

"Claiming our right to have our human dignity and safety protected and respected in pursuit of a decolonised, quality, public education"



27 January 2022

To: **Committee on Trade and Industry**

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

SADTU expresses its sincere condolences to the family, friends and colleagues of comrade Duma Nkosi, and especially to the Portfolio Committee on Trade and Industry. His professionalism and dedication in the Committee, especially regarding the Copyright Amendment Bill will always be remembered and appreciated.

SADTU also expresses its sadness and outrage at the fire that destroyed the Old Assembly and parts of the National Assembly building. This is a direct attack on our democracy and our people. We hope that your Committee will still be able to continue with its work in 2022.

SADTU is grateful for this opportunity to make a further submission on the Copyright Amendment Bill. We attach our Comments and Recommendations and hope that you will seriously consider them in this next round of deliberations.

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South African  
Democratic Teachers' Union  
SADTU



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SADTU, the Largest Affiliate  
of Education International  
in South Africa



SADTU, the Largest Union in  
Public Service and  
an Affiliate of COSATU

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**GENERAL SECRETARY**

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SADTU seeks to be a force that contributes towards the creation of an education system that can eliminate the main features of the apartheid education system, and improve the lives of South Africans, but our member teachers and learners are seriously hampered because outdated and restrictive copyright laws continue to create barriers for them on a daily basis, and more so in the ongoing COVID-19 pandemic.

**The Process of the Bill**

The genesis of this Bill was in 2009, then it was first published for comment in 2015, then passed in 2019 and then returned for review in 2020, due to undue pressure from the USTR, the EU and multinationals in the main. No doubt, deliberations will continue well into 2022, i.e. a 13-year span!

The stark reality of the atrocities of the past and barriers to access to information and education should be a glaring reminder to Parliament and the President that prolonging the life of the current Copyright Act is a purposeful snub to our Bill of Rights and an intention to maintain the status quo to appease multinationals, the EU and USTR, rather than correcting the wrongs of the past and improving the lives of South Africans. This also goes against the spirit of our liberation struggle, and the ongoing struggles in the educational and research sectors.



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In December 2021, Judge Mbongwe in a case in the Gauteng High Court against Parliament, the President, the Minister of Trade and Industry and the Minister of International Relations and Cooperation, ruled by Judge Mbongwe that the current Copyright Act is unconstitutional as it related to people with disabilities. See Judgment: <https://powersingh.africa/wp-content/uploads/2021/09/0001-BLIND-SA-v-MINISTER-OF-TRADE-INDUSTRY-COMPETITION-OTHERS-FINAL-4-Copy-Right-Act-2021-12-08.pdf>. SADTU believes that a similar ruling could very well be applied to the current lack of proper provisions for education, research, libraries and archives, galleries and museums in the current copyright law as well.

In the previous round of submissions and in our oral presentation on 11 August 2021, SADTU fully supported the Bill (vers. 2017), which we believed was constitutional and in compliance with international IP commitments. We believe that version spoke strongly to our Bill of Rights and introduced fair and balanced provisions for all stakeholders. We stressed that compliance with our Bill of Rights should be paramount in all the decisions made by your Committee. It was also our understanding, and that of most stakeholders, that the public comments called for in 2021 should be restricted to the specific clauses sent back for review by the President on constitutionality issues only. Issues that were tagged by the President as issues of concern around constitutionality in relation to exceptions for education, research, libraries and other information services proved to be in line with our Constitution. SADTU is therefore worried that the scope of the President's letter dated 16 June 2020 has now been expanded to add new changes to the Bill, many of which are prohibitive or restrictive in nature.

We know that the Bill has been retagged as a Section 76 Bill and must still go through the Provincial Legislatures, another long process. Once the Bill has finally been passed by Parliament and signed by the President, we are aware that Draft Regulations will then have to be published for public comment.

