refused to relinquish what they saw as a potential advantage in the ambiguity of the provisions of the regulations.

In 1996, the then Chairman of the Copyright Sub-Committee of the Advisory Committee on Trade Marks, Patents, Copyright and Designs in the DTI, considering the regulations to be hard to understand and almost unworkable in practice, sought to revise them and invited PASA to prepare a suitable draft.

In drafting the proposal PASA had two fundamental objectives: to make the regulations easy enough for the layperson to understand and apply, and to reduce free multiple copying to a minimum. The focus was on multiple copying for classroom use, as that was where publishers were most directly affected and prejudiced when photocopies, made without permission or payment, were used in the classroom or lecture hall. PASA argued that, above a certain minimum level, a fee should be paid to a collecting society to pass on to rights owners for the use of their works.

The draft prepared by PASA was submitted to the DTI early in 1998. The DTI found it to be acceptable and it was published in the Government Gazette of 7 August 1998. Interested parties were invited to submit their written comments to the Registrar, SA Patent and Trade Marks Office, by 18 September 1998.

The proposed regulations met with protest from the university sector, as a result of which the Minister of Trade and Industry granted an extension for the submission of comments and the Registrar agreed to broaden the consultation process by convening a workshop with all stakeholders.

The workshop, held in March 1999, merely demonstrated that the polarisation of views appeared irreconcilable. Rights owners wanted the author's exclusive right to be limited as little as possible through legislative means and motivated for collective licensing as a balancing mechanism between the rights of owners and needs of users of published copyright works. Users, on the other hand, sought generous exceptions, arguing that this was to the advantage of disadvantaged students.<sup>54</sup>

And there, effectively, the legislative process on the regulations has stalled. Attempts by the print industries sector and its international partners to get amendments reinstated have been met with silence from the DTI.<sup>55</sup> As far as the industry sector has been able to establish, the DTI wants the publishers and the universities to reach agreement before any legislative amendment will be undertaken. For reasons set out below, rights owners do not believe that this is a realistic prospect.

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<sup>54</sup> These arguments have been rejected by stakeholders from authors' associations and libraries who have argued that the rights of disadvantaged South Africans would be better met by a strong copyright regime that protects local authors; the existence of a collective licensing system; and a strong local publishing industry. (PICC Copyright Workshop, March 2004)

<sup>55</sup> Letters from PASA and the IPA requesting clarity on the state of legislative amendments and phone calls to the DTI department responsible for the management of copyright legislation have gone unanswered.

As the regulations are ambiguous and contradictory (see p. XXX, above), the print industries urge the DTI to put legislative amendments back on track. Examining and analysing the submissions in opposition (many of which were reasonable) it would be possible to redraft the proposed revised regulations to take most of those submissions into account without compromising the objectives of the original draft. A proposal in this regard, drafted in response to the stalemate that has been reached, is appended to this Report, together with a detailed explanation of how and why revisions were made (see Appendix 3).

### *Fair Dealing and Legislative Reform*

On 10 May 2001, there unexpectedly appeared in the Government Gazette a proposal to revise the expression of fair dealing and to introduce five factors<sup>56</sup> that a court should consider in determining whether the dealing has been fair. These amendments appeared to be the product of deliberations undertaken by the former Advisory Committee on Trade Marks, Patents, Copyright and Designs designed to clarify legislative ambiguities, strengthen enforcement and ensure South Africa's compliance with its TRIPS obligations.

Supported by PASA, DALRO, the Intellectual Property Action Group (IPACT) and the international bodies IPA and IFRRO, the proposed amendments were opposed by the SAUVCA/CTP Electronic Task Team on the basis that they did not relate to the requirements of the WIPO Internet Treaties or 'address e-commerce, electronic media, distance education or exemptions for the disabled' and that it would be 'short-sighted' to attempt to amend the Act 'piecemeal'.

As a result of the university protests, and pressure exerted through the Department of Education, the DTI discarded the proposed amendment to Section 12 (apart from a proposed amendment to Section 9 which introduced 'needle time'), as well as proposals to amend sections of the Act dealing with evidentiary presumptions in court proceedings and with the introduction of statutory damages (see below).

Protests at the abandonment of this legislation by local and international publishers' associations were not responded to and their submissions were apparently ignored.<sup>57</sup> Why the DTI jettisoned its own proposals without explanation in the face of strong support from the copyright industries is not clear to the publishing industry.

### *Statutory Damages and Presumption of Copyright*

South African rights holders complain that unnecessary barriers to enforcement of the rights in the courts are set up by the failure of South African legislation to allow for the presumption of the subsistence of copyright, which involves plaintiffs in unnecessarily burdensome and expensive procedures in proving their ownership of copyright in civil and criminal cases (see Chapter 3, above, and Chapter 4, Copyright Enforcement, below).

Such presumption of copyright would go a long way to resolving other problems of enforcement, copyright expert Owen Dean argues. Right now, Dean claims, SA

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<sup>56</sup> Four from the US Copyright Act and one from the Australian. The South African publishers and their international advisers supported the re-worded Section 12 because they appreciated the need for clarity and certainty. The writers of this Report, however, have some doubts about the wisdom of attempting to lay a definition on what is, strictly speaking, a statutory defence to a charge of copyright infringement, and the striking similarity to the fair use provision in Section 107 of the United States Copyright Act raises questions regarding the respective applications of fair use and fair dealing.

<sup>57</sup> Correspondence on file from PASA, DALRO, the IPA and IFRRO.

legislation requires the copyright owner to prove ownership from the ground up, something that is out of line with international practice and poses serious problems of enforcement.<sup>58</sup>

Moreover, the penalties that can be awarded are inadequate to compensate plaintiffs, resulting in a reluctance to prosecute cases in South Africa's courts. Local and international associations have argued for some time for the introduction of stiffer penalties for copyright infringement, in particular for statutory damages as a way of compensating rights owners and providing a deterrent against copyright violations.

In the proposed amendments introduced by the DTI in 2001, one of the provisions would have introduced statutory damages amounting to R10 000 for each article to which the infringement relates<sup>59</sup> as a deterrent to copyright infringement.

Two new subsections were also introduced to deal with the onus of proof in proceedings, and another proposed amendment is concerned with the distribution of infringing articles by way of trade. These proposed amendments met with the unanimous approval of local and international publishing industry associations.

These proposed amendments were withdrawn, along with provisions for the clarification of fair dealing, as a result of protests from the university sector, as described above.

PASA, DALRO and their international partners objected to the withdrawal of these amendments. DALRO submitted a detailed refutation of the arguments put forward by SAUVCA (see Appendix 3). Opinion from overseas experts, too, was strong in its rejection of the withdrawal of the proposed amendments, rejecting the arguments against them as lacking in substance and in an understanding of international copyright law and practice.<sup>60</sup>

In short, all attempts at legislative reform in print copyright have been stalled, presumably as a result of protests from the university sector, and have remained in limbo for a number of years. The print industry sector sees these reforms as necessary for the effective functioning of what is after all a strategic industry sector. The print industries argue that it is the role of government to intervene in the resolution of conflicts around legislative needs and to ensure that a strong and effective copyright regime exists in the country as an enabling environment for authors and content creators; for industry players; and for the consumers of information and knowledge.

### *Legislative Reform – Policy Considerations and Collective Licensing*

Following the Canadian and Australian examples, it is clear that the kind of impasse that has been reached in South Africa can be resolved by using pricing mechanisms in the negotiation of a collective licensing regime, to ensure that the information needs of the education sector are met without compromising the viability of the copyright industries. As Canadian copyright expert Andrew Martin has argued, such developments need not be *ad hoc* but should be linked in a coherent policy with the objective of creating an environment in which legal provisions and voluntary negotiated arrangements are satisfactorily balanced. In other words, **exceptions in the law**

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<sup>58</sup> PICC Copyright Workshop, March 2004.

<sup>59</sup> It should more properly have been R10 000 for each infringing act or each article to which the infringement relates.

<sup>60</sup> Correspondence between PASA and the AAP, 2001.

**should be minimal and the balance should be provided by licensing with the cost properly negotiated between the stakeholders.**

Moreover, as Andrew Martin argues, and as will be elaborated in more detail in the chapter on Copyright and Development below, legislation is a problematic vehicle for enacting measures to meet the particular needs of copyright in a developing country. The development status of a country can change and this in turn would require the revision of measures incorporated into legislation. Where there are commercial and contractual ways of meeting development needs, therefore, this should be the preferred route.<sup>61</sup>

The Government has, at the time of writing (April 2004), introduced proposals for the introduction of a regulatory framework for the collecting licensing in the music sector. The print industries urge the government to address the issue of collective licensing in the print sector in a similar fashion.

## Legislative Process – An Endnote

In view of the conflict that has arisen between some stakeholders over the question of legislative reform, it is worthwhile reviewing the possible future legislative process in the context of South African copyright legislation.

The DTI appears to have taken the stance that the stakeholders concerned must resolve their differences and agree to mutually acceptable terms for new regulations and for fair dealing, before legislative amendments can be enacted. However, the print industries fear this simply will not work because the degree of polarisation is too great for copyright legislation to be drafted by stakeholders after thrashing out agreement on its terms.

US copyright expert Jessica Litman warns against this approach<sup>62</sup>, particularly in the digital era, saying that it tends to favour the most powerful at the expense of emerging players and that it will almost inevitably tend towards entrenching further the existing tendencies of the law. This could well be at odds with national policy and with national and international trading needs. Most importantly, no established stakeholders, she argues, will negotiate a position that will leave them worse off than they perceive themselves to be currently (the resolution of this dichotomy depends of course on **how** they perceive themselves currently and on whether that perception is based on a sound interpretation of the law).

An analysis of international legislative practice demonstrates that consultation with rights owners and users is an important part of the process. The Canadian and Australian approach to legislative reform involves the convening of standing committees and the creation of task teams. Consultation takes place through the submission of position papers and presentations to the relevant committee from industry and rights users associations (rather than encouraging individual submissions). As a result, much expert information is generated about the copyright environment in these countries. In contrast, the South African legislative process, as it has been manifested thus far, seems fragmented and lacking in clear direction.

If the DTI is set on extending the consultative process before embarking on legislative reform, then that process should ensure the dispassionate evaluation of stakeholder

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<sup>61</sup> Andrew Martin, PICC Copyright Workshop, March 2004.

<sup>62</sup> Jessica Litman, *Digital Copyright*. Prometheus Books, Amherst 2001, p. 20.

positions with a view to moving the process forward through the intervention of departmental experts. To assist in this, and in order to set out clearly the respective positions of the publishers and authors, on one side, and the SAUVCA sub-committee, on the other, a framework has been drawn up showing current legislative provisions, the desired provisions of each side, and possible compromise provisions.

## RECOMMENDATIONS

16. It is the belief of the print industries sector that the conflict between some users and rights owners in the sector is unlikely to be resolved through mutual agreement on legislative reform without government mediation. Moreover, the impact of this kind of conflict is destructive and should be resolved as quickly as possible through the intervention of government to review stakeholders' submissions, resolve short-term legislative needs and put on track a regulated environment for collective licensing.

This would involve a three-pronged approach: amending the Copyright Act, revising the regulations and promulgating regulations for a supervisory mechanism applicable to all collecting societies.

17. The print industry sector needs to play a more active role, on its own account and in concert with other rights holders, to interact with government to ensure the implementation of a sound legislative regime.

18. There is a clear set of requirements for legislative reform, agreed by South African industries and their international partners. These include:

- a. The regulations governing exceptions for educational and library use;
- b. The lack of a presumption of ownership of copyright in South African law;
- c. Difficulties in securing evidence in the case of copyright infringement (in part dealt with by the promulgation of the Counterfeit Goods Act of 1997 that confers powers of seizure upon inspectors and certain members of the police);
- d. Inadequate penalties for copyright infringements;
- e. Ambiguities in the interpretation of fair dealing;
- f. The lack of provisions for digital copyright; and
- g. The creation of a regulatory framework for collecting societies.

These need to be addressed by government.

19. The legislative impasse that has been reached concerning amendments to the Copyright Act and to the Regulations needs to be resolved through active participation and expert intervention by the DTI to ensure that the South African copyright environment is conducive to local and international trading and developmental needs. This is a matter of some urgency, as it is clear that deficiencies in legislation are impeding the growth and development of the copyright industries.

20. The industry does not believe that demands for multiple copying for educational use can be met by resorting to fair dealing provisions in copyright legislation without causing serious harm to the publishing industry and other copyright industries. Rather, it recommends the use of collective licensing agreements, priced to suit local conditions, with regulatory backing to ensure maximum participation.
21. It is vitally important that these issues are cleared up in the print domain before South Africa can move towards legislating for digital media, where the issues are more complex and the problems more acute.
22. The print industry urges the creation of a transparent consultative process as a necessary part of legislative reform. This consultation should include representatives of all the relevant industry organisations with a stake in copyright.

The DTI's initiative to set in motion a process to create copyright policy is an admirable one. However, international examples show very clearly the value of consultative processes built into the development of such policy initiatives.

23. While comprehensive legislative reform should await such a policy initiative, the print and publishing industries feel that legislative review has been stalled for too long and should not be delayed any longer. Legislative inadequacies are impacting negatively not only on the print industries, but on software developers and other IP stakeholders. Industry developments in strategic areas of crucial importance to the country are being hampered by inadequacies in copyright legislation; these are clearly recognised and agreed to by national and international stakeholders; and the print industries sector sees no reason for the process of implementing amendments to be delayed any longer.
24. The print industries sector needs to formulate its own objectives more clearly, spelling out for government the economic impact of a failure to amend the law at this stage. It is also recommended that rights owners in the print industries sector form alliances with other rights holders, to ensure a concerted approach to the formulation of copyright policy.



# 4 | COPYRIGHT ENFORCEMENT

**L**EGISLATION, TO BE EFFECTIVE, MUST BE ENFORCEABLE. In the case of copyright legislation, we have already seen the importance of enforcement in international trading relationships, as embodied in the TRIPS Agreement (see Chapter 3 above, *et passim*).

The legislative problems with copyright enforcement in South African legislation have already been identified in the context of this Report's discussion of copyright and economic growth (see Chapter 2). However, this is a vitally important issue, one that rights holders in South Africa regard as probably the most serious impediment to print industry growth and development in South Africa. In addition, enforcement is not only a matter of legislation – the best legislation can fail if the criminal justice system in which it operates is dysfunctional.

## AN INTERNATIONAL CASE STUDY – AUSTRALIA

**A** COMPREHENSIVE REVIEW OF IP ENFORCEMENT ISSUES in an international context is provided by the report on copyright enforcement by the Australian House of Representatives' Standing Committee on Legal and Constitutional Affairs, *Cracking Down on Copycats: Enforcement of Copyright in Australia*.<sup>63</sup> This report provides a comprehensive review of the major issues facing national legislatures, enforcement agencies and rights owners in enforcing copyright effectively.

The Australian report acts as a useful case study for South Africa, not only because it identifies the issues relating to enforcement with great clarity, but also because it provides a model of how stakeholders and government can work together in an informed way to reach an effective copyright regime. The fact that a parliamentary committee produced the report shows the seriousness with which the Australian government tackles copyright as an essential underpinning of its economy in the information age.

Given the importance of enforcement in South Africa, this report offers a detailed comparison with the Australian experience, as a way of illuminating the issues that need to be dealt with in South Africa, in an industry not that different in size to the Australian publishing industry.

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<sup>63</sup> The House of Representatives, Legal and Constitutional Affairs Committee, Government of Australia *Cracking Down on Copycats: Enforcement of Copyright in Australia*. 2000.  
<http://www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm>  
Contents page: <http://www.aph.gov.au/house/committee/laca/copyrightenforcement/cover.pdf>

The Australian report identifies the following requirements for effective enforcement:

- An effective (TRIPS-compliant) **legislative system** that minimises the obstacles in the way of the prosecution of copyright offenders and provides sufficient deterrents to prevent recurring infringement;
- A section of the **police force** that specialises in the enforcement of Intellectual Property Rights; has sufficient capacity to enforce a wide range of IP rights; has an understanding of the importance of intellectual property to the country's social and economic well-being; and is provided with regular training to allow them to be up-to-date and informed on IP issues and intellectual property enforcement;
- An effective **court system** with the capacity to prosecute cases of infringement, with an understanding of copyright and its importance, and armed with sufficient remedies in law to allow for penalties against infringers to act as an effective deterrent;
- **Government and industry cooperation** in the creation of a climate of respect for and understanding of the value of copyright to the country.

## Responsibility for Enforcement – Australia

Copyright enforcement tends to be a responsibility shared between copyright owners and law enforcement agencies, the Australian report claims. Because copyright is intangible, it is not as readily understood as tangible property rights. For this reason, there is an additional burden placed both on government and on copyright owners in the enforcement of these rights. The Australian Commission found that

... government has a responsibility to afford copyright, as well as other intellectual property rights, proper recognition and protection as property. This responsibility will only increase with the emergence of electronic commerce and the exchange of ideas through the Internet.<sup>64</sup>

At the same time, copyright enforcement needs the involvement and cooperation of copyright owners. This is a result both of the specialist nature of copyright and of limitations in the capacity of law enforcement agencies. The process of prosecuting civil cases is expensive and this can, at times, render enforcement difficult, if not impossible, for rights owners, particularly smaller companies and companies in smaller industry sectors, such as publishing. It is in good part for this reason that effective enforcement often depends on industry and cross-industry collaboration. Alliances of rights holders in various copyright industries, at national and international level, funded by industry members, often investigate infringements and carry out regular surveillance of infringement levels.<sup>65</sup>

## Responsibility for Enforcement – South Africa

When faced with illegal copying, South African rights owners can press a civil case for damages, or lay a complaint with the police for the institution of criminal charges under either the Copyright Act or the Counterfeit Goods Act. Given that under the Copyright

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<sup>64</sup> The House of Representatives, Legal and Constitutional Affairs Committee, Government of Australia *Cracking Down on Copycats: Enforcement of Copyright in Australia*. 2000. Pp. 24-5.

<sup>65</sup> <http://www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm>  
<sup>65</sup> *Ibid.*, p. 25.

Act it falls to the plaintiff to prove copyright ownership, it could be preferable, when the publisher's trade mark is registered, to prosecute under the Counterfeit Goods Act and rely on trade mark infringement.

The available remedies are described by copyright lawyer Owen Dean in a set of guidelines for publishers commissioned by DALRO in 2003.<sup>66</sup>

The infringement of the copyright in a literary work or a published edition can give rise to a civil law claim, and in most instances to a criminal offence, under the Copyright Act. In both instances the legal action can be instigated by the copyright owner or by an exclusive licensee. In civil proceedings an interdict restraining the unlawful conduct, damages, delivery-up of infringing copies and various other forms of ancillary relief can be obtained. In the case of criminal copyright infringement the State can prosecute the offender and the court can impose a penalty of R3 000 or five years imprisonment, or both, for each infringing article, in the case of a first offence. In the case of a second or further offence, the penalty is increased to imprisonment for a period of five years and a fine of R10 000 per infringing article, or both.

Civil court proceedings generally proceed more expeditiously than a criminal prosecution and can be dealt with more efficiently. However, they are very costly and can be time-consuming as well. In general, an application for an interdict, but not including a damages claim, can be disposed of within six months. An action for an interdict and damages can take up to a year or 18 months to be finalised. The distinct advantage of civil proceedings is that their conduct is under the control of the plaintiff, unlike in the case of a criminal prosecution.

The advantage of commencing a criminal procedure, on the other hand, is that the raid can take place and the infringing goods can be seized and placed in safe custody expeditiously, perhaps even within days of the initial purchase being made. However, after the raid and seizure of the goods is over, the further prosecution of the criminal case can be extremely drawn out and frustrating as one is entirely in the hands of the police and prosecutors as to the efficiency with which the criminal procedure is pursued. Experience has shown that it can take many months, even years, before a prosecution is finalised. However, the raid and seizure are in themselves a deterrent and an unpleasant experience for an offender.

The Counterfeit Goods Act renders the making and sale of unauthorised copies of a book an act of dealing in counterfeit goods, provided that activity at the same time constitutes either an infringement of copyright or the infringement of a registered trade mark. Offending against the Counterfeit Goods Act can give rise to a criminal prosecution and the penalties are the same as those for which provision is made under the Copyright Act. The Counterfeit Goods Act gives wide-ranging powers of search and seizure to inspectors (police officers, customs officials, and the inspectors appointed by the Department of Trade and Industry) operating in terms of the Act. In practice, the Counterfeit Goods Act has become the norm for use by the police and law enforcement authorities when dealing with trading and other activities in counterfeit goods. It has certain advantages over the Copyright Act: the mere possession of counterfeit goods in the course of trade is a criminal offence, whereas under the Copyright Act in equivalent circumstances proving that the goods have been made and/or sold by the accused is necessary before an offence can take place.

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<sup>66</sup> Owen Dean, 'Taking Action against Copyshops: Guidelines for Publishers on what to do'. DALRO, 2003. Available from PASA.

In South Africa, there is relatively little copyright case law relating to print products. Rights owners hesitate to prosecute either civil or criminal copyright cases, because of the expense involved in pursuing the case; the length of time that a case can take; and the lack of effective remedies. The Counterfeit Goods Act is providing some relief, but there are still serious problems with enforcement.

The South African print industries could learn from the Australian experience in joining rights alliances in the interests of better enforcement. At the same time, it is clear that a more focused intervention by government is needed if it is to create an effective copyright regime in the interests of the national economy. Thus far, the South African government has shown some vigour in pursuing legislative reform and better enforcement for the music industry, but copyright in the print industries, as own Dean commented, is in a state of almost complete paralysis.<sup>67</sup>

## Civil Remedies – Australia

Rights holders need to be able to enforce their rights in civil courts, the Australian report argues – in most countries this is the main enforcement mechanism. However, as the Australian commission commented, very often civil remedies appear ineffectual and inadequate.

The main issues that need to be considered in relation to civil remedies and their effectiveness are:

### *The Presumption of Ownership Of Copyright*

In Australian law, as in many other legislative systems, subsistence of ownership of copyright will be assumed by the court. However, in spite of such a presumption, copyright owners argued that the defendant can still challenge ownership, often as a diversionary tactic that can put the plaintiff to considerable trouble and expense. As a result, the Standing Committee recommended amendments to the Australian Copyright Act to strengthen presumption of copyright ownership, as well as the introduction of discretionary penalties for defendants who abuse the presumptions of ownership.<sup>68</sup>

### *The Cost of Litigation*

The high cost of litigation, along with long delays in hearing civil cases, provides barriers to effective enforcement. This is particularly onerous for small companies needing to enforce their rights. As a result of such difficulties, many rights holders are reduced to writing letters asking infringers to desist, rather than having any real remedies against offenders.

In Australia, the Standing Committee investigating copyright enforcement recommended the creation of small claims courts for minor copyright violations.

### *Anton Pillar Orders and Seizure Orders*

Obtaining evidence in cases of piracy can be very problematic. As has been the case in a number of South African cases of book piracy, the offender can hide evidence

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<sup>67</sup> PICC Copyright Workshop, March 2004.

<sup>68</sup> The House of Representatives, Legal and Constitutional Affairs Committee, Government of Australia *Cracking Down on Copycats: Enforcement of Copyright in Australia*. 2000. P. 64.  
<http://www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm>

when there is a threat of legal action. Anton Pillar orders, or *ex parte* civil search orders, are only granted under restricted circumstances and can be very expensive to obtain. Search and seizure orders need to be made easily available in order to allow copyright owners to take effective action against pirates.

### *Statutory Damages*

Plaintiffs need to be able to get compensation for the damage that they have suffered through copyright violations. For this reason, many countries, including Australia, have provisions for statutory damages, calculated on the number and flagrancy of the offences concerned. Statutory damages are damages that can be granted by the court when the rights owner has suffered considerable financial prejudice, irrespective of the actual damage suffered.

## Civil Remedies – South Africa

### *The Presumption of Ownership Of Copyright*

This has already been identified as a serious deficiency in South Africa. In South African cases, the plaintiff has to prove ownership of copyright, a burdensome and expensive process. Because of the impact this has on the cost of litigation, it is a real barrier to effective enforcement, and **one that the print industries would like to see dealt with as a matter of urgency.**

### *Statutory Damages*

As has been already identified, there is a need in South Africa for a stronger system of damages, to act as a deterrent and to afford compensation for victims of copyright infringement and piracy. Right now, the high cost of pursuing a case (even in the event of a criminal prosecution) and the lack of effective damages, act to discourage South African rights holders from pursuing cases.

### *The Justice System in South Africa*

A real problem experienced with enforcement in South Africa is the current state of the criminal justice system.

Particularly given the high levels of violent crime in South Africa, rights owners often find it difficult to persuade grossly overburdened **prosecutors** to press charges of criminal copyright infringement. Moreover, even when charges are pressed, all too often the case is withdrawn, or a derisory fine offered against a guilty plea.

**Magistrates** tend to know very little about Intellectual Property Rights and in general, there is a lack of appreciation of the importance of effective IPR enforcement.

In the last few years, responsibility for IP **policing** has been transferred from the Narcotics Branch of the police to the Commercial Branch. This is perceived by the print industries sector as an improvement and a more appropriate way of dealing with IP crimes. However, it is taking time for the necessary structures to be put in place countrywide and for awareness and knowledge about copyright crime to be instilled in policemen and women who are new to this branch of policing.

## Enforcement Measures

### *Copyright Education in Australia*

The Australian report on copyright enforcement (see p. XXX, above) stresses the fact that 'the difficulty in enforcing copyright lies in the community's attitude towards, and in some cases ignorance about, copyright'. The report goes on to identify education as an important strategy in combating infringement. Public awareness campaigns are therefore needed to back up legal remedies to copyright infringement. In Australia, organisations representing copyright owners conduct education programmes, including training programmes for members of these organisations and for law enforcement agencies.

The finding of the Australian copyright enforcement report was that such education and awareness campaigns should be the joint responsibility of government and organisations representing copyright owners. The report stresses that creators and intellectual property industries are themselves often unaware of how copyright protects their works and that it is therefore necessary to convey to the business sector the value of copyright protection. Education for the copyright industries, and particularly for small and medium businesses, is identified in the report as of primary importance.

At the same time, the judiciary often awards minimal damages in copyright cases, reflecting a lack of understanding of the importance of intellectual property, and police departments tend to regard copyright matters as a commercial matter that should be handled by rights owners. The Australian report identifies the need for educational programmes and attitudinal change in the criminal justice system and likens the current situation to the disavowal of responsibility for domestic violence that used to characterise legal systems.<sup>69</sup>

### *Copyright Education in South Africa*

The need for copyright education in the community and in copyright industries in South Africa has already been identified as being of primary importance. South Africa has fallen substantially behind a country like Australia in this regard and could learn from the collaboration between Australian rights holders and government in ensuring high levels of copyright awareness and knowledge. South Africa could do worse than emulate the Australian Copyright Council's active involvement in producing web- and print-based information on copyright, advisory services for rights owners and rights users, and position papers for government on legislative reform.

## Collective Licensing

### *Collective Licensing in Australia*

The Australian report argues that collecting societies can be used as a mechanism in counteracting copyright infringements, through the use of statutory licenses. It is generally accepted that minor infringements often go undetected and the Australian copyright licensing body, CAL, argued to the Standing Committee that a provision be introduced into Australian law, similar to that enacted in Canadian and UK law, allowing

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<sup>69</sup> The House of Representatives, Legal and Constitutional Affairs Committee, Government of Australia *Cracking Down on Copycats: Enforcement of Copyright in Australia*. 2000. Pp. 37-39. <http://www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm>

the collecting society to 'license' copies of a work that would otherwise be infringing, when the society represents owners of that class of work, but not the owner of that particular work.<sup>70</sup> The Standing Committee recommended that the legislature should start a process of consultation to consider the introduction of statutory licensing into Australian law. An explanatory document on how the statutory licence works in Australia is appended to this Report (Appendix 1).

In Canada, there is a limit placed on the amount that can be claimed for infringement if the offender has a licence with a collecting society which covers works in the same class as the work infringed.<sup>71</sup> While not as stringent a measure as the statutory licence, it is a means of encouraging rights owners to grant licences in justifiable circumstances.

### *Collective Licensing in South Africa*

**As a first step, the South African print industries urge the government to create a regulatory framework for collective licensing in South Africa as a way of supporting a credible collective licensing regime that has the confidence of rights users and rights owners alike.**

This was canvassed in discussions at a workshop convened by the DTI in 2001, where broad agreement was reached between the DTI and a range of stakeholders on the most desirable regulatory framework for collecting societies. As a first step, the DTI has gazetted proposed regulations for collecting societies in the music industry, a process that the print industries sector and DALRO would like to see extended to DALRO (see a more detailed discussion on p. XXX, below).

South African rights owners need to consider whether they wish to follow the Australian example in arguing for a statutory licence, or a more voluntary licensing system (see the chapter on Collective Licensing, below).

## Information on Levels of Copyright Infringement

Information on levels of infringement and their impact on the industry sectors involved in copyright and on the national economy are not readily available, either in South Africa or in other countries. In Australia these figures are compiled from different industry sources that tend to use different conventions for the collection of data. The UK publishing industry also acknowledges the difficulty of obtaining reliable statistics on infringement.<sup>72</sup> However, if the cultural and knowledge industries are to be managed for growth, it is important that the measurement of infringement be undertaken, in order to determine its impact on cultural, economic and social development and growth.

## Book Piracy and Copyright Infringement in Developing Countries

Piracy and unauthorised reproduction are common problems in the developing world but it is essential to counteract the outdated perception that knowledge production, writing and publishing are the preserve of the industrialised western nations. In India, Indonesia, Japan, Korea, Malaysia, the Philippines, Singapore and Thailand, annual

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<sup>70</sup> The House of Representatives, Legal and Constitutional Affairs Committee, Government of Australia *Cracking Down on Copycats: Enforcement of Copyright in Australia*. 2000. P. 73.

<http://www.aph.gov.au/house/committee/laca/copyrightenforcement/contents.htm>

<sup>71</sup> Op. cit.

<sup>72</sup> Conversation with Ian Taylor, International Director of the UK Publishers' association, March 2003.

book production is in the region of 170 000 book titles. In these countries the copyright industries represent an increasingly important segment of the economy and are among the fastest growing employment providers.

Rights owners in developing countries do not accept arguments for the overriding of copyright laws for the sake of 'the public good'. Rather, they believe that the public good is best served by the fostering of strong local writing and publishing industries.

Indian publishers, to provide an example, realise that their viability is at stake, and have said that to participate in a global society and safeguard their local and national cultures, citizens from all nations need access to information and the legal protection of their creativity. The dissemination of books, journals and digital content as well as the development of national publishing industries will only be effective in territories which meet internationally recognised copyright enforcement standards.

While most of the calls for lenient copyright regimes to assist in information provision have come from sympathisers in the developed world, in the developing nations themselves the trend is towards increased copyright protection because their governments are becoming conscious of their own cultural heritages<sup>73</sup> and the need to protect them from unauthorised exploitation.

Some Asian countries have recently taken significant anti-piracy measures. In South Korea, government at the highest level takes copyright law and practice seriously and is liaising with publishers to counteract infringement. General awareness runs high, and daily newspapers have been known to give copyright infringements first page coverage. In India, a Copyright Enforcement Advisory Council which provides guidance and suggestions in the field of enforcement has been established under the Ministry of Human Resource Development. In the southern African region, Namibia and Zimbabwe are examples of countries which have recently updated and strengthened their copyright legislation. The Southern African Development Community (SADC) has affirmed the need to ensure that its member countries' copyright laws are sound, and has indicated that one of its long-term objectives is the harmonisation of intellectual property legislation in the region.

## RECOMMENDATIONS

25. There are a number of legislative shortcomings that need to be addressed if South Africa is to be able to enforce copyright effectively and conform to its international treaty obligations. These include the presumption of copyright; revision of the Section 13 regulations; easier access to Anton Pillar search orders for copyright plaintiffs; and stiffer penalties for copyright infringement, including statutory damages.
26. The print industries sector needs to engage with the DTI as a matter of urgency to motivate for the enactment of legislative reforms that would remove obstacles to the successful prosecution of copyright violations. It is the responsibility of the government, in particular the DTI, to ensure that copyright legislation conforms to South Africa's international treaty requirements and that copyright enforcement is rendered more effective.

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<sup>73</sup> The worldwide interest in Indigenous Knowledge Systems (IKS) has been instrumental in creating awareness of a country's culture, not only as heritage but also as a living, growing, source of cultural and economic development.

