SUBMISSION ON COPYRIGHT AMENDMENT BILL [B13B-2017]

Denise R. Nicholson

I am a Copyright and Scholarly Communications Consultant and Owner of Scholarly Horizons, Gauteng. My full CV and other information can be found at https://scholarlyhorizons.com.

As you will see, I have been involved in copyright matters since 1998. In September 2021, I was awarded the SALI Trust-LIASA Lifetime Achievement Award for extraordinary leadership, commitment, service and achievements in the library and information field and copyright in South Africa. In November 2021, I was awarded the UNISA Chancellor's Calabash Award for Outstanding Educator for my work in copyright and scholarly communication in South Africa, regionally and internationally.

I made a written submission in July 2021 and presented in the online presentations during August 2021. I strongly supported the version of the Bill at that stage, which was progressive, fair and balanced, and finally addressed many of the issues experienced by the educational, research and library sectors and people with disabilities for decades.

However, I am really concerned that in the 2021 round of submissions, some stakeholders were allowed to provide submissions far wider than the prescribed clauses or 'constitutionality issues' sent back by the President for review. As a result, it seems, a whole new range of expanded and more restrictive proposals have now been included for comment in this round in 2022. Also, some problematic deletions have been recommended, which have implications for access to information, education, etc., yet the public have not been given the chance to comment on them. These are extremely relevant to this discussion, and I have therefore referred to some of these deletions in my submission below.

It is indeed worrying how the priorities of access to knowledge, education and research, libraries and other information entities and people with disabilities are clearly being eroded to support a more restrictive copyright regime favoured by multinationals in particular. The new proposals attempt to shift the goalposts and introduce far-reaching restrictions. This was not the purpose of the Bill and in many instances, conflict with our Constitution.

MY FORMAL COMMENTS AND RECOMMENDATIONS:

New definitions

a. **(b) –** lawful entities that have the capability or willingness to assist people with disabilities should be permitted to do so, even if this does not form part of their primary functions or institutional obligations. The word '***primary***' is restrictive and **should therefore be deleted**, especially with reference to a developing country and in particular, where people with disabilities have not had any exceptions for decades and now they have the opportunity to be assisted.
b. "***lawfully acquired***". It stands to reason that if fair practice or the 4 factors apply, then the use must be lawful and the works lawfully acquired, so this definition is superfluous. The definition limits use to a few situations, whereas lawful acquisition is far broader in nature. However, please see **S.12(B)(1)(i) – Personal copying, on page 5 below** relating to personal copying, which makes this new definition redundant, **and it should therefore be deleted.**

Removal of the word 'wire' from CAB

In line with the definition of broadcast in (a), the word 'wired' has been deleted. Should this not also apply to Section 11A(c), 11B(dA), Section 19D(2) (a) and Section 27 (EB) of the Bill?

Use of SA English rather than US English

I recommend that SA/UK English should be used in this entire Bill, instead of US English, e.g. authorized should be authorised, authorization should be authorisation, license (as a noun) should be licence, modeled should be modelled, etc.

Reference to 'government'

Apart from its use in the definition of 'authorized entity', the word 'government' in the proposed amendments should be changed to 'relevant government department' or 'relevant government entity responsible for …'

PROPOSED NEW AMENDMENTS

S. 12A. (a) – Fair Use

The planned removal (without public comment) of subsections (i), (iv) and (vi) is very problematic and detrimental to access to information, research, education, libraries and archives. These are valid examples should stand on their own under fair use, as they embrace wider and other possible acts (e.g. computational analysis (text and data mining), research, and unforeseen or future acts that are not specifically addressed in S.12D and S.19C. The provisions for research and scholarship in other parts of the Bill are surprisingly deficient, so it is necessary that subsections (iv) and (vi) stay in S.12A(a). Fair use must have a list of examples of acts that can assist users when using copyright works. **I recommend that subsections (i), (iv) and (vi) remain under S.12A(a), even though there may be some overlap in the other Sections.**

S.12A(d) – Over-extended or 'stacked' conditions

The purpose of limitations and exceptions is to provide a balance between the rights of rightsowners and the just needs of users. By introducing fair use and the separate exceptions for education and academic activities, and libraries, archives, museums and galleries in the Bill, the DTI and Parliament achieved this balance in the earlier version of the Bill.

