Joint Academic Opinion
Re: Copyright Amendment Bill (B-13B of 2017), Proposed Changes November and December 2021

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Introduction

We offer the enclosed Joint Opinion on the changes to the Copyright Amendment Bill proposed in November and December 2021.

We wish to offer our sincere condolences for the loss of Chairperson Honourable Duma Nkosi and Macdonald Netshitenzhe, former DTI Director of Policy and Legislation. These were two critical leaders in South Africa's effort to enact a more just and equitable copyright law and they will be sorely missed. We also express our condolences for the losses caused by the Parliament fire, including of works in its collections that may not have been adequately preserved.

We thank the Committee for this and the long history of opportunities for public comment on the Copyright Amendment Bill.

We confine our comments largely to those provisions on which the call for comments was made. We also provide some comments on wording that resulted from the previous call or are technical in nature where we believe serious errors or omissions detract from the purposes the changes are meant to promote, many of which are inseparable from the advertised changes. We do not comment on all of the proposed changes.

PROPOSED CHANGES TO THE COPYRIGHT AMENDMENT BILL

AMENDMENTS RELATED TO PEOPLE WITH DISABILITIES

Clause 20, Section 19D(3)(b)

The proposed Section 19D(3)(b) "only" permits export or import of accessible format copies "where such person knows, or has reasonable grounds to believe that the accessible format copy will only be used to aid persons with a disability." The stated purpose of this provision is to align the CAB with the Marrakesh VIP Treaty. However, we submit that it does the opposite. The proposed section *reverses* the Marrakesh VIP Treaty's test in Article 5(2), which requires that the provider "did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons" (emphasis added).

The proposed standard places an onerous and near-impossible burden on authorised entities to acquire affirmative knowledge of the end-user. This is not

required by the Marrakesh VIP Treaty,[1] and will likely dissuade legitimate import and export of accessible copies that the Treaty was meant to permit. Moreover, it risks falling foul of the principle of legality under Sections 1(c) and 33 of the Constitution as well as the right to equality and non-discrimination under Section 9 of the Constitution, as it is an onerous burden that is placed *only* on people with disabilities or people serving people with disabilities.

Recommendation:
We propose adding the emphasised portions below, using the Marrakesh VIP Treaty language, so that Section 19D(3)(b) reads:

> "A person contemplated in paragraph (a) may only so export or import provided that prior to the distribution or making available they did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons."

AMENDMENTS RELATED TO PERSONAL COPIES (REQUIRING THAT THE WORK MUST HAVE BEEN LAWFULLY ACQUIRED)

Clause 1 - Section 1, Clause 13- Section 12B(1)(i) and (3)

The proposed amendments would change Section 1 (by inserting a definition) and 12B(1)(i) to limit copying for personal use to works 'lawfully acquired', defined to exclude copies from works 'borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy.'

The proposed restriction would forbid common usages that most laws, including the current Section 12(1)(a) of the Copyright Act, permit, including:

- Making a personal use copy from a library, archive, or other public collection;
- Recording from a public broadcast;
- Making a private copy from a source in which access is licensed, such as through a journal or media subscription service.

Many of these activities are permitted under the current law allowing fair dealings for personal and research purposes - prohibiting them is retrogressive.[2] To the extent that there is a concern about duplication, then

1 We note that the President did not raise any constitutional concerns about this aspect of section 19D, and that the current Copyright Act has been held to be unconstitutional to the extent that it does not make provisions for blind or visually impaired persons. See *Blind SA v Minister of Trade, Industry and Competition* (Case no. 14996/21) (North Gauteng High Court).

2 For example an Internet service provider makes one or more copies of a webpage to display it to someone so that they can read it. Millions of such copies are made in South Africa at present without any authorisation in the Copyright Act, without any evidence these affects the interests of authors.

‘personal use’ should be retained in S12A(a) where it is restricted by the fair use balancing test in S12A(b).

Recommendation

Retain personal and research uses as an explicit example of a lawful purpose for fair use in Section 12A(a)

Replace the phrase “lawfully acquired” with “lawfully accessed” in Section 12B(1)(i), leaving courts free to define lawfully acquired.