27. Civil prosecutions need to be made more effective and less onerous for rights holders, as this, rather than criminal prosecutions, should be the first line of defence against copyright infringement, particularly given the overloading of the criminal justice system in South Africa.
28. Statutory damages need to be introduced into South African legislation as a matter of urgency to provide adequate compensation for victims of copyright violation and to act as a deterrent against further infringement.
29. Questions of capacity in the police force and courts need to be addressed to allow for the successful prosecution of cases of copyright violation.
30. There is a need for the introduction of training programmes for police, prosecutors and magistrates to increase awareness of the importance of copyright and the necessity for effective enforcement would be a valuable policy initiative.

# 5 | COPYRIGHT AND DEVELOPMENT

## GLOBAL IMBALANCES

**T**HE NEED FOR INITIATIVES TO ADDRESS PROBLEMS in the publishing industries of developing countries is clearly reflected in the relevant statistics. The figures are a stark reminder of the global imbalance in information and knowledge availability. Statistics published by UNESCO in 2000 show that 72% of book exports worldwide come from North America, the United Kingdom and Western Europe. In Africa, the market is particularly badly skewed. According to recent research by ADEA and the African Publishers' Network, Africa consumes about 12% of all books produced in the world but contributes less than 3% to books read in the world.<sup>74</sup> The knowledge gap, which sees most of the world's information produced by a handful of developed countries, is being intensified by the digital divide. While digital media offer opportunities for cheaper and more extensive dissemination of information worldwide, problems of connectivity and technology availability block access to these products in most developing markets.

## COPYRIGHT AND DEVELOPMENT – THE INTERNATIONAL CONTEXT

**T**HERE IS CONSIDERABLE DEBATE INTERNATIONALLY about the contribution of intellectual property protection to growth in developing countries. Most of this discussion has been carried out by development agencies and governments in the North – notably the UNESCO Infoethics Conferences<sup>75</sup> and the UK Commission on Intellectual Property Rights (CIPR).<sup>76</sup> Because of the global impact of digital media and the problems of the digital divide, much of this discussion has been framed by the particular challenges posed by digital copyright. These initiatives have tended to rely on input from users, to the virtual exclusion of publishing industry participants from developing countries. As a result, the solutions that have been proposed for the information needs of developing countries tend to reflect the demands of users for generous allowances for free copying in national legislations and for differential pricing.

The perspective of this rather skewed debate changes when it is viewed through the eyes of copyright industries in an African country. The essential questions that needs to be addressed are: 'What kind of copyright regime would contribute most effectively to the availability of relevant and affordable information in developing countries? And how

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<sup>74</sup> Cited by Brian Wafawarowa (APNET representative) "Legal Exception to Copyright and the Development of the African and Developing Countries' Information Sector". Intervention at the UNESCO Infoethics Conference. Pp. 13-15.

<sup>75</sup> See the UNESCO Information and Communications website for links to a range of papers and discussion on development issues and digital media, including links to the Infoethics 2000 Conference. <http://www.unesco.org/webworld/index.shtml>

<sup>76</sup> Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*. London 2002. [www.iprcommission.org.uk](http://www.iprcommission.org.uk)

can developing countries most effectively address the needs of poorer readers and learners, while still fostering the growth of local knowledge and local publications?’

## Exceptions and Differential Pricing

The CIPR provides a good example of the approach to development issues by agencies and governments in the North. It also needs analysis, from the perspective of this Report, because the chapter on Copyright in the CIPR Report drew heavily on input from the South African library sector.<sup>77</sup> The CIPR was convened by the British Department for International Development (DfID) to examine intellectual property rights in the context of the needs of developing countries. Although the Commission’s report draws many justified and worthwhile conclusions, its failing, with respect to copyright, is that it assumes developing countries have little or nothing of their own to protect. Thus unduly biased in favour of the public interest, the report adopts the position that the international intellectual property system is detrimental to the developing world.

The CIPR report argues a case that is commonly taken up in developed countries:

The evidence suggests that the availability of copyright protection may be a necessary but not a sufficient condition for the development of viable domestic industries in the publishing, entertainment and software sectors in developing countries. Many other factors are important for the sustained development of copyright-based industries. Taking the publishing industry in Africa as an example, factors such as the unpredictability of textbook purchasing by governments and donors, weak management skills in local firms, high costs for printing equipment and paper, and poor access to finance are likely to continue to act as very severe constraints in many countries in the foreseeable future.

The Commission does not go on to argue that developing countries should follow the US 19<sup>th</sup> century example in not recognising international copyrights, allowing local publishers to publish international books free of charge (in other words, a form of compulsory licensing), which would be inimical to the interests of the UK publishing industry. Instead, it argues for generous exceptions for educational use, something that would have little impact on UK publishers, to whom these are marginal rights in developing markets. Such a move would, however, according to APNET, have a very damaging effect on local African publishing industries, as would differential pricing of mainstream products, which would undercut locally produced books in developing countries.

The CIPR Report was submitted to the UK government for review and adoption. The views on copyright and development expressed in the working sessions and in the final report were not all endorsed in the government’s response. Adopting a view more acceptable to African publishers, the UK government, in response to the Commission’s report, notes the concerns raised, but expresses the belief that the existing TRIPS provisions are adequate to meet the needs of developing countries. Rather, the government expresses concern about the ability of developing countries to enforce copyright effectively.

The Government notes the Commission’s concerns about ‘fair use’ provisions but believes that existing provisions in TRIPS and other international copyright conventions are adequate for the needs of developing countries. However, the Government remains

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<sup>77</sup> It is telling, however, that the investigative visit to South Africa by the author of the chapter on copyright did not include any interviews with any informants from the publishing sector.

concerned about poor enforcement and high levels of copyright infringement in some countries and will continue to work for effective action against piracy, wherever it occurs. It will continue to contribute to the development of international systems for the protection and enforcement of rights in this important field. Our commitment to capacity building and to providing copyright training for peoples from developing countries will be maintained and, wherever possible, strengthened.<sup>78</sup>

However, the UK government did endorse the idea of the application of generous exceptions, at the discretion of national legislatures, as a way of bridging the knowledge gap. This does not accord with the approach of African publishers. In APNET's view:

Applying legal exceptions to the developing world will further erode the competitiveness of the local book and information sector and perpetuate a neo-colonial order in which our understanding of the world and ourselves continues to be fired from the same colonial intellectual cannon. This is so because only those information creators and developers who have operations in more viable parts of the world will be able to disseminate information in the developing world.<sup>79</sup>

Differential pricing, too, while offering distinct advantages for the availability of scholarly information and specialist academic textbooks, can be a double-edged weapon, to be treated with caution if it is not to undermine local products. For example, the UK publishing industry is arguing, as a way of responding to the CIPR report, for the reinstatement of the now discontinued subsidised textbooks scheme, funded by the UK government. This scheme made cheap books available to African educational consumers, but in the countries where cheap subsidised UK textbooks were available, local industries were not able to compete and were effectively excluded from potential textbook markets. This increased reliance on imported products rather than locally developed, more relevant, publications. This scheme also served to undercut potential export markets for South African textbook publishers, who found that they could not export their more relevant products into neighbouring countries, because of the very low prices of the subsidised UK products, targeted at mainstream undergraduate textbook markets.

## African Publishing and Development

The African Publishers' Network (APNET) argues for the existence of strongly protective copyright regimes as a way of fostering the growth of knowledge, while contributing to the expansion of creative industries and protecting cultural diversity in developing countries. By extension, APNET believes that the most effective way of meeting knowledge and information needs in Africa would be the development of strong local industries, trading across the continent, rather than schemes that would increase dependence on imported products.

In Africa, in particular, knowledge industries struggle to reach viability. This is the result of a combination of issues: very low reading habits among the populations, an underdeveloped information distribution system and a myriad of economic problems that make books and information unaffordable and inaccessible. Poverty and the lack

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<sup>78</sup> The UK Government Response to the Report of the Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*.

<sup>79</sup> Cited by Brian Wafawarowa (APNET representative) "Legal Exception to Copyright and the Development of the African and Developing Countries' Information Sector". Intervention at the UNESCO Infoethics Conference. Pp. 13-15.

of a reading culture result in low readership for published products and resulting high prices erode markets further. The impact of high levels of piracy aggravates the vicious cycle even more. As APNET representative, Brian Wafawarowa, argued at the UNESCO Infoethics Conference in 2000:

The developing world does not only need access to information. It also needs relevant and appropriate information. It needs to be an equal participant in the global information system and to be able to do this, it needs to be both a consumer of world information and also a producer of global content.

To disregard the question what type of information, produced by who, for whose use, will perpetuate the hegemony of information dissemination that exists today. To be able to cut through this hegemony, the rights holders in the developing world also need effective copyright protection.<sup>80</sup>

## Cultural Diversity

From the perspective of African publishing industries, an important context in which to view intellectual property issues and development is that of international initiatives relating to cultural diversity. Inter-ministerial discussions in the International Network on Cultural Policy (INCP) have led to the drafting of a proposed New International Instrument for Cultural Diversity (NIICD), under the auspices of UNESCO.<sup>81</sup> In South Africa, the Department of Arts and Culture and the Human Sciences Research Council have been actively involved in this process, having been briefed to review the Instrument from the perspective of developing countries. South Africa has created a fourth Working Group within the INCP to generate input on Developing Countries and Cultural Policy.

These initiatives attempt to address cultural policy issues and integrated ways of promoting cultural diversity in an increasingly globalised world. Essentially, they address the steps needed to foster growth and development of local cultural industries and ways of empowering local cultural industries in international trade and cultural interchange. What the cultural diversity initiative recognises clearly is the need for strong policy intervention in support of cultural industries in developing countries, faced with dominant global products emanating from the powerful countries of the North.

The priorities identified for developing countries in this initiative have to do with reconstruction, transformation, sustainable development, job creation and redress. Both the economic and the human rights aspects of cultural production are recognised. The cultural diversity documentation stresses the importance of cultural issues in broader development initiatives and places particular emphasis on the need for consolidated policy approaches to cultural development.

This policy initiative requires that copyright policy be viewed from the perspective of local cultural development. In other words, **copyright policy needs to support the growth of creators and of cultural industries that can provide local relevance and local content and that are strong enough to maintain the identity of local cultural output in world markets.** This is in distinct contrast to development approaches, as

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<sup>80</sup> Cited by Brian Wafawarowa (APNET representative) "Legal Exception to Copyright and the Development of the African and Developing Countries' Information Sector". Intervention at the UNESCO Infoethics Conference. Pp. 13-15.

<sup>81</sup> For the UNESCO Universal Declaration on Cultural Diversity, see

<http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>

For a more general discussion of Cultural Diversity policies and actions, see [www.unesco.org/culture](http://www.unesco.org/culture)

spelled out above, that place the emphasis on developing countries as consumers of knowledge products, often to the detriment of local cultural industries. Where the CIPR report is dismissive of publishing industries in developing countries, arguing for reliance on subsidised international content for knowledge growth, the promotion of cultural diversity would require the development of policies that could underpin the growth of local writing and local publishing.

As Wafawarowa put it, at the UNESCO Infoethics conference:

... any campaign that seeks to develop access to information without qualifying the nature of the information and the need to make sure that the developing world is an active participant in information creation and dissemination is inadequate. Among the plausible principles of this conference is the promotion of multiculturalism. The wealth of information in a global context is in its diversity and this diversity can only be achieved through more equitable participation.<sup>82</sup>

## COPYRIGHT AND DEVELOPMENT IN SOUTH AFRICA

THE PRINT INDUSTRIES, IN THE PICC STRATEGIC PLAN,<sup>83</sup> acknowledge development as being of vital importance in the sector. In fact, in South Africa development issues and potential for economic growth are inextricably entwined. The most powerful theme in the PICC's growth strategy is finding ways of expanding the consumption of print media into wider markets, to reach the majority of the population in South Africa, rather than the predominantly middle-class market that it currently reaches. In doing so, the industry sector will need to face a number of development issues, given the levels of poverty and educational disadvantage in the country. The PICC believes that the most effective way of producing the relevant yet low cost books and print products that the country needs would be through support for local writers and the growth of local products. The history of Indian publishing is possibly the most successful comparative example of a developing country that has succeeded in using its market dynamic (in its case, a huge readership base) to grow a local book industry that produces very low-cost and locally relevant books in a variety of languages, with the result that national needs for knowledge and culture are met predominantly by local products.

The PICC therefore sees support for local industry as the necessary cornerstone of any copyright regime. That said, this protection must be balanced against the particular needs of the population for access to culture, knowledge and information vital to national growth.

The difficulties arising in South Africa in this regard are not dissimilar from those articulated in stakeholder discussions around Australian copyright reform. These include:

- Distance from major information markets in the UK and USA;
- A thinly-spread readership across a wide geographical area, with remote rural areas ill-served by conventional information and distribution networks;

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<sup>82</sup> PICC Development Strategy/Policy Presentation, December 2002. The formulation of the strategy goals was the result of consultation and discussion among the various industry participants in the cluster.

<sup>83</sup> *Ibid.*

- Market failure in the form of problems in the local availability of international publications, particularly of specialist books and journals; and
- Problems of pricing and affordability, generated by low readership levels and the relatively low value of the currency internationally.

**The development issue is therefore clearly how to balance the need to nurture and grow local authors, industries, and cultural production against the need for access to essential knowledge, information and culture, in a country with high levels of poverty.**

## Exceptions for Library and Educational Use as a Development Tool

The print industries advise caution in adopting either differential pricing or generous exceptions as the only solutions for the resolution of problems of access in South Africa. While the granting of generous exceptions to educational institutions and libraries might at first appear to be one possible solution to the problem of adequate information provision, those who have called for amendments to the law to enable photocopies to be made freely in educational institutions have failed to recognise the adverse impact this would have on local authors and publishers and the knock-on effect it would have on the availability of local content. From the outset, this Report has stressed that the drafting of copyright legislation involves maintaining a fine balance between the differing and sometimes opposing interests and demands of the sectors of a society. When the scales are tilted too deeply in favour of one sector, to the detriment of the other, then copyright law has failed to maintain that balance.

South Africa is unusual in Africa in having a viable local educational publishing industry, capable of meeting the needs of learners. Publishing for schools, which is by far the biggest publishing sector in the country, aims to meet the need for affordability through commercial measures: in other words creating big enough markets for economies of scale enabling high quality learning resources to be produced at a low price – often lower than the cost of copying. If educators were to be granted the right to make free multiple copies of extracts from school books, for example, this could well undermine these economies of scale, with a very negative impact on the government's aim of providing affordable but high quality textbooks for all learners.

In academic and scholarly markets – the source of the most persistent arguments from rights users for generous exceptions as a way of addressing information needs – were such a right to be granted it could rebound on rights users themselves. South Africa's academic publishers produce textbooks for a wide range of undergraduate and graduate courses. The growth of digital media also provides opportunities for regeneration and growth of local scholarly publishing, so that the voice of South African scholarship has a renewed chance of being heard internationally. This should not be undermined, as the availability of locally authored academic textbooks and scholarly works is an effective way of ensuring relevance and affordability.

Arguments in favour of generous exceptions tend to focus on the need to copy international material free of charge. Sometimes these arguments seem to imply that a developing country should not have to pay at all for international information. However, the print industries sector argues that the necessary underpinning of a good copyright regime is respect for **all** intellectual property, including that from abroad. This is the necessary pre-requisite for access to international products and the recognition of South African content creators across the world. South Africa does not want to be a 'special case' internationally and has resisted in its broad approaches to national

economic policy the reliance on aid-funded measures that have proved so damaging elsewhere on the continent.

A further problem is that if a legislated solution is applied to resolve the problem of access to scholarly resources, then this legislation would equally apply to other products in other markets. For example, exceptions intended to deal with specialist information, if dealt with through legislative amendment, would apply to school textbooks, with potentially disastrous results for local publishers and for the availability of affordable resource material in the educational system.

Rights owners in the print industry sector reject the idea of generous exceptions as a solution to information needs. Neither authors nor publishers want to be seen as 'special cases' in need of handouts from the international community.<sup>84</sup> In particular, argues State Librarian, John Tsebe, given the role that South Africa is playing as a leader on the African continent, and given the country's ambitions in NEPAD, to argue that South Africa needs international handouts in order to maintain its information needs would only undermine the country's international trade relations.<sup>85</sup> Moreover, as South Africa is a major player in the formulation of international policies on cultural diversity, through UNESCO's Cultural Diversity initiative, it is important that policy and legislative initiatives take account of the need to empower local content creators, ensuring that South Africa's voice becomes heard in the global dialogue.

In approaching the question of copyright exceptions as a tool for development, something that has to be recognised is that the right to make free multiple copies as part of education and library privileges, as SAUVCA has requested, is not something that exists in comparable legislations in the developing world:

- Brazilian law permits very few exceptions to the exclusive right.
- The Copyright Acts of Ecuador, Uruguay, Guatemala, Honduras, Nicaragua, Bolivia and Chile contain no exceptions at all, not even for personal use.
- The Samoan Copyright Act permits reproduction for teaching only by way of illustration (*cf* our Section 12(4)) provided that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions and provided that no licence is on offer from a collecting society.<sup>86</sup>
- There are virtually no exceptions in the Nigerian Copyright Act.
- The only exceptions for education in the new Namibian Copyright Act of 1994 are those for fair dealing purposes.

In a country like South Africa, it is vitally important that the development of local culture and local knowledge not be undermined or overwhelmed by ostensibly well-meaning initiatives if the country is to deliver the aims so clearly articulated in NEPAD, for an African presence in the global economy. In particular:

If the work of South African creative writers is not protected by an effective copyright system, the very necessary work of growing local authors and expanding local publication of creative writing in all languages will be compromised.

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<sup>84</sup> Comments made by author and library representatives, industry participants and the SACOB representative at the PICC Copyright Workshop, March 2004.

<sup>85</sup> Comments made at the PICC Copyright Workshop, March 2004.

<sup>86</sup> Section 10(1)(a) and 10(1)(b)(i) and (ii).

South Africa has competent writers and a viable publishing industry capable of producing educational materials which allow learners and students access to a South African perspective on the world and to locally relevant knowledge. This should not be compromised in an attempt to gain greater cost-free access to international information.

When it comes to scholarly information and research, the current situation is that the major research on African issues or by African scholars is published in the UK and the US. Africa thus re-imports a first world version of its own scholarship. The digital revolution offers opportunities for reversing this situation and a developmental approach to copyright in South Africa needs to protect the potential for the growth of African research and knowledge rather than strengthening the hegemony of the North.

## Collective Licensing and Development

Ultimately, argues Canadian copyright expert Andrew Martin the issues at the heart of the copyright and development debate come down to a matter of price. It is the relatively high price of international information, particularly in the academic sector that leads to arguments for exceptions in developing countries. However, Andrew Martin argues, legislation is an unsuitable tool for dealing with such issues, given the inflexibility of legislative amendment, and it is to contractual solutions for the regulation of prices through collective licensing agreements that developing countries could more usefully turn.<sup>87</sup> A further mechanism for regulating access to information in the library sector is, as Sate Librarian John Tsebe argues, the formation of regional consortia for the negotiation of licences with international journal suppliers.<sup>88</sup>

**It is therefore through the strengthening of local industry for the supply of low-cost and relevant cultural and knowledge products, coupled with negotiation of collective licences with regulatory support from government, that the print industry sector aims to meet the development needs of South African consumers.**

## Libraries

In approaching the need for the democratisation of access to printed and digital cultural and information products, the print industries sector stresses the vital importance of a well-resourced and comprehensive library system. Libraries have a crucially important development role and the neglect of the library sector in South Africa in recent years has a far-reaching negative impact on education, culture and economic development. Where poverty is acting as a barrier to access to culture and knowledge, it is through the availability of comprehensive and appropriate library resources that this could best be addressed.

Libraries also serve as an important market for local print industries and can be a factor in fostering industry growth in local cultural and knowledge products. Whereas the library system should provide a market for authors and publishers to reach a wide range of readers, and should equally ensure the availability of local creative works and local knowledge for these readers, this market has all but collapsed in the last few years.

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<sup>87</sup> Presentation at the PICC Copyright Workshop, March 2004.

<sup>88</sup> *Ibid.*

The print industries sector argues that increased resourcing of libraries would be the answer to these problems, along with increased opportunities for local content, rather than increased photocopying of international materials.

## RECOMMENDATIONS

31. The print industry sector recommends that development needs be met in the first instance by the negotiation of collective licensing, backed by regulatory control by government, using the pricing of licences to ensure equitable access to information without eroding the rights of authors and publishers.
32. Any initiatives to address the need for access to knowledge and information should, in the first instance, ensure that relevant and affordable information products are available from a strong local publishing sector. Interventions that erode the capacity of the industry sector will ultimately work to harm access to affordable knowledge and information for the country as a whole.
33. The formulation of copyright policies, particularly those policies that seek to balance the rights of authors and users, needs to take cognisance of cultural diversity initiatives and the protection of national folklore heritage.
34. If South African creative writing, scholarly research and educational resources are to have a strong presence locally and internationally, and if South Africa is not to be colonised by international content, a copyright policy needs to be created that fosters growth in local writing and publishing.
35. Although this is not directly copyright issue, the strength of the library sector does have a direct influence on the capacity of the country to meet users' needs and therefore indirectly works to reduce the potential for copying.



# 6 COLLECTING SOCIETIES

## THE ROLE OF COLLECTING SOCIETIES

**T**HE OBJECTIVE OF THE COLLECTING SOCIETY for the collective administration of rights is to provide a vehicle through which rights users can more easily clear permissions and rights holders more effectively get their remuneration. It is not always practicable for rights users to clear permissions one by one, and collecting societies for literary works, correctly named Reproduction Rights Organisations, or RROs, provide users with an acceptable means of copying extracts from copyright-protected published works for internal use when the whole work is not required, and provide rights owners with monetary compensation when extracts from their works are used. They are thus key players.

Whereas certain categories of rights can conceivably be administered by rights owners themselves, others are ideally suited to collective administration, in other words, to rights owners exercising their rights in concert through a collecting society. This normally happens where there is a need for instant legal access to high volumes of copyright protected material, such as the public performance of music or reproduction from literary works in educational institutions, government departments, administrative offices and corporations. In the same way as it would be impracticable for a user to apply to the relevant rights owner every time a piece of music is performed, so it is very cumbersome for an academic institution to seek permission from thousands of different rights owners to reproduce extracts from books and articles from journals as additional reading material for students.

Licensing can be **transactional**, requiring a separate transaction for each clearance, or through a **blanket licence**, which allows upfront comprehensive clearance for copying, within certain specified limitations, with reporting carried out retrospectively.

The way a blanket licence works is that the RRO obtains a mandate from rights owners to administer certain rights, such as reprographic reproduction, and it then negotiates licences with the organisations or institutions wishing to copy, providing them with a service in which they can copy freely within agreed limitations (for example, the percentage of a work allowed to be copied). In return for an annual fee, which is calculated on the basis of an estimate of the annual volume of copying in the institution, the rights user can then copy without having to get permission for every transaction. Blanket licence permission fees tend to be lower than transactional fees, providing an advantage to the institution. For the rights owner, the advantage is that once a licence is negotiated with an institution, all copying is covered and there is a revenue stream for much copying that otherwise might slip through the net.

Licensing can also be **voluntary**, or **statutory**. In a voluntary licence, rights owners join the system on a voluntary basis and some can choose to be excluded. In this case, users of the licence cannot copy excluded works. Price setting is through voluntary

negotiation. While this system offers the maximum freedom to participants, it has its disadvantages, in that exclusions can pose administrative problems for users.

At the other end of the spectrum, statutory licensing requires the participation of rights owners and users in particular categories and the government regulates pricing and the functioning of the RRO. This has the advantage of comprehensiveness and the possibility of pricing structures that meet national needs.

In between – as is the case with Canada – are licensing systems that are voluntary, but which have a degree of government regulation and which include provisions to ensure that rights owners are encouraged to join the scheme and rights users to make use of it. It is this option that appears to appeal most to the South African government and the South African publishing industry. It has the advantage of voluntariness, without coercion, but with the potential for comprehensive coverage and pricing structures that are acceptable for users.

RROs such as the Norwegian Kopinor argue that illegal copying cannot be prevented and therefore should be controlled. Licensing generates awareness of copyright, provides an easy-to-administer service for the user at a reasonable cost and generates income for the rights owner. In a number of countries a proportion of the revenue generated is used for the promotion of copyright awareness and for creative development.

The RRO therefore offers an advantage to rights users, making permissions easier and their administration less burdensome. To rights holders the advantages are obviously payment for the use of their work, as granted by copyright law and a revenue stream to help the growth of creative industries.

The negotiation of collective licensing agreements does not tend to be an easy process and has, in most countries, led to heated debate between rights owners and rights users. Nevertheless, once mutual understanding has been reached, in many countries the existence of RROs has proved an invaluable tool in reaching the required balance between the protection of rights and access to information and knowledge. In countries like Australia, Canada and the UK, the trend is to use the negotiation of collective rights agreements as a balancing mechanism, rather than attempting to enshrine in legislation detailed limits for copying for educational and library use.

Groups of rights users commonly making use of collective licences internationally include schools and other public educational institutions (which would involve negotiations with government education departments), universities; government departments; and businesses.

## Ownership and Regulation of RROs

Internationally, RROs tend to be not-for-profit organisations, owned by rights owners, for example authors, journalists, illustrators and photographers, book, newspaper and magazine publishers, composers and music publishers. This provides a broad rights owner front for the negotiation of comprehensive coverage and collection, ensures transparency and is a way of providing for the equitable distribution of royalties. It also helps ensure credibility for the RRO in its negotiations with universities, government departments and other rights users, because the RRO, acting as an intermediary, speaks clearly for the rights owners who own and manage it.

In some countries, government plays a monitoring role concerning the structure of the RRO and the licensing tariffs.

## Different Models of Collecting Societies

There are currently 33 dedicated RROs worldwide. In order to exchange mandates and to collect royalties locally but disburse them internationally, RROs enter into bilateral agreements with each other, based on the principle of national treatment as found in the Berne Convention; each RRO, operating within its own legal environment, collects and distributes photocopy royalties on behalf of foreign rights owners in basically the same way that it does on behalf of its domestic rights owners. The RROs are further linked through membership of their umbrella organisation, the International Federation of Reproduction Rights Organisations (IFRRO). RROs do not own the rights they administer, but function under non-exclusive mandates from authors and publishers.

There are various models of rights licensing throughout the world, depending on the legislative framework within which they operate:

- **The Anglo-American model** uses a system of voluntary contracts with rights holders (both individual rights holders and organisations representing rights holders), and negotiated licence agreements with users. Distribution of income collected is based on statistical data, and undertaken on a title-specific basis. This provides maximum freedom of choice for participants, but does require a lot of administration and the exclusion of certain rights holders can be a disadvantage to users.
- **The German-Spanish model** rests on statutory provisions in those countries, which permit a levy attached to the sale of photocopying machines. The levy is determined by regulation, and varies according to the type and capacity of the machine, and according to its location and use.
- **The Dutch model** is based on a statutory licensing system for reproduction rights. In government and in education users may copy but must pay, the law determining the fees. In higher education (for course readers and study packs), fees are negotiable.
- **The Nordic model** is based on the 'extended collective licence'. The RRO is authorised by organised groups of rights holders (writers, publishers, illustrators and journalists) to collect and distribute royalties on their behalf; and by law the RRO is also authorised to collect on behalf of rights holders who have not authorised the licensing organisation to represent them. This model allows users licensed access to most published works worldwide. Collection and distribution are based on statistical surveys which determine quantities and classes of works copied. In the Nordic model, distribution is made through rights owners' associations, rather than directly to individual rights owners. In many cases, a proportion of this income is used by rights owners' associations for development projects, locally and internationally.

Variations on all of these are possible. There is, therefore, no one 'model' of an RRO, but, rather, a principle held in common by all of them. That principle is founded on the recognition that the uncontrolled reprographic reproduction of books and other publications undermines the freedom of expression by reducing publishers' willingness to take the risk of offering new works in the marketplace. Licensed photocopying does not inhibit the legitimate use of copyright material, but rather makes simple and *legal*, at

a small fee, what is frequently carried out *illegally* and without payment. Unfortunately, owing, in some cases, to poor knowledge of copyright provisions and, in others, to disregard for the law, users have become accustomed to photocopying without restriction, and are bound to balk at having to pay for something they have so far been getting 'free'. It is therefore vital to educate users about the need to provide some returns to the creators of the material they have been using for nothing.

In other countries, national legislation allows for compulsory or semi-compulsory licensing, linked to strategic national policy decisions on the role of collecting societies in supporting local industry growth and in creating the balance between rights owners and users.

## COLLECTING SOCIETIES IN SOUTH AFRICA

### Background

The South African RRO, the Dramatic, Artistic and Literary Rights Organisation (DALRO) operates within what is known as a voluntary system of collective licensing, the only system currently enabled by the country's national copyright legislation. In essence this means that rights owners entrust their rights to collective administration by DALRO on a voluntary basis and, similarly, that users voluntarily acquire those rights under licence. The voluntary system of collective licensing is enabled by Section 6(a) of the Copyright Act which reserves to the owner of the copyright in a work the exclusive right to reproduce or to authorise the reproduction of the work 'in any manner or form'.

In the course of this study, it has emerged clearly that a crucial issue in determining policy for the management of copyright involves the degree to which a country uses the collective management of copyright and neighbouring rights to help achieve the balance between the author's entitlement to protection and due reward and the right of access to information.

As early as 2001 MacDonald Netshitenzhe, then Registrar in SAPTO, is on record as claiming that licensing is another way of assisting protection, and that licensing structures should be put in place in the legislation.<sup>89</sup> Collective agreements should be negotiated, he said, and dispute resolution mechanisms should be entrenched in the law, as should regulatory structures.

### The Canadian Model of Collective Licensing and its Relevance to SA

The South African Departments of Arts and Culture and of Trade and Industry have both expressed interest in the Canadian legislative model for rights collection. In 2001 a delegation from the Canadian Ministry of Heritage met with officials of the Department of Arts, Culture, Science and Technology (DACST) and the DTI. The Canadian delegation briefed several meetings about copyright legislation and the collective administration of reprography in its home country, concentrating on copyright licensing in higher education – how it was initiated, how it proceeded and the role of national bodies such as the Association of Universities and Colleges of Canada (AUCC).

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<sup>89</sup> Speaking at the 2001 DTI workshop on the regulation of collecting societies.

The report arising out of the Canadian intervention recommended that the uncertainties surrounding legislative reform and licensing in South Africa would be eased by a form of statutory reinforcement for collective licensing such as exists in the United Kingdom<sup>90</sup> and Canada. Canadian law, for instance, limits the damages a rights owner outside the collective's repertoire can obtain for copyright infringement to the level of the royalties which would have been payable for that use under licence. Canadian law also prevents a claim for statutory damages against a licensed educational institution, and it offers statutory indemnity to an institution in respect of acts committed on its premises (i.e. photocopying by students or staff) only if the institution holds a blanket licence:

The Canadian RRO, Cancopy, aided largely by supportive legislation ... was able to overcome [the] barriers and currently has a strong and constructive relationship with the universities. The AUCC played a hugely important role in representing its members in negotiating the Cancopy model agreement, and even though it could not commit them all to signing, all of them did.

At the end of the visit, the report submitted by Andrew Martin, a member of the Canadian delegation, recognised something very important, namely that:

... what is most appropriate for the longer term is a more conceptual approach to copyright law reform. The recent draft amendments and draft regulations do not flow from a statutory framework for collective licensing. This needs to be addressed before legislating on the rights and obligations of the respective parties ... if the South African government is committed to collective licensing, this should be reflected in the Copyright Act. That will give DALRO the legitimacy that [the Canadian RROs] had in their work with rightsholders and users.

As Andrew Martin has pointed out, ultimately most licensing disputes come down to price. In Canada, the strategy was to enrol as many users as possible, rather than aiming for high prices. Within the Canadian pricing structure, it was accepted that tariffs needed to reflect sectoral differences.<sup>91</sup>

It seems that Andrew Martin's report was favourably received by DACST and the DTI, for when, in May 2001, the DTI held another workshop, this time on a regulatory framework for collecting societies, Mr Tsheko Ratsheko, at the time Deputy Registrar in the South African Patents and Trademarks Office (SAPTO), delivered a paper supporting licensing on the Canadian model and spoke glowingly of the Cancopy model agreement with the universities. Steven Sack, Director of Cultural Industries Development in the DACST, actually said, "We're going the Canadian route."

