



**Chairperson**

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**To: Mr. A. Hermans, Portfolio Committee on Trade and Industry, Parliament**

For attention: Mr A. Hermans, Ms M. Sheldon, Ms. Y. Manakaza, Mr. T. Madima, via email:

[REDACTED]  
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**Date: 28 January 2022**

Dear Mr. Hermans

**Re: NCLIS SUBMISSION ON COPYRIGHT AMENDMENT BILL PROPOSALS**

The National Council for Library and Information Services (NCLIS) would like to thank you for the opportunity once again to make submissions on the Copyright Amendment Bill, deadline 28 January 2022. We also express our deepest sympathy on the passing of the Chairperson, Mr. Duma Nkosi.

NCLIS was established in terms of the National Council for Library and Information Services Act, 2001 (Act No. 6, 2001) and was inaugurated on 11 March 2004 in Cape Town. NCLIS is an Advisory Council to the Minister of Sport, Arts and Culture, the Minister of Higher Education and Training and Minister of Basic Education.

NCLIS refers to our attached Submission on the Copyright Amendment Bill (CAB) in July 2021, when we strongly supported the Sections under review. We also refer to the new proposals published for public comment on 6 December 2021.

NCLIS would like to stress that the Bill approved by Parliament in 2019 promised to be a progressive, appropriate and balanced copyright law for all stakeholders, and a possible model for other countries. The limitations and exceptions in that version for the library and information sectors, for education, academic activities, and people with disabilities, as well as authors and creators were widely welcomed. Ongoing discrimination against people with disabilities, and the many omissions, limitations and restrictions in the current Copyright Act would finally be rectified through that Bill. All these exceptions were in line with the Constitution, international IP commitments and were modelled on existing copyright laws from various countries round the world.

Unfortunately, due to undue pressures on our President from the US Trade Representative's Office, multinationals, and the European Commission, certain sections of the Bill were sent back for review. President Ramaphosa was very specific on the issues he sent back for review, and that they were on '*constitutionality issues only*'. Yet, we note, with concern, that the new amendments are far broader than what is required in Section 79(1) of the Constitution and affect parts of the Bill that were not sent back for review, e.g. TPMs, Section 19D, etc.

NCLIS has perused both the proposed amendments in blue text (for public comment), and technical changes in green text (not for public comment) in the document circulated this week. We would like to place on record that some of the so-called technical changes are problematic and change the meaning in some instances. These should have been put out for public comment as well.

#### **NCLIS COMMENTS ON THE NEW PROPOSALS IN THE CAB:**

NCLIS is shocked and extremely concerned about the current turn of events relating to the Copyright Amendment Bill and the redrafting of large sections of the Bill. **NCLIS hereby urgently requests** that the reasons why, at this late stage of the legislative process, the Portfolio Committee on Trade and Industry and/or DTI decided to go beyond the

requirements of the President's review, and to introduce the following restrictive amendments:

- **Draconian conditions** – prohibiting copying in Section 19C(4); curtailing personal copying (Section 12B1(f)(i)); adding 3 levels of tests or conditions (Section 12A(d)), i.e. fair use, fair practice and in some instances, the 3-step test too, to all the exceptions in Section 12B,C and D, and Section 19B and C. Application of these criteria, especially in some of the Sections would be totally impractical and would in fact, override valid exceptions in those Sections, e.g. the lawful copying of a whole work in certain situations in Section 12B. Section 12B is already subject to fair use factors in Section 12A, so fair practice is a double condition.

These layered conditions would also create such hurdles for users of information that they would either be decentivised to use the material, or would be forced to apply for permission and pay copyright fees for something that they are in fact allowed to use, but have found too difficult to interpret or apply. They would also create immense problems for educators if they have to interpret such a layer of conditions before they can even use works for teaching purposes. Essentially, they would hinder access to knowledge and the sharing of educational materials.

**NCLIS recommends** that all the layered conditions be removed from Sections 12 B,C and D and Section 19B and C, as they have their own built-in limitations, and that the fair use factors only apply to the Fair Use Clause in Section 12A. In some cases, fair practice could be added to the abovementioned sections, only if there are no other conditions applicable to them in their specific sections. This should be the last resort. Limitations and exceptions are supposed to provide clarity as to what can and cannot be done. Adding layers of conditions complicates the situation and is difficult for users and even lawyers to interpret and apply them. All the prohibitions and restrictions on personal copying should be removed. Personal copying is already allowed in our current Copyright Act, and the new restrictions would violate the principle of non-retrogression, which would violate our Constitution and human rights law internationally.

- **Erosion of the fair use provisions** - deleting very important examples of fair use from Section 12(A)(a) (without first seeking public comments). These examples would and should enable unspecified acts such as text and data mining, using orphan works when they are needed urgently and the process in Section 22A would take too long to make them available for use, AI and 3D applications, machine-learning, and unforeseen or future (as-yet-undefined) uses. The deleted subsections are not exact duplications of subsections in other Sections of the Bill, as is suggested in the footnote.

**NCLIS recommends** that Subsections (i), (iv) and (iv) should remain in Section 12(A)(a).

- **Introduce new amendments beyond the President's review** - creating issues with TPMs in Section 27, e.g. instead of treating the issues as copyright infringement, certain actions now have become criminal acts; and deviating from Marrakesh Treaty language in Section 19D(3) which creates unnecessary burdens for libraries and other authorised entities when importing/exporting accessible formats. These go beyond the President's remit to Parliament on 16 June 2020. Please see our request in the first paragraph under NCLIS COMMENTS ON THE NEW PROPOSALS IN THE CAB.

It seems the whole process has become skewed, and the pendulum has swayed way past fair and balanced. It is indeed worrying that the whole process has gone so horribly wrong, reversing the hopes of so many, for whom the Bill was a door to better access to knowledge and education.

NCLIS looks to South Africa to uphold its commitment to libraries and related entities who play a pivotal role in development, education, and knowledge-sharing nationally and on the continent. We believe the Bill was to entrench the constitutional rights into our copyright law and to address the wrongs of the past and discriminatory practices that for more than four decades deprived millions of people from accessing information and educational material.

NCLIS recommends that this whole situation, as highlighted above, be reviewed and remedied as a matter of urgency, otherwise it could derail the whole purpose of the Bill.

We look forward to the response at your earliest convenience.

Regards.



**Dr Naresh Sentoo**

**Chairperson: NCLIS**