However, a further delay will be necessary, as we believe that some of the new proposed amendments (for public comments) and deletions from sections (without public comments) are problematic and may even verge on unconstitutionality. We are concerned that some recommended deletions of a 'technical nature' were not published for public comment, despite their implications for the educational, research and library and information service sectors, in fact, all users of information. These proposed amendments and so-called 'technical changes' which in fact are not mere changes, will decisively change the situation for our constituencies.

## SADTU'S COMMENTS AND SUGGESTIONS ON THE NEW PROPOSALS

### Spelling

SADTU recommends that all US English spelling in the Bill should be changed to UK/SA English, e.g. license should be licence, authorized should be authorised, authorization should be authorisation, modeled should be modelled, etc.

### Reference to 'government'

Where the word 'government' is used in proposed amendments, SADTU recommends using the words 'relevant government department' or 'relevant government entity responsible for .....’.

### New Definitions:

**“Authorized entity” – (b)** Although it is in the Marrakesh Treaty (a minimum requirement), SADTU believes the word **‘primary’** should be deleted, as any willing lawful entities should be able to provide such a service to people with disabilities, especially in a developing country, even if the activity is not one of their *primary* activities or institutional obligations.

**“Lawfully acquired” -** This definition is superfluous and should be deleted, as the 4 factors of fair use would be applicable to such a use, as personal and private copying should remain a subsection of fair use as is the current situation. As per the proposed amendments, the range for use of copyright works is severely curtailed and eliminates the use of a whole range of works which provide information but are not purchased, gifts or online paid material. This is not the purpose of fair use, nor any limitations and exceptions in the Bill and in some instances, would be unconstitutional. **N.B. See our comments below under Fair Use and Exceptions**

### People With Disabilities:

- Inaccessible advert calling for public comments

The advert in the media calling for comments on a broader set of amendments than anticipated was made public on 6 December 2021, with deadline of 21 January 2022, yet it was totally inaccessible to people with disabilities. We are not aware of any new notice to date to alert the public (including disabled people) of an extension of the deadline to 28 January 2022. This is yet another example where people with disabilities' rights are being infringed.

- **Section 19D(3) – Not aligned with Marrakesh Treaty**

In this proposed amendment, there is a subtle change, but it makes a huge difference to the meaning, interpretation and application of this clause. The proposed wording of Section 19D(3)(b) is not aligned with the wording in the Marrakesh Treaty. As a result, it creates a greater burden or places the onus on those importing or exporting the works to positively know that only persons with disabilities will use the work. SADTU recommends that the Bill be correctly aligned with the wording of the Marrakesh Treaty and the proposed amended wording be deleted.

**Fair Use and Exceptions:**

*Please note that all comments regarding fair use and other exceptions in this submission also apply to people with disabilities.*

- **Section 12A(a)**

SADTU recommends that this section should remain unchanged, as is currently in the Bill, and the subsections (i), (iv) and (vi) as discussed below, should not be deleted, even if they are also included in other specific sections for education, research, and libraries, archives and museums. There is no direct duplication in other parts of the Bill. They provide useful examples of fair use which may be broader than detailed exceptions in other Sections of the Bill.

The reason given for removing examples from fair use was that there seems to be duplication between fair use and the detailed provisions, but this is based on an erroneous understanding of fair use. In jurisdictions that use fair use there are both detailed provisions and the more flexible fair use (a 'catch-all' clause). Detailed provisions are more limited in scope, allowing very specific uses subject to very specific limitations. This has the advantage of saying

exactly what someone can do but the disadvantage of inflexibility, it cannot be adapted to new uses and circumstances. A teacher needing to make a use can first look at the detailed provisions, and if one applies to the use s/he needs to make then s/he can make that use, complying with these requirements. But if that use does not appear in the detailed provisions, then a teacher should be able to turn to fair use, and then see if her/his intended use is fair, taking into account the analysis in S12A(b). If it is permitted under that analysis, then s/he can go ahead and do it. That is exactly what already happens in jurisdictions such as the United States. That is how fair use works. But removing education from s12A(a) means that a teacher seeking to engage in an educational use that does not appear in the inflexible detailed provisions may incorrectly conclude that s/he cannot turn to fair use. The result is that the fair use provision becomes much harder to use for teachers. Similarly, the removal of other examples of fair use are problematic as they are not addressed fully in the specific exceptions in Section 12D or 19C, for instance.