## DALRO

The role of an RRO is to consult, negotiate and liaise with the users of licensable material, and over the past five years DALRO's work in the higher education institutions has led to a steady growth in the collection of licensing income and a slow but steady decline in infringement levels in the majority of institutions.<sup>92</sup>

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<sup>90</sup> Where the law allows the Minister to place excluded publishers into the collective's repertoire in certain circumstances.

<sup>91</sup> PICC Copyright Workshop, March 2004.

<sup>92</sup> As has been noticed outside South Africa as well as domestically: '... indications are ... that educational institutions are becoming more copyright-conscious.' From the website of the International Intellectual Property Alliance (IIPA), 2003 Special 301 Report.

In 2002, DALRO distributed almost R5,7m to local and foreign rights owners for reproduction from published editions. Approximately 38% of this amount was paid to local rights owners, with the balance distributed to foreign RROs, mainly the Copyright Clearance Center (CCC) in the USA and the Copyright Licensing Agency (CLA) in the UK.

### *The Negotiation of Collective Licensing in South Africa – A History*

The negotiation of the blanket licences through the higher education system was a stormy process. While PASA readily accepted the blanket licence developed by DALRO, the prospect of having to pay considerable amounts of money to publishers to photocopy material previously photocopied *gratis* was not warmly welcomed by the universities and technikons in general. Eventually, the institutions had to choose between compliance and the possibility of prosecution, and the blanket licence was the only vehicle for compliance in institutions without the infrastructure to license transactionally. Eight institutions, four universities and four technikons, acceded to the blanket licence in 1999. One of the eight took the opt-out clause in the licence at the beginning of 2002, but a further two universities and two technikons signed during 2001 and 2002.<sup>93</sup>

In 2002, there were nine HE institutions holding blanket licences. DALRO's blanket licence distribution for 2002 took place in May 2003, and the South African academic publishers between them received over R1 million, which sum represents approximately 50% of the total sum available for disbursement.

In 2002, there were 15 universities *not* holding blanket licences. Of these, two were properly compliant. Four licensed transactionally from a satisfactory to very satisfactory extent, four licensed transactionally to some reasonable extent, and only five licensed little or nothing at all.<sup>94</sup>

## Government Plans for Supervising Collecting Societies

In May 2001, the Office of the Registrar for Patents, Trade Marks and Copyright convened a workshop to discuss the regulation of collecting societies in South Africa. The DTI was worried about the practices of collecting societies. The cause of this anxiety was public perception (boosted by inflammatory articles in the press about the deaths, in poverty, of people's musicians) that performing artists and composers of music were being cheated out of their rightful earnings. It is quite likely that DACST, under pressure from the artistic community, had requested the DTI to address the need for a regulatory framework for collecting societies to ensure that performing artists get their fair share of needle time royalties, instead of their falling in their entirety to the recording industry. Whether or not the real source of the problem was the unfavourable contracts many had concluded with recording companies, signing away their economic and even moral rights, the spotlight nonetheless fell on the collective management of

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<sup>93</sup> The initial eight were all Historically Disadvantaged Institutions (HDIs) and their decisions to accede were almost certainly due in large part to the generous subsidies offered to blanket licensees in the first three years by the Department of Education/European Union Higher Education Libraries Programme.

<sup>94</sup> What does 'properly compliant' mean? On the basis of its record-keeping over a five-year period, DALRO calculated that the average number of licensable photocopied pages received by a student in a South African university is 200. A university which licences, through DALRO, an average of 190 pages per student per year is properly compliant. A university which licences an average of 100 to 190 pages per student per year is satisfactorily compliant. The next band, 'some reasonable extent', includes universities licensing an average of between 30 and 100 pages per student, while 'little or nothing' at all categorises universities licensing an average of less than 30 pages per student.

performing, recording and broadcasting rights (the so-called 'neighbouring rights'). Collecting societies for copyright found themselves in its glare as well.

The rationale for this workshop on collecting societies was evident from the invitation:

The Department of Trade and Industry has placed before Cabinet the amendments to [the Copyright Act].<sup>95</sup> The purpose of the amendments was to effect changes to the collective management of copyright and neighbouring rights ... Cabinet has approved the amendments with a rider i.e. the exercising of these copyrights ... should be preferably by statutory collecting societies which should account, on distribution of royalties and participatory democracy by members of a particular collecting society, to a competent authority (an arm of the South African Government).

In discussion at the workshop and in the working groups which met at the end of the workshop session to discuss conclusions, it was agreed – and endorsed by the Registrar's office – that the ideal situation would be for there to be one collecting society for each rights owners' grouping; that ownership of collecting societies should be in the hands of rights owners in order to ensure transparency and legitimacy; and that the government should not own or control collecting societies, but play a regulatory role, to ensure transparency and prevent abuses.

Workshop participants pointed out that there was the potential for a conflict of interest if the government tried to regulate tariffs, given that the government is in fact a major rights purchaser.<sup>96</sup>

Workshop participants received an introductory document containing the following statements:

Intellectual property protection, which provides an adequate balance between the interests of rights owners and the public in general, has proven to be highly beneficial for investment, growth, job creation, cultural diversity, creativity and the entire economy ... this statement presupposes that:

- infrastructures exist which support the existence and vibrancy of intellectual property;
- all owners of rights must determine their destiny with due regard to the users of these rights and to economic vibrancy.

The document's starting point was that the collective management of copyright and neighbouring rights<sup>97</sup> was necessary because individuals in general do not have the capacity to monitor all the users, to bargain with users and to collect a fair and equitable remuneration. In respect of reprographic reproduction rights, the document made it clear that 'special public considerations' govern the use of these rights, which provide a basis for certain 'restrictions' on the author's exclusive right in accordance with Article 9(2) of the Berne Convention. Prejudice to the legitimate interests of the author must be 'mitigated by equitable remuneration'. To explain what was meant by 'prejudice mitigated by equitable remuneration', the document approvingly provided examples from the Federal Republic of Germany, the Netherlands, Norway and the

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<sup>95</sup> These subsequently became law with the passing of the Copyright Amendment Act 9 of 2002.

<sup>96</sup> PASA Report on the DTI Workshop on Collecting Societies, April 2001.

<sup>97</sup> The document incorrectly included the rights of publishers in the definition of neighbouring rights. Publishers' rights are, in fact, the rights of copyright.

United Kingdom.<sup>98</sup> These examples are salutary: the thinking behind citing them is that the bargain to be struck between rights owners and users is that exceptions should be granted only in return for payment.

It was abundantly clear from the tenor of the meeting that Government was determined to impose some form of control over collecting societies. From the perspectives of the authors and publishers, and also from the perspective of the RRO, a regulatory mechanism stopping short of outright control would be a welcome development, so long as regulation is accompanied by the required enabling legal environment. DALRO, for instance, strongly supports limited regulation along the lines of the Canadian model in which collecting societies must be registered and tariffs must be filed annually at the Copyright Board; users can object to the tariff and if they do, the tariff is contested and the Board intervenes. An arrangement such as this would give the RRO the legitimacy it needs in order to promote and protect the best interests of its mandating rights owners.

However, closing remarks by the DTI official at the abovementioned workshop contained the following of general relevance to the collective management of rights:

- Collecting societies will continue to exist but will be subject to some form of regulatory mechanism on the part of Government;
- Government will take the final decision on new amendments and the new legislation must ensure that society in general benefits from the administration of these rights;
- Government is not going to form its own collecting society but a new supervisory body will ensure that rights owners get their share; and
- There should be a degree of public ownership – in other words, collecting societies should preferably be owned by their members.

Concerning reprographic reproduction rights, it was said by the DTI official that although there are special public considerations such as the right to an education, users must not say they do not want to pay. They **must** pay, he said – but the cost is up for negotiation.

So far, the DTI has made no move to legislate a regulatory mechanism for the RRO although efforts are in progress to draft legislation for the regulation of collecting societies for 'needle time' (as the Copyright Act has since been amended to re-introduce this neighbouring right, and regulations to amplify its operation are urgently required).

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<sup>98</sup> In Germany the law permits limited reprographic reproduction of extracts in multiples for teaching purposes. However, the levy system in that country provides for an equipment levy, paid by manufacturers, and an operator levy paid by users. The levies are administered by the national RRO, VG Wort. The SAPTO document made reference to lenient photocopying under the Dutch legal régime but this was not quite correct as in The Netherlands private use is limited to small sections of books and may only be used by the person copying them, while educational institutions and libraries may issue photocopies for internal use to students only provided fair compensation is paid to the Dutch RRO, Stichting Reprorecht – this is a form of statutory licence (or, more accurately, a limitation on the exclusive right) authorising copying in return for payment. Kopinor, the Norwegian RRO, operates under voluntary collective licensing based on the Extended Collective Licence, a system highly favourable to the collective administration of rights; Kopinor's collection per head is the highest in the world. Source: IFRRO country Status Reports, October 2002.

A highly informative analysis by Professor Daniel Gervais of collective administration in Canada, contemplating the introduction of the extended collective licence (characteristic of the Nordic countries) could be instructive in South Africa where a number of scenarios are being contemplated.<sup>99</sup>

The publishing industry supports the proposals of the DTI for ownership and regulation of collecting societies. DALRO, for historical reasons, is owned and subsidised by SAMRO, the composers' and lyricists' collecting society, but the ideal situation would be ownership collectively by all classes of rights owners in literary, dramatic and artistic works. This would necessitate the organisation of these groups into associations capable of managing the complex process of disbursing royalties collected by DALRO to their respective memberships and of setting up means of also using those royalties for developmental purposes.

This is a long-term view but, with the successful collective management systems of countries such as Norway, Canada and Australia in sight, South Africa should be taking the first steps towards it. Those steps could include government support of the academic and non-fiction authors' association, and collaboration with the DTI in putting in place the enabling legal framework for the collective administration of rights. At other points in this Report we make reference to the heated debate occasioned by recent attempts to amend the Copyright Act and regulations, with the academic sector opposing efforts to accord stronger protection to creator communities on the grounds that educational needs override all other considerations. This debate has been both debilitating and inconclusive, leaving legislative reform stalled. One of the primary objectives of this report is to seek ways to end it and to get legislative reform back on track.

The South African print industries, along with Government, therefore broadly supports the Canadian model of collecting society, which has government regulation to ensure transparency and fair pricing, but that still allows for voluntary participation, albeit with regulatory incentives to encourage maximum participation.<sup>100</sup>

**International examples such as Canada and Australia demonstrate the value of a collecting society in helping to create a balance between the interests of rights owners and the needs of users. Moreover, in a context in which there is a high level of demand for customised content and for the ability to provide multiple copies for library and classroom use, a collecting society provides an effective way of achieving this without eroding the rights of authors and while still providing an affordable route for the user.**

Collecting societies can play a vital role in providing ease of access to information while ensuring fair rewards for authors and publishers. The degree to which a country enforces statutory licensing depends upon national policy approaches, negotiated between government, rights holders and rights users, particularly educational institutions.

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<sup>99</sup> This document can be consulted on

[http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/collective/index\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/collective/index_e.cfm)

<sup>100</sup> A highly informative analysis by Professor Daniel Gervais on collective administration in Canada, contemplating the introduction of the extended collective licence (characteristic of the Nordic countries) could be instructive in South Africa where a number of scenarios are being contemplated. *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective*. (Report prepared for The Department of Canadian Heritage.) 2001.

[http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/collective/index\\_e.cfm](http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/collective/index_e.cfm)

The ownership of collecting societies is an important adjunct to their policy role: in general, collecting societies are owned by rights owners, an important factor in their credibility in the eyes of rights users. Authors and other content creators are important stakeholders involved in collecting societies and their ownership.

Money collected through collecting societies can make an important contribution to the advancement of copyright awareness, through publications and awareness programmes. Collecting societies such as Kopinor contribute to cultural development through projects funded from rights income.

## RECOMMENDATIONS

36. The print industries sector needs to initiate discussion and consultation on collective licensing as a mechanism for balancing rights and ensuring that content creators and producers receive fair reimbursement for the exploitation of their works. The consensus from the PICC stakeholder workshop held in March 2004 is that the industry sector broadly supports the Canadian model of collective licensing as the most appropriate one for South Africa.
37. Responses to the DTI proposals for policy for the supervision and ownership of collecting societies need to be agreed, clarified and articulated and the print industry sector needs to press for the introduction of similar regulations for collective licensing in the print copyright industries.
38. PASA and DALRO should work together in exploring the potential for blanket licensing beyond the tertiary sector. In particular, the potential of blanket licensing in schools needs to be thoroughly surveyed.
39. PASA should consider its way forward in case, at some point in the future, there was rights holders' ownership of DALRO.
40. Information and education on the role and functioning of the collective administration of rights should be provided for industry members.



# 7 | ELECTRONIC COPYRIGHT

## DIGITAL MEDIA – OPPORTUNITIES AND THREATS

**S**OUTH AFRICA IS UNUSUAL AS A DEVELOPING COUNTRY for its relatively high levels of technological capacity and its high Internet usage.

Electronic communications offer considerable opportunities in a country like South Africa: exciting opportunities for new business growth; for cheaper access to information; and for disseminating South African voices internationally. There is, however, also a major threat posed by cultural dominance from the sheer weight of information emanating from the major countries of the North – a manifestation of the Digital Divide.

There are particular developmental opportunities, using electronic media, for the cheaper dissemination of creative and educational content and for the development of small businesses. The Internet is also providing opportunities for new writers who are using this medium to create online publications, at a much lower cost than print publications, to gain audiences for their writing. Increasingly, government departments are placing information online and there are major initiatives under way for the expansion of education and training through the use of computers and the Internet.

Obviously, such developments are dependent upon the availability of hardware and connectivity, and South Africa needs to work to bridge the digital divide. However, with an increasing emphasis on initiatives that will widen access to digital media in education and in the community, any policy initiatives relating to digital media will have to be far-sighted. Moreover, given the speed with which developments are taking place in this environment, policies and legislation should build in the requirement of regular review and should be designed to be flexible enough to encompass change.

## DIGITAL MEDIA IN THE SOUTH AFRICAN PRINT MEDIA SECTOR – THE CONTEXT

### The Stakeholders

Electronic authors and publishers in South Africa include individual academics and writers with their own websites; research organisations; creative writing websites; electronic magazines, or e-zines; online versions of newspapers; electronic encyclopaedias and online information resources for educational purposes; digital content systems for content storage and print on demand of customised products; business information providers; online education providers; content databases and compilations; historical and archaeological archives; and much more.

## *Print Media and Digital Media*

Print and digital media impact on each other in such a way that the two cannot be separated into neat categories and print companies are likely to have ever-increasing interests in digital ventures. Already, most newspapers have parallel print and digital products; magazines have related content websites; law and professional publishers publish parallel products; educational publishers develop interactive digital enhancements to print books; and digital reference works are increasingly becoming the norm.

Booksellers are using e-commerce for online sales of printed books and it looks as if there will be a growing market for online content for remote printing, including the printing of international titles in South Africa from digital content archives.

There is no doubt, therefore, that digital media provide growth opportunities for the print industries sector. A particular growth area is likely to be the use of print on demand, linked to digital content resources, for customised products or for the production of whole books in short runs. This could provide a boost for the print industry, as growing markets develop for a range of short-run products. There is also considerable potential for a market in the local printing of international short-run titles, imported digitally. Digital imports of this kind would have the dual impact of increasing volumes for local printers and reducing prices.

Players in electronic publishing are likely to include a variety of new start-ups, many of which do not necessarily resemble traditional publishers at all. It is important that, in formulating electronic copyright policy, these are identified and drawn into the discussion.

Commercial models for electronic content dissemination differ widely and extend far beyond the sale of a physical product like a book or magazine, including sharing, leasing, licensing, syndicating, and subscribing. A strong trend in electronic dissemination is free distribution, with revenue earned indirectly, or through linking to other products. Another trend is the use of contractual licenses for subscription-based access to content or pay-per-view.

From the users' perspective, electronic media can offer easier access to a mass of information, but, on the other hand, there is potential extensive control over the user of content, through technological means. Rights users' groups fear the erosion of fair dealing and the loss of many of the rights that users hold in the print domain. This is probably the most burning issue in the debate about digital copyright, and one that has led to radical challenges to the core concepts of copyright, both from those who wish for greater protection and those who argue for greater freedom. The issues are very complex and cannot be dealt with in any detail in the context of this report; however it will be critical for South Africa to debate them as it is to develop its own, compromises that are appropriate to the country's development needs.<sup>101</sup>

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<sup>101</sup> For a detailed discussion of these issues, see Jessica Litman, *Digital Copyright*. Prometheus Books, Amherst 2003; Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Commercial World*, Random House, New York, 2001; and *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Contain Creativity*. The Penguin Press, New York 2004.

## ISSUES IN DIGITAL COPYRIGHT

THERE ARE A NUMBER OF PARTICULAR ISSUES relating to electronic copyright that need to be addressed in national legislations. The most basic of these is the definition of what constitutes reproduction in digital media.

### Control Over Reproduction

As WIPO describes it:

Perhaps the most basic right granted under both copyright and related rights is the right of reproduction, which under the Berne Convention covers reproduction 'in any manner or form'. This right is at the core of e-commerce, because any transmission of a work or an object of related rights presupposes the uploading of that work or object into the memory of a computer or other digital device. In addition, when the work or object is transmitted over networks, multiple copies are made in the memory of network computers at numerous points. It is therefore necessary to determine how the reproduction right applies to such copies.<sup>102</sup>

### Fair Dealing in the Digital Domain: Copyright and Contract

A key issue in digital copyright, leading to lively debate, has been related to the limits of fair dealing. Can the fair dealing provisions of print copyright be carried over into the digital environment? Or is digital different?

As far as rights users are concerned, they feel threatened by what seems to be a diminution of fair dealing rights in the digital domain, accompanied by increasing restrictions and expanding demands from rights owners seeking to protect a new technological environment. At the other extreme, proponents of the freedom of the Internet press for the democratisation of information and herald the death of copyright. Between the two extremes are a wide range of commercial and delivery models for internet products. At one extreme are the newspapers that provide free access to online versions of their publications and open access scholarly journals building new models for the free dissemination of research information. At the other end of the spectrum are high-priced databases and information products that offer users the opportunity to select and purchase content under licences ranging from the comprehensive content licences negotiated between libraries and commercial journals to click-through licences for the use of articles, extracts, or whole books.

Creating a balanced legal framework for copyright in the information society is therefore a major challenge: how to take into account changed business and social models in the digital world, while at the same time safeguarding fundamental rights for authors and users. A fundamental change relates to the growth of the use of contract as opposed to copyright in the dissemination of information on the Internet. As opposed to a book, which is a physical object, contained within covers, which is sold as a commodity, information disseminated through the Internet tends to be governed by licensing agreements, in which the author and user enter into contractual arrangements for the exploitation of information in different ways. This quite commonly includes the licensing of the right to use smaller chunks of information: for example, a scholarly

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<sup>102</sup> *Intellectual Property on the Internet: A Survey of Issues.*  
[http://ecommerce.wipo.int/survey/html/3.html#\\_ftn72](http://ecommerce.wipo.int/survey/html/3.html#_ftn72)

journal would licence access to individual articles or extracts. This poses a challenge in relation to the three-step test in Article 9(2) of the Berne Convention and which the WCT confirms in respect of the digital environment, which prohibits actions which might impede the author's right to normal exploitation of his or her work.

To put this in practical terms, what might be of marginal value to the author or publisher of a printed product – the exploitation of small extracts of the work as a whole – might well be the major commercial thrust of a digital product. This in turn would lead to a diminution of the user's right to non-commercial use of small portions of a work, as this would now fall foul of the three-step test. Rights owners are exploring new commercial models for exploiting information on-line, using pay-per-view or content licensing models to try to make the new medium viable for them.

Rights users see a threat in this development, fearing that information will be kept under lock and key and fair dealing rights eroded in these contractual relationships. The rights holders' rejoinder is that if indeed copyright owners are placing too onerous conditions in their contracts, the recourse is under commercial practice and contract law. Publishers producing products that are too restrictive or expensive are likely to lose their markets and be replaced by competitive products (as happened in the early days of the software industry).

## Digital Copyright Issues in the South African Context

The desirable extent of the author's monopoly over digital reproduction, a matter of lively debate worldwide, needs to be addressed in South Africa, where both the health of local creative industries and the rights of information users are of critical importance to development.

In general there is agreement across national legislations on the importance of the Berne Convention's 'three-step test' as a necessary proviso of any fair dealing dispensation in electronic media. There are a number of practical examples in legislation and practice worldwide that could be instructive in the formulation of South Africa's policy on the extent of fair dealing in digital media. International examples suggest, moreover, that it is important that such policy initiatives be linked to broader national policies for national development in the knowledge economy.

In developing countries, it is particularly important that the balance struck in national legislation does not undermine the local creative industries and that steps taken to protect the right of access to information do not erode the viability and vitality of indigenous authors and publishing industries.

This issue cannot be divorced from development agendas – the protection of Indigenous Knowledge Systems (IKS) for instance may well depend on the creation of national databases that will need effective protection.

Legislation passed to deal with digital copyright must encourage investment in the on-line provision of copyright material, if South Africa is to be part of the global knowledge economy, as it wishes to be, and if South African culture and content is to be a presence on the world-wide web.

What is clear, in comparison with other countries, is that South Africa has fallen behind badly in addressing legislative issues relating to digital copyright. Nor has there been a consultative process to determine legislative needs, as has been the case in other countries. There is an urgent need to bring South African copyright legislation in line

with the WCT, in order to ensure protection for those investing in the development of digital media, and to set up a proper consultative process within the industry sector.

## Libraries and Electronic Media

At the same time, the situation is further challenged by changes in the role of libraries in the digital environment. To quote the Australian Copyright Council:

Libraries are no longer merely holders of copies, which they have bought. Increasingly, they are 'information centres' with fast and international interlibrary, copying capabilities. This capability is enormously increased by digital technology.<sup>103</sup>

A number of countries have therefore addressed the question of libraries using digital dissemination to cut down, for example, on journal subscriptions or database purchases by using inter-library loan facilities for the sharing of digital files. In this context, publishers argue, libraries are effectively becoming publishers themselves. Many see this, therefore, as a threat to rights holders and an interference with the right to normal exploitation of an author's work.

Indeed, the potential for electronic media to allow for rapid and cheap dissemination of content has led to opportunities and challenges to libraries. On the one hand, networked libraries provide access to immense information resources that can be shared between libraries; content licences and subscriptions allow access to vast ranges of journal and research content without the need for a library to subscribe to all of them. A Utopian vision is that of the single library, stocking digital content for the world. This, however, also poses challenges to authors and publishers who wish to make a living out of their creative efforts – any IPR framework for the digital environment must balance very carefully these enhanced opportunities to access against the need to protect authors and publishers from the erosion of their potential to earn rewards in a changed business context, with very different business models. The debate about exceptions becomes particularly acute in this context.

## ELECTRONIC COPYRIGHT AND LEGISLATION IN SOUTH AFRICA

**S**OUTH AFRICA IS A SIGNATORY to the WIPO Copyright Treaty (WCT). However, the legislative issues that need to be addressed if the country is to accede to the treaty still remain in abeyance, ten years after the signature of the treaty.

The DTI held a workshop with stakeholders in November 1999 to discuss South Africa's accession to the WCT. At this workshop the legislative changes that would be needed in South African law were detailed by legal experts. The DTI agreed to a proposal by the stakeholders attending the workshop to facilitate the setting up of an Electronic Copyright Task Team to address the issues raised by electronic copyright and to speed up the legislative process. This Task Team was never convened.

In 2002 the Electronic Communications and Transactions Act was passed. In the consultative process leading up to the passing of the Act, publishers, newspapers, magazines and others involved in electronic communications made submissions on the

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<sup>103</sup> The Centre for Copyright Studies, for the Australian Copyright Council: *Copyright in the new Communications Environment: Balancing Protection and Access*. Sydney 1999.  
[www.copyright.org.au](http://www.copyright.org.au)

copyright issues that needed to be addressed in South African legislation if it was to provide an environment in which investment was encouraged. In the event, the issues relating to IPR that were raised by stakeholders were not addressed in the ECT Act but were referred to the DTI for action. The PASA submission, which is attached in Appendix 6, made the point that outstanding legislative amendments which were needed to bring South Africa in line with its obligations under the Berne Convention and TRIPS Agreement were still awaited. The publishing industry expressed frustration at the failure of communication with the DTI, which was not responding to requests for clarification on the process of legislative amendment and pointed out the dangers of expecting digital communications to operate with a Copyright Act that is outdated.

It is the opinion of the print industries sector that South African legislation for the electronic domain should, in the first instance, be relatively interventionist but should avoid trying to regulate in too much detail, particularly in areas in which there is still no international consensus. It is becoming increasingly clear that 'lock and key' approaches that attempt to control every possible infringement of an electronic document do not work and can lead to ludicrous outcomes. It is suggested that the approach in South Africa should be to make amendments to existing legislation where immediately necessary and defer major legislation until such time as the process of consultation and policy-making is complete (although there is now extreme urgency in this, too). South Africa also cannot wait for the long-drawn out process of drafting an entire body of new legislation: the approach has to be pragmatic and necessary amendments to existing legislation need to be processed as quickly as possible if we are to move into the digital age.

There are sound examples of international practice in formulating legislation for electronic copyright from countries such as Canada and Australia that could be emulated in approaching this issue in South Africa.

Because of the particular interests of publishers as content providers, specific attention has been given in our proposals to a content creator's or rights holder's right of reproduction, right of communication to the public and right of distribution. Other issues that are addressed include fair dealing, evidence of copyright infringement and enforcement, the current South African Act and how it should be amended, moral rights, territorial rights, transient copies, copyright exemptions, intermediary liability, the emphasis on contracting licensing solutions, technological obligations on rights holders, digital rights management systems and the recognition of international copyright judgements.

An informed discussion of legislative issues relating to digital copyright needs to take place as a matter of urgency. The proposals made in submissions by print industry members in the context of the Electronic Commerce Act need to be put on the table and addressed in a cross-sectoral review of digital copyright policies in South Africa.

The establishment of an inter-sectoral Task Team on Electronic Copyright, convened by SAPTO, as suggested at the DTI Workshop in 1999 is supported.

## Legislative Issues

The following legislative issues need attention in South African copyright law.

### *The Right of Reproduction*

The right of reproduction should be extended to the electronic environment. However, where any electronic reproduction is not in conflict with the normal exploitation of the rights holders' right, an exception should be allowed.

### *WCT*

We suggest that the guidelines that were set in the WIPO Copyright Treaty, the Digital Millennium Copyright Act and the European Commission be followed by the legislature in South Africa in such a way that it will act as an incentive for content creators to distribute their material electronically and at lower cost to more South Africans.

### *Digital Rights Management*

The provisions proposed by the WIPO Treaty for the protection of digital rights management information need to be dealt with in South African legislation.

### *Territorial Rights*

Territorial rights, exhaustion of rights and parallel importation are all areas in need of discussion and review in South Africa, in order to determine the regime that would be in the best interests of the country, both for rights owners and consumers. The global reach of electronic media and their capacity to transcend national boundaries means that these issues have now become urgent, and the country needs to decide if it will continue to observe the territorial limitations imposed by rights holders in the UK in particular, or legislate for the right to parallel importation into South Africa.

If parallel importation is allowed, it poses risks in relation to counterfeit goods and pirate editions and the print industries sector would argue that parallel importation would only be feasible if it could only take place in an environment in which copyright and other IPRs are effectively protected and enforceable.

### *Technological Measures*

The use of technological measures to protect copyright is already used by many companies in South Africa and it is suggested that the protections offered by the WIPO Copyright Treaty should be incorporated into our law as a matter of urgency. As was stated above the international experience could be introduced into South Africa. However, the urgency of introducing these measures could not be overstressed, if not, South Africa will become a haven for copyright infringement and other forms of piracy. On the other hand, South Africa should avoid enacting legislation that is too sweeping and results in absurd prohibitions of legitimate exploitation of intellectual property.

The print industries are concerned at the lack of national initiatives to set in motion policy and legislative decisions relating to digital copyright in South Africa. It urges the creation of a broadly constituted Working Group on Digital Media that includes all industry stakeholders, including new ventures.

The print industries need to identify stakeholders within the sector with an interest in digital copyright to set up an industry-wide focus group on digital copyright that can interact with stakeholders in other industry sectors.

Electronic copyright legal expert Reinhard Buys has identified a further list of legislative issues needing attention. These are spelled out in more detail in a legal opinion provided by Buys for the purposes of this report, which is appended in Appendix F.

## IPR AND DIGITAL MEDIA – THE INTERNATIONAL CONTEXT

**I**N SOUTH AFRICA, DEVELOPMENTS IN DIGITAL MEDIA are taking place in an environment in which the issues relating to electronic copyright have still not been addressed in national policy and legislation, so that those working in this domain are operating with an outdated and often inappropriate Copyright Act. If urgent attention is not given to these matters, content creators will be discouraged from moving their products online, as the risks would be too high. This will result in an environment where South Africans will not have access to affordable and quality local content on the Internet and South African initiatives to make the country's voice heard globally will be impeded.

There is a preliminary step that needs to be taken before the development of policy and legislation in digital copyright. Given the ease of copying in an electronic environment, it will only be possible to regulate electronic content dissemination effectively on the basis of a strong and effective South African Copyright Act. If print and broadcast rights are not adequately protected, South Africa has little chance of developing local electronic industries or participating effectively in international electronic commerce.

### National Legislations – Approaches to Legislative Change in Relation to Digital Copyright

The challenges posed by digital media in the copyright arena have led to intense legislative discussions and activity worldwide. Given that South Africa has been slow in responding to the question of digital copyright, it might be instructive to consider how this has been handled in a range of other countries. The implementation of legislation to deal with the digital environment has been the subject of long processes of consultation and discussion, leading to legislative amendment.

In the United States, discussions around the impact of technology on copying started early, with the National Commission on New Technological Uses of Copyrighted Material (CONTU) in 1976. From 1993-5 the Working Group on Intellectual Property Rights, part of the Information Infrastructure Task Group, produced a Green Paper and then a White Paper and convened a Conference on Fair Use (CONFU) to develop guidelines for fair use of digital content. CONFU's final report was submitted in 1998.

The Digital Millennium Copyright Act (2000) provided, in large measure, the basis for other legislations around the world, including the European Community's *Directive on Copyright and Certain Neighbouring Rights*, adopted in 2001 and due to be reflected in national legislations (including the UK) in the next few years.

The United Kingdom Copyright Act was last updated in 1989 and includes some generic recognition of media other than print. The UK Publishers' Association has also

used negotiation with key rights users, particularly in the university sector, to agree common approaches to issues of fair dealing in the digital domain, in anticipation of the introduction of legislation on digital copyright. Discussion around digital copyright has been framed by the participation of the UK in the drafting of the EU Directive on Digital Copyright and EU countries are now in the process of harmonisation of their laws to meet the requirements of the EU Directive.

Australia began the process of discussion and consultation on digital copyright in 1997. The government published a Discussion Paper in 1997, followed by government proposals on Digital Agenda reforms in 1998, and the convening of Working Groups in 1999. The Digital Agenda Bill was introduced into Parliament in September 1999 and, after written submissions and public hearings, the Act was passed in September 2000.

In Canada, treatment of digital copyright issues was built on the foundation of an earlier discussion, in the early 1970s, by the Economic Council of Canada, which emphasised the crucial economic importance of information. Interestingly, the approach was that the rise of sophisticated reprographic technologies should lead to a situation where the publishing industries responded to the need for faster information delivery, meeting consumer demand for customised and rapid-delivery products. And so in an interesting variation to other countries, Canada moved towards blanket licensing as a solution for the needs of libraries and educational institutions, rejecting demands for broader exceptions under copyright law. The Canadian Advisory Council on the Information Highway set up by the Ministry of Industry produced a report in 1995, which resulted in legislative amendments in 1999. Noting that these amendments had taken ten years of negotiations, and given the high rate of technological change, the Canadian government undertook five-yearly review of copyright legislation. Much of the copying in Canadian libraries is undertaken under licence, rather than falling under fair dealing provisions.

## Electronic Copyright and International Trade

Even if the first step in developing an appropriate copyright environment for digital media in South Africa lies in ensuring that copyright in the print media is sound, there is nevertheless great urgency in the need for South Africa to address legislative and policy issues in electronic media if it is to meet its international trade obligations. As can be seen from the above comparison, the country has fallen badly behind its international trading partners in the implementation of digital copyright legislation and, given the high profile of digital copyright issues in North America, Europe and Australia, this is likely to become a serious issue in the negotiation of trade treaties.