Limitations and exceptions need to be clear and straightforward so that users of copyright works know exactly what is allowed. They should NOT create hurdles or complicated interpretation of conditional criteria before a work can be reproduced. Limitations and exceptions should NOT be subjected to restrictive conditions, such as fair use factors, plus fair practice, as well as the 3-step test in some instances, as they have their own limiting conditions in their specific Sections.

By now introducing 'stacked' tests or conditions, such as fair use factors, plus fair practice, plus 3-step test criteria, applicable to Sections 12B,C,D

and 19B and C, they virtually reverse the situation and make copying any copyright works very difficult or impossible. They restrict or prevent access to information. They make it very difficult for users to decide if they can use a copyright work. It could result in educational institutions and others having to apply for permission first before copying works. This is counterproductive and expensive if copyright fees are levied. Also, fair use factors (especially the 4th factor) would override lawful exceptions, e.g. lawful copying of a whole work in S.12B.

Moving from the favourable fair use clause and separate exceptions for education, academic activity, libraries and other information entities, etc. in the 2017-2021 version of the Bill, the new proposed amendments now create a far more rigid copyright regime, and in some instances, worse than the current copyright law. This is unacceptable and counter-productive, and arguably unconstitutional, as they create so many challenges before anyone can use a copyright work for any purpose.

There is a valid reason why fair use should be separate from more specific exceptions. This is because fair use is more flexible and apply to all users, whereas separate clauses focus on more specific users and have their own limiting conditions in their relevant sections. The US has a fair use clause (S.107), and then separate clauses, e.g. S108 and S109, with specific conditions in those sections, but not subject to the 4 fair use factors.

No provision in separate Sections should be intended to take away any rights existing under the fair use clause. <u>These rights should stand side by side</u> – fair use clause and separate Sections relating to specific exceptions, such as education, academic activity, libraries, etc. Parliament has also confirmed that the Bill is compliant with the 3- step test, so there is no need to include them anywhere in the Bill.

The loading of so many conditions on S.12B, C and D and S.19B and C, goes way beyond the President's remit to Parliament on 16 June 2020 and is not required to address any issues of a constitutional nature. In fact, the new proposed amendments <u>potentially create a situation of unconstitutionality</u>, in view of their barriers and new restrictions that will negatively affect access to information, personal copying, academic activities, education, library and other information services, etc. and affect the import/export of accessible formats.

I strongly recommend that the fair use factors be applied <u>solely</u> to Section 12A, and that they be deleted entirely from Sections 12B, 12C, 12D, 19B and 19C. All references to the 3-step test criteria should be deleted, as well as Section 12A(d).

S.12B(1)(b): Illustration for teaching purposes

Since this exception is specifically linked to teaching, it may be moved to Section 19C(9) as planned, without public comment, but it is important that the wording remains unchanged. This exception is crucial for teaching and learning, even more so in the digital environment and in the COVID-19 pandemic.

S.12B(1)(f)(i)

The word **'or'** has been omitted at the end of this phrase. **Please add 'or' after the semicolon.**

S.12(B)(1)(i) – Personal copying

S.12B(1) (a) of the current Copyright Act provides for "research or private study by, or the personal or private use of, the person using the work". There are no restrictive conditions. S.12B(1)(i) of the Copyright Amendment Bill now introduces a restrictive condition that the work must be 'lawfully acquired", which excludes anything other than a purchased item, or a gift or paid-for online streaming, and is subject to 'fair practice'. The added S.12(A)(d) now adds the 4 fair use factors to S.12(B)(1)(i) as well, which would make re-use and reproduction of works almost impossible.

These new restrictions would significantly limit access for personal or private copies, whether it be for education, research, leisure, self-improvement, professional, employment, government, or any other purposes. It would also be seriously discriminatory against people with disabilities, who would need to make personal copies from printed or online material for the purpose of having them converted into accessible formats, and against the majority of people in South Africa, who are not privileged to own much in the way of reading and other materials. This amendment would only benefit those who own or can afford to purchase works, and would exclude use of materials borrowed from libraries and other information centres, donated, inherited or swopped works, etc. Any reference to 'lawfully acquired' in this section or others should be deleted.

What is very important and relevant to the above paragraph is that this new proposed amendment would override the benefits already enjoyed in the current Copyright Act 12(1)(a), and those already included in the Copyright Amendment Bill to date. This would violate the principle of non-retrogression and would therefore conflict with our Constitution and international human rights laws.