The fair use clause in Section 12A should be as openly flexible as possible and provide a useful list of examples to assist users of copyright works. The fair use clause in the Bill (ver. 2017) succeeded in doing just that, but now the new amendments for public comment attempt to delete (without the public having a chance to comment on this) several very important and relevant examples, making fair use less flexible. In addition, there is no need to add 'fair practice' as a condition, as the 4 factors, inherently part of fair use, are more than adequate.

SADTU recommends that the word 'use' of copyright works in Section 12A should include 'reproduction' of such works. The words 'computational analysis' should be added into subsection (i), alternatively, an explicit separate exception for this should be included in Section 12D, as this is crucial to digital research. In addition, the following subsections should NOT be deleted from the Fair Use Clause (Section 12A), as they are important examples of fair use, which go beyond the limited exceptions for research, education, libraries, etc. This is the very purpose of a separate Fair Use clause, with practical examples of uses that provide clarity to users and courts.

*(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;*

In this instance, research, and private study or personal use, extend beyond scholarly research or formal educational purposes and should therefore remain in Section 12A(a). Also, the provisions for research in the separate exceptions in Section 12D are minimal, e.g. text and data mining, computational analysis, machine-learning, AI, 3D applications, etc. are not included, so fair use could be applied to permit such acts. Such uses can also include research for investigative studies, journalism, broadcasting, hobbies, leisure, learning new skills, civic or professional purposes, use for employment, competitions, surveys, or many other activities. Fair use could also enable the use of orphan works for immediate or short-term purposes for research and education, when application of Section 22 of the Bill would take too long or be too late for the work to be used.

*(iv) scholarship, teaching and education;*

This subsection should remain under Section 12A(a) as it also relates to formal and informal teaching and learning, and broader scholarship, and provides practical examples of fair use. Section 12D does not provide for distance learning, learning new skills, informal teaching and learning, for instance, so fair use could be applied.

*(vi) preservation of and access to the collections of libraries, archives and museums;*

These should remain in Section 12A(a) as examples of fair use, even though they are mentioned elsewhere in the Bill. Duplication in this instance is not superfluous. It will give clarity to users and courts when deciding cases. However, there are various activities that libraries are not authorised to do in Section 19C, especially where users, especially researchers, require access to information for commercial purposes. Fair use could be applied.

The multitude of activities required for research, scholarship, education and libraries and other information entities cannot be confined to the detailed provisions of the other sections, such as Section 12D and 19C. It is therefore important that these subsections remain in Section 12A(a).

- **Section 12A(d)** – This subsection should be deleted. See SADTU’s comment below under Sections 12B, 12C, 12D, 19B AND 19C – Layered conditions.
- **Section 12B(1)(b)** - It is important that if this clause is moved to Section 19C(9), it remains unchanged.
- **Subsection 12B(1)(f)(i)** – the word ‘or’ is missing at the end of this subsection.
- **Section 12B(1)(i)**

Section 12(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. Section 12B(1)(i) of the Copyright Amendment Bill now adds an additional restrictive condition that the work must be ‘*lawfully acquired*’, which excludes anything other than a purchased item or a gift or paid-for online downloads and is subject to ‘fair practice’.

This condition would significantly limit access for personal or private copying, whether it be for education, research, employment, or civic, leisure or any other purposes. It would prohibit reproduction from other works such as donations, inherited works, swapped or second-hand works, works loaned from library collections, etc. The majority of our population do not own reading materials or receive them as gifts and depend on loans from libraries and other information services. All abovementioned and other lawful sources of information would be excluded. This is clearly discriminatory and arguably unconstitutional, as it would only benefit a very small percentage of people who are privileged to own such materials. It will be virtually impossible for anyone to make any reproductions without permission from the rightsholder. This goes against the very reason for amending the current restrictive copyright law. In fact, the **principle of non-retrogression** would apply as the new proposed amendment would seriously erode broader exceptions that have been in the current Copyright Act since 1978, as well as current amendments in the Copyright Amendment Bill.