### *Australia – A Case Study*

Australia has recently, as a result of the negotiation of trade agreements with the US, tabled amendments to its digital copyright legislation – and Australia is some ten years ahead of South Africa in the formation of policy and the implementation of legislation for digital copyright.

It is worth noting in some detail the issues that Australia has identified, as these are likely to confront South Africa in its trade negotiations with the US: The Australian government's Fact Sheet first emphasises the importance of IPR issues in trade negotiations. The IP chapter in the treaty, it says:

- Reinforces Australia's reputation as one of the world's leading countries in protecting and enforcing intellectual property rights.

- Harmonises our intellectual property laws more closely with the largest intellectual property market in the world, which is recognised as a global leader in innovation and creative products.
- At the same time it allows Australia considerable flexibility to implement the Agreement in a way that reflects the interests of our domestic interest groups and Australia's legal and regulatory environment.
- Demonstrates to our trading partners our commitment to strong intellectual property laws.<sup>104</sup>

The document then goes on to list the measures that Australia has had to address in the negotiation of the treaty. Most of them relate to digital copyright. The treaty negotiations required:

- Stronger protection for copyright owners, including:
  - Agreement to implement the WIPO Internet Treaties by entry into force of the Free Trade Agreement: these being world intellectual property standards on treatment of digital copyright material.
- An expeditious process that allows for copyright owners to engage with Internet Service Providers and subscribers to deal with allegedly infringing copyright material on the Internet.
- Tighter controls on circumventing technological protection of copyright material together with a mechanism for examining and as necessary introducing public interest exceptions in relation to technological protection measures, along with a transition period to provide the opportunity for public submissions in this area, as well as other measures in relation to circumvention tools.
- Agreement on standards of copyright protection.
- An increased term of protection for copyright material.
- Enhanced intellectual property enforcement, including:
  - increased criminal and civil protection against the unlawful decoding of encrypted program carrying satellite TV signals – which will assist the Pay TV industry enforce its rights;
  - agreed criminal standards for copyright infringement and on remedies and penalties; and
  - reinforcement of Australia's existing framework for industrial property protection.

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<sup>104</sup> Australia-United States Free Trade Agreement – Australian Government *Fact Sheet on Intellectual Property*  
[http://www.dfat.gov.au/trade/negotiations/us\\_fta/outcomes/08\\_intellectual\\_property.html](http://www.dfat.gov.au/trade/negotiations/us_fta/outcomes/08_intellectual_property.html)

## COPYRIGHT AND DEVELOPMENT IN DIGITAL MEDIA

THERE HAS BEEN MUCH DEBATE INTERNATIONALLY about the relationship between copyright and development and the limits on exceptions to the author's right in electronic media. In South Africa, this is particularly the case in the universities, where scholars and librarians face the paradox of easier access to a bewildering array of free resources and licences to journal databases that they complain are prohibitively expensive.

Opportunities are offered through the increasing number of electronic journals that are offered on an open access basis, including a number of commercial medical and scientific journals that are provided free of charge in Africa.

While university librarians in South Africa are demanding generous exceptions for the copying of digital journals and other online materials, publishers argue that in many cases the remedies available are not legislative, but contractual – the negotiation of differential pricing and terms for digital licences. In this they would have the support of the UK CIPR and the UK government, which has proposed differential pricing as a way of remedying disadvantage in access to research information in developing countries.<sup>105</sup>

There is a need for discussion and research on the best ways of addressing development needs and digital media, particularly, but not only, in the Higher Education sector in South Africa. This discussion should include the identification of contractual and business solutions to digital information needs, as well as legislative issues.

### The Legislative Process – Resolving Differences

The disagreements between the SAUVCA Copyright Committee and the publishing industry in South Africa over the extent of fair dealing in electronic media is by no means an isolated case. Internationally the debates between rights owners and rights users on digital copyright have been heated and sometimes acrimonious. It is clear that there is a gap between what rights owners perceive as the necessary means to encourage further cultural expression and knowledge production, and what the users desire to access freely in the interests of information provision. The tension between these two positions is not unique to South Africa; it is common worldwide.

In some contexts, it is possible to reach an acceptable situation for mutually agreed practice within the parameters of the law if the stakeholders put their minds to it, and where satisfactory arrangements have been set in place they are the result of negotiations made in good faith and which involve some compromise from both sides. Such compromises also require the existence of a sound basis in national copyright legislation for the print medium.

#### *Negotiating Copyright Practices – JISC in the UK*

For instance, in the United Kingdom, in 1996, the Publishers' association (PA) and the Joint Information Systems Committee (JISC) established five joint working parties to seek agreed solutions to differences between the university and publishing communities on the use of copyright-protected information in higher education and academic research. Each working party investigated a different area: standard

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<sup>105</sup> [www.iprcommission.org/papers/word/govt-response.doc](http://www.iprcommission.org/papers/word/govt-response.doc)

licensing agreements, clearance mechanisms, fair dealing in the electronic context, the provision of and access to networks, and the retention of electronic materials.<sup>106</sup>

Where such agreements have succeeded, they have required compromise, an understanding of the other side's position and a willingness to accommodate it, and a commitment to devising a scenario to benefit society as a whole

### *Stakeholder Consultation and the Legislative Process – Australia*

In Australia, much of the discussion about copyright issues is driven through the Australian Copyright Council<sup>107</sup> and the Centre for Copyright Studies, which is funded by the Copyright Agency Limited, the copyright collecting agency representing authors and publishers.<sup>108</sup> This has resulted in the availability of a number of papers and publications on copyright issues and an informed level of debate. In Australia, legislative reform around issues of fair dealing have been the outcome of discussion conducted through committees set up to examine the need for legislative reform, notably the Spicer Committee and the Frankl Committee. In August 2000, the Copyright Amendment (Digital Agenda) Act was passed, after consultations and submissions from stakeholders. The legislative process was eased by the existence of the Copyright Council as a recognized representative of the rights owners, including authors.

Australian discussions on fair dealing and on special provisions for libraries and educational institutions provide a useful point of comparison for South Africa, as Australian commentators and legislators acknowledge the additional difficulties encountered by users when they are geographically at a great distance from the major sources of information and also have to distribute information across widespread yet thinly populated areas in their own country. In the revised Act, fair dealing for purposes of research and library provision, 'as far as possible replicate[s] the balance struck between the rights of owners and users that has applied in the print environment'. However, there are some changes: only not-for-profit libraries benefit from library exceptions; and 'a library may only request an article of a portion of a work in electronic form from another library if that portion or article is not available within a reasonable time at an ordinary commercial price. This is to ensure that the exercise of the inter-library loan exceptions will not unreasonably conflict with the emerging markets of copyright owners.'<sup>109</sup>

Exceptions for educational institutions in Australia carry over exceptions from the print medium into the electronic domain. However, while such uses allow educational institutions to make copies within defined reasonable limits without permission, this is subject to payment of equitable remuneration, negotiated through the collecting

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<sup>106</sup> Joint Information Systems Committee (JISC), *Guidelines for Fair Dealing in an Electronic Environment*. London 1998.

[www.ukoln.ac.uk/services/elib/papers/pa/fair/intro/html](http://www.ukoln.ac.uk/services/elib/papers/pa/fair/intro/html)

<sup>107</sup> The Australian Copyright Council is a non-profit organisation established in 1968. It receives substantial funding from the Federal Council, the Australian Federal Government's arts funding and advisory body. The Council's objectives are 'to assist creators and other copyright owners to exercise their rights effectively, raise awareness in the community about the importance of copyright, identify and research areas of copyright law which are inadequate or unfair, seek changes in law and practice to enhance the effectiveness and fairness of copyright, and to foster co-operation amongst bodies representing creators and owners of copyright'. It provides information about copyright, via publications, training and its website; provides free legal advice about copyright and conducts research.

<sup>108</sup> This is an interesting example of the contribution that can be made to copyright affairs by a collecting society owned by and firmly backed by rights holders.

<sup>109</sup> Fact sheets on the Copyright Amendment (Digital Agenda) Act 2000.

[www.law.gov.au](http://www.law.gov.au)

society. In effect, the existence of a credible collecting society is being used in Australia to create the balance between the needs of educational institutions to generate copies quickly and affordably and the rights owners' need for equitable remuneration.

However important the process of stakeholder negotiation might be in forging frameworks for copyright practice during the process of legislative reform, Jessica Litman, an international commentator on the legislative process and copyright policy, warns against the appropriateness of this approach in the digital environment. Given the impasse that has stalled South African legislative reform in the last years, this argument is worth exploring in some detail. As Litman describes the traditional approach to copyright reform in the US, 'Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation.'

The result, argues Litman, is that established players will not support any legislative move that would leave them, in their perception, any worse off than they are in the current state of legislation. Current law becomes the baseline against which any negotiations will occur. This, she argues, will exaggerate the existing tendencies of the law and 'make it exceedingly difficult to speak of legislative intent if by legislative intent one means the intent of Congress'. She also draws attention to the fact that such approaches will tend to exclude emerging industries and their concerns, an important consideration in the ever-changing environment of digital media and digital commerce.<sup>110</sup>

Thus it would seem that, while stakeholder consultation plays a vital role in determining national policy and development needs, in the end it is the government that must take responsibility for the drafting of appropriate legislation that delivers these goals.

In all the countries discussed, legislative reform to bring copyright laws into line with the WCT and national priorities for digital copyright was a high priority national policy issue. The process of legislative reform was the result of government-driven consultation, taking into account the needs of industry and rights users.

**In all cases, consultation took place over an extended period with a wide range of stakeholders, including industry participants and rights users.**

There were varying degrees of caution in approaching the demands of digital copyright legislation. Built into all the legislative regimes is a recognition of the need for continual review and updating.

Coupled with the government-driven consultative process, independent negotiations also took place between rights owners and rights users, particularly in the context of higher education needs.

However, while such negotiations might have regulated transactional relationships, legislative reform was government-driven and was linked to clearly identified national policy needs.

Legislative and policy approaches ideally take account of the circumstances of the country concerned: its trading relationships and its distance from international markets.

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<sup>110</sup> Jessica Litman, *Digital Copyright*. Prometheus Books, Amherst 2001,. Cited by Pamela Samuleson, 'Toward a New Deal for an Information Age', *Michigan Law Review*, 2002.

Policy approaches in these countries also recognise the need to create a climate of respect for intellectual property. In Australia, government and industry contribute to information dissemination and advice.

## CONCLUSION

**I**T IS CLEAR, FROM THE EVALUATION of these international examples, that South Africa needs to address its electronic copyright legislative requirements as a matter of urgency. This is not a matter of a terrain that is marginal to the country's needs, but is central to many of the country's critical needs, both for internal cultural and economic development and for the fostering of international trading relationships.

## RECOMMENDATIONS

41. While the growth of digital media might at first sight seem to pose a threat to the print industries in South Africa, in fact digital dissemination of content offers great advantages and growth potential to authors and publishers. Media convergence, moreover, means that print industry players are already extensively involved in digital media and it is urgently necessary to address questions of authors' and publishers' rights in this new context.
42. It is clear that, in comparison with other countries, South Africa has fallen behind badly in addressing legislative issues relating to digital copyright. Nor has there been a consultative process to determine legislative needs, as has been the case in other countries. There is an urgent need to bring South African copyright legislation in line with the WCT, in order to ensure protection for those investing in the development of digital media, and to set up a proper consultative process within the industry sector. This will be a critical issue in the negotiation of international trade treaties.
43. It is noted that the basis for a sound regime in digital copyright is to be found in viable legislation for print copyright. Any deficiencies in traditional copyright law are likely to be exaggerated in the electronic domain.
44. The print industries are concerned at the lack of national initiatives to set in motion policy and legislative decisions relating to digital copyright in South Africa. It urges the creation of a broadly constituted Working Group on Digital Media that includes all industry stakeholders, including new ventures.
45. An informed discussion of legislative issues relating to digital copyright needs to take place as a matter of urgency.
46. The print industries sector needs to identify stakeholders within the sector with an interest in digital copyright to set up an industry wide focus group on digital copyright that can interact with stakeholders in other industry sectors.
47. The print industries sector argues that the proposals made in submissions by industry members in the context of the Electronic Commerce Act need to be put on the table and addressed in an urgent cross-sectoral review of digital copyright policies in South Africa.

## CONCLUSION

**D**URING 2002, A FREELANCE JOURNALIST writing for the *Warsaw Business Journal*, in interviewing Carlo Scollo Lavizzari, Legal Counsel for the International Publishers' association, suggested that the copyright system as we know it is wrong. In reply, Mr Scollo Lavizzari said that the alternatives were unattractive since both patronage by a religious or secular aristocracy or state subsidisation came with the risk of influence and censorship. 'Copyright law cannot create freedom of speech and of the press, but freedom will be diminished unless those who create, produce and disseminate copyright material enjoy financial independence.'

As far as the future of international copyright treaties and national copyright laws are concerned, Mr Scollo Lavizzari considered that the Internet, which links the world and is inherently global, will increasingly lead to international cooperation in the form of voluntary codes of conduct, guidelines and contracts which could supplement national legislation in the future.

This is the path along which the print industries advocates for the legislator to develop the South African copyright environment: promotion of a culture of respect for intellectual property, balanced by public rights to access knowledge and information; and sound protective legislation supplemented by voluntary contractual arrangements.

As we have noted above, some have sought to argue against copyright because the educational and informational needs of a developing country are so different from those of an industrialised nation that public policy should admit, *inter alia*, broad exceptions to the exclusive right. While it is not within the brief of this report to engage even further in that debate than we have so far, we are constrained to point out that such a viewpoint is not necessarily reflected in the copyright laws of African countries. Kenyan copyright law, for instance, specifies that not more than two short passages may be taken from a work for inclusion in a compilation designed for use in an educational establishment. Zimbabwe has recently drafted a new Copyright Act with minimal exceptions. The following is a statement from Ghana:

There is a need to recognise that modern well-drafted copyright legislation is an indispensable tool in the protection of authors' rights. Most developing countries fail to see or realise the importance of vibrant intellectual property legislation. The copyright system, as it now exists in virtually every country in the world, is a vital part of modern society's infrastructure, serving the entire community. It is the foundation on which the world's publishing industry rests, bringing the written or recorded word, carrying knowledge, ideas, understanding and entertainment to every literate person, young and old, in the community.<sup>111</sup>

In short, the print industries in South Africa believe that South African rights owners deserve the same levels of protection as any other country in the world; and the growth

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<sup>111</sup> Betty Mould-Iddrisu, Chief State Attorney in the Internal Legal Division of the Ministry of Justice, Ghana.

of a local industry is the surest way to provide affordable and relevant cultural and knowledge products to serve the needs of the country.



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# LIST OF RECOMMENDATIONS

## THE STATE OF COPYRIGHT IN SOUTH AFRICA

1. The print industry sector needs to become more active in forging alliances both within the industry sector and with other copyright industries to promote copyright issues and to lobby for national policy initiatives and legislative reform.
2. However, the industry sector cannot achieve this alone. Active government engagement is needed, in a transparent and consultative process, to ensure the creation of an effective copyright regime that will
  - Foster the growth of the copyright industries;
  - Provide an effective framework for information and knowledge dissemination to meet national needs;
  - Provide an enabling context for South Africa's international trade negotiations.
3. If the print industries are to make their maximum contribution to the country and its cultural and economic growth, attempts to improve the copyright framework in South Africa will need to be linked to:
  - Active programmes for the growth of a reading culture;
  - Support for and promotion of the rights of authors;
  - Educational programmes on the value of copyright;
  - The expansion of library services.
4. From the perspective of industry strategy, this could include:
  - Initiatives to produce information and raise the profile of copyright issues;
  - The promotion of training in copyright for publishers and rights owners;
  - Active interaction with readers and consumers to promote the value of copyright and copyright compliance.

## COPYRIGHT AND ELECTRONIC MEDIA

5. Because of the interconnectedness of print and digital media and the opportunities that digital media offer for the development of new products and new markets, it is important that issues relating to digital copyright be included in any policies or strategies for potential growth in the contribution of the print industries sector.

6. Given the importance of digital communications in national economic and cultural development, it is vitally important for any country wishing to be a trading presence in the digital information market, to address legislative issues hindering the creation of an intellectual property environment that encourages investment (creative and financial) in digital media.

## COPYRIGHT INDUSTRIES AND ECONOMIC GROWTH

7. If there is to be progress in dealing with the legislative and other policy issues causing conflict between rights holders and users in the tertiary sector, and spilling over damagingly into other sectors, there is a need for government involvement in creating a conducive environment for an understanding to be reached on the desirable balance in South African legislation and practice. This can readily be achieved by:
  - a. The promotion of collective licensing priced to offer affordability and access to rights users as the most effective mechanism for addressing the problems faced by the Higher Education sector.
  - b. Attention to the proposed regulations, along the lines of those gazetted for the music industry, which will define the government's approach to the accountability of collecting societies and will introduce and clearly delineate a regulatory mechanism by which the collecting society's activities will be transparently exposed and at the same time legitimised.
  - c. Urgent attention to the legislative amendments needed to remove ambiguity on the limits of photocopying for personal use and in the educational context; the strengthening of enforcement measures; the provision of a stable basis for policy-making on copyright for digital media. These would constitute a necessary first step preceding any of the issues listed below.
  - d. Better communications between the DTI and industry stakeholders to ensure a balanced response to the submissions of the different sectors of society.
  - e. Support for ANFASA to ensure balance in proposed legislation and policy, as probably the majority of authors writing non-fiction in South Africa are active in higher education. It is recommended that academic authors become more active in protecting their rights as authors and that educational campaigns on copyright and contract be provided for authors.
  - f. Education and awareness programmes among students and lecturers on the value of intellectual property.
  - g. High-level discussions between industry associations and SAUVCA on the most desirable policy environment for the development of academic publishing in South Africa and the creation of the best possible environment for access to knowledge and research information.
8. Rising levels of illegal copying in schools can and should be addressed, in the first instance, through awareness and educational campaigns in schools. The positive levels of communication and understanding that now exist between the Department of Education and the publishing industry are encouraging and should help address the situation.

9. Factors in the educational system aggravating the trend towards copying should be addressed with the national and provincial departments of education and departmental cooperation sought in combating illegal copying.
10. Education departments and educators should be made aware of the risks attached to gross copyright violation.
11. Following on policy initiatives on the ownership and accountability of collecting societies in South Africa, and in the wake of copyright awareness campaigns in schools, there needs to be an investigation, with the print industries sector, DALRO and the DoE of the desirability of introducing blanket licensing in schools for print and digital copying of resource materials.

#### INTERNATIONAL TREATIES GOVERNING COPYRIGHT

12. South Africa needs to ensure that its legislation and is in line with international treaties if it is to provide a conducive trading environment for local industries and their international trading partners. This is particularly important in the light of international trade agreements currently being negotiated.
13. It is a matter of concern that a number of legislative amendments needed to bring South African legislation into line with international standards of protection and enforcement have been stalled for a number of years. The DTI is urged to take up its responsibilities in addressing these issues and resolving differences currently blocking legislative change.
14. It is equally disturbing that South Africa has fallen behind in addressing its international obligations in relation to electronic copyright issues and the DTI is urged to set up, as a matter of urgency, the inter-industry consultations needed to formulate South African policy on electronic copyright legislation.
15. Provisions in South African legislation for fair dealing and regulations governing exceptions for educational use are of particular concern and these need to be examined in the light of international treaty obligations.

#### SOUTH AFRICAN COPYRIGHT LEGISLATION

16. It is the belief of the print industries sector that the conflict between some users and rights owners in the sector is unlikely to be resolved through mutual agreement on legislative reform without government mediation. Moreover, the impact of this kind of conflict is destructive and should be resolved as quickly as possible through the intervention of government to review stakeholders' submissions, resolve short-term legislative needs and put on track a regulated environment for collective licensing.

This would involve a three-pronged approach: amending the Copyright Act, revising the regulations and promulgating regulations for a supervisory mechanism applicable to all collecting societies.

17. The print industry sector needs to play a more active role, on its own account and in concert with other rights holders, to interact with government to ensure the implementation of a sound legislative regime.
18. There is a clear set of requirements for legislative reform, agreed by South African industries and their international partners. These include:

- h. The regulations governing exceptions for educational and library use;
- i. The lack of a presumption of ownership of copyright in South African law;
- j. Difficulties in securing evidence in the case of copyright infringement (in part dealt with by the promulgation of the Counterfeit Goods Act of 1997 that confers powers of seizure upon inspectors and certain members of the police);
- k. Inadequate penalties for copyright infringements;
- l. Ambiguities in the interpretation of fair dealing;
- m. The lack of provisions for digital copyright; and
- n. The creation of a regulatory framework for collecting societies.

These need to be addressed by government.

19. The legislative impasse that has been reached concerning amendments to the Copyright Act and to the Regulations needs to be resolved through active participation and expert intervention by the DTI to ensure that the South African copyright environment is conducive to local and international trading and developmental needs. This is a matter of some urgency, as it is clear that deficiencies in legislation are impeding the growth and development of the copyright industries.
20. The industry does not believe that demands for multiple copying for educational use can be met by resorting to fair dealing provisions in copyright legislation without causing serious harm to the publishing industry and other copyright industries. Rather, it recommends the use of collective licensing agreements, priced to suit local conditions, with regulatory backing to ensure maximum participation.
21. It is vitally important that these issues are cleared up in the print domain before South Africa can move towards legislating for digital media, where the issues are more complex and the problems more acute.
22. The print industry urges the creation of a transparent consultative process as a necessary part of legislative reform. This consultation should include representatives of all the relevant industry organisations with a stake in copyright.

The DTI's initiative to set in motion a process to create copyright policy is an admirable one. However, international examples show very clearly the value of consultative processes built into the development of such policy initiatives.

23. While comprehensive legislative reform should await such a policy initiative, the print and publishing industries feel that legislative review has been stalled for too long and should not be delayed any longer. Legislative inadequacies are impacting negatively not only on the print industries, but on software developers and other IP stakeholders. Industry developments in strategic areas of crucial importance to the country are being hampered by inadequacies in copyright legislation; these are clearly recognised and agreed to by national and international stakeholders; and the print industries sector sees no reason for the process of implementing amendments to be delayed any longer.

24. The print industries sector needs to formulate its own objectives more clearly, spelling out for government the economic impact of a failure to amend the law at this stage. It is also recommended that rights owners in the print industries sector form alliances with other rights holders, to ensure a concerted approach to the formulation of copyright policy.

#### COPYRIGHT ENFORCEMENT

25. There are a number of legislative shortcomings that need to be addressed if South Africa is to be able to enforce copyright effectively and conform to its international treaty obligations. These include the presumption of copyright; revision of the Section 13 regulations; easier access to Anton Pillar search orders for copyright plaintiffs; and stiffer penalties for copyright infringement, including statutory damages.
26. The print industries sector needs to engage with the DTI as a matter of urgency to motivate for the enactment of legislative reforms that would remove obstacles to the successful prosecution of copyright violations. It is the responsibility of the government, in particular the DTI, to ensure that copyright legislation conforms to South Africa's international treaty requirements and that copyright enforcement is rendered more effective.
27. Civil prosecutions need to be made more effective and less onerous for rights holders, as this, rather than criminal prosecutions, should be the first line of defence against copyright infringement, particularly given the overloading of the criminal justice system in South Africa.
28. Statutory damages need to be introduced into South African legislation as a matter of urgency to provide adequate compensation for victims of copyright violation and to act as a deterrent against further infringement.
29. Questions of capacity in the police force and courts need to be addressed to allow for the successful prosecution of cases of copyright violation.
30. There is a need for the introduction of training programmes for police, prosecutors and magistrates to increase awareness of the importance of copyright and the necessity for effective enforcement would be a valuable policy initiative.

#### COPYRIGHT AND DEVELOPMENT

31. The print industry sector recommends that development needs be met in the first instance by the negotiation of collective licensing, backed by regulatory control by government, using the pricing of licences to ensure equitable access to information without eroding the rights of authors and publishers.
32. Any initiatives to address the need for access to knowledge and information should, in the first instance, ensure that relevant and affordable information products are available from a strong local publishing sector. Interventions that erode the capacity of the industry sector will ultimately work to harm access to affordable knowledge and information for the country as a whole.
33. The formulation of copyright policies, particularly those policies that seek to balance the rights of authors and users, needs to take cognisance of cultural diversity initiatives and the protection of national folklore heritage.

34. If South African creative writing, scholarly research and educational resources are to have a strong presence locally and internationally, and if South Africa is not to be colonised by international content, a copyright policy needs to be created that fosters growth in local writing and publishing.
35. Although this is not directly copyright issue, the strength of the library sector does have a direct influence on the capacity of the country to meet users' needs and therefore indirectly works to reduce the potential for copying.

#### COLLECTING SOCIETIES

36. The print industries sector needs to initiate discussion and consultation on collective licensing as a mechanism for balancing rights and ensuring that content creators and producers receive fair reimbursement for the exploitation of their works. The consensus from the PICC stakeholder workshop held in March 2004 is that the industry sector broadly supports the Canadian model of collective licensing as the most appropriate one for South Africa.
37. Responses to the DTI proposals for policy for the supervision and ownership of collecting societies need to be agreed, clarified and articulated and the print industry sector needs to press for the introduction of similar regulations for collective licensing in the print copyright industries.
38. PASA and DALRO should work together in exploring the potential for blanket licensing beyond the tertiary sector. In particular, the potential of blanket licensing in schools needs to be thoroughly surveyed.
39. PASA should consider its way forward in case, at some point in the future, there was rights holders' ownership of DALRO.
40. Information and education on the role and functioning of the collective administration of rights should be provided for industry members.

#### ELECTRONIC COPYRIGHT

41. While the growth of digital media might at first sight seem to pose a threat to the print industries in South Africa, in fact digital dissemination of content offers great advantages and growth potential to authors and publishers. Media convergence, moreover, means that print industry players are already extensively involved in digital media and it is urgently necessary to address questions of authors' and publishers' rights in this new context.
42. It is clear that, in comparison with other countries, South Africa has fallen behind badly in addressing legislative issues relating to digital copyright. Nor has there been a consultative process to determine legislative needs, as has been the case in other countries. There is an urgent need to bring South African copyright legislation in line with the WCT, in order to ensure protection for those investing in the development of digital media, and to set up a proper consultative process within the industry sector. This will be a critical issue in the negotiation of international trade treaties.
43. It is noted that the basis for a sound regime in digital copyright is to be found in viable legislation for print copyright. Any deficiencies in traditional copyright law are likely to be exaggerated in the electronic domain.

44. The print industries are concerned at the lack of national initiatives to set in motion policy and legislative decisions relating to digital copyright in South Africa. It urges the creation of a broadly constituted Working Group on Digital Media that includes all industry stakeholders, including new ventures.
45. An informed discussion of legislative issues relating to digital copyright needs to take place as a matter of urgency.
46. The print industries sector needs to identify stakeholders within the sector with an interest in digital copyright to set up an industry wide focus group on digital copyright that can interact with stakeholders in other industry sectors.
47. The print industries sector argues that the proposals made in submissions by industry members in the context of the Electronic Commerce Act need to be put on the table and addressed in an urgent cross-sectoral review of digital copyright policies in South Africa.



## APPENDIX

# 1

## LIVING WITH THE STATUTORY LICENCE – THE AUSTRALIAN EXPERIENCE<sup>112</sup>

This summary is based on the unpublished paper 'Living with the Statutory Licence' delivered by Ms Caroline Morgan of the Copyright Agency Limited (CAL) at a copyright workshop held in Harare, Zimbabwe, July 1999.

The statutory licence is a legal instrument permitting educational institutions to copy extracts without seeking permission, provided that a fee – determined by government – is paid.

It was introduced into the Australian Copyright Act in 1976 subsequent to the recommendation of a Commission appointed to review the situation. In its recommendation, the Commission commented as follows:

... multiple copying should not be carried out without remuneration to the copyright owner in any case where it represents a substantial use of his property or it could prejudice the sale of his works, particularly if the work has been specifically written for use in schools.

Initially, Australian copyright owners were not in favour, preferring to continue with what they had at the time – voluntary transactional licensing. In its report, the Commission indicated it was aware that statutory licensing might seem to favour the interests of education as against those of copyright owners, since it would enable copies to be made without permission and, in addition, the rights owners would be faced with the logistics of collecting the royalties and distributing them. The Commission, however, felt that the needs of education were so great that they could not wait for a comprehensive (or blanket) licensing scheme. It also felt the statutory licence was fair, since payment was, after all, to be made. If there were rules about how records of the copying were to be kept administration and distribution would not be too much of a burden on the rights owners.

At first, no-one was happy. Rights owners felt their rights had been usurped while users objected to paying for what they had previously copied for free. The rate of payment was also a subject for disagreement until, in 1985, the Copyright Tribunal set a tariff per page of 2c, Mr Justice Shepherd commenting that evaluating the price had been difficult because there was nothing to guide him. In the event, the 2c tariff was in use for almost 15 years.

CAL was then able to start invoicing educational institutions for blanket licence fees, but one of the first problems was that because of the complexity of the recording provisions

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<sup>112</sup> This Appendix was authored by Monica Seeber.

much copying taking place under the licence was not actually recorded. Eventually, the educational institutions agreed to enter into voluntary agreements which involved paying an annual amount per student and participating in a sample survey, the purpose of which was to estimate the volume of copying for payment and to identify the rights owners whose works had been copied.

In 1999 the statutory licence was amended to eliminate the need for voluntary agreements. Educational institutions now relied completely on the statutory licence.

The per-page payment, however, was not keeping pace with inflation, and negotiations about increasing it between CAL and the institutions were unsuccessful. In February 1999 the Copyright Tribunal determined the rate of payment for universities: 4c a page for loose copies, 5c a page for course packs and 15c a page for artistic and musical works.

Administration of the statutory licence is not easy, and the instrument has not been an unqualified success in Australia. The advice of CAL, based on its own experiences, is that the statutory licence is not necessarily the best solution to the problem of multiple copying in educational institutions, and a country contemplating its introduction should review the situation carefully in consultation with legislators, rights owners and users. This review should 'clearly articulate the problems the licence is meant to solve' and accept that the licence is also capable of creating certain problems as well as solving others.

What does the licence offer?

Educational institutions may copy from all published works for their educational purposes. The quantitative limits are:

- 10% of a book, or one chapter.
- One article from a periodical – or more if they refer to the same subject matter.
- A work appearing in an anthology as long as it is less than 15 pages in length.
- The whole of an out-of-print work.

In terms of the statutory licence the Australian Government has to appoint a collecting society to represent all copyright owners for the purposes of the licence. Appointment is accompanied by regulatory restrictions, for example the organisation must be a non-profit company limited by guarantee; membership must be open to all copyright owners in the class of works administered; there are rules applying to the use of funds by the collecting society and the methods of distribution to rights owners.

Educational institutions have to 'declare' themselves to the collecting society and must specify whether they intend to keep full records of copying or participate in a sample survey, and the collecting society has the power to inspect all the records of the institution relevant to the amount and type of copying, regardless of whether the institution has elected to keep full records or participate in the sample survey. All copies made under the licence must be specially marked, and if they are used for any purposes other than permitted by the licence, they are considered infringing copies.

On the one hand the statutory licence enables educational institutions to make the copies they need, and on the other it enables substantial revenues to be paid over to rights owners (in the first 10 years, CAL paid over 70 million Australian dollars to

copyright owners). The disadvantage to rights owners is a forced loss of control over their works since this is no longer a voluntary system. The advantage to educational institutions is that the repertoire from which they may copy is all-inclusive. The advantage to both parties is that the Copyright Tribunal has the power to set rates of payment – a major benefit since, in the words of CAL, ‘negotiations regarding the amounts to be paid...under the licence can be vigorous to say the least’, and sometimes the parties to the negotiations are simply unable to reach agreement. When called upon to arbitrate, the Copyright Tribunal will consider factors such as: the nature of the works copied; the types of institutions making the copies; the types and levels of copying as assessed by the sampling system; the need to ensure adequate incentive for the local production of educational works; the purpose and character of the copying and its effect on the market for or the value of the materials copied; and the special circumstances of distance education.

A major advantage for the collecting society is that institutions are forced either to report fully or take part in the sample, and if there is a dispute regarding the operation the Copyright Tribunal will determine the sample that will apply. When licensing is voluntary, it can happen that although the educational institution pays for its copying it does not fully cooperate in reporting (or sampling), leaving the collecting society to assume this responsibility.

