shazacin

Shazacin Accessible Media (PTY) LTD
Company Reg. Number: 2020/196128/07

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Dear Mr. A. Hermans, Parliamentary Secretariat for PC on Trade and Industry

Re: COMMENTS ON NEW PROPOSED AMENDMENTS TO COPYRIGHT AMENDMENT BILL

I wish to express my sincere condolences to you and your committee on the passing of your Chairperson, Honourable Duma Nkosi.

I am writing in my personal and professional capacity as a blind organisational psychologist and MD of DAISY SA and ShazaCin Accessible Media. I am a recognised global disability strategist and policy developer. I am a member of the Presidential Working Group on Disability and recipient of several awards for my contribution to disability rights enforcement.

I am currently driving access to visual information through audio description in South Africa. This enables persons with visual disabilities to exercise their basic human right to access information produced in visual media formats namely video /motion and still images. As information and communication becomes more digital/video based and exacerbated by the pandemic, visually disabled persons are left further behind. Audio description is the skilful use of words compliant with international standards and is and established access tool and artform. In my endeavour to assist blind people I have come across so many copyright issues due to our law being so outdated.

As a blind person I feel seriously restricted and discriminated against as my needs and those of others who have print disabilities are not addressed in our current copyright law. I was happy that Section 19D of the Bill was not sent back by President Ramaphosa for review as it provides useful exceptions for people with disabilities. In August 2021, in my written submission to your Committee, I also supported the sections of the Bill that are under review relating to fair use and exceptions for education, research, libraries and other information entities, because blind and other print disabled people also need these exceptions in our daily use of information, whether it be for leisure, work, health, teaching, learning, innovation, civic, work, or other activities.

I was pleased when Blind SA was successful in its case in the Johannesburg High Court in late 2021 regarding the unconstitutionality of our current law relating to people with disabilities. Confirmation is awaited by the

Constitutional Court, whereafter accessible formats will at last be possible for blind and other print disabled people.

I thank you for this opportunity to make a further submission on the Copyright Amendment Bill. However, I am upset and surprised at the new more restrictive amendments being proposed, which will further affect access to information for people with disabilities as well as other users of copyright works. Here are some of my concerns:

1. **Advert in the Mail and Guardian calling for comments:**

   The printed advert for the public was totally inaccessible to blind and visually impaired persons. This is unconstitutional and discriminatory. The only way that I found out that there was a call for comments was from a friend of mine who sent the information to me via email. Otherwise, I would not have been aware of the advert or its contents and would not have had the chance to comment on the proposed amendments. I also believe that the deadline for comments has been extended to 28 January 2022, yet it has not been conveyed to the general public in the media nor on an accessible format for people with disabilities. I wonder how many other people with disabilities are still unaware of the call for submissions or the extended deadline, because of this insensitivity to their needs?

2. **Definition of 'authorized entity'**

   This definition is too narrow. In (b) – the word '***primary***' should be deleted, because lawful entities, even if the activity is not one of their primary activities or institutional obligations, should be permitted to provide such a service to people with disabilities, especially in a country where they have been deprived from copyright exceptions for decades.

3. **Definition of 'lawfully acquired'**

   This definition is flawed as it is limited in what lawful acquisition actually is. It is impossible to cover all forms of lawful acquisition in the definition, e.g. donations, inherited works, accessible formats not charged for, loans from

libraries, etc. By including a definition for 'lawfully acquired', it essentially creates an exception only for those privileged to own reading materials and discriminates against everyone else who has to depend on donations or library or other resources to make personal copies for access to information, education, research, civic or other personal purposes. In fact, it severely restricts or prohibits personal copying for any purpose, without prior permission from the rightsholders.

What is very important is that where this definition is applied in the Bill, it totally overrides what has been in our current copyright law for 23 years, i.e. personal and private copying in Section 12. (1) (a) of the current Copyright Act which provides for "*research or private study by, or the **personal or private use** of, the person using the work",* without any restrictive conditions. By including the proposed amendment in Section 12B(1)(i), and with the added condition of 'fair practice', the principle of **non-transgression** is applicable. This means that rights already enjoyed in the current Act cannot be overridden or restricted. In view of this, I recommend that the status quo remains in the Bill with regard to personal and private copying.

4. Fair use examples (Section 12A(a) (i),(iv) and (vi)

I notice that 3 sub-sections providing examples of fair use will be deleted from Section 12A(a) (without public comment), namely, *(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; (iv) scholarship, teaching and education; and (vi) preservation of and access to the collections of libraries, archives and museums.*

These are important examples of fair use and should not be deleted. They should remain in Section 12A(a).