In a nutshell, the principle of non-retrogression is an international human rights law principle (International Covenant on Economic, Social and Cultural Rights) that has been applied by South African courts. This principle entails



that where the State already protects a particular right (here, personal copying and the right of access to educational and cultural materials as given effect to in s.12(1)(a)) of the Act, it must continue to maintain that right and level of protection. International human rights law prohibits retrogression, and the Bill of Rights requires that the rights in the Bill be interpreted in accordance with international human rights law. SADTU rejects this new definition and its application to Section 12B(1)(i) of the Bill. SADTU recommends that the definition “lawfully acquired” be deleted, and any reference made to it in the Bill be deleted.

- **Section 12B(2) – SADTU recommends that the words ‘registered and accredited’ should be inserted before the words ‘collecting society’ in this Section.**
- **Sections 12B, 12C, 12D, 19B AND 19C – Layered conditions.**

Thirteen countries around the world already have fair use with 4 deciding factors, which apply before a work can be reproduced. It is accepted, like the US and other copyright regimes with fair use, that the fair use clause is a ‘catch-all’ clause when other more specific limitations and exceptions are not applicable or are too narrow.

The detailed exceptions in other Sections of the Bill have now been made more difficult to use because of additional requirements and the application of multiple tests before even using or reproducing the works. Layering or stacking of conditions makes reproduction virtually impossible for all users of copyright works. Anyone, whether a teacher, learner, member of the public, government official, professional or otherwise, who wants to reproduce or reuse a copyright work, would be subject to all these onerous layers of conditions. How are teachers, for instance, meant to be able to use a provision that has as many as three tests on the use, before they can even make a copy? This will make access to any works problematic, resulting in them being totally disincentivised to use the work in the first place, or be restricted from using the work without first obtaining permission and paying a fee, which will have budgetary implications as well. Course and content planning, and provision and circulation of teaching materials will be seriously hampered in our

schools. This was not the intention of the Bill and introducing such restrictions at this late stage is not acceptable.

There is no need to apply the 3-step test to anything subject to the fair use balancing analysis. Similarly, fair practice is long established in international law, and has been used in South Africa for decades and is compliant with the 3-step test. There is no reason to subject anything to fair practice and then add the 3-step too. It makes no sense to include both or all 3 sets of conditions. Parliament has already decided that fair use does comply with the 3-step test so any reference to this test in the Bill is superfluous and should be deleted.

SADTU therefore recommends that the 4 fair use factors apply solely to Section 12A(a), and that only if there is a need for condition(s) over and above the limitations already attached to specific exceptions in Sections 12B, 12C, 12D, 19B AND 19C, then ‘fair practice’ should be applied. Fair practice makes more sense for detailed exceptions for education, research, libraries, etc., since these are already limited in their application, and many have additional limits. Fair practice has also been used in other sections of the Bill.

- **Section 19C(4)**

In the previous version of the Bill, this subsection did not permit the making of copies or recordings ‘for commercial purposes’, but now the words ‘for commercial purposes’ are to be deleted (without public having the opportunity to comment on this) and an additional phrase added, stating ‘*may not permit a user to make a copy or recording of the work*’. This totally changes the meaning and context of this Section. It prohibits any copy being made at all, which is unfair, impractical and arguably unconstitutional, especially in the COVID-19 pandemic, where it may be necessary for a user to make a private copy or record the work for educational or non-commercial purposes, e.g. to do an online assignment, project, homework, practice, or other work that cannot be done in the physical institutional classroom or lecture theatre, or for people with disabilities who need to download or have the work converted into an accessible format.

SADTU strongly recommends that this Section **be amended urgently** to allow reproduction for at least personal educational and research purposes, and to enable conversions to accessible formats.