There are also disadvantages to the statutory licence, and one is that it is capable of distorting the operation of the market by giving students and educators the power to choose whether to buy works or copy extracts. Another is that the licence is mandatory and rights owners may not exclude any categories of works. In Australia, where each state sets its own curriculum, it is difficult for the sample scheme to adequately compensate rights owners. The balance always to be maintained is to distribute equitably to publishers and authors without increasing the burden of record-keeping on the institutions. And to further demonstrate that the disputes in South Africa over the past few years are not unusual, CAL has noted that:

Another difficulty with the licence is the continuing uncertainty about the relationship between the copying permitted and paid for under the statutory licence and that permitted under the free exceptions such as fair dealing for research or study ...

CAL points out that there are other legislative measures a government can take to ensure that copyright owners are remunerated for multiple copying in educational institutions which ‘may not be as heavy handed a tool as the statutory licence’. One such measure might be to limit the penalties for unknowing infringement by a collecting society. Another is to permit licensees to assume (unless they are explicitly told otherwise) that if a work is in a class of works covered by a voluntary licence, all works in that class of works may be copied under the licence. The effect of this measure would be to introduce a legal instrument similar to the extended collective licence. Yet another is to require that all voluntary licensing schemes are also referable to a body such as the Copyright Tribunal.

In summarising the Australian experience, CAL concludes that:

The statutory licence in Australia as crafted by the Copyright Law Review Committee, the Australian legislators, the Copyright Tribunal and the collecting societies, has developed out of local concerns due to our geographic isolation and our status as a net importer of copyright material. What is remarkable ... is that it has been so effective. This is in large part due to the cooperation between users, owners and Government to ensure that the licence continues to be practical and to offer solutions to issues such as copying, monitoring and payment.

## APPENDIX

# 2

## MAKING MULTIPLE COPIES IN EDUCATIONAL INSTITUTIONS<sup>113</sup>

The facts of the matter are that South African universities have expressed the need to make multiple copies of extracts from copyright-protected published works, and wish to see the Copyright Act revised to cater for this. Publishers and authors, on the other hand, believe that such a provision would be a serious invasion of their rights, and a potential threat to the very existence of academic publishing in South Africa. This is the issue at the heart of the debate between the rights owner and rights user communities, and which has held up legislative development in South Africa over the past few years.

The DTI has indicated that the two sides should reach consensus on the future form of the law before it acts, as it intends new legislation to have been arrived at by a democratic and consultative process. It is important, however, to bear in mind that the process is not just about what stakeholders *want* from the law, but also about what is *feasible* in terms of South Africa's international obligations coupled with the effect on South African society in general. In other words, a balance must be achieved.

Appendix 4 deals with fair dealing and attempted to clarify what the current provisions of Section 12(1)(a) permit, what a proposed revision (now shelved) would have permitted, and what the Copyright Sub-Committee of the SAUVCA Intellectual Property Committee objected to in that proposal.

Appendix 3 deals with the copyright Regulations promulgated under Section 13 of the Act which are intended to provide clarification on further concessions to educational institutions and libraries, in addition to those contained in Section 12.

Section 13 of the Copyright Act states that:

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.<sup>114</sup>

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<sup>113</sup> This Appendix was authored by Monica Seeber.

<sup>114</sup> It has not gone unnoticed by commentators in the university sector that whereas Section 13 speaks of '[unreasonable prejudice to the] **legitimate**' interests of the copyright owner, Sub-section 2(b) of the regulations themselves refers to 'unreasonable prejudice [of] the **legal** interest and residuary rights'. Stressing the difference in meaning between the two expressions, legitimate and legal, they say that the provision is not about economic prejudice, but only about the right to not have any illegal actions committed in respect of the work. The late Dr Gideon Roos addressed this matter in a presentation to the Johannesburg College of Education some years ago, pointing out that reality suggests the legislator did not intend there to be two different words and two distinct fields of application. Originally, Section 13 also spoke of 'legal' but when the Act was amended by Act 56 of 1980, 'legal' was changed to 'legitimate'. The regulations, however, were not changed, no doubt by oversight. The 1978 regulations contained other terminological misunderstandings, such as the reference to 'residuary rights'. 'Residuary rights' were,

Section 13 of the Act draws on Article 9(2) of the Berne Convention (Paris Act, 1971):

It shall be a matter for legislation in the countries of the Union to permit the reproduction of works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The basis, then, on which copyright protection is based, is the exclusive right of the owner of copyright. The reproduction of a copyright work is always subject to the authorisation of the copyright owner except where exceptions to the rule exist in national law, and such limitations have to conform to the provisions of Article 9(2) of the Berne Convention. They are subject to a three-step test:

- (i) The copying must constitute a 'special case';
- (ii) The copying must not conflict with a normal exploitation of the work; and
- (iii) The copying must not unreasonably prejudice the legitimate interests of the copyright owner.

The Act and the Regulations may not, therefore, permit an act of copying which does not pass the three-step test, and if the Regulations do permit such acts then they are *ultra vires* Section 13 and in contravention of the Berne Convention. As a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) within the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), South Africa is bound to comply with specific provisions of Berne regarding the exclusive right<sup>115</sup> and the permissible limitations (see Article 9.1 of the TRIPS Agreement).

This limitation on the exclusive right is restricted to the making of a copy by an individual, for the purposes of his research or private study, or personal or private use. Further, the person making the copy has to 'deal fairly' with it. The Act does not define fair dealing, but an indication of its extent may be gleaned from Section 12(3), which permits quotation '*provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose*'. Section 12(4) again couples the expressions 'the extent justified by the purpose' and 'compatible with fair practice'. Bearing in mind that fair dealing is a defence against a charge of copyright infringement, it is reasonable to assume that what the Act intends is that the person using the protected work may copy just as much of it as he needs in order to conduct his research or private study, or to make personal or private use of it.

Although a relevant case has not yet come before a South African court, British case law suggests that the mere fact that a work is reproduced for private study will not, by itself, mean that the use constitutes fair dealing (*University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch. 601). To what extent might the defence of fair

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again, amended to 'moral rights' in Section 20 of the Act by Section 19 of Act No 125 of 1992. As moral rights are not harmed by photocopying, it is impossible to know what 'unreasonable prejudice of the legal interest and residuary rights of the author' could mean in the context in which the phrase appears. Finally, Dr Roos commented that if the legislator could use as baffling a word, in its context, as 'residuary', it could just as inexplicably fail to spot the difference between 'legal' and 'legitimate'.

<sup>115</sup> South Africa has signed the Brussels text (1948) of the Berne Convention, and not the more recent Paris text (1971). However, South Africa is bound by Article 9 of TRIPS which provides that members of the World Trade Organisation must adhere to the Paris text of the Berne Convention. Thus, South Africa is as bound to the Paris text as if it had signed that text.

dealing be raised to justify the reproduction of study notes by students? Again, one may look to British case law to answer this question. In *Sillitoe v McGraw-Hill Book Co* (U.K.) [1983] F.S.R. 545 it was held that to take advantage of the fair dealing defence the defendant himself must be engaged in private study or research, and that fair dealing was no defence to the reproduction of study notes by students.<sup>116</sup>

The making of multiple copies cannot be fair dealing<sup>117</sup> or a special case, and therefore for such copying the other two tests have to be met to see what legislation is possible.

## The Copying Must Not Conflict With a Normal Exploitation of the Work

It is fair to say that extensive photocopying destroys the market for textbooks and supplementary educational and academic works as well as journals and periodicals, and therefore conflicts with a normal exploitation of these works which are, after all, written and produced in order to be sold. However, given that many librarians and educators say that when students photocopy extracts from books that they would not have bought anyway, the rights owners suffer no losses, it is prudent to seek a more workable definition.

Although it is 'normal' for books, journals, periodicals and so on to be produced in order to be sold, it is simplistic to assert that the mere loss of a sale will conflict with a normal exploitation of the work. In order to broaden the definition, one has to ask how else a publication might be 'normally exploited'. Or, rather, one might turn the question around and ask what is *not* normal. Although some educators believe that it is normal for photocopied extracts from published works to be made freely available in multiples, and given or sold to a whole class of students, that is not a normality with which the copyright owner will agree. He will say, "This is not the kind of exploitation I had in mind when I wrote (or published) the book. 'Exploitation' refers to the ways in which I, not you, may exploit my intellectual property. I accept that if you are not going to buy it, you

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<sup>116</sup> While some commentators have on occasion referred to the fair dealing provision as 'fair use', the two doctrines should not be confused. Although fair use is also an affirmative defence to an action for copyright infringement, it derives from American law, where it is given statutory language in Section 107 of the United States Copyright Act 1976 as amended, which specifically states that in determining whether the unauthorised use of a work in any case is fair a court will consider four factors: the purpose and character of the use, including whether it is of a commercial nature or for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the work as a whole; and the effect of the use on the potential market for or value of the work. The apparent similarities between the British and South African 'fair dealing' and the American 'fair use' belie certain fundamental differences (such as, for instance, that multiple copying may constitute fair use if such use does not affect the market for the work), and the terms may not, therefore, be used interchangeably.

<sup>117</sup> The question arises whether a group of students, directed by their teacher, may each make a copy, each for his or her personal and private use or research or private study, under the fair dealing provision of Section 12(1)(a). The issue has not been tested in either a South African or a British court. It is our view that the defence of fair dealing would fail in such a case, since the end result – multiple copies – would amount to systematic or coordinated copying, and the use would no longer be personal and private. A court would also consider the effect on the potential market for the work in determining whether the dealing was fair. Since British courts have applied the defence of fair dealing restrictively, a South African court would probably do so as well (C E Puckrin, Section C). Opinion: Ex parte Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd, In re Infringement of Reprographic Rights by South African Universities). Section 12(1)(a) also requires that the fair dealing copy should be made by the person wishing to use the work for his own use. Thus the regulations provide (in regulation 4) that a librarian may also make a copy for a person requesting it for research or private use. The privilege offered by regulation 4 should not, however, be confused with fair dealing.

may need to exploit my work by photocopying the parts you need, but you may only do so with my permission."<sup>118</sup>

We thus come closer to a definition if we conclude that *abnormal* exploitation of a copyright work will occur when the exclusive right to authorise such reproduction as does not constitute a special case is usurped. National legislation of Berne member states may therefore not permit it.

## The Copying May Not Unreasonably Prejudice the Legitimate Interests of the Copyright Owner

The legitimate interests of the rights holder relate to what financial reward he can reasonably expect to receive. Again, the principle does not necessarily depend on the loss of one, or a few, sales. Here we have to take a closer look at the type of publication which is to be copied; conformity with this test must be judged according to the circumstances. Mass-market publications do not stand or fall as a result of a few photocopied extracts. But academic textbooks, which are expensive to develop, aimed at a small specialist market and depend on substantial sales to recoup the investment, are different. The financial interests of the authors and publishers of these will undoubtedly be prejudiced if they are extensively copied, *gratis*, in multiples for classroom use – the very classrooms for which they were written and published.

Prejudice to the financial interests of authors and publishers does not rest solely on the monies recouped from sales. Financial reward may also be made in the form of a licence fee, since authors and publishers earn money, not just from the sale of the primary product, but also from permission fees. We must remember that both Article 9(2) of the Berne Convention and Section 13 of the South African Copyright Act use the term 'unreasonable' to qualify the prejudice. *Some* prejudice to the rights owner (i.e. loss of a few sales) is permissible, but *unreasonable* prejudice (no financial return at all) is not. This undercuts the argument that when students photocopy books that they would not have bought in any case, there is no negative impact on the rights owner.

Rights owners accept that in drawing up the new regulations, account must be taken of the various situations and conditions in which reprographic reproduction takes place. But account must also be taken of the national legal framework. Since the South African Copyright Act provides neither for statutory licences (statutory provisions allowing reprographic reproduction without authorisation but against a fee determined by law – such as exist in Australian law), nor compulsory licences (statutory provisions allowing reproduction without authorisation but against a fee negotiated between rights owners and users – such as exist, for instance, in the Nordic countries), then the legislator has the choice between:

- Free use, i.e. reproduction without authorisation or remuneration (but only where the free use passes the three-step test

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<sup>118</sup> The argument that the loss of sales is the compelling factor in determining whether or not the work has been normally exploited was addressed by the United States Court of Appeals for the Second Circuit in the 1994 decision *American Geophysical Union v Texaco*, where the court found that the publisher had not lost subscriptions but had lost the right to license the work for reproduction. Because there existed a licensing body (the Copyright Clearance Center of CCC, from which Texaco could have acquired a licence, the market was affected.

- Individual authorisation with mandatory collective administration, i.e. authorisation through a collecting society
- Individual authorisation authorised individually.

The draft regulations published in the Government Gazette of 7 August 1998 do not limit the ambit of the free use allowed in Section 12 of the Act, but grant additional concessions. They aim at striking a just balance between the reasonable demands of users and the property rights of owners of copyright protected works, by placing stringent restrictions on *free* copying but at the same time allowing the reprographic reproduction of extracts of protected works through a licensing scheme (Sub-regulation 2(2)), i.e. a scheme by which rights owners mandate a licensing body to authorise reproduction on their behalf. Licensing itself provides the balance between the needs of users and the rights of owners; users are accorded access to the information they require when they cannot afford to buy the publication or do not need to buy it, and owners receive financial compensation.

Much emphasis has, correctly, been placed on the fairness of the new regulations. Fairness, in our view, rests on reasonable access to the copyright material on the one hand, and just returns to the rights owner on the other. There have been demands favouring unlimited free access, denying the rights owner any returns at all. Accordingly, it is necessary to examine what level of free access may be deemed 'reasonable' and what sort of returns are 'just', and we shall address this conundrum repeatedly in the course of discussing the objections of the library and academic sectors to the draft document on the table.

In the context of the balance between needs and rights we find it difficult to comprehend some of the objections raised against the draft regulations. The main thrust of the objections is that South African students are, in the main, financially disadvantaged and, not being able to afford books and journals, should be allowed to copy them instead. It was also said that the restrictions on free photocopying result in the denial of access to information. Rights owners respond by pointing out that they have incurred costs in providing the information: in the case of authors, the time and mental labour spent writing, and in the case of publishers, editorial, production, printing and distribution costs. It is the intention of rights owners that access to the published works they have made available should be by buying those works, reading them in a library, photocopying them within the fair dealing limit allowed by the law, or by obtaining a licence, which offers access cheaply and provides equity. If access through reprographic reproduction was made free by law, there would very quickly be no locally-produced information, as publishers would go out of business and authors would find no local outlet for their works. Thus, while a librarian may say that stringent copyright protection will 'hamper and limit the free flow of information', rights owners say that, to the contrary, excessively lenient copyright law will stem the flow of information.

It was also said that while the proposed new regulations would suit the copyright régime of a so-called 'first world' country, they would not suit South Africa, where 'third world' conditions prevail, and that 'our copyright laws should surely contain copyright concessions'.

While aware of the 'very real problems of users in universities and other educational institutions' and of 'disadvantaged communities' one cannot agree to the expedience of stretching the rules quite so far to accommodate socio-economic considerations. South Africa is party to an international copyright commitment to which the revised copyright regulations are obliged to conform. And as a signatory to the Berne Convention, South

Africa shares this commitment with the majority of the world's nations, developed and less-developed. The protection of authors' and publishers' rights does not rest on the poverty or prosperity of users. Intellectual property is a global commodity, and in this context it is not legitimate for sentiment, however well-intentioned, to influence legislation unduly, for South Africa is bound to frame its national copyright legislation within given parameters. Surely the debate around the regulations is about achieving a balance *within* those parameters rather than by stretching the boundaries. Moreover, it is possible, and much fairer to all, to accommodate the concessions required by 'third-world conditions' through voluntarily negotiated tariffs. Put simply, users should have to pay to make multiple copies, but how *much* they should pay in a developing country where many students are financially constrained is up for negotiation.



## APPENDIX

# 3

## REVISION OF THE COPYRIGHT REGULATIONS<sup>119</sup>

APPENDIX 2 are all about the conflicting views of publishers and authors on the one hand, and universities and libraries on the other, regarding what provisions the Copyright Act should allow for reprographic reproduction. Appendix 4 deals with fair dealing and multiple copies respectively, while Appendix 3 is concerned with the revision of the regulations. It deals with the objections which were raised when the proposed draft revised regulations appeared in the Government Gazette for comment, and it presents for consideration a further draft which takes the majority of those objections into account.

The objections:

### Regulation 2

Two submissions request that, in sub-regulation 2(1)(a), the words 'provided the copying is not by means of a reprographic process' should be deleted, as this 'is impractical and excludes electronic media and provisions for distance education' and 'essentially prohibits any multiple copying'.

Sub-regulation 2(1)(a) was specifically *intended* to prohibit multiple copying, which is provided for in 2(1)(b), and offers educationists certainty that in addition they may make a copy by non-reprographic means. Reproduction for distance education is catered for in 2(1)(b). We submit that this particular objection stems from a mis-reading of sub-regulation 2(1)(a).

Sub-regulation 2(2)(b) has also been mis-read. Sub-regulation 2(2) provides that multiple copies of an extract from a literary work may be made by a reprographic process for the educational purpose of an educational institution, and 2(2)(b) limits the amount copied by virtue of 2(2) to no more than 1% of a work, or two pages, whichever is the greater, in any quarter. The objection is that terminology should be consistent, and that '1%' should be changed to a 'reasonable portion', 'reasonable portion' having been defined in regulation 1 as '10%'. But in the draft regulations the term 'reasonable portion' *applies only to library privileges*, and not classroom privileges. The term appears only twice, in subregulation 4(3) and in regulation 7 - and in both instances it refers to the amount a librarian may copy when an original is unobtainable for various reasons. The intention of 2(2)(b) was not to allow 10% to be copied in terms of 2(2).

It has unfortunately become noticeable that those who called for numerous sub-regulations to be deleted or altered, may have not considered the effect. The effect of changing 1% to 'reasonable portion' would be to permit such large-scale copying (one-tenth of a book could be copied for each member of a class) as would treat rights owners most *unreasonably*.

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<sup>119</sup> This Appendix was authored by Monica Seeber.

The mis-reading of sub-regulation 2(2)(b) brings to mind the polarisation of opinion, in the United Kingdom, between librarians and publishers, over the essential difference in British law between library privilege and fair dealing. Authors and publishers interpret fair dealing strictly and would regard as fair a single copy of up to one chapter of a book, or up to 5% of a book if several excerpts are copied.<sup>120</sup> The other view, held by librarians, is that almost all single copying of reasonable extracts, say, about 10% of a book, falls under fair dealing. This view is clouded by confusion with the library privileges of sections 37 – 41 of the Copyright, Designs and Patents Act 1988 which allow prescribed libraries to make copies for users who need them for research or private study and which specify the amounts which may be copied. It is these amounts which the library community claims may be copied under fair dealing, 'a point of view which begs the question: what is the purpose of providing special privileges for librarians?'<sup>121</sup>

Despite the difference of context, the two examples are comparable because both involve a confusion of library privileges with other privileges.

In objecting to sub-regulation 2(2)(b), one of the objectors says: 'Whereas the test for infringement contemplates a qualitative assessment, the quantitative threshold in this regulation appears to be inappropriate'. This would appear to be a confusion of the provisions of the Act with those of the regulations. The test for infringement, as far as the regulations are concerned, is firmly quantitative, because the quantity is clearly stated.

### Regulation 3

One of the objections stated that sub-regulation 3(1) – that copies made in terms of the regulations may not be used to create or replace or substitute anthologies, compilations or collective works – conflicts with sections 12(1) and 12(4) of the Act. We cannot see any such conflict. This sub-regulation is absolutely essential to prevent abuse of the privileges granted by regulation 2, since it is common practice in tertiary education institutions to compile 'coursepacks' consisting of material culled from various sources – books, journals and periodicals – which are intended to serve as additional texts. If the regulations allow course packs and other anthologies and compilations to be made *gratis*, authors and publishers of academic texts and other scholarly works will suffer unreasonable prejudice. If, however, they are made under licence, access is *reasonable* and rights owners receive just returns.

We might here consider briefly what level of returns might be deemed just since it is rather possible that rights owners and users will disagree on this point. Again, if the question is turned around it becomes obvious that for rights owners to receive nothing at all is patently unjust. Here, the collective administration of rights, as practised internationally, comes into its own, for the bilateral agreements between licensing bodies, or Reproduction Rights Organisations (RROs), cater for each RRO to apply local treatment when devising its tariff structure. Thus, the fee for a licence to photocopy in South Africa should be lower than, for example, in the United Kingdom or the United States. If it were not for such licensing bodies, the user seeking a licence to photocopy would be at the mercy of the rights owner, who is at liberty to charge whatever he wishes, just or not. It is precisely in the interests of justice – bearing in mind what the user might reasonably be expected to afford and the rights owner reasonably expected to accept - that sub-regulation 2(2)(d) prohibits any multiple copying at all when a licence is available in terms of a licensing scheme, which acts to protect users from the possibility of unfair treatment by rights owners abroad.

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<sup>120</sup> C Clark. *Photocopying From Books and Journals*. British Copyright Council, London 1996.

<sup>121</sup> E Barrow. 'Fair Dealing and the Texaco Decision: Implications for the UK.' In *Copyright World*, Issue 25, November 1992, pp. 16-24.

It is incorrect to state that sub-regulation 3(3) – which provides that an educational institution, teacher or student may not use copies made in terms of the regulations as a substitute for the purchase of published works – ‘places an unnecessary limitation on the concept of “fair dealing” and “fair practice” as set out in sections 12(1) and 12(4) of the Act’. In allowing concessions for multiple copying, it is essential for the regulations to prevent large-scale substitution for purchase; no such restriction exists in the Act, for implicit in ‘fair dealing’ and ‘fair practice’ is that they do not lead to such large-scale substitution and thus do not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the copyright owner.

#### Regulation 4

Sub-regulation 4(1)(b) provides that when a librarian makes a copy for a person who has requested it for private study, the person must make a declaration to the effect that the copy will not be used for any other purpose. While objectors to this provision find a written declaration ‘impractical’, ‘time-consuming’ and ‘onerous’, one cannot understand why it should be more onerous to accept a declaration than to make a photocopy. If, as one objection has it, ‘librarians do not have the capacity or staff to attend to these forms’ how is it, one might ask, that they do have the capacity to make numerous photocopies on request? The purpose of 4(1) is to allow the librarian to act for the person requesting the copy which, if he made it himself, he would be making under the provisions of Section 12(1)(a) of the Act, and the purpose of 4(1)(b) is to provide a procedure to ascertain the intention of the person requesting the copy.

There are numerous objections to sub-regulation 4(1)(c). This provides that where a librarian makes a copy of a whole article or part of one, or a whole published work, or part of one, for a person who has requested it (4(1)), the librarian must be satisfied that the requirements of the person requesting the copy are not for substantially the same material at substantially the same time and for substantially the same purpose as the requirements of any other person. The wording of this sub-regulation derives from United Kingdom legislation [section 40(2)(a) Copyright, Designs and Patents Act 1988, read with copyright regulation (librarian and archivist) 1989].

The restriction has been criticised on several grounds, including its ‘impracticality’; the inconvenience and burden placed on a librarian to ascertain whether a number of users wish to have copies made for them of the same material; the necessity of students doing assignments to have access to the same information; and the requirements of impecunious schoolchildren who rely on libraries for information for essays. It has been said that the restriction would ‘restrict the flow of information’, and that it would ‘affect inter-library loans and resource-sharing in consortia’.

Sub-regulation 4(1)(c) is intended to prevent abuse of the privilege introduced by 4(1) if, for instance, a class of a hundred students each requested a copy of a whole book. We do not believe anyone could argue that such an abuse would not prejudice the legitimate interests of the author and publisher, and find it surprising that librarians could rate the minor inconvenience to them higher than the potentially calamitous losses to authors and publishers if it were to be deleted. And we reject the assertion that preventing a librarian from copying the same work for a queue of students will restrict the flow of information. Those who interpret unrestricted access to information as unrestricted access to the property of others confuse the free flow of information with the flow of free information.

We therefore feel that it is somewhat selfish to seek for this sub-regulation to be deleted on the grounds that it is impractical or inconvenient without taking into account the effect

of its deletion, i.e. to allow coordinated and systematic copying by large numbers of pupils *under the library privileges*.

As for inter-library loans, the effect of 4(1)(c) is to limit 5(1). A library may supply another library with a copy to be supplied to a person requesting it for private use, but the library may not supply, say, fifty copies of substantially the same material at the same time and for the same purpose. It stands to reason that this sub-regulation must remain.

It is opportune at this stage to recall the principles of fairness and balance. Libraries are, one readily accepts, often short-staffed, and librarians are over-worked, and perhaps it is not fair to ask them to take on extra duties such as are envisaged in sub-regulation 4. But is it, on the other hand, fair to rights owners for a librarian to make fifty copies of a book, resulting in the loss of fifty sales?

### Regulations 5, 6 and 7

Regulations 5 and 6 permit libraries to supply photocopies to other libraries for strictly defined purposes, with the restrictions that not more than one copy may be made and supplied except in certain circumstances and that the library requesting the copy cannot easily obtain an original. Regulation 7 says in essence that if the copy was supplied because an original could not easily be obtained, the copy must be destroyed when one does become available. Written statements are required by the requesting library to attest to the *bona fide* nature of the requests.

The objection to these restrictions is that they are 'impractical' We do not understand why. Nor do we find it fair and balanced for libraries to freely circulate copies among themselves without taking the trouble to establish their *bona fides*. It is requested that regulation 7 be deleted. If it were, libraries would be permitted to hold photocopies in their collections indefinitely instead of purchasing the books. This would conflict with a normal exploitation of the work.

We have referred to the balance which the draft regulations are intended to provide, and trust that when a new draft is considered it will be remembered that the purpose of the regulations is to provide certain sectors of society with *concessions and privileges* in addition to the exemptions from protection provided by Section 12. They are the means by which rights owners are prepared to limit their property rights in the interests of the facilitation and promotion of education and of library services. The provisos and conditions attached to the concessions and privileges are not there to make librarians' lives intolerable or to deny students access to information, but to prevent abuse of the privileges granted therein. Unfortunately, educators, academics and librarians have become accustomed to the privileges they grant, and have grown to regard those privileges as rights, as a result of which the draft revised regulations are perceived as curtailing the *status quo*.

In conclusion it is appropriate to return to the origins of the current regulations, which derive from the United States *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals*. The history of this document in the United States is that, given a lack of agreement between the user communities and the copyright owners on the bright lines separating lawful from unlawful fair usage, the parties agreed in 1976 to a set of voluntary guidelines which, while having no force of law<sup>122</sup>, set out what may be copied by and for teachers in the classroom context.<sup>123</sup>

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<sup>122</sup> Though they were given judicial recognition in the Kinko's case and have, in the United States, been elevated to the level similar to that of interpretative regulations. Spalding, A D, 'Fair use of research and

The current regulations are a corrupted version of the American classroom guidelines, for while the latter are clearly set out, and require all multiple copying in the classroom to pass the tests of brevity, spontaneity and cumulative effect, the former are difficult to fathom and the tests of brevity and spontaneity are omitted. Moreover, the American classroom guidelines came into effect in 1976, before the United States joined the Berne Convention, and some international copyright authorities believe that their generous provisions – despite the injunction that copying may not be a substitute for the purchase of books or periodicals – go beyond what is allowed by Berne.<sup>124</sup> There were, and still are, good reasons to revise them.

A possible revision, based on those SAUVCA/CTP objections it was possible to address, is set out below, followed by an explanation of how this revision was arrived at.

## COPYRIGHT REGULATIONS

### 1. DEFINITIONS

- (1) In these regulations, unless the context otherwise indicates:
  - (a) “the Act” means the Copyright Act, 1978 (Act 98 of 1978);
  - (b) “archives repository” means an archives repository referred to in section 1 of the National Archives of South Africa Act, 1966 (Act 6 of 1966);
  - (c) “archivist” means the person who is responsible, for the time being, for the immediate care and control of a collection comprising an archive repository;
  - (d) “disabled reader” means a blind person, a person with severely impaired sight, a person unable to hold or handle books or to focus or move his or her eyes, or a person suffering from a perceptual handicap;
  - (e) “educational institution” means any institution providing general, further or higher education and training;
  - (f) “librarian” means the person, being a member of the library staff, who is responsible, for the time being, for the immediate care and control of a collection comprising a library;
  - (g) “library” means any organised collection of documents intended to store or convey information in any format and which is available for use by the public or a specific group for the purpose of reading, reference, research or study;
  - (h) “municipality” means a municipality as referred to in Chapter 7 of the Constitution of the Republic of South Africa 1996 (Act 108 of 1996);
  - (i) “reprographic process” means a process of making copies, including copies which are reduced or enlarged in scale, or involving the use of an appliance for making multiple copies, and includes, in relation to a work held in electronic form, any copying by electronic means, but does not include the making of a cinematograph film or sound recording;

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course packets in the classroom’. In *American Business Law Journal*, 1993.

<sup>123</sup> Lehman, B A, *The Conference on Fair Use*. Washington, U S Patent and Trademark Office 1996, p. 5.

<sup>124</sup> It should also be remembered that while the American Classroom Guidelines were agreed by representatives of publisher, author, educator and librarian bodies, the South African regulations of 1978 were imposed on rights owners without consultation.

- (j) “student” means any person enrolled or receiving instruction at an educational institution;
  - (k) “teacher” means any person giving instruction at an educational institution;
  - (l) “work” in relation to:
    - (i) an article in a periodical publication, means that article; and
    - (ii) a literary, musical or artistic work contained in a collection of such works means each literary, musical or artistic work so contained.
- (2) (a) A word or expression to which a meaning has been assigned in the Act bears that meaning.
- (b) A word or expression to which a meaning has been assigned in the Act and these regulations bears the meaning assigned to it in the Act supplemented by the meaning assigned to it in these regulations.

**CHAPTER 1**  
**REPRODUCTION REGULATIONS**  
 (Section 13)

***Permitted reproduction in educational institutions***

2. Insofar as reproduction of a work does not fall within the exceptions of Section 12 of the Act, reproduction of that work shall be permitted:
- (1) where a teacher or student makes one or more copies of a work by means other than a reprographic process in the course of instruction or of preparation for instruction;
  - (2) where a teacher or student makes one or more copies of a work by means of a reprographic process for the purpose of giving an assignment, communicating the questions and answers to students completing the assignment or taking the test or examination, or for the purpose of a student’s answering such questions;
  - (3) where a teacher or student makes one or more copies of an extract from a work by means of a reprographic process for the educational purposes of an educational institution provided that:
    - (a) copy of the whole work is not made;
    - (b) no more than five per cent of a work may be copied by virtue of this sub-regulation 2 (3) for any one discrete module or study programme;
    - (c) the number of copies made of an extract of a work by virtue of this sub-regulation 2(3) does not exceed one copy per student; and
    - (d) no licence is available authorizing such reprographic copying.
3. The right of reproduction in terms of regulation 2 shall not apply to works other than literary works except that no such limitation shall apply with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced in accordance with regulations 2(1), (2) and (3).

### ***Prohibitions on copies for use in educational institutions***

4. Notwithstanding the provisions contained in regulation 2, an educational institution, a teacher and a student may not:
  - (1) use copies made in terms of these regulations to create or replace or substitute anthologies, compilations or collective works;
  - (2) make copies in terms of these regulations of or from published works intended to be ephemeral, such as workbooks; and
  - (3) use copies made in terms of these regulations as a substitute for the purchase of published works, including books, publishers' reprints and periodicals.