It is important that various examples are provided under fair use to give clarity to users when using copyright works and to courts when assessing cases regarding fair use. In many instances, examples under fair use are broader than in specific categories to allow a 'catch-all' situation when specific categories, e.g. education and research, may be too narrow. For

instance, research extends far beyond scholarly research, and teaching and education extend far beyond institutional or formal education. There is no harm in having wording in the fair use clause, and again in other specific clauses, e.g. education and academic activity, or for libraries, etc.

5. **Adding conditions of fair practice and four factors of fair use and in some cases, 3-step test provisions - Sections 12B, C & D, Section 19B & C and Section 12C(2) and 12 D(1)(b-d):**

The fair use factors should only apply to the fair use Section 2 of the Bill, and not to any of the exceptions relating to Sections 12B, 12C, 12D, 19B and 19C. The loading or layering of restrictive conditions, such as fair practice and the 4 fair use factors, and 3-step test in Section 12C(2) and 12 D(1)(b-d), is grossly unfair and virtually makes reproduction of any copyright work impossible, or subject to permission before use. The exceptions should be clear and straightforward, without users having to weigh up various factors before being able to use the works. Limitations and exceptions are supposed to be balancing mechanisms against the exclusive rights of rightsholders, and should not be weighted according to fair practice and fair use factors and 3-step test conditions as well. This was not the intention of the revised Bill passed in 2019, nor was it the intention of the Bill to date, and nor should it be the intention of the Bill going forward. These additional restrictive conditions curtail the very limitations and exceptions in the Bill that are meant to make access to information more flexible, especially in the digital environment. Inclusion of these layered conditions is arguably unconstitutional as access to information will be virtually impossible without prior permission.

As a blind person I feel seriously restricted and discriminated against as my needs and those of others who have print disabilities, are not addressed in our current copyright law. They were addressed in the Copyright Amendment Bill to date but now things have got more restrictive. I strongly recommend that the 4 fair use factors apply to Section 12A only and that all other exceptions be subject to 'fair practice', if some condition has to apply.

Please remember that blind and visually impaired persons first will have to apply these conditions or criteria when accessing any material for the purpose of having it converted into an accessible format, so they will be seriously prejudiced by the above layering of conditions on exceptions.

6. Conditions relating to importing or exporting accessible format copies - Section 19D(3) and (4)(b)

Section 19D3(b) - In the proposed amendments, there is a subtle change, but it makes a huge difference to the meaning, interpretation and application of this clause. 19D3(b) does not align with the wording of the Marrakesh Treaty. 19D(3)(b) of the Bill states that "*a person contemplated in paragraph (a) may only so export or import 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.*" This is different to the Marrakesh Treaty which clarifies that "*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*". This subtle difference is very important.

It would therefore be sensible for the wording in the Bill to be aligned with that of the Marrakesh Treaty, and the proposed amended wording to be deleted.

Section 19D(4)(b) – provides the condition of ''*use of the accessible format copy* ***exclusively*** *by a person with a disability*''. This is impractical and discriminatory, as in some instances, people with disabilities may need some assistance from another person when using an accessible format. This restrictive condition would not allow this to happen.

7. Use of Whole Works - Section 19C(4)

"A library, archive, museum or gallery may, … purposes, permit a user to view a whole audiovisual work, listen … , without permission from copyright owners, but may not permit a user to make a copy or recording of the work" (the words 'for commercial purposes' are to be deleted).

This gives a totally different meaning to this section. This stops a personal or private copy from being made at all, which is unfair and impractical, especially for people with disabilities, who would in all instances, need to download or make a copy of the work for purposes of having it converted into an accessible format. This section needs to be corrected to allow personal or private copying for educational and research purposes at least.

8. Technological Protection Measures (TPMs) – Section 27(5B)

With regard to the new proposed amendments relating to TPMs, I strongly recommend that there be adequate exceptions and flexibilities included for people with disabilities to use or circumvent TPMs lawfully for the purpose of accessing materials, e.g. using devices to make a digital book accessible, or to convert a section of a PDF work into an accessible format for fair use purposes, or to enable text-to-speech software to work, or for a library to circumvent a TPM in order to browse through an electronic database when considering subscribing to it, to check if it is compatible for people with disabilities. These acts should not have to be subject to obtaining permission first from the rightsholders. If this is not possible in this round of amendments, these should be considered in further amendments in the provincial legislatures, or included in Draft Regulations in the future.

9. Transient of Incidental copies or adaptations – Section 12C

Transient or incidental copies and/or adaptations are generally created as part of the digital process and are out of the control of users. They are essential for access purposes. This clause is subject to fair practice, fair use and the 3-step test which is totally impractical and unnecessary. It is also discriminatory, especially against people with disabilities. All these layered conditions should be removed.

I hope your Committee will take my above comments and recommendations into account, and in the process, avoid more access problems for people with disabilities and other users of copyright works.

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Thank you

Shakila Maharaj