I therefore recommend that the wording in the existing subsection remain, or the wording in the current Act be used, and that the definition and any reference to 'lawfully acquired' in any part of the Bill be deleted.

S.12B(1)(c) and 12B(2) – Ephemeral 'rights'

The term 'ephemeral 'rights' is not defined in the Bill and is incorrect. It should be 'ephemeral recordings' or 'ephemeral copies', not 'rights.

It is indeed worrying that there seems to be a concerted effort by the DTI or your Committee to tailor these amendments to accommodate multinational companies and related entities to support a new licensing scheme which will benefit them. Yet, in the process, questionable requirements and problems are created for South African broadcasters.

The proposed amendments in Section 12B(1)(c)(i-vii) and 12B(2) do not rectify any issues of constitutionality as required by the President, so why are these amendments even included? In fact, they are impractical and prescriptive. In terms of **S.12B(2),** they offer a licence from a collecting society as the only option for broadcasters. No mention is made of what happens once the licence expires. Also, the words 'registered or accredited' should have been added before the words 'collecting society'.

Issues around the deletion of fixations and recordings are problematic, as many of them may form part of our cultural heritage and should be stored and preserved for longevity.

S.12B(1)(vii) refers to an 'official' archive, but this is not defined in the Bill. What does 'official' actually mean? Whose archive would it be? Who would be responsible for managing, updating and securing the archive on an ongoing basis? Would this include a broadcaster's archive or is there an intention to create an 'official' archive within government structures? A lawful and functioning archive should be allowed to collect, store and preserve these fixations or reproductions.

Also, what does 'exceptional documentary character' mean? It is not defined, nor is any example provided. What criteria would apply and who would set these criteria? Would it include topics such as cultural heritage, tourism, nature, health, safety and security, climate change, etc? What would be excluded and who would make the decisions on exclusions? These requirements are impractical and nebulous.

I recommend that S. 12B(1)(c)(i-vii) and 12B(2) be deleted in toto.

Section 19C(4) – Prohibits reproduction

It is your Committee's intention to delete the words "*for commercial purposes*" (without having sought public comment on this). It has also added a new phrase stating "*may not permit a user to make a copy or recording of the work".* This changes the whole context of Section 19C(4), basically prohibiting copying at all.

This is unfair, impractical and arguably unconstitutional. This subsection should be deleted.

Section 19D – Accessible formats

Section 19D was not sent back for review by the President, so why is this Section being amended at all?

It seems the DTI or your Committee has adopted a form of 'poetic licence' to amend Sections outside the President's 2020 remit to Parliament. In fact, it is disconcerting to see that, despite stakeholders being told in a number of calls for comments only to comment on the Sections under review, and NOT to comment on other Sections, your Committee has been persuaded by some stakeholders to extend its amendments beyond the Sections under review. These are not issues of constitutionality as required in Section 79(1) of the Constitution and should not be included in this round of amendments.

Since they have been included, here are my comments on this Section.

- The grammar is incorrect in 3 places, i.e. in **Section 19(D)(1), (2) and (3). 'Any person that serves …' should be changed to 'any person *who* serves…** '

- **Section 19D3(b) – Contradicts Marrakesh Treaty wording**

  The proposed amendment in **Section 19D3(b)** changes the situation completely. It affects the meaning, interpretation and application of this Section. The proposed wording is different to that of the Marrakesh Treaty and creates an unnecessary burden on the importer/exporter (including libraries, tertiary disability rights units and other authorised entities).

  I recommend that the proposed wording be deleted, and that the following text be inserted from the Marrakesh Treaty:

"prior to such distribution or making available, the authorized entity must not know or have reasonable grounds to know that the accessible format copy would be used by others".

- **Section 19D(4)(b)** is problematic as it would create significant potential liability for libraries, causing a chilling effect on their activities, which would undermine the goal of the Marrakesh Treaty.

  I recommend that S. 19(4)(b) should be deleted.

S.27(5A, B and C)

The amendments in these sections are draconian and go beyond the ambit of the President's letter to Parliament on 16 June 2020 and **should therefore be deleted from this Bill**.

I urge your Committee to please take these comments and recommendations seriously in your deliberations and to restore the balance that has now been lost by the introduction of these new restrictive proposed amendments.

Thank you

[redacted]

26 January 2022