## **Conclusion**

The purpose of this copyright reform was to balance the copyright law and to correct omissions and remove barriers currently in the apartheid-era Copyright Act, not to create new barriers and infringe constitutional rights or further restrict exceptions in the current copyright law. It was certainly not to add new barriers at this late stage of the process.

SADTU believes that the new restrictive proposals in the Bill will be detrimental to teachers and learners, and other users of information. We strongly oppose any measures that would disenfranchise our members or the broader community from accessing information, especially for educational and research purposes, but also for leisure, civic, employment, health, safety and security, and any other purposes for the upliftment and socio-economic development of our people.

SADTU, therefore, urges your Committee to take our comments and suggestions into account to remedy the problems introduced by the new proposals (advertised on 6 December 2021) as a matter of urgency.

Yours faithfully,

Mugwena Maluleke  
General Secretary

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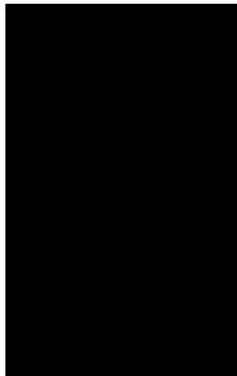
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In this instance, research, and private study or personal use, extend beyond scholarly research or formal educational purposes and should therefore remain in Section 12A(a). Also, the provisions for research in the separate exceptions in Section 12D are minimal, e.g. text and data mining, computational analysis, machine-learning, AI, 3D applications, etc. are not included, so fair use could be applied to permit such acts. Such uses can also include research for investigative studies, journalism, broadcasting, hobbies, leisure, learning new skills, civic or professional purposes, use for employment, competitions, surveys, or many other activities. Fair use could also enable the use of orphan works for immediate or short-term purposes for research and education, when application of Section 22 of the Bill would take too long or be too late for the work to be used.

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The multitude of activities required for research, scholarship, education and libraries and other information entities cannot be confined to the detailed

provisions of the other sections, such as Section 12D and 19C. It is therefore important that these subsections remain in Section 12A(a).

- **Section 12A(d)** – This subsection should be deleted. See SADTU’s comment below under Sections 12B, 12C, 12D, 19B AND 19C – Layered conditions.
- **Section 12B(1)(b)** - It is important that if this clause is moved to Section 19C(9), it remains unchanged.
- **Subsection 12B(1)(f)(i)** – the word ‘or’ is missing at the end of this subsection.
- **Section 12B(1)(i)**

Section 12(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. Section 12B(1)(i) of the Copyright Amendment Bill now adds an additional restrictive condition that the work must be ‘*lawfully acquired*’, which excludes anything other than a purchased item or a gift or paid-for online downloads and is subject to ‘fair practice’.

This condition would significantly limit access for personal or private copying, whether it be for education, research, employment, or civic, leisure or any other purposes. It would prohibit reproduction from other works such as donations, inherited works, swapped or second-hand works, works loaned from library collections, etc. The majority of our population do not own reading materials or receive them as gifts and depend on loans from libraries and other information services. All abovementioned and other lawful sources of information would be excluded. This is clearly discriminatory and arguably unconstitutional, as it would only benefit a very small percentage of people who are privileged to own such materials. It will be virtually impossible for anyone to make any reproductions without permission from the rightsholder. This goes against the very reason for amending the current restrictive copyright law. In fact, the **principle of non-retrogression** would apply as the new proposed amendment would seriously erode broader exceptions that have been in the current Copyright Act since 1978, as well as current amendments

in the Copyright Amendment Bill.

In a nutshell, the principle of non-retrogression is an international human rights law principle (International Covenant on Economic, Social and Cultural Rights) that has been applied by South African courts. This principle entails that where the State already protects a particular right (here, personal copying and the right of access to educational and cultural materials as given effect to in s.12(1)(a)) of the Act, it must continue to maintain that right and level of protection. International human rights law prohibits retrogression, and the Bill of Rights requires that the rights in the Bill be interpreted in accordance with international human rights law. SADTU rejects this new definition and its application to Section 12B(1)(i) of the Bill. SADTU recommends that the definition “lawfully acquired” be deleted, and any reference made to it in the Bill be deleted.