### ***Permitted reproduction by libraries and archive depositories***

5. A librarian or archivist may make and supply one or more copies of the contents pages and précis of the contents of a book or an issue of a periodical as part of a current awareness programme.
6.
  - (1) A librarian or archivist may make and supply a copy of an article or part of an article contained in a periodical publication, or of the whole or part of a published work other than an article contained in a periodical publication, to a person who has requested such a copy, provided:
    - (a) the person satisfies the librarian or archivist, as the case may be, that he or she requires the copy for the purposes of research or private study and will not use it for any other purpose;
    - (b) the librarian or archivist is satisfied that the requirements of the person requesting the copy are not for substantially the same material at substantially the same time and for substantially the same purpose as the requirements of any other person.
  - (2) Sub-regulation 6(1) shall not apply to a request for a copy of the whole of a work (other than an article contained in a periodical publication), or to a copy of a part of such a work that contains more than ten percent of a work, or one chapter of a work in the case where a work is divided into chapters, whichever is the greater, unless the librarian or archivist is, after reasonable investigation, satisfied that the work (not being a second hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.
7.
  - (1) A librarian or archivist may make and supply to another library or archive repository a copy of an article, or part of an article, contained in a periodical publication, or the whole or part of a published work other than an article contained in a periodical publication:
    - (a) for the purpose of including the copy in the collection of the other library or archive repository; or
    - (b) for the purpose of supplying the copy to a person who has made a request for the copy under sub-regulation 6(1).
  - (2) The provisions of sub-regulation 7(1) shall not apply:
    - (a) where a copy of the same article or other work or of the same part of the article or other work, as the case may be, has previously been supplied under sub-regulation 7(1) for the purpose of inclusion in the collection of the other library or archive repository, unless the librarian of the other library or archive repository, as the case may be, furnishes a written declaration setting out the particulars of the request, including the purpose for which the request is made, and stating that the copy

previously supplied has been lost, destroyed or damaged, as the case may be; and

- (b) unless the librarian or archivist requiring the copy furnishes, in his or her written declaration, a statement to the effect that, after reasonable investigation he or she is satisfied that the work (not being a second hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.
8. (1) A librarian or archivist may make a copy of any work that forms part of the collection of the library or archive repository, as the case may be:
- (a) in order to preserve or replace that work by placing the copy in the collection of the library or archive repository, as the case may be, in addition to or in place of it, or
  - (b) in order to replace in the collection of another library or archive repository a work which is deteriorating or has been lost, stolen, destroyed or damaged.
- (2) Sub-regulation 8(1)(a) shall not apply unless the librarian or archivist, as the case may be, has, after reasonable investigation, made a written declaration stating that he or she is satisfied that the work (not being a second hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.
- (3) Sub-regulation 8(1)(b) shall not apply unless the librarian or archivist of the other library or archive repository, as the case may be, furnishes a written declaration to the effect that the work to be replaced is deteriorating or has been lost, stolen, destroyed or damaged, and that he or she is satisfied, after reasonable investigation, that the work (not being a second hand copy) cannot be obtained within a reasonable time at an ordinary commercial price, and that if a copy is supplied it will only be used to fulfil the purpose set out in sub-regulation 8(1)(b).
9. If the collection of a library or archive repository contains a copy, made by a reprographic process, of the whole or of more than ten percent of a work, or of more than one chapter of a work in the case where the work is divided into chapters, whichever is the greater, and the copy was made in terms of these regulations because the work (not being a second hand copy) could not be obtained within a reasonable time and at an ordinary commercial price, and subsequently the work concerned can be obtained within a reasonable time and at an ordinary commercial price, the library or archive repository, as the case may be, will, within a reasonable time of the availability of the work concerned coming to its attention, destroy such copy.
10. The right of reproduction in terms of these regulations shall not apply to works other than literary works, except that no such limitation shall apply with respect to rights under regulation 8.

### ***Permitted reproduction for disabled readers***

11. (1) Any person may make a single copy or sound recording of a published literary, musical or artistic work in a format that is more appropriate to meet the needs of disabled readers than the format in which the work was published.
- (2) Sub-regulation 11(1) shall not apply where a copy or sound recording of the work is commercially available in a format that would accommodate the needs of a disabled reader.
- (3) If it is necessary to make an intermediate copy of a work in order to make a copy or sound recording in terms of sub-regulation 11(1), such intermediate copy must be destroyed as soon as it is no longer needed.
- (4) A person who makes a copy or sound recording under sub-regulation 11(1) may not, without the express consent of the owner of copyright, use the copy or sound recording for any purpose other than that for which the making of the copy or sound recording is permitted in terms of sub-regulation 11(1).

### ***Reproduction of building plans by a municipality***

12. The person in charge of a municipality may make and supply a copy of a building plan in respect of which the original or a reproduction is lodged for purposes of record at an office of that municipality, if the owner of land upon which a building has been erected in accordance with that plan requires copies of the plan or any portion thereof for the purpose of making additions or alterations to such building.

### ***Exemptions and savings***

13. Nothing contained in these regulations:
  - (1) shall be construed as imposing any liability for copyright infringement upon a library or archive repository or its employees for the unsupervised use of reproducing equipment located on its premises, provided that a copyright warning in terms of regulation 14 is prominently displayed on or in the immediate vicinity of such equipment;
  - (2) shall absolve any person who uses such reproducing equipment or who requests a copy under regulation 6 from liability for copyright infringement for any such act, or the use of any such copy, if it exceeds the extent of the copying permitted under the Act or these regulations; and
  - (3) shall in any way affect any contractual obligations assumed at any time by the library or archive repository when it obtained a copy of a work for its collection.
14. (1) A warning of copyright shall consist of a verbatim production of the notice in this sub-regulation in such size and form and displayed in such a manner as to conform to sub-regulation 14(2). Copyright warnings shall be displayed at the place where orders for copies are accepted by libraries and archive repositories and shall be incorporated in all forms supplied by libraries and archive depositories and used by their subscribers or the general public for ordering copies, and where unsupervised equipment is located.

### **COPYRIGHT WARNING**

**The Copyright Act, 1978, governs the making of photocopies or other reproductions of copyrighted material. Under the provisions of the Act libraries and archive repositories are authorised to supply photocopies or other reproductions. One of these provisions is that the photocopy or reproduction is not to be used for any purpose**

**other than private study, scholarship or research or personal or private use.**

**If a user makes a request for, or later uses, a photocopy or reproduction for purposes not permitted by the Act, that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its opinion, fulfilment of the order might involve violation of the Act.**

- (2) The copyright warning required to be displayed in terms of sub-regulation 14(1) shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such a manner and position as to be clearly visible and comprehensible to a casual observer in the immediate vicinity of the place where orders are accepted or where unsupervised equipment is located.
- (3) The copyright warning required to be incorporated in order forms in terms of sub-regulation 14(1) shall be printed within a box located prominently on the order form itself, either on the face of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than 8 points. The notice shall be printed in such a manner as to be clearly legible, comprehensible and readily apparent to a casual reader of the form.

[NO RECOMMENDATION IS MADE IN RESPECT OF ANY OTHER CHAPTER OF THE COPYRIGHT REGULATIONS]

## **NEW PROPOSED DRAFT REGULATIONS – AN EXPLANATION**

Note: The regulations currently in force are referred to as the “current regulations”; the revised regulations as published in the Government Gazette of 7 August 1998 are referred to as the “draft regulations” and the new proposed draft regulations as set out herein are referred to as the “proposed draft regulations”.

### **DEFINITIONS**

Changes to definitions:

- (1)(d) “handicapped reader” has been changed to “disabled reader”. Members of the SAUVCA/CTP Copyright Task Team suggested numerous variants of this definition, some quite cumbersome, but “disabled reader” seems to be the most apt of the suggestions.
- (e) “educational institution” has been more simply defined as “any institution providing general, further or higher education and training”. This is in line, both with the desire for simplicity, and with the suggestion of the SAUVCA/CTP Submission.
- (f) The definition of “librarian” has been extended to include “member of library staff” as requested by the Submission.
- (g) The definition of “library” has been simplified in line with the Submission. This is a more generic definition, and includes all types of libraries.

Two definitions have been deleted:

Definition (i) of the draft regulations (“quarter”): Educationists in the Task Team objected to the definition of a discrete part of a course in terms of its **duration**, and requested that the definition should take account of the development towards open learning, or a system dependent on less-fixed periods of study. Since the expression “quarter” is used only once in the draft regulations, in sub-regulation (2)(b), sub-regulation 2(3)(b) of the proposed draft regulations itself defines the ‘block’ beyond which further copying is disallowed.

Definition (j) of the draft regulations (“reasonable portion”): This definition caused considerable confusion among educationists and librarians. In the lengthy document entitled *SAUVCA/CTP Copyright Task Team’s Comments on the Draft Regulations Published in the Government Gazette of 7 August 1998* (the Submission) numerous contributors misconstrued “reasonable portion” as referring to permitted reproduction in educational institutions whereas in fact it refers to permitted reproduction by libraries and archive repositories, and they consequently called for sub-regulation 2(2)(b) of the draft regulations to be changed from one percent to ten percent. There is no need to define “reasonable portion” at all if, in the sub-regulations which refer to it if the amount itself is inserted.

#### *Permitted Reproduction in Educational Institutions*

As suggested by the Submission, the introductory paragraph of this regulation now refers back to Section 12 of the Act.

Regulation 2 (1): this now reads “where a teacher or student makes one or more copies of a work”. The Submission says that sub-regulation 2(1)(b) contradicts 2(1)(a). This is not strictly correct, but the point the Submission is apparently reaching for is that these two sub-regulations should be taken together to make sense. 2(1) now allows multiple reproduction **not** by a reprographic process and 2(2) now allows multiple reproduction **by** a reprographic process in specific circumstances - assignments, tests and examinations – in which multiple copies are by necessity required, and both sub-regulations therefore refer to the same introductory sentence, i.e. **one or more copies**. Sub-regulation 2(1)(b) in the draft regulations now becomes sub-regulation 2(2) in the proposed draft regulations, and 2(2) becomes 2(3). The purpose is to provide complete clarity with respect to the three instances in which reproduction is permitted in educational institutions.

Another change to sub-regulation 2(2) is that “person” has been replaced by “teacher or student”. Not only does this change make 2(2) concordant with 2(1) but, since regulation 2 deals with reproduction in educational institutions and not in libraries, it is logical to restrict the acts of copying permitted by the regulation to teachers or students.

2(2) The word “literary” has been removed from this sub-regulation. The new regulation 3 makes it clear beyond doubt that only literary works are referred to, but that where pictorial or graphic works appear as diagrams, illustrations etc within the body of a text, they are permitted. This new regulation 3, taken from sub-regulation 5(2) of the current regulations, is as a result of a very sensible intervention from the University of Pretoria.

2(2)(b) “Quarter” has been replaced by “any one discrete module or study programme” for the reasons outlined above.

In sub-regulation 2(2)(b), the amount which may be copied has been increased from one percent or 2 pages, to five per cent. It should be noted that 5% may, however, only be copied **if no licence is available** (2(2)(d)). Originally, “in terms of a licensing scheme” caused a lot of confusion. It was assumed to mean “in terms of a *blanket* licensing scheme”, whereas the original drafters of the proposed new regulations had merely intended it to mean any kind of a licence, transactional or blanket. All confusion should fall away if reference to a “scheme” is removed.

4(2) The words “in terms of these regulations” have been added, so that the sub-regulation cannot be misconstrued as impinging on the rights granted in Section 12(1)(a) of the Act. Further the word “published” has been added, and only workbooks have been specified as excluded from the provisions of regulation 2. This is in line with the Submission’s comment that it is common practice for students to work through old exam papers.

Sub-regulation 3(4) of the draft regulations has been omitted. It has given rise to justifiable concerns about the meaning of “term” in the context of the modularisation of tertiary education currently in development.

#### *Permitted Reproduction by Libraries and Archive Repositories*

A new regulation 5 has been inserted. The Submission has requested this concession and it appears to be a very reasonable one which will help educators and librarians without prejudicing rights owners.

Sub-regulation 4 (1)(b) of the draft regulations has been omitted. In omitting it we have taken into account the Submission’s view that a simple order form should suffice and, since the order form bears the copyright warning as set out in regulation 14, we feel that a further written declaration - even though we do not agree that it would place an undue and impractical obligation on the librarian - would serve no useful purpose.

Sub-regulation 4(2) of the draft regulations has also been omitted. We agree with and accept the Submission’s argument that to check on the precise subject matter of each article requires technical knowledge which the librarian may lack, and that it would place excessive responsibility on the librarian. The Submission is also correct in that this sub-regulation is covered by 4(3) of the draft regulations (6(2) of the proposed draft regulations).

New sub-regulation 6(2) differs slightly from its counterpart in the draft regulations 4(3). Instead of specifying that no more than a reasonable portion may be made by the librarian or archivist, the sub-regulation stipulates how much may be made - ten per cent or one chapter, whichever is the greater. This removes all doubt as to the meaning of “reasonable portion”, and “lesser” has been changed to “greater”. We agree in this instance as well, that a declaration by the librarian or archivist is of no more practical use than his or her satisfaction that the work cannot be obtained within a reasonable time at an ordinary commercial price, and have therefore scrapped the declaration requirement. Finally, we agree with the Submission that the use of the word “copy” in the second last line of 4(3) is ambiguous, and now, in 6(2) refer only to “work”.

Since a declaration is no longer required by the proposed draft regulations, sub-regulation 4(4) of the draft regulations falls away.

7(2)(a) and(b) in the proposed draft regulations: In 7(2)(a) the “declaration” is now a “written declaration”, and in (b) the “written statement” has become a “written declaration”, which makes it obvious that what is required from the librarian requesting

the copy is a written declaration stating why the request is being made, and that an attempt has been made, and has failed, to obtain an original of the work. The Submission indicated confusion at the seemingly interchangeable use of two terms “declaration” and “statement” and we have therefore standardised terminology for the sake of simplicity and ease of understanding. To answer the Submission’s question ‘to whom will the declaration be addressed?’ we have used the phrase “furnishes a written declaration” which indicates that the declaration will be addressed to the librarian or archivist supplying the copy. Again, we have noted the apparent contradictions usefully pointed out by the Submission, and attempted to put them right.

In 6(2), 7(2)(b), 8(2), 8(3) and 9 we have acted on the concern of the Submission that the word “copy” is potentially confusing, and where “copy” is intended to indicate an original copy, i.e. the book itself, have used the term “work”.

Sub-regulations 8(2) and 8(3) now refer to a “written declaration”, again to obviate any confusion between a statement and a declaration.

Regulation 9, which corresponds with regulation 7 in the draft regulations, omits the term “reasonable portion” and, instead, sets out the amount of the portion - ten percent or one chapter, whichever is the greater.

Regulation 11, which corresponds with regulation 9 in the draft regulations, uses the term “disabled reader” instead of “handicapped reader”.

The Submission is correct in saying that the Copyright Warning should include the purpose of research, and the words “scholarship and research” have been added.



## APPENDIX

# 4

## FAIR DEALING AND LITERARY WORKS

South Africa, as a signatory to the Berne Convention<sup>125</sup>, is bound to frame its national copyright legislation within certain parameters and to abide by the provisions of Article 9(1) according to which the author has the exclusive right to authorise reproduction of his or her work *in any manner or form*.

However, recognising the need for special provisions to take account of the needs of the public and especially of education, Article 9(2) of the Berne Convention allows member states to permit reproduction in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the author. Thus, while copyright law reserves to the copyright owner the exclusive right to undertake certain acts in regard to his or her work, it recognises that certain uses of copyright-protected works lie outside the owner's control, and it consequently provides for exceptions to, or limitations on, the exclusive right. While many users regard these exceptions or limitations as their rights, they are technically exemptions from liability or, in other words, defences to what would otherwise be acts of infringement.

In accordance with Article 9(2), the South African Copyright Act, Act No 98 of 1978, sets out, in Section 12, general exceptions from the protection of literary works. Section 12(1)(a) states that fair dealing with a literary work is permissible for the purpose of research or private study or for the personal or private use of the person using the work.

Thus in a loose way, since it is not defined with exactitude and there are no set guidelines with universal applicability, fair dealing permits users to copy, for their own study or research or private use, as much of the work as is necessary to meet their reasonable needs, without seeking permission from the copyright owner or paying compensation.

Provisions similar to that of Section 12 (1)(a) are contained in the Copyright Acts of other countries including:

The United Kingdom, where section 29 of the Act stipulates that "Fair dealing with a literary, dramatic or artistic work for the purposes of research or private study does not infringe any copyright in the work..."<sup>126</sup>

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<sup>125</sup> South Africa is not in fact a signatory to the Paris Act 1971 of the Berne Convention. However, it is a signatory to the TRIPS Agreement, by virtue of which it is bound to abide by articles 1-20 of the Berne Convention, including those added by the Paris Act.

<sup>126</sup> S 29(3) explicitly provides for a person other than the researcher or student himself to make the copy. However, it is also explicit that only one copy may be made, and that it is not fair dealing if the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

Australia, where section 40 of the Act states that fair dealing for the purposes of research or study is not an infringement of copyright. In determining whether dealing with a work by copying it constitutes a fair dealing regard must be had to the purpose and character of the dealing, the nature of the work, the possibility of obtaining the work within a reasonable time and at an ordinary commercial price, the effect of the dealing upon the potential market for the work, and (when only part of the work is copied) the amount and substantiality of the part copied in relation to the whole.<sup>127</sup>

Fair dealing is not quantified in any law, and since there is no bright line separating the lawful from the unlawful, voluntary guidelines have been developed in some countries. In Norway 15% of a complete work or 30 pages, whichever is the lesser, is considered fair for private use. In Britain the Publishers' Association, the Writers' Guild and the Society of Authors accept, as within the bounds of fair dealing for research or private study, one copy of a maximum of one chapter in a book, or 5% of a complete work.<sup>128</sup>

On the other hand, in the United States, 'fair use' is by law determined qualitatively as well as quantitatively. Section 107 of the US Copyright Act 1976 states that it depends on four factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the whole; the effect of the use on the potential market for the work.

The American 'fair use' should always, therefore, be distinguished from 'fair dealing. In *The Modern Law of Copyright and Designs* Laddie, Prescott and Vitoria make the following reference to this distinction:

*'Fair use should be distinguished from the statutory defences based on fair dealing; the latter are conceptually distinct since they pre-suppose that a substantial part has been taken.'*

Moreover, fair dealing, sets out a 'limited and specified catalogue of circumstances within which the defence may apply'<sup>129</sup>. 'In other words, if a certain act does not fit one of the pigeon-hole fair dealing exceptions (research, private study, personal and private use) no defence is available, whereas in the United States the Act 'contains an open-ended catalogue' - what has been called an 'omnibus' approach.<sup>130</sup> Consequently, while in the United States commercial use may qualify as fair provided it conforms to the four factors, in South Africa commercial use is excluded. Fair use, an open-ended legal doctrine, is thus an altogether broader concept<sup>131</sup> than fair dealing, which is constrained by reference to the specific instances in which it applies.

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<sup>127</sup> The Australian Act regards the copying of the whole of an article in a periodical publication as a fair dealing. As far as books are concerned, a reasonable portion may be copied, and 'reasonable portion' is defined as not more than 10% or one chapter, whichever is the greater. This provision has been misinterpreted to mean that multiple copies of an entire journal article or 10% of a book may be copied in Australian law whereas it applies only to the single copy for personal or private use or personal scholarship or research. In effect, the Australian fair dealing provision is stricter than the South African, where the amount of the fair dealing has not been quantified.

<sup>128</sup> Thus, in the United Kingdom as well, there exists some definition of the extent of fair dealing, although, unlike in Australia, it has no statutory force.

<sup>129</sup> Carlo Scollo Lavizzari, 'Is fair for the principle fair for the agent?', unpublished article.

<sup>130</sup> *Ibid.*

<sup>131</sup> It would be altogether a mistake for a user to presume that use would qualify as fair so long as he had paid lip service to the four factors, as they are merely the starting point for a court's deliberations on the matter. While multiple copies for educational purposes are capable of qualifying as fair use (whereas they are not under fair dealing), they also have to pass tests such as their effect on the potential market for the work and one aspect a court would consider is whether the copies appeal to the same audience as the original. If they do, the dealing would not be fair.

In May 2000, the Department of Trade and industry published, in the Government Gazette, certain proposed amendments to the Copyright Act, including one to Section 12 (1)(a). Rights' owners approved of the proposed amendment as, *inter alia*, it made unambiguous that the act of copying must be performed by the person requiring the copies. The Task Team set up by the South African Universities' Vice-Chancellors' Association (SAUVCA) to deal with impending changes to the Copyright Act, on the other hand, objected on the grounds that the change would 'virtually cancel all provisions allowed for reproduction of works for educational purposes in the current legislation ...' The proposed amendment was subsequently withdrawn – presumably, in the absence of any evidence to the contrary, that the DTI found validity in this objection.

This commentary will now examine the validity of the SAUVCA's allegation. In the current legislation, reproduction for educational purposes, without the authorisation of the copyright owner, is allowed in three places, Section 12(1)(a), Section 12(4) and the regulations promulgated in terms of Section 13. No reference to the regulations was made in the proposed amendments to the Act, thus their provisions are not relevant to the allegation. Section 12(4) permits reproduction by way of illustration in a publication for teaching, and would have been unaffected by the proposed amendments. Section 12(4) is therefore also irrelevant to the allegation.

Thus, the assertion that the proposed amendments 'virtually cancel all provisions allowed for reproduction of works for educational purposes in the current legislation' can only be based on one premise: that such provisions *are currently granted* in Section 12(1)(a).

Current Section 12(1)(a) states that:

(1) *Copyright shall not be infringed by any fair dealing with a literary or musical work -*  
(a) *for the purposes of research or private study by, or the personal or private use of,*  
*the person using the work;*

The section offers no further explanation of 'fair dealing'. However, Section 12(3), dealing with quotations, says that the quotation 'shall be compatible with fair practice, and that the extent thereof shall be justified by the purpose'. This provides a guide to the effect that fairness might rest on not taking more from a work than is necessary to satisfy the purpose for which the copy is made.

Section 12(1)(a) does not explicitly say that only a single copy may be made under fair dealing. It is nonetheless impossible to escape the conclusion that a single copy is contemplated, since the dealing may only be deemed fair if it is for the purposes of research or private study by, or the personal and private use of, the person (singular) using the work. And why would the person using the work seek to make more than a single copy for his own private and personal use, his research or private study? However, if he did so seek, and had a good reason, then he would be justified in making more than one copy, and the dealing might still be fair.

The next question to consider is whether Section 12(1)(a) permits the making of the single copy by a person other than the person using the work. In other words, does the Act insist that the person using the work makes the copy himself, or does it contemplate his requesting another person to make it on his behalf? Does 'using the work' mean using it in the sense of studying from it, or obtaining information from it; or does 'using' refer to the act of using it to make a photocopy? The narrow interpretation would insist that the person using the work and the person making the copy should be

one and the same, while the broader interpretation would hold that the intended meaning of 'use' here is for the purpose of study and personal and private use of a person, but that person need not necessarily be the one making the copy.<sup>132</sup>

If one adopts the broader view and concedes that the person using the work is not excluded by Section 12(1)(a) from having his copy made by another person,<sup>133</sup> the next thing to consider is whether that other person is restricted to making a single copy. It is logical to assume that the person making the copy is restricted, in exactly the same way as the person using the work, to a single copy - and that only in unusual circumstances, justified by the personal and private use, research or private study of the person requesting the copy, may more than a single copy be made.

The scope of the fair dealing defence, as expressed in Section 12(1)(a) is limited. '... although it is not confined in terms to activities performed by the researcher or student himself, it does not justify the making of multiple copies by a third party for use by a plurality of such persons.'<sup>134</sup>

The proposed new Section 12(1)(a) is as follows:

*(1) Copyright shall not be infringed by doing a restricted act in respect of a literary or musical work if*                      *doing such act is compatible with fair practice and is*  
*(a) for the purposes of research or private study by, or the personal and private use of, the person,*                      *being a natural person, doing such act;*

In what way or ways does this purport to change the current situation? The use of the term 'restricted act' (newly-defined as 'any act in respect of a work which falls within the exclusive rights in the copyright comprised in that work') reiterates the exclusive right of the author to authorise the reproduction of his work 'in any manner or form' (Article 9(1) of the Berne Convention), and is thus in line with Articles 2.1 and 9.1 of the TRIPS Agreement. The term 'fair dealing' has been replaced by 'fair practice'. This renders Section 12(1) concordant with sections 12(3) and 12 (4).

The person making the copy is now specified to be a 'natural person', rather than a juristic person. The legal effect of this specification is that an institution may not rely on the fair dealing (now fair practice) defence. However, the **practical** effect of this specification is merely that the student has to make the copy for himself, and not get the institution to make it on his behalf. One consequence of the proposed amendment would be to bring South African copyright law closer to British in this respect by achieving a similar result in a different way. The United Kingdom Copyright, Designs and Patents Act 1988 unambiguously makes the fair dealing defence available to a person other than the researcher or student himself (section 29(3)), but also unambiguously places a restriction on multiple copies of the same material (sections 29(3) (a) and (b)). The proposed amendment to Section 12(1) of the South African Act

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<sup>132</sup> Common sense, moreover, dictates that the use of the present tense ('using') is intended to mean that the fair dealing and the use are simultaneous events. Had the legislator intended to allow a third party to perform the act, surely it would have used the future tense ('the person who *will* use the work'). This point was also made by Carlo Scollo Lavizzari in his interesting and relevant article.

<sup>133</sup> A further argument made by the opposition to the requirement that the person making the copy be a natural person is that under the South African law of agency (which has not been expressly excluded in the Copyright Act) a person may authorise another, natural or juristic, person to do an act on his or her behalf. To what extent would the defence of a person making a reproduction of a work for use by a third party hold up? There is no South African case law to guide one here, but common sense dictates that if the fair dealing defence was meant to be available to a third party acting as the agent of the person requiring the copy, then why were regulations enacted expressly providing exemptions in the cases of libraries and educational institutions?

<sup>134</sup> Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*.

does the opposite: it does not explicitly restrict the number of copies to a single copy but, by restricting the person making the copy to a natural person, does so implicitly. In practice, neither British nor South African law will permit an institution to rely on the fair dealing defence in the case where it has made a number of copies available to its students. However, since the **current** South African Section 12(1) does not permit it either, the proposed amendment is not more restrictive to the education sector than the present law.

It is therefore surprising that any respected academic commentator could have supported a submission, as some did, stating that if the proposal was accepted no educational institution would be able to make an unauthorised copy on behalf of a student and that such a situation would represent a 'dramatic' departure from the current position in that it denies educational institutions the possibility of relying on the defence of fair dealing.<sup>135</sup> It begs the question whether educational institutions are relying on *current* Section 12 (1)(a) to make unauthorised copies on behalf of students. Similarly, any insinuation that Section 12 (1)(a) currently allows unrestricted copying calls into question the whole purpose of the section. The purpose of Section 12(1)(a) is to place a justifiable limitation on the exclusive right of the author, granted in section 6(a), in the interests of education. Article 9(2) of the Berne Convention concedes that member countries may limit the exclusive right in 'certain special cases', provided that they do not 'conflict with a normal exploitation of the work' or 'unreasonably prejudice the legitimate interests of the author'. The general exceptions from the protection of literary and musical works, as set out in Section 12 of the Copyright Act, constitute those special cases. The purpose of fair dealing is to maintain a delicate balance between the exclusive right of the author and the needs of education, which would undeniably be prejudiced if the author had a total monopoly. Any interpretation of the current Section 12(1)(a) which admits of multiple copying by an institution would be an interpretation disregarding the delicate balance, for the author would undeniably be prejudiced if an institution were permitted, under the fair dealing principle, to make multiple copies, without permission or payment, for its students.

Another question arises when one is considering whether current Section 12(1)(a) is intended to grant to institutions the fair dealing defence in cases where they are making multiple copies for their students, and that is the purpose of the regulations promulgated under Section 13. Section 13 states that 'in addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation ...' It is certain, then, that the regulations are intended to provide *additional* instances to those in the Act itself in which reproduction is permitted, and not to curb them. But the regulations do *not* permit unrestricted copying in a library or educational institution. On the contrary, the reproduction or distribution of a single copy in a library is limited to the 'isolated and unrelated reproduction of a single copy of the same material on separate occasions' (regulation 5(1)), and the making of multiple copies for classroom use, limited by the so-called 'cumulative effect', is restricted to the provisions of regulations 7, 8 and 9.

The conclusion reached in the light of the above arguments can only, therefore, be that the proposed amendment to Section 12 (1)(a) makes no substantive changes to

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<sup>135</sup> One of the arguments raised by an academic institution in defence of third-party copying under fair dealing is that South African common law admits of the principle of agency; in other words a person may instruct another person to act as his agent in carrying out certain actions. It is difficult, however, to see how the law of agency might apply to a university's making copies on behalf of its students, since the legal relationship between the student and the university is not that of an agency. But even if the making of one copy by a university for a student might slip through the fair dealing net under the guise of 'agency', one fails to see how multiple copies, resulting in economic prejudice to the rights' owner, could ever be considered fair.

current provisions and that opposition to it based on the allegation that it 'virtually cancel all provisions allowed for reproduction of works for educational purposes in the current legislation' is misguided. The proposed amendment would, rather, have provided useful clarification without altering the purpose of the law, and publishers look forward to seeing it re-instated.

In a commentary referred to in some detail below, Dr Owen Dean has the following to say about whether or not Section 12 (1)(a) refers to a natural or a juristic person:

'There is a substantial body of opinion, if not the preponderance of legal opinion, that holds the view that the reference to "person" in existing Section 12 (1)(a) of the Copyright Act must be interpreted as a reference to a "natural person" and not also to a juristic person. There are other instances in the Copyright Act where the word "person" is clearly used in a context which can only refer to a natural person.'

Among the academic institutions which opposed the amendment, those which objected most strongly, and with reason, were the distance learning institutions which need to make photocopies of articles from learned journals and of extracts from books available to students at distant locations, often in quite remote rural areas where access to the original works is limited. This practice is as unlawful under current Section 12 (1)(a) as it would have been under the new section. That some provision is made for such students, who do not have access to the books and journals, in order to make their own copies when required under fair dealing, is a public good that rights' owners might be able to concede. The obvious solution is for such copies to be made under licence, but this would mean that distance-learning students would be placed at a disadvantage compared to students in a contact teaching environment and with access to a library. With respect, however, placing unsustainable interpretations on Section 12 (1)(a) in order to service such students is not the right way to go about it. It would be preferable to amend the Section 13 regulations in order to introduce a concession in this respect.

In response to the proposed amendments to the Act which the SAUVCA found unacceptable, its Intellectual Property Committee drafted an alternative set of amendments to Section 12 (1) which were presented to, and roundly rejected by, the Publishers' Association of South Africa (PASA). The SAUVCA's proposals were examined and analysed by Dr Owen Dean, whose comments are incorporated herein. Dr Dean termed them 'sectarian, one-sided and simplistic' since they 'overlook the fact that the Copyright Act protects nine different categories of works, ranging from literary works to programme-carrying signals and computer programmes, and not only literary works and published editions, and by and large its provisions must apply equally to all these divergent and heterogeneous classes of works.'<sup>136</sup> Moreover, as Dr Dean points out, they would result in the failure on the part of South Africa to meet the minimum requirements of the Berne Convention and the TRIPS Agreement and would 'bring about a situation where South Africa would be in breach of its international obligations and thus be liable to action being taken by other member countries, and international organisations, in respect of such breaches.'<sup>137</sup>

It should be borne in mind that Section 12 of the Act sets out certain specific cases in which exceptions to the author's exclusive right may, in terms of article 9(2) of Berne, be admitted. Multiple copying in an educational setting is not one of those certain cases, and it may not therefore fall under Section 12 but should, instead, be dealt with in the s13 regulations, the purpose of which is to offer additional concessions for

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<sup>136</sup> Dean, O H. 'Comments on the suggested amendments to the Copyright Act of 1978 proposed by SAUVCA/CTP', unpublished commentary, 22 August 2001. Page 1.

<sup>137</sup> Dean, *op cit*, Page 2.

educational and library uses. Even so, the regulations may not introduce any provisions falling outside the parameters imposed by article 9(2) of Berne, repeated in the words of Section 13 itself. In other words, even if the SAUVCA's proposals were to find a place in the regulations they would have to be 'tested against the requirement that they are not unreasonably prejudicial to the legitimate interests of the owner of the copyright in relevant works and should not be in conflict with the normal exploitation of the works in question. Meeting this test will require an analysis and a survey of the circumstances of the South African market in educational books and other works.'<sup>138</sup> It is submitted that such a survey as suggested by Dean would immediately and unequivocally demonstrate that permitting multiple copies to be made in educational institutions would annihilate local academic and educational publishing and cripple the South African publishing industry.

Dean has acutely pointed out that although the benefits to education which would be brought about by permitting such multiple copying would be substantial, they would upset the balance which copyright law aims to bring about between the needs of society and the rights of authors and publishers to derive economic benefit from their works. 'The proposal appears to be based on the premise that the needs and wants of education are all-conquering but this approach is in conflict with that of the Berne Convention, the TRIPS Agreement and the South African Copyright Act.'<sup>139</sup>

To return to the statutory defence of fair dealing, it is clear that a court will apply a restrictive interpretation based on the facts and circumstances of the individual case. Although it does not apply clearly defined limits to the acts of the researcher or student himself, there is nothing in Section 12 (1)(a) which could reasonably be interpreted as justifying the making of multiple copies by a third party for the use of an amorphous body of students.

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<sup>138</sup> Dean, *op cit*, Page 6.

<sup>139</sup> Dean, *op cit*, Page 7.