AMENDMENTS RELATED TO TECHNOLOGICAL PROTECTION MEASURES

Section 1

Definition of ‘technological protection measure’

It is proposed to amend the definition of technological protection measure to remove paragraph (b), which makes clear that the definitions “does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work **for non-infringing purposes**.” This amendment is not required by international law and would have harmful effects.

The treaties to which South Africa plans to accede, WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT), that refer to technological measures explicitly exclude acts ‘permitted by law’ from any prohibition of circumvention of technological measures. Paragraph (b), quoted above, took advantage of this flexibility in international law. The proposal would give up this flexibility. The flexibility is important to allow the circumvention of digital locks for lawful means -- e.g. to make a copy for classroom use or to quote in a documentary film.[3]

Recommendation

Retain the following part of the definition of technological protection measure, and add “product”, to confirm with the rest of the section:

> (b) does not include a process, treatment, mechanism, technology, device, **product**, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes

3 These changes do not appear in the December 8 document from Parliament entitled "Wording for all amendments” but only in the document of 24 November 2021.

‘technological protection measure circumvention device or service’

It is proposed to expand the definition of technological measure to include a device or service that has a mostly non-commercial use, such as enabling access by disabled persons or non-profit education that can also be used to circumvent technological protection measures. But circumvention of TPMs is often required for lawful commercial purposes, such as quoting a film in a documentary or television program. It is also proposed to prohibit a device or service advertised as circumventing technical protection measures in the definition.

Note 18 of the proposed changes to the CAB circulated for comment on 24 November 2021 states that the expansion of the definition is required to “align the wording with treaty wording”. However none of the treaties to which South Africa is a party or seeks to be a party, including the WCT and WPPT, contains such wording.

Recommendation

Do not expand the definition of ‘technological protection measure circumvention device or service’.

Section 28O

It is proposed to replace the phrase “‘has reason to believe”, which requires intention, with the phrase “should reasonably have known”, which imposes criminal liability based on negligence, in s280(1) and s28O(2)(b).[4] The result would be to criminalise many more actions than the current wording. Using negligence as grounds for criminal liability will make it much more dangerous for people who want to engage in a lawful use,and must circumvent a digital lock to do so.

The treaty provisions applicable to technological protection measures do not require criminalisation of circumvention, much less doing so based on a negligence standard. Leading jurisdictions such as Canada do not criminalise circumvention. See Section 41 of Copyright Act (R.S.C., 1985, c. C-42) (treating circumvention as an infringement of copyright subject to an interdict or damages). Section 23(2) of the Copyright Act of the 1978 Copyright Act sets the standard for secondary infringement as ‘to his knowledge’. This requires actual knowledge and thus provides an appropriate standard without imposing negligence.

4 Although Section 28P contains a defence to the offences relating to digital locks it is too narrow to protect all lawful uses, it only protects acts involving circumventions devices or services whereas acts that do not involve circumvention devices are criminalised and it is limited to exceptions and not all lawful acts. The second part of the definition is required to protect lawful acts from criminalisation.

Recommendation

Delete “has reason to believe” but to insert “to his knowledge” in 280(1) and (2)(b).

As an alternative, parliament may consider having only civil penalties for circumvention.

AMENDMENTS TO MAKE THE FAIR USE FACTORS APPLICABLE TO EXCEPTIONS IN SECTIONS 12B, 12C, 12D, 19B AND 19C

Clause 13 - Section 12A

It is proposed to remove mention of several purposes from the fair use clause which are addressed in other sections and to make the exceptions in sections 12B, 12C, 12D, 19B and 19C “subject to the principle of fair use, determined by the factors contemplated in paragraph (b).”

We advise parliament to retain the mention of the excluded purposes of education, research and scholarship in fair use, because fair use is intended to apply as a supplement to specific exceptions.

Section 12A(a), Removal of illustrative purposes regarding research, private study and personal use; scholarship, teaching and education; and libraries, archives and museum use

Specific exceptions provide clarity and certainty for defined uses. The value of fair use is to provide flexibility, including for approving of uses that are fair to the rights holder and valuable for society but do not fall within specific exceptions. To serve this purpose, it is most useful to define fair use as a supplementary exception that applies independently of specific exceptions, including to uses in the same general category of, but not addressed by, such exceptions. United States law, for example, provides that nothing in the specific exception for library uses “in any way affects the right of fair use as provided by section 107.”[5] Singapore’s recently amended Copyright Act likewise includes fair use and explicitly provides that permitted uses are to be applied independently of one another.[6]

