

Department of Higher Education and Training submission on Sections 12 (A to D) and Section 19 (B and C) of the Copyright Amendment Bill [B13-2017]

The Directorate: Open Learning within the Department of Higher Education and Training (the Department) appreciates the opportunity to make comments on the above sections of the Copyright Bill that are under review in Parliament.

The Department derives its mandate from the supreme law of the Republic, the Constitution, within the purport of Section 29, read with schedule 4, which lists education at all levels, including tertiary education as a functional area of national and provincial legislative competence.

Since 1994, South Africa is progressively increasing access to quality learning opportunities for all people. The Department has adopted open learning¹ as a strategy to increase access to education and training opportunities and to construct quality learning environments which take account of students' context and use the most appropriate and cost-effective methods and information and communication technologies (ICT). Therefore, within the broader strategic goals of the Department, it aims to create an enabling environment for the implementation of open learning across the entire PSET system, including Universities, Universities of Technology, Technical and Vocational Education and Training (TVET) Colleges, Community Education and Training (CET) Colleges, and skills development providers. It supports open learning practices and the integration of ICT to address the issue of widening access to affordable and quality learning environments while also taking account of learners' context and use the most appropriate and cost-effective methods and technologies.

The Department supports the Copyright Amendment Bill.

The proposed amendments are progressive and bring South Africa's outdated copyright laws forward, into this digital era. Below, we outline how these amendments to the copyright act will support the strategic intentions of the Department and offer a legislative support to opening the doors of learning and removing unnecessary barriers to education and training for everyone, especially those who have been marginalised.

COMMENTS ON THE RELEVANT SECTIONS OF THE BILL

Fair Use (Section 12A)

The Department welcomes and supports the provisions for fair use. The current legislation has fair dealing in Section 12, which is extremely limiting for research and educational purposes. The Act is outdated and essentially applies to print materials only. The Department is aware that these fair use provisions have been adopted from the U.S. with 11 other countries who have already adopted these provisions. Other countries, such as Australia and Ireland are considering them in their copyright reforms.

Fair use is urgently needed to enable open learning. Fair use is flexible and 'future-proof' so researchers, educators and students in the PSET system will be able to embrace the research tools

¹ Since 1995, open learning is defined as: '... an approach which combines the principles of learner-centeredness, lifelong learning, flexibility of learning provision, the removal of barriers to access learning, the recognition for credit of prior learning experience, the provision of learner support, the construction of learning programmes in the expectation that learners can succeed, and the maintenance of rigorous quality assurance over the design of learning materials and support systems'. Also referenced in Chapter 7 of the White Paper for Post-School Education and Training. Building an Expanded, Effective and Integrated Post-School System (2014).

and evolving technological developments to meet the demands of the Fourth Industrial Revolution. Fair use will also resolve issues such as orphan works, where permissions from rightsholders are not possible, as well as text and data mining for research, particularly in the quest to find solutions to the COVID-19 pandemic.

Education and Research exceptions (Section 12 B, C and D)

The Department fully supports the provisions in Section 12 B, C and D. The regulations within the current Copyright Act have exceptions for education and research. However, these are confined to the face-to-face classroom teaching, and are difficult to interpret and impractical, as they do not extend to eEducation and in specific online education. Any of the acts permitted in the current law are not permitted in the digital space, without copyright clearance from the rightsholders. Permission is often at a high cost to the institutions that require the material for teaching and learning purposes.

The exceptions for course-packs help provide relevant material in print, where recipients do not have internet access at home, or via secure e-learning platforms. Many of the international publishers now permit print and/or electronic course-packs in their e-licences. Photocopying is on the decrease as more and more electronic resources and open access materials are being used. This exception will also save millions of rands that universities spend in copyright licences annually. Funds can be redirected for new resources and infrastructure, and in particular, to support local publishers and university presses.

Exceptions for quotation (with acknowledgement), satire, parody, illustration, etc. for teaching, research and assessment purposes are welcomed.

In view of the number of indigenous languages in South Africa, the Department welcomes the exceptions for translations for research and educational purposes. The provisions for the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or other similar works delivered in public (including the digital environment) will be especially useful, as the current law does not address such acts. The exceptions for back-copies, format-shifting and conversion from old technologies to new ones are extremely important in the digital curation process of making works accessible and preserving them for the future.

Exceptions for Computer Programs, and Libraries and Archives, Museums and Galleries (Section 19 B and C)

The Department supports the exceptions in Section 19 B for computer programs as these are lawful functions in the digital space. It also supports all the exceptions in Section 19 C, which expand existing functions of and introduce new provisions for libraries and archives. It introduces brand new exceptions for museums and galleries.

During the COVID-19 lockdowns, libraries, archives, and other information services have been closed and their printed collections were inaccessible. The alternate mode for course completion was predominantly online, except in circumstances where online works have to be photocopied for students who lack online facilities at home. At present the copyright law does not permit acts in the digital space without permission from rightsholders, e.g. digitisation, scanning, sharing works via USB flash drives, emails, CDs or other digital formats. Even in lectures, book clubs and academic reading circles, the common practice of reading aloud from a work is not permitted without prior permission via online platforms such as YouTube or Zoom, etc.

The Department believes the exceptions in Section 19 B and C are crucial to research and the provision of teaching and learning materials online. At present, a National Open Learning System (NOLS) is

intended to hold and disseminate high quality, self-directed, interactive learning materials that learners can select and complete modules. NOLS also contains materials that prepares learners for formal assessment such as examinations and trade tests to obtain qualifications. The exceptions for preservation and digital curation enable the dissemination of the above resources. The provisions also allow for collaborative development, use and re-use of interactive learning materials available as open educational resources.

In addition, there are some very useful exceptions for the reproduction of whole works in special circumstances, for non-commercial purposes, as well as the use of whole works, such as films, music, etc. in the course of teaching. Libraries and other information services entities will now be allowed to include extracts of works in exhibitions, commemorative and other events of a non-commercial nature, which is currently not permitted in our copyright law. Section 19C empowers librarians and other information specialists to expand or transfer their functions in the analogue world to the digital world, e.g. interlibrary loans, format-shifting, conversions from old technologies to new ones, lending, replacement of damaged or stolen material, back-up copies, and many more. The current law has been a barrier to these professional services, so these exceptions are certainly welcomed by the Department.

The exceptions relating to institutional repositories will enhance the many Department and Donor Funded sponsored programmes, such as Open Access, Open Educational Resources and Open Textbook programmes of the Department and the European Union (EU).

The Department encourages Parliament to act on this Bill expeditiously so that a new Amendment Act is in place.

The Department requests the opportunity to make an oral presentation at the online hearings on 4 and 5 August 2021.

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