## APPENDIX

# 5

## ELECTRONIC COPYRIGHT – AN OPINION FROM BUYS INCORPORATED ATTORNEYS

### 1. INTRODUCTION

The use of electronic communication technology such as e-mail and the Internet is putting strain on traditional copyright issues. The problem has been recognised by the international community and in 1996 the World Intellectual Property Organisation (WIPO) initiated the WIPO Copyright Treaty (WCT) in an effort to address digital copyright issues. Although South Africa signed the treaty, no steps have been taken to introduce it into local copyright legislation. Both the USA and the EU have addressed digital copyright in their legislation, as detailed in the WCT.

Download the WCT from: <http://www.wipo.int/clea/docs/en/wo/wo033en.htm>

Local copyright stakeholders, such as book publishers, newspapers, magazines, printers, distributors, authors and web site owners have to rely on a copyright act that is outdated. The current status leaves rightholders unprotected and promotes copyright infringement.

### 2. ELECTRONIC COPYRIGHT ISSUES

The following electronic (or digital) copyright issues needs to be addressed by the legislator or the courts as a matter of extreme urgency:

#### 2.1 *The introduction of the WCT into South African copyright law.*

Seven years have passed since South Africa signed the WCT and the following issues needs to be incorporated and addressed in an amendment of the 1978 Copyright Act or in a new electronic copyright act:

- Fair dealing in the electronic environment;
- Reproduction right;
- Communications to the public right;
- Obligations concerning technological measures;
- Copyright management;
- Moral rights; and
- International law enforcement in cases of electronic copyright infringement.

The abovementioned issues are comprehensively detailed in the PASA submission to Department of Communications, attached hereto as Annexure A.

## 2.2 ***Deep linking from one web site to another***

Deep linking refers to a hyperlink, programmed on one web site, that allows an Internet user to be transferred from that web site to a page on another web site that is not the home page of the target site. Although many would consider deep-linking as an integral part of the Internet, court cases in the USA and the EU have showed that there are various legal and financial risks associated with deep linking.

Deep linking has received attention in many foreign court cases:

- *Mainpost v NewsClub (Germany)* – the court held that an electronic newspaper archive was a database in terms of EU law and that a search or link to that database constituted database infringement. NewsClub had to pay damages of US\$250 000.
- *Kelly v Arriba (USA)* – deep linking associated with framing the target site is an infringement of the target site’s copyright.
- *Ticketmaster v Microsoft (USA)* – the case was settled and Ticketmaster accepted links a) directed at its home page or b) with prior permission and a linking agreement between the parties.
- *Ticketmaster v Tickets.com (USA)* – Judge Hubb confirmed that deep linking by itself is not unfair competition. The issue of copyright was not addressed.
- *Danish Newspaper Publishers Association v Newsbooster (Denmark)* - Newsbooster searched online newspapers and made their own newsletter made up of links to various Danish newspapers. The court ordered Newsbooster to cease this practice because the links infringed the newspaper’s online database and competed with subscription services of the newspapers.
- *Mainpost v Newsclub (Germany)* – The court rules that a link to a newspaper’s archive infringed the newspaper’s database.

In South Africa no legislation or court cases directly addressed the practice of deep linking. To provide a clear opinion on deep linking in South Africa, it is necessary to consult the Copyright Act of 1978, international court cases, international legislation and generally accepted best practice. We therefore come to the conclusion that deep-linking will be legal in South Africa, subject to the following conditions:

- The link must clearly indicate that the user will be transferred to another web site, for example:

*Click here to access the article in Business Day:*  
[www.businessday.co.za/aaaaa](http://www.businessday.co.za/aaaaa)

- The target web page should not be framed;
- The target site should not prohibit linking in their online “use agreement” or “terms and condition”; and

- A collection of links should not be copied from the target site.

We suggest that the legislator should urgently address the legality of deep linking in South Africa.

### 2.3 **Caching**

Caching at the server level, otherwise referred to as proxy caching, is done to facilitate quick access, linking and to save bandwidth. In copyright terms, an exact copy of the target site's web site is made on a server for a certain period. Users accessing the cached site will have to click on "refresh" to access the original site. We could not trace any local or international cases that directly addressed the issue of caching. However, some foreign status and the Electronic Communications and Transactions (ECT) Act 25 of 2002 address caching:

- *Digital Millennium Copyright Act 1999 (USA)* – caching by an ISP is an exception and will not result in copyright infringement.
- *Copyright Harmonisation Directive 1997 (EU)* – caching is an exception and will not be copyright infringement if the caching is "integral to delivery technology" and "of no economic significance to the rights holder".
- *Copyright and e-Commerce Directive (EU)* – ISPs are allowed to cache web sites under certain conditions.

Although the practice of caching is widely used, it does not follow that it is legal. A person who caches another's site may be liable for one or all of the following:

- Delivery outdated information attributed to the caches web site e.g. share prices; and
- Disguise web site visits and hits and therefor affect advertising revenue.

We suggest that the legislator urgently address the caching issue and whether the practice amounts to copyright infringement or not.

### 2.4 **Internet service provider's limited liability for copyright infringement**

Section 75 of the Electronic Communications and Transactions Act 25 of 2002 states that:

*(1) A service provider that provides a service that consists of the storage of data provided by a recipient of the service, is not liable for damages arising from data stored at the request of the recipient of the service, as long as the service provider-*

*a. does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of a hird party; or*

*b. is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent;  
and*

*c. upon receipt of a take-down notification referred to in section 77, acts expeditiously to remove or to disable access to the data.*

*(2) The limitations on liability established by this section do not apply to a service provider unless it has designated an agent to receive notifications of infringement and has provided through its services, including on its web sites in locations accessible to the public, the name, address, phone number and e-mail address of the agent.*

*(3) Notwithstanding this section, a competent court may order a service provider to terminate or prevent unlawful activity in terms of any other law.*

*(4) Subsection (1) does not apply when the recipient of the service is acting under the authority or the control of the service provider.*

In short, the above section protects an Internet service provider (ISP) from copyright infringement claims based on content hosted on behalf of a third party.

However, the definition of an ISP is very restricted and will only include true ISPs such as M-Web, World Online and IOL. In our opinion, many other entities in South Africa host third party content available to the public – for example university research databases or content provided electronically by the CSIR. These entities should also be afforded the limited liability detailed in section 75 above, because they provided valuable content resources and cannot, like ISPs, check whether the content may infringe third party copyright. We suggest that the limited liability should be extended on the same conditions as detailed in section 75(1) above.

## **2.5 Search engine's limited liability for deep linking**

Although the legislator in South Africa never addressed the issue of deep linking (see 2.2 above), it did, however, limit an ISP's liability for deep linking in the ECT Act!

Section 76 of the ECT Act states that:

*A service provider is not liable for damages incurred by a person if the service provider refers or links users to a web page containing an infringing data message or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hyperlink, where the service provider-*

*a. does not have actual knowledge that the data message or an activity relating to the data message is infringing the rights of that person;*

*b. is not aware of facts or circumstances from which the infringing activity or the infringing nature of the data message is apparent;*

*c. does not receive a financial benefit directly attributable to the infringing activity; and*

*d. removes, or disables access to, the reference or link to the data message or activity within a reasonable time after being informed that the data message or the activity relating to such data message, infringes the rights of a person.*

Our opinion detailed in 2.4 above applies equally here. Books, newspapers, magazines and the like that provide hyperlinks to “infringing” content, should be afforded the same protections as those afforded to an ISP.

## 2.6 ***Electronic and paper based newsclipping***

Newsclipping refers to a practice where businesses cut certain articles from newspapers and magazines and distributes it to employees or clients. As with linking and caching, this practice takes place internationally, but that fact that “everybody seems to be doing it” does not answer the questions whether it is legal or not.

For purposes of this part of the opinion, we will focus on offline newsclipping, as online newsclipping is based on linking and our opinion as detailed above applies thereto. No local statutes or court cases directly address newsclipping, but it has received attention in a number of foreign statutes:

- *Nihon Keizai Shimbun v Comline Business Data (USA)* – the defendant collected articles from newspapers and then, after translating and summarising it, sold it to its customers. The court concluded that such a practice amount to copyright infringement and ordered Comline to pay damages of US\$220 000 and attorneys fees of US\$200 000.
- *Unreported case (Switzerland)* – the defendant purchased newspapers and then summarised the articles for its customers. The Swiss court rules that the practice amounted to copyright infringement.
- *Het Financieele Dagblad en De Telegraaf v Euroclip (Netherlands)* – two Dutch newspapers sued a clipping service that distributed copied of newspaper articles to customers. The Dutch court rules that the practice amounted to copyright infringement.
- *De Gariss v Neville Jefres Pidler (Australia)* – The defendant clipped newspaper articles and provided photocopies thereof to its clients. When a newspaper sued the defendant, the defendant claimed that the fair dealing provisions in the Australian copyright act, namely research and study, protected the practice. The court rejected the defence of fair use and held that the practice of news clipping amounted to copyright infringement.

- *Handelsbatt v Arcus GmbH (Germany)* – the court held that a clipping service was infringing a newspaper's copyright.

In terms of s. 12(7) of the South African Copyright Act:

12. *General exceptions from protection of literary and musical works*

(7) *The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.*

The above section implies that a newspaper or magazine article may be reproduced if all the following conditions apply:

- a) the article must have been published in a newspaper or magazine (or other "periodical");
- b) it must be re-produced in the "press" (another newspaper or magazine or online version thereof);
- c) the content of the article must be political, religious or economic;
- d) the copyright owner should not have reserved reproduction; and
- e) the source is mentioned in the reproduction.

It is unclear whether paper or electronic articles may be reproduced electronically on web sites (or other electronic media such as cell phone SMS) where the content of such articles are not political, religious or economic. The "press" requirement, detailed above, also needs clarification.

## 2.7 **Cooling-off right include digital works**

In terms of section 44 of the ECT Act, a person that purchase goods or services online have seven days in which he or she may return the goods. Section 44 states that:

*(1) A consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply-*

*a. of goods within seven days after the date of the receipt of the goods; or*

*b. of services within seven days after the date of the conclusion of the agreement.*

*(2) The only charge that may be levied on the consumer is the direct cost of returning the goods.*

*(3) If payment for the goods or services has been effected prior to a consumer exercising a right referred to in subsection (1), the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.*

*(4) This section must not be construed as prejudicing the rights of a consumer provided for in any other law.*

This cooling-off right does not extend to every possible item or service purchased online and, in terms of section 42(2) of the ECT Act, the following goods and/or services are excluded from the seven day cooling off period:

- a. for financial services, including but not limited to, investment services, insurance and reinsurance operations, banking services and operations relating to dealings in securities;*
- b. by way of an auction;*
- c. for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer;*
- d. for services which began with the consumer's consent before the end of the seven-day period referred to in section 44(1);*
- e. where the price for the supply of goods or services is dependent on fluctuations in the financial markets and which cannot be controlled by the supplier;*
- f. where the goods:*
  - are made to the consumer's specifications;*
  - are clearly personalised;*
  - by reason of their nature cannot be returned; or*
  - are likely to deteriorate or expire rapidly;*
- g. where audio or video recordings or computer software were unsealed by the consumer;*
- h. for the sale of newspapers, periodicals, magazines and books;*
- i. for the provision of gaming and lottery services; or*
- j. for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.*

Electronic transactions concluded for the supply of digital goods such as digital music downloads, eBooks and software that is delivered

electronically directly to the consumer's computer are not included in the list of exclusions detailed in section 42(2) above.

It follows that such goods may be purchased, installed and used by the consumer for a period of seven days upon which the consumer may elect to enforce the cooling-off right and return the goods to the supplier. The effect of this glaring oversight is that the market for digital downloads in South Africa is rendered unprofitable.

Furthermore, the oversight will encourage piracy, copyright infringement and creates a barrier to the cost-effective delivery of digital content to South African consumers. Numerous appeals to the Communications Portfolio Committee during the drafting of the ECT Act failed to remedy this situation.

## 2.8 ***Electronic document management***

Approximately sixteen South African laws force every local business to retain certain documents for specified periods, e.g. in terms of the VAT Act an invoice needs to be retained for 3 years. A list of all the document retention laws is listed in Annexure B hereto.

In terms of Chapter 3 Part I of the ECT Act, businesses may now archive the necessary documents in electronic format e.g. a business may scan an original invoice, destroy the original copy and archive the electronic copy.

It is unclear whether a business will infringe the copyright in documents if they scan such documents (make a copy) and destroy the original. We suggest that the legislator should address the issues as it stands in the way of effective electronic document and record management by local businesses.

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The ECT Act may be downloaded from:

<http://www.polity.org.za/html/govdocs/legislation/2002/act25.html>

## APPENDIX

# 6

## ELECTRONIC COPYRIGHT – PASA SUBMISSION ON THE ELECTRONIC COMMERCE BILL MARCH 2001

### INTRODUCTION

The Publishers' Association of South Africa (PASA) is the national association representing book publishers (print and electronic) in South Africa. It is affiliated to the International Publishers Association, the world body for publishers, and represents some 140 publishing companies, the substantial majority of publishers in the country. Membership ranges from large multinational companies to a large number of small businesses.

The publishing industry globally is one of the first industries to be affected by developments in electronic commerce. The dissemination of information on the Internet, e-publishing and the development of e-books is all of vital concern to the publishing industry. South Africa will need to position itself effectively if it is to maintain its global competitiveness in this regard. From the perspective of e-commerce and trading on the Internet, the sale of books is one of the key e-commerce industries globally and one of the first to take off.

How realistic is the prospect of e-books in an African context, where we suffer from a lack of availability of hardware, poor bandwidth, expensive telecommunications, and the lack of a reading culture? It seems possible for South Africa to jump the technology gap and necessary to do so, if we are not to be marginalized by the 'digital divide'. South Africa is high in the Internet usage stakes, unlike the rest of Africa and has 90% of the continent's Internet users.

In a country in which markets are very thinly spread, the ability to use electronic networks to disseminate information should prove a major advantage, particularly in the education sector. It is anticipated that there will be rapid developments in electronic publishing in the academic sector, where digitized content storage and print-on-demand at remote sites are set to open up the potential for distance education to many more students.

It is possible that, in many markets, the availability of electronic content, provided through regional, communal file servers, would solve a number of distribution problems in remote areas. The prospect of widely available computer access in private homes and even in institutions, is remote, given the problems of electricity supply and telecommunications access. However, it would be feasible, particularly in the education sector, to have community centres spread across the country, within reasonable reach of users. There are a number of such projects under discussion, or being developed. On the technical front, it is of major concern to PASA that Internet access be made easier, quicker and cheaper. The full benefits of electronic information distribution will only be felt fully by users and businesses if Telkom makes access cheaper than it is currently. The implementation of new technologies like ADSL and XDSL would offer substantial advantages to content users (including education providers) and content

providers (particularly, small businesses). Currently, Internet access in South Africa is one of the most expensive in the world. It is therefore vital that Telkom and any privatised companies that enter the telecommunications field are encouraged to implement new technologies as quickly as possible.

Electronic media show signs of opening new niches for entrepreneurs and self-publishers. The Internet is already changing people's mindsets of what authorship means and what publishing means. This is in part because the new media do offer new possibilities for the success of the small player, and for self-publishing. This could mean that there would be enhanced possibilities for the development of new authors and new creativity. Short-run printing of quality is now also an option. So authors and publishers are no longer bound by the expensive imperative of having to sell 2 000 or 3 000 books, in order for a publication to be viable.

PASA welcomes the government's intervention in the field of electronic commerce and hopes that the initiative represented by the publication of the Green Paper on Electronic Commerce will result in effective collaboration between all the Ministries involved in the different aspects of e-commerce so that South Africa can move forward effectively into a new business era.

Issues discussed herein include:

- Copyright
  - Fair Dealing
  - Reproduction Right
  - Communication to the Public Right
  - Obligations concerning technological Measures
  - Copyright Management
  - Databases and the Database Right
  - Moral Rights
  - International Law Enforcement and Evidence
  - Contractual Solutions
  - Framing
  - Hyperlinking
- Non-Copyright e-Publishing Issues
  - Customer Privacy
  - Telkom's Monopoly
  - Electronic Criminal law
  - Contracts
  - Taxation

## **COPYRIGHT ISSUES**

### Introduction

The development of the Internet has been seen by many as the beginning of the end for intellectual property rights. Original users of the Internet were mostly from the Government sector and universities, lecturers and students. They were not using the Internet as a source of income, but to disseminate and acquire information. This has led to a situation in which there is a vehement debate between those who think that information should be free to all and those who regard the maintenance of an intellectual property regime in a commercial

environment as the only way to ensure sustainability of intellectual and cultural creativity.

Inevitably the economic potential of the Internet was realised by businesses and regulation of the Internet now has to follow, with specific reference to intellectual property rights. Although the Internet and e-commerce present a wonderful new opportunity to rights holders it also creates numerous risks. Distributing content in an electronic form is cheaper and easier and would therefore result in cheaper products that are accessible by most South Africans. However, the fact that copying and distributing a work in an electronic form is so easy and cheap, erodes the rights of the rightsholder and any potential royalties he or she may receive for the work.

The South African Government now has to step in to balance this opportunity and risk, not only to assist content creators like artists, authors and publishers to protect their copyright in an electronic environment but also to create environment where more content creators can embrace this new and exciting technology. There are particular opportunities in the electronic environment for the cheaper dissemination of educational content and for the development of small businesses. If urgent attention is not given to these matters, content creators will not move their products online, as there is no incentive for them to do so. This will result in an environment where the majority of South Africans will not have access to affordable and quality content on the Internet.

Furthermore, the South African Government also has to address its international obligations in terms of the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty. This obligation is detailed further hereunder. It must be pointed out that South Africa is under attack at the moment by rights holders in the United States for the withdrawal by the DTI of amendments to the Copyright Act which US rights holders regard as necessary for the fulfilment of South Africa's TRIPS obligations. South Africa is perceived to be a country in which intellectual property is not adequately protected and this is now putting our trading relationships at risk.

Given the ease of copying in an electronic environment, it will only be possible to regulate electronic content dissemination effectively on the basis of a strong and effective South African Copyright Act. If print and broadcast rights are not adequately protected, South Africa has no chance of participating effectively in international electronic commerce. This means that the South African government needs to address problems in its existing copyright legislation as a matter of urgency before it can move on to legislation for electronic commerce.

It is our opinion that South African legislation for the electronic domain should, in the first instance, be relatively interventionist and should avoid trying to regulate in too much detail, particularly in areas in which there is still no international agreement. It is becoming increasingly clear that 'lock and key' approaches that attempt to control every possible infringement of an electronic document does not work and can lead to ludicrous outcomes. It is the belief of PASA that international efforts to legislate for e-commerce in one Act, like the Digital Millennium Act in the United States, have not yet succeeded. We therefore suggest that the approach in South Africa should be to make amendments to existing legislation where necessary and defer major legislation until such time as international precedents are more encouraging. South Africa also cannot wait for the long-drawn out process of drafting an entire body of new legislation: the approach has to be pragmatic and necessary amendments

to existing legislation need to be processed as quickly as possible if we are to move into the digital age.

The market for copyright goods and services covers a wide range internationally. This market is comprised of a large variety of products and services, containing protected subject matter, ranging from traditional products such as print products, films, graphics or art to electronic products like cable broadcasts, satellite broadcasts, CD, and video, music and other forms of electronic content. This enumeration is far from being exhaustive and reveals the already numerous ways of marketing intellectual property. The information era has added new forms of marketing of intellectual property, through new electronic products and on-demand services provided electronically at a distance, over networks and on request of the customer. A large variety of such on-demand services have already emerged in the marketplace, for example personalised newspapers and weather reports.

Because of the particular interests of PASA as content providers, specific attention will be given in this document to a content creator or rightsholder's right of reproduction, right of communication to the public and right of distribution. Other issues that will be addressed include fair dealing, evidence of copyright infringement and enforcement, the current South African Act and how it should be amended, moral rights, territorial rights, transient copies, copyright exemptions, intermediary liability, the emphasis on contracting licensing solutions, technological obligations on rightsholders, digital rights management systems and the recognition of international copyright judgements.

## Fair Dealing

### 1.1 The issue

The Green Paper on Electronic Commerce recommends that the 'fair use' provisions in the context of digitised use should be approached just as they are in traditional environments. The Green Paper comments, further, that it is therefore likely that commercial use would probably constitute infringement, while 'non-profit educational transformative use' would be likely to be deemed fair.

This is a highly contentious issue in the South African, and indeed in the African, context. It is the opinion of the South African and international publishing industry (as represented by the International Publishers Association) that current legislation in South Africa is defective in this regard and there is broad agreement between rights holders and rights users that South African legislation needs amendment. However debate rages around acceptable levels of 'fair use' copying in a developing country.

The African Publishers Network (APNET), which represents some 43 African countries, remains strongly opposed to the idea of special dispensations for extensive 'fair use' copying for developing countries. APNET is opposed to differential copyright regimes for the North and the South. They assert that African authors and publishers deserve as much protection as their Northern colleagues do. Although such dispensations

may at first sight be advantageous to education providers, in fact the longer-term impact is likely to be the decimation of local publishing and information industries, which will not be able to sustain commercial viability in the face of the destruction of large parts of their local market, leading to the domination of information markets by more expensive, imported products. This is because multinational companies, for whom the African market is marginal, can afford to effectively give away a substantial part of their product in these (marginal) markets. African publishers and authors, who are dependent on local markets, cannot afford to.

The danger in this situation can be illustrated by the fact that currently Africa consumes some 12% of all books produced in the world, while only 3% of the books used in the world originate in Africa. There is a danger that excessively generous copyright regimes could further perpetuate the colonial system in which Africa remains the consumer of cultural material produced in the North. There is a need for Africa to exploit its own heritage, rather than having African culture and African knowledge packaged in the North. The growth of electronic media should enhance Africa's ability to reach global markets with its cultural products. This should not be inhibited.

The South African rights users' lobby, predominantly librarians in the academic sector, argues, on the other hand, that there need to be very generous provisions for free copying, in order to alleviate student poverty. It is the view of PASA, supported by the African and international publishing community, that generous copying provisions do not solve the problems of information provision to disadvantaged students. On the contrary, they would serve to damage the local publishing industry and further act to the detriment of local authors, while at the same time increasing the cost of locally published content and forcing the country to rely more and more on expensive imported products.

It is the publishing industry's view that the best way to ensure the availability of affordable information products and the development of writing in South Africa is through the growth of the local publishing industry. It is the contention of the publishing industry that certain amendments relating to copyright in the print domain need to be addressed before effective legislation for electronic copyright and electronic commerce can be enacted.

The question of fair use becomes even more critical in the electronic domain. The copying of printed material is a subsidiary business to the main business of most content creators. However, in the electronic domain there is a shift from copyright to contract and licensing. The main business of an electronic content creator is more likely to be the licensing of content to end-users. Therefore, what is a subsidiary business in the printed domain now moves to become a core business in the electronic domain. Thus, the transfer of an overly generous fair use regime from the traditional copyright context could prove disastrous and could inhibit totally the development of electronic commerce in digitised content.

Before South Africa is able to move to an effective copyright dispensation for electronic content, necessary amendments to the fair practice provisions of the Copyright Act need to be enacted. Two sets of amendments have been gazetted in the last few years. One amendment, gazetted in 1997, related to the Regulations promulgated under Section 13 for copying in the educational sector. Further amendments, which clarified aspects of fair practice and strengthened penalties for infringement, were gazetted in 2000. These amendments met with vociferous opposition from a lobby of tertiary sector librarians and were withdrawn by the DTI after SAUVCA put pressure on the DTI. PASA and other international organisations have been unable to get a response from the Registrar of Copyright in the DTI confirming the status of these amendments or explaining why submissions from national and international industries have apparently been ignored. The withdrawal of these amendments to the South African Copyright Act and the failure of effective copyright enforcement in South Africa have now led USA rights holders to put pressure on the US Congress to have South Africa put on the copyright watch list and to have duty-free trading concessions for South African companies withdrawn. A particular concern of the Association of American Publishers and other US rights holders is the impact that a failure to strengthen South African copyright protection would have on electronic commerce.

It is clear that South Africa will be severely hampered in its efforts to develop e-commerce in the country if these problems are not dealt with as a matter of urgency.

## 1.2 Present

Currently, the Copyright Act prescribes a number of statutory exemptions to what would ordinarily be regarded as infringement of copyright in the various categories of works. General exemptions from protection of literary and musical works are set out in Section 12 of the Copyright Act. These include use for and/or in:

- research
- private study
- private use
- criticism
- review and reporting current events
- judicial proceedings
- quotations
- teaching
- reproduction by the SABC
- lectures
- address or similar work delivered in public
- articles on current economic, political or religious topics
- official text of a legislative, administrative or legal nature
- translations
- demonstrating radio or television receivers or recording equipment.

Further exceptions are listed in the Regulations promulgated in terms of Section 13, relating to copying in the educational sector, promulgated during the apartheid era, in response to the academic boycott. These

are widely regarded as contradictory and unenforceable. In practice, in the view of publishers, these have led to wide-scale copying, of dubious legality.

The burning question is whether these exemptions should also apply to content in its digital form.

In terms of Article 10 of the WIPO Copyright Treaty contracting parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works. However, it is stated further that such limitations or exceptions shall not conflict with a normal exploitation of the work and should furthermore not unreasonably prejudice the legitimate interest of the author. In both the Digital Millennium Copyright Act in the United States and the draft EU Directive on copyright these limitations and exceptions have been detailed.

In the European Commission one exception to the right of reproduction is mandatory: temporary acts of reproduction which are integral to a technological process made for the sole purpose of enabling a use of a work or other subject matter and having no independent economic significance shall be exempted from the reproduction right.

This wording attempts to meet the concern of telecommunication providers that acts of reproduction which have to take place as part of the functioning of the electronic system so that a work can be used should not be subject to the authorisation of the rightsholder since a mere conduit provided cannot know whether what is passing along the conduit is authorised or not. This exemption is detailed below under the liability of intermediaries for copyright infringement.

### 1.3 Proposed Action

It is vitally important, in the opinion of PASA, that amendments to the Copyright Act, to bring South Africa into line with international practice and to provide compliance with its TRIPS obligations, be put back on track before legislation to deal with electronic commerce is enacted.

It is suggested that the Government should follow a position where fair dealing in the electronic domain is based on amended provisions for the printed domain. However, provisions will have to be made for transient electronic copies. We suggest that the international guidelines set by the Digital Millennium Copyright Act and the European Union be followed. The bottom line is, however, that no exceptions should be allowed that would prejudice the rightsholder economically or erode any incentive to produce electronic content.

## The Right of Reproduction

### 1.4 The Issue

In the information society, traditional forms of reproduction co-exist with a multitude of new forms of reproducing works and other protected matter, such as scanning of a work or loading and/or storing

of digitised material in a computer memory or other electronic systems. Reproduction may also arise from incidental and ephemeral acts, which occur from normal use of an electronic system, for instance, when transmitting material over the Internet. Internationally, the question has arisen how far such new acts of reproduction are covered by the traditional reproduction right, which is still significantly focused on the traditional understanding of making copies on paper or tape. Protected material, once converted into electronic form and transmitted digitally, is much more vulnerable to exploitation by copying. This is true both in qualitative and quantitative terms (large-scale exploitation of protected material by the broad public). The traditional reproduction right and the legitimate exceptions to it therefore need to be reassessed and adapted to the new environment, where this found to be necessary, in order to ensure that a clear and adequate level of protection is achieved.

## 1.5 Present

In South Africa, the Copyright Act grants to the owner of copyright the exclusive right to reproduce or authorise the reproduction in any manner or form. Currently, the definition of reproduction gives an indication that copies on electronic storage devices are included under the copyright holder's exclusive right. According to the definition a reproduction also includes reproductions made of a reproduction. The exclusive reproduction rights granted to the holder of copyright are however very wide in that they provide for reproduction in any manner or form. This definition is probably wide enough to also include transient and more permanent copies of all the types of works that are protected, including copies in the random access memory of a computer or copies kept on any other computer storing device including caches. It is therefore submitted that the reproduction right and its application to the electronic environment are too wide in a South African context.

At an international level, the exclusive reproduction right is granted to authors in terms of the Berne Convention, the Rome Convention and TRIPS Agreement. This right is also extended to the WIPO Copyright Treaty. In the view of the broad formulation of this right in these instruments, its concept is wide enough to cover all methods of reproduction, even electronic ones which may not be perceptible to the human senses. The limitations set out to these rights vary. The Berne Convention provides for a very general limitation, entitling countries of the Union to provide for limitations in certain special cases which do not conflict with normal exploitation of the work and reasonably prejudice legitimate interest of the author. The limitations set out in the Rome Convention are wider to some extent.

The need to adapt or clarify the scope of the reproduction right for the new electronic environment has been identified in the course of ongoing negotiations internationally. Although there seems to be international agreement that permanent electronic storage is a restricted act, these differ with respect to the treatment of transient or ephemeral acts of reproduction. As regards the exceptions to the reproduction right, some of the national legislative measures provide for many copyright privileges, others for only minimal exceptions and

others for none. Therefore, a substantial degree of uncertainty exists with regard to the precise acts of reproduction that are protected by the reproduction right, notably with respect to the new electronic environment. Furthermore, the level of protection varies substantially between different countries.

#### 1.6 Proposed Action

We recognise that the new environment implies a multitude of new forms and new quality of reproduction. These require clear predictability on what exactly is protected as well as an equivalent of protection internationally. Harmonising the electronic reproduction right with the doctrine of fair dealing will be of the utmost importance. In this regard South Africa's legislation cannot be different from any international standards.

The bottom line is that the right of reproduction should be extended to the electronic environment. However, where any electronic reproduction is not in conflict with the normal exploitation of the right holders' right, an exception should be allowed.

We suggest that the guidelines that were set in the WIPO Copyright Treaty, the Digital Millennium Copyright Act and the European Commission be followed by the legislature in South Africa in such a way that it will act as an incentive for content creators to distribute their material electronically and at lower cost to more South Africans.

### The Communication to the Public Right

#### 1.7 The Issue

Electronic transmissions of text, software, graphics and databases over networks such as the Internet, to a consumer's personal computer or other digital unit at a time individually chosen has already become a reality in a number of countries. Such "on demand" transmissions are characterised by the fact that a work or other subject matter stored in a digital format is made available to the public or individual members of the public in such a way that they may access it and request its transmission individually with respect to time and place to a personal computer. This situation is clearly outside the scope of broadcasting and also goes beyond mere private communication. The market for these on demand services is considered one of the main growth areas in electronic commerce. In view of the facility with which works can be transmitted, reproduced, stored, manipulated and retransmitted over networks, the introduction of such works or other subject matter in digital networks and their exploitation in the context of on demand services, however, implies a considerable new dimension for piracy. Adequate protection of transmissions on demand therefore constitutes one of the many challenges faced by the South African legislature.

#### 1.8 Present

The communication to the public right is not clearly defined in the South African Copyright Act; some believe however, that this right

could be accommodated under provisions for transmission or broadcast over a diffusion service.

With respect to the international framework, interpretations vary as to whether the right of communication to the public as provided for in the Berne and Rome Conventions cover transmissions of works to third parties “on demand”. Also international law does not explicitly provide for a general exclusive right for on demand transmissions.

The WIPO Copyright Treaty states that member states shall provide authors with an exclusive right to authorise or prohibit any communication to the public of the originals and copies of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Furthermore, the right of communication to the public has been accepted in the Digital Millennium Copyright Act in the United States and also by the European Commission.

#### 1.9 Proposed Action

The rights applicable to “on demand” transmissions of works and other subject matter need to be incorporated in the South African copyright regime as a matter of urgency. Furthermore, the limitations and exceptions allowed under this right should also be standardised in line with international exceptions and limitations. As was stated above, limitations and exceptions should be of such a nature that it does not prevent content creators from taking their material online and rather than sticking to the more traditional paper environment.

### The Right of Distribution

#### 1.10 The Issue

The distribution right entitles the author of a work or the holder of a related right to require/her consent for any distribution of copies of a work or related matter. The distribution right is recognised internationally. However, important discrepancies exist as to the exact scope of and limitations to this right. Some countries have integrated the act of putting into circulation of works of copies thereof into a rather broadly defined right of reproduction. Others grant explicitly a separate right to authorise or prohibit the distribution of tangible copies. In addition to such different approaches there are considerable differences in relation to exceptions and limitations to this right.

The main limitation to the distribution right is exhaustion. The right may be considered to be exhausted once copies are put into circulation in the market with the consent of the rightsholder. At least in certain cases, some countries provide for no exhaustion (limitation) of the distribution right at all whereas others apply exhaustion even when the first legal act of distribution has occurred in a country outside that specific country. The latter concept, which allows for

parallel imports originating in third countries, might entail major difficulties for the operation of the international e-commerce market.