Removing some of the identified examples of fair use purposes could inhibit courts from correctly applying fair use “in addition to” the specific exceptions,

5 This proposed change is marked in blue as a proposal advertised for comment in the document advertised on 24 November 2021.
6 The Agreed Statement concerning Article 5(2) specifies that authorised entities may voluntarily adopt their own practices to ensure that the work reaches the end user. In particular, the Agreed Statement read with Article 5(2) has been interpreted to mean that States must *not* impose onerous due diligence obligations upon authorised entities

as the first words of Section 12A require. It is not necessary to avoid the mentioning of permitted purposes for fair use that are also covered in specifically defined exceptions. U.S. law, for example, provides a specific exception for performance and display of works in education (17 U.S.C. 110) and also defines "teaching (including multiple copies for classroom use)" as a permitted purpose for fair use in section 107.

The sections of the CAB that the proposal mentions as "duplicative" do not provide the same scope of applicability as fair use. Fair use is applicable to any exclusive right, of any work, by any user, as long as that use meets the fairness test. Each specific exception is much more limited:

- Section 12B(1)(i) does not apply to "research", only permits a "copy" not a "use", and only applies to a natural person. So limited, it would not, for example, permit individuals or organisations to engage in text and data mining research (aka computational analysis).[7]
- Section 12D authorises only "reproduction" and "broadcast" of works, and thus fails to authorise the uses (including communications of works) essential for online schooling.
- Section 19C is cabined to library, archive and museum "activities in accordance with subsections (2) to (13)" and requires that "the work is not used for commercial purposes." These restrictions fail to authorise many fair uses of works, such as providing copies to a local business or making research corpuses for text and data mining research.[8]

Recommendation

1. Retain the purposes of research, private study and personal use; scholarship, teaching and education; and libraries, archives and museum use as illustrative examples of fair use.
2. Add after "research", "including computational analysis,"

Section 12A(d), applying fair use to sections 12B, 12C, 12D, 19B AND 19C

in this regard as that would inhibit cross-border exchange of works and hamper the functioning of the Treaty. See, Laurence R. Helfer, Molly K. Land, Ruth L. Okediji, and Jerome H. Reichman, World Blind Union Guide to the Marrakesh VIP Treaty (Oxford University Press, 2014) 138.

7 Text and data mining is the process of using computational research to analyse a corpus of works, which is the first step toward creation of artificial intelligence programs, these uses are examples of computational analysis, see Sections 243-4 of the Singapore Copyright Act 2021.

8 For an example of a library program explicitly designed to assist businesses, see The Thomas Yoseloff Business Center at the Stavros Niarchos Foundation Library https://www.nypl.org/about/locations/snfl/business ("offering an array of free resources, including premium electronic resources and services for businesses of all sizes, from start-ups to established businesses seeking expansion, and for job seekers").

Section 12A(d) appears to require that the four-factor fair use test be applied in addition to the carefully drafted internal limitations that exist in Sections 12B, 12C, 12D, 19B and 19C. This could cause great confusion by the courts.

The traditional ways to define the boundaries of limitations and exceptions are through a definition of the fairness of the purpose and extent of a use in relation to the rights holders interests. In the specific exceptions in 12B, 12C, 12D, 19B and 19C, the scope is limited through internal conditions, such as “fair practice” and “to the extent justified by the purpose.” Adding the fair use factors to these existing statutory conditions stacks tests with equivalent purposes on top of one another. This will likely cause confusion. Each exception should have one, and only one, framing of a fairness test setting the boundaries of the exception.

Recommendation

Amend the proposed Section 12A(d) to read:

> “Nothing in Sections 12B, 12C, 12D, 19B and 19C in any way affects application of the principle of fair use, determined by the factors contemplated in paragraph (b).”

AMENDMENTS RELATED TO ADDING THE WORDING OF THE THREE STEP TEST

Clause 13 -s12C and 12D

It is proposed to amend section 12D and 12C to insert modified versions of the “three-step test” found in the Berne Convention. The three-step test is a principle of international law used to assess domestic law. Its inclusion in domestic law is not required and is rare in copyright laws around the world. It is inappropriate as a standard to set the boundaries of exceptions when combined with other internal limitations that serve the same purpose.