- **Section 12B(2) – SADTU recommends that the words ‘registered and accredited’ should be inserted before the words ‘collecting society’ in this Section.**
- **Sections 12B, 12C, 12D, 19B AND 19C – Layered conditions.**

Thirteen countries around the world already have fair use with 4 deciding factors, which apply before a work can be reproduced. It is accepted, like the US and other copyright regimes with fair use, that the fair use clause is a ‘catch-all’ clause when other more specific limitations and exceptions are not applicable or are too narrow.

The detailed exceptions in other Sections of the Bill have now been made more difficult to use because of additional requirements and the application of multiple tests before even using or reproducing the works. Layering or stacking of conditions makes reproduction virtually impossible for all users of copyright works. Anyone, whether a teacher, learner, member of the public, government official, professional or otherwise, who wants to reproduce or reuse a copyright work, would be subject to all these onerous layers of conditions. How are teachers, for instance, meant to be able to use a provision

that has as many as three tests on the use, before they can even make a copy? This will make access to any works problematic, resulting in them being totally disincentivised to use the work in the first place, or be restricted from using the work without first obtaining permission and paying a fee, which will have budgetary implications as well. Course and content planning, and provision and circulation of teaching materials will be seriously hampered in our schools. This was not the intention of the Bill and introducing such restrictions at this late stage is not acceptable.

There is no need to apply the 3-step test to anything subject to the fair use balancing analysis. Similarly, fair practice is long established in international law, and has been used in South Africa for decades and is compliant with the 3-step test. There is no reason to subject anything to fair practice and then add the 3-step too. It makes no sense to include both or all 3 sets of conditions. Parliament has already decided that fair use does comply with the 3-step test so any reference to this test in the Bill is superfluous and should be deleted.

SADTU therefore recommends that the 4 fair use factors apply solely to Section 12A(a), and that only if there is a need for condition(s) over and above the limitations already attached to specific exceptions in Sections 12B, 12C, 12D, 19B AND 19C, then ‘fair practice’ should be applied. Fair practice makes more sense for detailed exceptions for education, research, libraries, etc., since these are already limited in their application, and many have additional limits. Fair practice has also been used in other sections of the Bill.

- **Section 19C(4)**

In the previous version of the Bill, this subsection did not permit the making of copies or recordings ‘for commercial purposes’, but now the words ‘for commercial purposes’ are to be deleted (without the public having the opportunity to comment on this) and an additional phrase added, stating ‘*may not permit a user to make a copy or recording of the work*’. This totally changes the meaning and context of this Section. It prohibits any copy being made at all, which is unfair, impractical and arguably unconstitutional, especially in the COVID-19 pandemic, where it may be necessary for a user



to make a private copy or record the work for educational or non-commercial purposes, e.g. to do an online assignment, project, homework, practice, or other work that cannot be done in the physical institutional classroom or lecture theatre, or for people with disabilities who need to download or have the work converted into an accessible format.

**SADTU strongly recommends that this Section be amended urgently to allow reproduction for at least personal educational and research purposes, and to enable conversions to accessible formats.**

### **Conclusion**

The purpose of this copyright reform was to balance the copyright law and to correct omissions and remove barriers currently in the apartheid-era Copyright Act, not to create new barriers and infringe constitutional rights or further restrict exceptions in the current copyright law. It was certainly not to add new barriers at this late stage of the process.

SADTU believes that the new restrictive proposals in the Bill will be detrimental to teachers and learners, and other users of information. We strongly oppose any measures that would disenfranchise our members or the broader community from accessing information, especially for educational and research purposes, but also for leisure, civic, employment, health, safety and security, and any other purposes for the upliftment and socio-economic development of our people.

**SADTU, therefore, urges your Committee to take our comments and suggestions into account to remedy the problems introduced by the new proposals (advertised on 6 December 2021) as a matter of urgency.**

Yours faithfully,

A black rectangular box redacting the signature of the General Secretary.

General Secretary  
27/01/2022