The digital revolution transcends national boundaries and global reach. On the other hand copyright is defined nationally and copyright legislation has, with certain exceptions, national applications. While it might appear that the abandonment of territorial rights in the print and electronic domain might allow a country like South Africa to sanction parallel importation, so that the cheapest products can be sourced from anywhere in the world, there are balancing factors which suggest that such a move could prove harmful to local content creators.

The maintenance of territorial rights helps protect local content creators by encouraging sustained investment in local markets by publishers and other content aggregators. A regime of international exhaustion might also lead to cultural hegemony and further erosion of local content creating activities.

#### 1.11 Present

In South Africa, the Copyright Act grants the owner of copyright exclusive rights to reproduce or authorise the reproduction in any manner or form. Furthermore, literary, musical and artistic works and computer programmes are protected in that the owner of copyright has the exclusive right to first publish or authorise the publication of these works. It therefore seems that the right of distribution is referred to as the right of publication in terms of South African legislation.

Before the WIPO Copyright Treaty the distribution right was governed by any international instrument on intellectual property.

Now, Article 6 of the WIPO Copyright Treaty states that authors of literary and artistic works shall enjoy the exclusive rights of authorising the making available to the public the original copies of the work through sale or other transfer of ownership. Furthermore, nothing in the WIPO Copyright Treaty shall affect the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of the distribution right applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.

This distribution right, in the European Union, is relevant only to tangible products, which could be put into circulation, e.g. books. Its place in the EU Directive is partly due to the Commission's concern to harmonise one consequence of the right, i.e. exhaustion. Countries which have no export market for their national languages, such as the Nordic countries, tend to favour international exhaustion since it allows importing the cheapest edition of a work which is lawfully available. Countries that have a strong export market for their national languages, e.g. English or Spanish, develop orderly international marketing through holding exclusive rights in and thus being able to invest in certain national territories. They therefore oppose the striking down of exclusive dealings in national territories through the doctrine of international exhaustion, which allows parallel importation.

Exclusive territoriality versus free trade is currently an intense debate. In countries where the removal of territorial rights has the effect of creating a grey market, increased opportunities for counterfeit or pirate goods are likely to result, and this is an increasingly serious problem. While a distinction is made between legitimate products, infringing products and pirate copies, safeguarding the first has led to policing of the second and discovery of the third. When the distinction between legitimate and infringing copies is institutionally blurred the result will be to multiply the opportunities open to the counterfeiter.

The removal of restrictions on parallel imports through a universal doctrine of international exhaustion will also deter content creators who have been licensing cheap editions in developing countries, if as rightsholders they become vulnerable to the importation of such editions into their own domestic markets. This would be particularly serious for publishers who may hold global rights but nevertheless require the territorial integrity of such licenses to be respected. Any withdrawal from the practice would also have serious commercial consequences for the licensed publishers in those countries.

While it might appear that the abandonment of territorial rights in the print and electronic domain might allow a country like South Africa to sanction parallel importation, so that the cheapest products can be sourced from anywhere in the world, there are balancing factors which suggest that such a move could prove harmful to local authors and publishers. This question is summed up as follows by Ronnie Williams, the Chief Executive of the UK Publishers Association:

Copyright-related industries are now major contributors to the growth of many countries where there are strong creative and innovative industries. While some import-dependent countries may prefer a regime of international exhaustion because it is thought that this would result in lower prices to consumers; or while some countries might look for trade advantage in exporting their goods into developed markets, the real benefit of IPR [Intellectual Property Rights] will accrue to nations that operate strong territorial property laws. Countries with weak intellectual property laws tend to lose the benefits of research and development together with foreign investment and technology transfers

The maintenance of territorial rights helps protect local authors and publishers by encouraging sustained investment in local markets by publishers. A regime of international exhaustion might also lead to cultural hegemony by powerful countries in the North and further erosion of local authorship and publishing.

#### 1.12 Proposed Action

As indicated above, the distribution right and territorial rights are currently being debated internationally. . PASA is, however, of the opinion that the continued protection of territorial rights is necessary in order to ensure a strong local industry providing locally relevant and cost-effective information products in South Africa and to protect against acts of piracy which are already threatening our markets.

## Obligations concerning Technological Measures

### 1.13 The Issue

Digitisation not only brings about new risks for rightholders of copyright, but it also makes it potentially easier to control acts of exploitation by means of access control, identification and anti-copying devices.

One of the main functions of electronic copyright management and protection systems, which are in the process of being developed, will be to allow for the automatic identification of protected material disseminated on networks, such as the Internet, and the identification of the respective rightholder.

The monitoring of the access to, and the use of, works or related matter could thus be improved. The schemes concerned would also allow for more efficient combating of piracy since the protection of the integrity of subject matter could be improved and the origin of works much more easily identified. At the same time, such developments may have negative implications for the right to privacy of users and rightholders.

### 1.14 Present

Apart from more general provisions in the TRIPS Agreement on enforcement, the international instruments on intellectual property do not deal with these aspects. However, Article 11 of the WIPO Copyright Treaty states that contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under the WIPO Copyright Treaty or the Berne Convention.

This Article has been included in the Digital Millennium Copyright Act in the United States and draft EU Directives.

The Digital Millennium Copyright Act has provisions that are meant to protect the emerging class of technical methods (frequently referred to as digital envelopes or digital objects) which are being used to protect digital works both on the Internet and on other media. Along with the protection of copyright management information, this provision sets up a framework for automated electronic distribution of digital works. The American Congress recognised that the ease of copying digital works requires the use of such means and wished to avoid the common problem in the 1980's (software protection technology for mass distributed PC software was frequently broken by computer programmers who make their cracking programmes available commercially). The Digital Millennium Copyright Act prohibits both the use of such methods and tools and the manufacture, distribution and offering to the public of the tools or services to perform the circumvention but only if such tools or services are either: 1) primarily designed for such purpose or 2) have only limited commercial purpose

beyond such circumvention or 3) marketed for the prohibited purpose. Because of the controversial nature of this “black box” provision, the provision on circumvention will take effect two years after the affected date of the Digital Millennium Copyright Act, but a ban on the manufacture distribution and offering to the public of tools or services takes immediate effect.

These “black box” provisions have been very controversial in the library, cryptology and software development communities because of its potential effect on them. Consequently, the Digital Millennium Copyright Act has exceptions for each of these groups as well as exceptions of less general application. The cryptology community has an exemption for good faith encryption research and a broader exemption to test the effectiveness of anti-circumvention measures. The software development community has another exemption for reverse engineering if used to identify and analyse parts of a programme needed to provide inter-operability with another software programme. Finally, the Digital Millennium Copyright Act has an exception for technological methods that collect or disseminate personally identifying information about online activities of an individual. These technological methods may be circumvented in order to disable the collection and the dissemination of such personally identifiable information unless the technological methods both give notice of the collection and the dissemination and provide the capability to permit a person to prevent or restrict such collection and dissemination. This provision would permit the future equivalent of cookie eater programmes. The other part of the framework is the prohibition on removing, changing or altering copyright management information. This information is the title of the work, the author, the copyright owner, the terms of use and any identifying numbers or symbols on or along the work. Copyright management information will be used to assist in the automated licensing of digital works. For example, the music industry is making songs available digitally for use in commercials from one of the major music publishers.

The perceived problem with the provisions of the Digital Millennium Act is that it appears to prohibit legal acts alongside illegal acts and bars users from legitimate uses of intellectual property that they have purchased. The DECSS case is relevant in this regard.

The violation of these “black box” and copyright management information provisions has both civil and criminal remedies.

The European Commission has broadly followed the same course of action.

#### 1.15 Proposed Action

The use of technological measures to protect copyright is already used by many companies in South Africa and it is suggested that the protections offered by the WIPO Copyright Treaty should be incorporated into our law as a matter of urgency. As was stated above the international experience could be introduced into South Africa. However, the urgency of introducing these measures could not be overstressed, if not, South Africa will become a haven for

copyright infringement and other forms of piracy. On the other hand, South Africa should avoid enacting legislation that is too sweeping and results in absurd prohibitions of legitimate exploitation of intellectual property.

## Copyright Management

### 1.16 The Issue

Most exploitation rights granted by intellectual property law are of an exclusive nature, allowing the holder of the right to exploit his/her work and other protected matter in whatever way he believes will be in his/her best interest. Such exclusive rights are traditionally managed by the individual rightsholders themselves or by intermediaries of their choice such as publishers, producers or reproductive rights organisations. Some rightsholders also mandate collecting societies to manage their exclusive rights. In other areas particularly where compulsory or legal licenses are imposed on rightsholders, management by a collecting society has become the traditional form of management, and is even mandatory in some cases. With the development of e-commerce, currently adequate means of administering rights must be re-assessed. In particular, the question must be addressed of whether and how copyright administration needs to be rationalised in view of the possibilities created by digital technology for creating complex works, such as multi-media products or services. In fact, the creation and exploitation of multi-media products and services may imply that the individual exercise of rights will become even less practical than it is today due to the great number of new or pre-existing works, productions and users involved. This may call for new forms of centralised administration, which facilitates rights management, or, in some cases for more collective management.

### 1.17 Present

Neither the South African Copyright Act, nor existing international conventions explicitly address the issue of copyright management. However, Article 12 of the WIPO Copyright Treaty states that contracting parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts: 1) removing or altering any electronic rights management information without authority; and 2) distributing, importing for distribution, broadcast or communicating to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

The Copyright Treaty goes further to define that rights management information shall mean information which identifies the work, the author, the owner of any right in the work; information about the terms and conditions of use of the work; and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

This Article has been incorporated into the Digital Millennium Copyright Act as well as the European Union Directive on Intellectual Property.

1.18 Proposed Action

What was stated in 1.15 above applies equally here. The provisions proposed by the WIPO Treaty need to be incorporated into South African legislation.

Databases – The Database Right

1.19 Issue

Increasingly, electronic databases and access thereto are becoming valuable assets in many businesses. As these databases are built up or made up of information that is either not copyrightable or information in which copyright belongs to third parties, it is unclear how databases, in whole or in part, should be protected.

1.20 Present

In terms of South African copyright legislation databases are protected as literary works in certain circumstances. However, the international movement seems to be that a separate database right should be established.

In this regard Article 5 of the WIPO Copyright Treaty states that compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

The United States of America and the European Commission have incorporated this new database protection right into national legislation.

1.21 Proposed Action

The Government should follow the international standard and protect databases through a separate right unrelated to copyright.

Moral Rights

1.22 The issue

Moral rights protect the personal link between the author and his/her creation. They give authors the inalienable right to claim authorship of the work and to object to any distortion, mutilation of, or other derogatory action in relation to his/her creation which would be detrimental to his/her honour or reputation. Moral rights are thus

complements to the authors' economic rights, protecting the paternity and the integrity of his/her works.

By its very nature the exploitation of works and other protected matter through digital technology affects moral rights. Digitisation as such necessitates some initial manipulation of the protected matter, once digitised and exploited over the Internet. The ease of manipulation allows almost everyone to retrieve the protected work, alter it in a large number of ways and then make it available once again to the public in its revised form.

Digitisation together with interactivity multiplies the risks of a violation of both authors and other rightsholders moral rights considerably. In view of these new rights, rightsholders in particular call for strengthening of moral rights or their recognition where they do not exist. However, not all changes to a work will amount to a violation of the moral rights. For instance, if the modification or the alteration may not prejudice the rightsholders' reputation, only economic rights will be effected. In the electronic environment a strict application of moral rights may even prove to be counter-productive. A certain flexibility in the application of moral rights might be needed, depending on the types of work in question, the method of exploitation and the contractual context.

#### 1.23 Present

South African copyright legislation as well as the Paris and Berne Conventions set out moral rights for authors, although it only establishes minimum standards. For holders of neighbouring rights, moral rights are not really recognised at international levels. The exact scope of moral rights stipulated in the copyright laws of various countries differs widely. Those countries with a civil law approach have all included provisions in their copyright legislation on moral rights for authors. These provisions are usually rather strong. Some countries even accord moral rights in perpetuity. The law within the Anglo-Saxon tradition has accorded authors certain prerogatives not allowed through the relevant copyright law, but partly in legislative acts serving other objectives such as consumer protection.

The fact that South African legislation offers authors far less protection than countries like the United Kingdom might be a disadvantage when it comes to international trade in electronic intellectual products.

Moral rights have furthermore not been a subject of any international harmonisation.

#### 1.24 Proposed Action

The fact that moral rights should be reinforced and introduced into the electronic domain is without question. However, it is suggested that the time is not yet ripe for concrete international harmonisation initiatives. The legislature will be well advised to approach a wait and see attitude and rather extend the traditional moral rights to the electronic environment once international standards hereon have been tried and tested.

It would be advisable to open discussions between government departments and authors' and publishers' associations over the question of moral rights in South Africa in order to move towards a regime which grants greater protection to South African authors on the question of moral rights. .

## International Law Enforcement and Evidence

### 1.25 The issue

Digital transmission dramatically increases the possibilities for exploiting, accessing and retrieving works and other subject matter across national borders. Some of the new services being developed are of a highly targeted nature and, in order to be economically viable, need to be available in several countries. Therefore the simultaneous exploitation of work in different countries and under different legal systems is rapidly increasing, and together with it the possibility of multiple infringements and piracy.

The question as to which country's law applies to such transnational acts of exploitation is particularly relevant in the area of intellectual property. This is due to the different degree of protection granted in different countries and the territorial character of copyright protection. Despite international harmonisation and despite the existing minimum standards of protection in international agreements, national copyright rules continue to differ considerably.

Due to the territorial nature of intellectual property protection, rightsholders usually enjoy a bundle of national intellectual property rights. The law applicable to acts of exploitation is the law of the place of exploitation and/or infringement. The law of the country in which protection is claimed governs the object protection, the eligibility for protection, first ownership, transfer of rights, scope of protection the term of protection etc. That country's legal rules also apply as regards to the law of contracts, enforcement and jurisdiction.

The new means of communication will substantially increase the relevance of applicable law issues. At the same time, the enforcement of rights will increasingly have to take place in a number of different countries under different jurisdictions. As a result, the number of foreign legal proceedings will also increase.

### 1.26 Present

Although international treaties and South African law allows for the enforcement of foreign judgements in South Africa and the enforcement of South African judgements in other countries, the digital age only highlights and puts these rules under strain. It would indeed be difficult for a South African party to institute legal action in a foreign jurisdiction if the chances of success are not reasonably good.

1.27 Proposed Action

Due to the international differences concerning copyright legislation and crossborder enforcement of judgements, we suggest that contract law should be employed by the individual to choose the governing law and even the court system that should apply to any possible copyright infringements. In this regard it is also necessary that online agreements and online terms and conditions be recognised and enforced.

Contractual Solutions

1.28 The issue

As was mentioned earlier in this submission, we are of the opinion that the Government should not over-legislate intellectual property rights in the electronic domain. Increasingly, it appears that contractual and licensing solutions address the specific problems better than national legislation ever could.

1.29 Present

Clarke (1999) states the following: “ It is this very welcome perception that digital is indeed different which lies behind the equally welcome emphasis on contractual solutions. In relation both to the reproduction right and to the communication to the public right, the explanatory memorandum shifts the focus of attention away from the bundle of limitations and exceptions which has developed over the years in the print on paper environment towards contractual licensing solutions. As to reproduction, the memorandum states: with respect to the use of digitised material by libraries, online as well as offline, initiatives are ongoing in a number of member states, notably the UK, where library privileges are most developed, to arise at more flexible contractual solutions”.

1.30 Proposed Action

Apart from the implementation of the WIPO Copyright Treaty, as indicated above, we suggest that the South African Government will be well advised to leave the outstanding issues to be resolved between the parties through the employment of flexible contractual solutions.

Rather, government departments should work with local industries and through legislative amendment, to create an environment in which intellectual property rights are respected as being for the public good and are willingly observed because of the benefits they bring. This is far from being the case at the moment. Respect for intellectual property, and the creation of an environment in which contractual solutions can be effectively applied, will have to be created through a combination of public campaigns on the value of intellectual property and the strengthening of enforcement through effective criminal prosecutions and stronger civil penalties.

A watching brief should be kept on changes in international legislation, so that South Africa can remain in harmony with international developments.

## Framing

### 1.31 The issue

Framing is an Internet technology that allows web site users to view content from another web site while still viewing the home page of the original site. This could lead the consumer to believe that the site owns the content or that there is some affiliation between the two sites.

### 1.32 Present

Although there is no case law on the matter yet, a number of international court cases have addressed framing. Although some of these cases have been settled, the fact remains that there is no silver bullet to deal with framing and that each case is decided on the facts. It could be a copyright matter, a trademark matter or even a case of unfair competition

### 1.33 Proposed Action

Framing as a technological tool should not be legislated. It should be left to the courts to create law in this area by examining the facts of each case. In this respect, our courts could tap on the various international court cases.

## Hyperlinking

### 1.34 The issue

Linking is so common on the Internet that the idea that a web site owner might need permission to link to another site was once considered absurd. After all, it is linking that makes the Internet a “web” of interconnected sites. In the web culture, providing a link to another site has generally been viewed as a favour to the owner of the linked site, because of the increased Internet traffic.

However, the increasing commercialisation of the web and the availability of new technology have caused the re-examination of the assumption that linking does not require permission, especially in light of some international lawsuits.

### 1.35 Present

Although there is no case law in South Africa yet, linking was addressed in a number of international court cases. Case law generally classifies the type of link and then considers forms of liability. Most of the cases have been decided on copyright

infringement, although some were decided on common law issues such as trespassing and unfair competition.

#### 1.36 Proposed Action

What was said in 12.3 applies equally here. It should be left to the courts to create law in this area by examining the facts of each case. In this respect, our courts could draw on the various international court cases.

### **NON COPYRIGHT E-PUBLISHING ISSUES**

#### 1. Internet access and the barrier caused by Telkom's monopoly

PASA publicly welcomes the government's delivery of the draft telecommunications policy and believes that competition will mean lower Internet access costs for consumers, translating into greater time spent online which would ultimately boost spending at local e-stores.

PASA looks forward to a smooth licensing process geared at enabling the network to get up and running as soon as possible, thereby boosting foreign investor confidence in SA. This would, ultimately, have positive knock-on effects, not only for the Internet industry but also for the country a whole.

#### Customer Privacy

##### 1.1 The issue

People who use the Internet give away a whole range of information about themselves. There are currently no guidelines in South African Law as to the extent to which this information can be made public and sold to third parties.

The rapid growth and increasing use of the Internet give rise to many and complex privacy issues. In every electronic communication an Internet user gives away some form of personal information. Every e-mail message contains a header with information about the sender and the recipient. Virtually every electronic transaction will involve the transfer of personal data such as credit card numbers, telephone numbers, physical addresses and e-mail addresses.

The key to further Internet growth, especially as far as electronic commerce is concerned, is the attainment of privacy through technology and law. Unauthorised access to communications and personal information on the Internet remains relatively easy in the absence of encryption technology. Whether or not the vulnerability of privacy on the Internet is exaggerated, it is undisputed that there are security risks associated with its use. As a result, it is safer to assume, for the present, that the Internet is not yet a secure medium over which to communicate financial and personal information without having due consideration of the risks and legal issues involved.

Apart from traditional privacy concerns like surveillance and unauthorised access to information, the Internet also creates new concerns relating to the use of cookies and spamming.

## 1.2 Present

Although the Open Democracy Bill addressed some of these issues, it was dropped from final legislation. Privacy of personal information is still governed by the common law.

## 1.3 Proposed action

We believe that personal information about the individual should be protected in the sense that no business can make it public or sell it unless forced to do so by a Court Order. However, aggregate personal information that cannot be traced back to a single individual could be a valuable asset in a business and should be legal to make public and sell to third parties.

In this regard we suggest that the Government closely follow developments in the European Union and United States of America and thereafter decide whether the privacy of the individuals should be regulated by the market/industry or whether the necessary legislation should be enacted.

The use of cookies should not be legislated as users have the option to disable cookies. Furthermore, most Internet surfers prefer the use of cookies. Likewise with spamming – we suggest that no legislation is required and that an institution like the Advertising Standards Authority should draft guidelines for spammers.

Definitions:

- **Cookies:** A cookie is an HTTP header that consists of a text-only string. The string is usually a set of random-looking letters long enough to be unique to every user. The cookie is sent from the server of the web site the user accessed the first time and is saved on the user's hard drive. When the user accesses that site again, a copy of the cookie is sent with the request to that site. In this way the remote server knows who the user is and that he/she visited the site before.
- **Spamming:** To send a message (usually an advertisement) to many discussion groups (bulletin boards, mailing lists or newsgroups), without regard for its topical relevance.

## Electronic criminal law

### 1.4 The issue

Hacking, cracking and other form of dangerous code bears a significant threat to any online business. Although these acts are punishable in other countries, a South African business should have

considerable difficulty taking such a case to Court as it would have to be argued under common law crimes such as house-breaking or trespassing.

#### 1.5 Present

Computer crime covers a very wide field. At one end of the scale, it involves “traditional”, straightforward crimes, as we know it, such as theft of computer systems and hardware. At the other end of the scale, computer crime is committed by using highly technical equipment to manipulate and infiltrate computer systems that may be on the other side of the world. In essence it can be said that computer crime involves any criminal activity where a computer is involved. Although computer crime spans such a wide field, it can be divided into two broad categories: the first deals with criminal activity that can be committed only by using a computer system. These crimes never existed before the advent of the computer, and a computer is absolutely essential for committing such a crime. Examples are hacking, cracking and sniffing. These crimes are exclusively created by statute. The second category of computer crime is much wider, and involves crimes that have existed for centuries, but are now committed by using a computer system. Obvious examples are theft of computer systems, Internet fraud and the possession and distribution of child pornography, to name but a few.

#### 1.6 Proposed action

We suggest that Government urgently amend the Criminal Procedure Act and create a statutory crime not only for the unauthorised access to a computer system but also any other technical means that could be used to circumvent access control measures and damage the infrastructure of an online business by either slowing it down or grinding it to a complete halt.

However, criminalising these acts would not be effective if the rules of evidence aren't amended to make it possible and reasonably easy for businesses to take these matters to a Court. Finally, we would also like to note that both the Police force and criminal prosecutors should be adequately trained to investigate Internet crime matters and prosecute these. For example, when an electronic publisher recently had cases of electronic credit card fraud during January 2001 the police were very slow to respond to the calls. We later found out that the unit dealing with credit card fraud in Cape Town did not have sufficient access to transport. They also worried that, even if they followed the case up, prosecutors would not be eager to prosecute the matter because of their limited knowledge of the Internet. Finally, should the prosecutor decide to prosecute the case, much of the time will be spent explaining the workings of the Internet and e-commerce to the magistrate or judge. In this regard, Government might be well advised to create specialised E-commerce courts, much like our current labour courts and tax courts, where these cases could be heard.

Better training for the police, prosecutors and magistrates should be a long-term policy goal of the relevant department. E-commerce will

never be a success in South Africa if the infrastructure and know-how is not created and preserved to enforce the laws we now want to enact. Electronic credit Cards and other forms of fraud are increasing daily in South Africa.

#### 1.7 The issue

Currently, the online business has to take the risk of any unauthorised online transactions. Obviously this creates a serious barrier to both confidence in electronic commerce and the growth of electronic commerce here in South Africa

#### 1.8 Present

Probably the most important issue from the perspective of the online merchant is getting paid. It is important to stress that payment mechanisms and payment instruments are continually being adapted to the online environment. Smart cards and electronic money (also known as "e-cash") are in various phases of development or implementation all over the world. The South African Reserve Bank issued a position paper on stored value smart cards and electronic money during April 1999. Merchants interested in this form of payment must have due regard to these directives as well as the legislation and regulations regulating deposit taking. Examples include the Reserve Bank Act, Banks Act, National Payment System Act, Usury Act and, depending on the payment instrument involved, the Credit Agreements Act and the Bills of Exchange Act.

However, for the better part of 2000 and perhaps 2001, the traditional credit card will remain the predominant payment method in the online environment. A credit card transaction is an instruction by your customers for funds to be transferred into your account and charged against theirs. The instruction is given by your customers directly to you. Later the customer will have to make payment to their bank, typically once each month, in full or part settlement of the account. Charge cards (e.g. Diners Club) operates on the same basis with the exception that the account is not held directly with a Bank.

Face to face credit card transactions (e.g. paying at a restaurant) is referred to as "card-present" transactions. Credit card transactions by mail, telephone or fax are referred to as "card-not-present" transactions. These transactions are referred to by the financial services industry as MOTO (mail order / telephone order) transactions. Because of the risks that the inherent risks of fraudulent use in card-not-present transactions, banks have developed a standard practice, generally referred to as MOTO "rules". In general, these MOTO rules provide that a cardholder is entitled to contest any entry that appears on their credit card statement. If they do so credibly the bank will credit their account and make a so-called "chargeback" to the Merchant with the result that you lose the money. The Bank will also require you to get authorisation from it for every Web transaction you conduct, using either an Electronic Fund Transfer point of Sale terminal (EFTPOS), your Internet Service Provider or the telephone. For unauthorised transactions conducted during the time between the theft of the card details and the card being stopped, the merchant is likely to bear the loss.

It is possible for a cardholder to effect a valid transaction, only to deny it later. If the denial seem credible to the customer's bank, the merchant will have to bear the loss. However, the merchant is likely to prevent a chargeback if it is able to show the bank evidence that the cardholder confirmed the order and took delivery of the goods. It is therefore important for organisations to incorporate sufficient checks-and-balances into the transactional process to enable them to prove delivery has been made to the cardholder.

#### 1.9 Proposed action

We suggest that banks should be forced to take more responsibility for unauthorised transactions that are authorised by them. In terms of credit card companies and South African Bank Rules a user only need a name, credit card number and expiry date to conclude an online transaction in South Africa. The effect of this is that any person that has another persons' card in his hand for a few seconds could go and commit electronic fraud with the information that is available on a credit card. This is not acceptable and we suggest that a starting point would be to force the banks to also check for a cardholder's address before authorising a transaction, as is the case in most other countries like in the United States of America.

The current situation only creates an unnecessary insurance industry because of the old economy risk management employed by South African banks.

Finally, we suggest that before Government starts to address issues like electronic money and electronic cheques, the uncertainty and risks involved with credit card transaction should be adequately addressed.

### Contracts

#### 1.10 The issue

Currently Internet users in South Africa conclude a whole range of agreements or quasi-agreements directly over the Internet. This could be in the form of mere terms and conditions for the use of a web site or an agreement for a delivery of goods and services.

It is uncertain whether these agreements concluded online are in fact binding, and if so, how are such agreements would be proved in a Court of Law.

#### 1.11 Present

There is little or no guidance in South African law on the conclusion and enforcement of electronic contracts and licenses.

#### 1.12 Proposed action

We should suggest that the Government take the following steps:

- Legislation should be enacted to ensure the legal recognition of electronic communications. Standards should be prescribed to

which electronic documents must conform to qualify as written and original. Seeing that the use of the Internet increases daily, we suggest that no exceptions should be provided for any agreements to be concluded online. However, acknowledging electronic communications as contracts only goes half the way – the true problem is proving such communications in courts. The current law of evidence, therefor, needs urgent attention. Finally, due regard should be had to international guidelines to ensure international conformity.

- Electronic agreements should be allowed as evidence in Courts and guidelines should be formulated to indicate what kinds of steps online business should take to keep track of this evidence. We suggest that the law should treat computer-generated evidence exactly the same as evidence created in the old economy.
- The time and place an electronic agreement came into being should be clear. In this regard that we would like to note that the old common law rules regarding the time and place of contracting, is insufficient in an electronic environment and we suggest that legislation should be used to clear up any misunderstanding. The misunderstanding comes from the different approaches followed in our common law when contracts are concluded over the telephone and when an acceptance of an offer is posted. We suggest that electronic communications should be treated in much the same way as telephonic communications.
- The issue of signature in an electronic environment should be addressed. In terms of South African law, a signature does not necessarily have to be something done in ink by a person's hand. It could also be an indication that a person agrees with the content of an agreement. In this regard we suggest that Government enacts legislation in line with international precedence. Currently, South African law states that a signature does not have to be a mark made with ink on a piece of paper – it could be any indication that a party agrees with the contents of an agreement. Therefor, a click on a computer screen (click-wrap agreements) and even opening a box of software (cling-wrap agreements) are considered "signatures". Regardless of whether a "signature" is present, proving such an act is very difficult under our current law of evidence.

## Taxation

### 1.13 The issue

The advent and growing use of the Internet and electronic commerce ("e-commerce") has signalled the beginning of a new era in taxation. Many fundamental tax concepts, currently used in tax jurisdictions globally, are challenged. Tax authorities will have to adapt their application of existing tax principles, practices and procedures for an e-commerce environment. Alternatively, new methods of levying and collecting taxes will have to be devised. Taxpayers, on the other hand, will have to adapt their tax planning strategies and consider the impact of a changing business environment on their global tax charge.

In essence the problems of physical location and distance (and time) as an obstacle to economic development have been overcome by e-commerce. A person's need through centuries to be physically close to markets has fallen away. Services can be supplied and goods sold remotely, and that is the crux of the problem. However, most taxation and tax collection systems in force globally are based on the premise of physical presence of a taxpayer in a jurisdiction as a prerequisite to having a taxable presence there. This premise potentially renders the application of these systems ineffectual in an e-commerce environment.

#### 1.14 Present

Although government has started to move away from the residence based tax system to a worldwide system, many e-tax issues remain unsolved. These include:

- Characterising types of income: Different forms of income are taxed differently. For example, if X allows the public the right to download 10 copies of an e-book from the Internet, the question remains as to the type of income X will receive. Is it income from the sale of books (10 copies sold) or rather royalty income (license to make 10 copies)?;
- The source of income;
- The residence of a multinational online company; and
- The definition of "permanent establishment" in Double Taxation.

As far as VAT is concerned:

Consumption tax, such as Value-added Tax (VAT) or Goods and Services Tax (GST), is probably the most talked-about electronic commerce taxation issue. Questions in this regard revolve around whether a Web-based sale is taxable and, if so, what jurisdiction, if any, may collect the tax and what is the most effective way of collecting the tax or ensuring tax compliance. In addition, many electronic commerce enterprises may be running at a loss and are therefore indifferent to income tax – at least for now. However, consumption tax is immediate. With the rapid increase in Web-based sales, an increasing number of purchases are made free of indirect tax when the buyer ignores the requirement to voluntarily remit the tax, causing an increasing strain on state tax revenues. Consumption tax issues have therefore been recognised to have more immediacy than direct taxation issues.

The problems presented by electronic commerce for the integrity of VAT are not in themselves new; it is more a question of electronic commerce exacerbating existing tensions and difficulties inherent in the tax when dealing with cross-border transactions, relating particularly to place of supply and enforcement issues for non-resident suppliers of services.

In South Africa there are currently no published rulings, tax court decisions or relevant publications focusing on the VAT treatment of electronic commerce operations.

In finding solutions, the underlying principle of any VAT system, of taxing the final consumer in the jurisdiction where the particular goods or services have been consumed and enjoyed, will have to be taken into account. An equally important principle is that goods and services that are provided across borders are zero-rated by the supplier in the country of origin. This is to ensure that consumers in the recipient country do not carry the burden of foreign tax.

All major trading nations support the fundamental principle of neutrality; i.e. economically similar income should be treated equally regardless of whether it is earned through electronic means or through more traditional channels of commerce. Neutrality can be achieved by adapting existing tax principles rather than imposing new or additional taxes.

The underlying question is whether existing indirect tax principles can be successfully applied to the taxation of electronic commerce in a way that will satisfy the competing demands of national revenue collecting agencies.

For VAT purposes it is important to consider the following three concepts:

- time of supply (i.e. the tax point)
- value of supply
- place of supply

Knowledge of the time of supply is essential as VAT on a particular supply must be accounted for by the parties in the particular tax period within which the tax point falls. Knowledge of the value of the supply is essential in order to calculate VAT in respect of that value. For VAT purposes, the place where a supply is made is referred to as the place of supply and that is the only place where that particular supply is liable to VAT. In traditional business this concept was relatively easy to define and straightforward rules could be applied. The advent of electronic commerce has, however, complicated this issue.

#### 1.15 Proposed action

We suggest that Government urgently address the gaps in the South African Income Tax Act. There is already significant international agreement in the UN and OECD to allow the Government to draft proper legislation in this regard.

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