Section 12C

S12C permits the making of transient copies, a mundane feature of the automated systems that enable the Internet to operate.[9] The making of transient copies is an extremely limited action for a very limited purpose, thus the section has sufficient internal restrictions and the three step test is unnecessary.

9 17 U.S.C. 108(f)(4): “Nothing in this section—

> …
> (4)in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

Importing the three step test into the Copyright Act adds yet another test to those already in the Copyright Act and to be inserted by the Copyright Amendment Bill which may lead to confusion.

Recommendation

Delete proposed subsection 12C(2).

Section 12D(1), (8) and (9)

It is proposed to add both a fair practice requirement and the three step test to the right to make educational reproductions in Section 12D(1), (8) and (9).

Section 12D(1) (a) authorises the making of copies and broadcasts for educational and academic purposes, and is subject to a number of restrictions set out in (2) to (5) and (8). As discussed above, it is important that this section apply to “uses” not only repercussions, including to authorise communications needed in online learning.

The Berne Convention stipulates in Article 10(1) that ‘extent justified the purpose’ and ‘fair practice’ are the appropriate restrictions for educational uses. Sections 12D(1)(c) and (d) propose to add additional limitations contained in the three-step test from Article 9 of the Berne Convention. Adding the three-step test in addition to the fair practice test is an example of test-stacking that is duplicative, and will likely cause confusion.[10]

Adding a fair practice requirement in 12D(1) is duplicative since it is applied in subsection 12D(8)(a).

Recommendation

Delete proposed sections 12D(1)(a)(b)(c) and (d).

In 12D(1), change “reproduction” to “use”, and add after “activities”: “including in the cases stipulated in this section.”

10 Section 184, Singapore Copyright Act 2021

REMOVAL OF DUPLICATION – ADVERTISEMENT RECOMMENDED

Clause 20 -Section 19C(4)

The proposed change to Section 19C(4) would remove the words ‘’for commercial purposes” because the 19C(1) already prohibits uses under the section for commercial purposes so it is duplicative. However the effect is to create an unanticipated prohibition on copying in a subsection not intended to deal with copying. Section 19C permits a library or archive to permit a user to view or listen to an audiovisual work. It originally prohibited making a copy for commercial purposes. Merely removing the words ‘for commercial purposes’ leaves the words ‘but may not permit a user to make a copy or recording of the work’. According to the parliamentary record this is not the result of a policy decision. This is likely to have unanticipated effects because it would prohibit libraries and archives using innovative technologies, for example streaming an audio visual work to a user’s device, which make technical copies of the work. It can also create confusion in respect of copies permitted in the remainder of Section 19C. The prohibition on copying is unnecessary since the authorization is already limited to permitting “ a user to view” - which does not include an authorization to copy.

Recommendation

Remove the entire phrase “but may not permit a user to make a copy or recording of the work for commercial purpose” from Section 19C(4).

REMOVING DUPLICATION, CHANGING WORDING TO BE MORE SIMILAR TO TREATY WORDING / S12(4) OF THE ACT (IN RESPECT OF MORAL RIGHTS)[11]

Clause 13 Section 12B

12B(1)(d)(ii) and (iii)[12]:

The proposal will add a fair practice requirement to exceptions which permit reproduction for reporting of current events and of speeches to the public. This is not required by the Berne Convention which creates a specific exception for this use, not subject to fair practice nor the three step test, since this is such an important function for a democracy. Since s12B(1)(e)(ii) and (iii) contain their own internal restrictions that limit the use and the CAB aims to increase access to information the unnecessary restriction of fair practice should not be applied.

Recommendation

Do not add fair practice requirements to s12B(e)(ii) and (iii).

11 Advertised for comment in 12B(1)(e)(ii) and (iii)in the wording advertised on 24 November 2021 and as s 12B(1)(d)(ii) and (iii) in the wording circulated on 8 December 2021.

12 See GUIDE to the BERNE CONVENTION for the Protection of Literary and Artistic Works (Paris Act, 1971), at 59 (explaining that the "fair practice" requirement "is ultimately a matter for the courts, who will no doubt consider such questions as the size of the extract in proportion both to the work
from which it was taken and that in which it is used, and, particularly the extent to which, if any, the new work, by competing with the old, cuts in upon its sales and circulation, etc..").