

# **Comments on the Copyright Amendment Bill before the National Council of Provinces; Promoting Technological Adaptability and Education**

## **Summary**

The 1978 Copyright Act is outmoded and requires updating to be suitable for the digital environment. The Amendment Bill [B 13B—2017] includes a number of important provisions which are necessary to update the Copyright Act for technological adaptability. It is recommended that the National Council of Provinces pass the Bill with the amendments suggested in these comments. None of the recommended amendments require changes to policy but each is necessary to enable the policies already expressed to be effective.

## **Background**

These comments were prepared by Dr. Andrew Rens,<sup>\*</sup> a South African copyright expert, and member of the global copyright expert network of *Global Expert Network on Copyright User Rights*. The focus of these comments is on ensuring that the South African Copyright Act can adapt to technological change and enables South African learners to get the educational materials they need.

## **Issues**

### **Fair Use:**

- **Fair Use enables the Law to Adapt to Changing Technology**

The Fair Use provision introduced in Section 12A is essential if South Africa is to adapt to a rapidly changing technological environment. Technology changes in unpredictable ways which presents new challenges to copyright law. Narrow exceptions which address existing problems are useful to address those problems but they are not at all useful to address new

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issues. Instead an open ended provision such as the provision in Section 12A of the Bill is essential to enable the courts to adapt copyright to rapidly changing technologies.

- **Fair Use is already compliant with the three step test in international copyright law**

The United States of America (US) where Fair Use originated, acceded to the Berne Convention in 1989 and was a major negotiator of the Trade Related Aspects of Intellectual Property Agreement (WTO-TRIPS). The US would not have entered into these agreements unless they permitted fair use because fair use is required by the US Constitution. The US is unable to challenge the introduction of fair use into South Africa because the US itself has fair use. Any country which sought to challenge South Africa's use of a fair use provision through World Trade Organization Dispute processes would be opposed by the US.

- **Fair Use enables online education**

The US States has both fair use and detailed specific legislation intended to enable use of copyright materials in online education; the Technology, Education and Copyright Harmonization Act of 2002, codified as 17 U.S. Code § 110 'Limitations on exclusive rights: Exemption of certain performances and displays'. The experience has shown that detailed exceptions for online education are burdensome to comply with and fair use is often preferable (see Copyright Law and Distance Education: Overview of the TEACH Act, Kenneth D. Crews, Director, Copyright Advisory Office Columbia University, 2010).

- **Fair use takes into account the rights of copyright owners.**

The factors that must be taken into account include the nature of the use and the effect of the use upon the potential market for or value of the work. Commercial uses are less likely to be fair. The provision has an internal balance between the interests of copyright rights holders who rely on copyright and film-makers, artists, teachers and learners who need to make fair use of copyright works to create new works and engage in education.

- **Fair Use future proofs copyright legislation**

It is not possible for legislation to predict all future technological developments. A fair use provision gives courts the flexibility to determine which uses of copyright works drive innovation and which are illegitimate.

- **Fair use is increasingly being incorporated in the copyright law of many countries including developing countries**

The following countries have fair use type provisions; Bangladesh (Copyright Act, 2000; s72), Liberia (Copyright Law, 1997; s2.7), Sri Lanka (Intellectual Property Act, 2003; s11-12), Taiwan (Copyright Act, 2007;s65); Uganda (Copyrights and Neighbouring Rights Act, 2006; s15), South Korea (Copyright Act 1967;art 35–3), Israel (Copyright Act 2007;s 19), the Philippines (Intellectual Property Code of the Philippines, Republic Act No 8293;s 185.) None of these laws have been challenged through the World Trade Organization as contrary to the three step test.

No changes are recommended to the provisions of Section 12A of the Bill.

### **Use for purposes of illustration for teaching**

Article 12B(1)(b) of the Bill provides that copyright in a work shall not be infringed by:

"(b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;"

Use by way of illustration is referred to in Article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979):

"It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."

The section should clarify that it is use by way of illustration refer to fair practice as Article 10(2) does.

## **Importing Legitimately Purchased Goods**

The import of goods legitimately bought in another country is often referred to as parallel import. The Act currently prohibits the import of books and other copyright works even when they were made and sold legitimately in another country except for personal use. As a result South Africans often pay more for the same book than people in other countries such as India. This situation arises when a publisher in country A gives a licence to print a book to one publisher in country B and to another publisher in South Africa. Even though the publisher in country A is paid royalties by the publisher in country B when a book is sold, the current Act prohibits wholesale import of that book into South Africa. Instead the publisher in country A sets a higher price which the publisher in South Africa must charge. In 2013 in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 the United States Supreme Court ruled that the import of cheaper versions of textbooks sold in Thailand into the United States for sale to students is permitted in US copyright law. Why should South African learners be worse off than those in the US?

As a result the policy decision was made to permit parallel import. The Bill already contains a provision enabling parallel import in section 12B (6) which states that the first sale or other assignment of ownership exhausts the right of importation in respect of that copy. However conflicting provisions in the definition of an infringing work (section 1 of the current Act), infringement (section 23 (2) of the current Act, and section 26 of the Bill), and Section 28 (2) must be amended as specified below.

## **Anti-Circumvention**

Rules preventing circumvention of technical protection measures were first introduced in the WIPO Copyright Treaty (WCT) which was adopted in 1996. A number of countries including the United States passed laws implementing the WCT. Numerous issues and problems have arisen in respect of these laws. South Africa has an opportunity to learn from the mistakes of other countries.

The draft national Intellectual Property Policy (October 2013) explicitly rejected the idea that anti-circumvention provisions should be allowed to affect exceptions and limitations.

“Access to internet in developing countries is limited and this is impacted upon by various factors. In this regard the “fair use” principle under copyright regime may be limited or severely restricted by forms of technological protection, e.g. encryption that restrict access severely than that under copyright principles. This is clearly demonstrated by the EU and US jurisdictions. The 1996 WIPO Copyright Treaty (WCT) contains elements that restrict access of developing countries to information. ... Principles of IP per se should not change just because the medium has change. ... The WCT and foreign jurisdictions such as those of the US and the EU seem to abrogate exactly this policy making options available to member states. It is submitted that the Electronic Communications and Transactions Act, 2002 administered by DOC contradicts this principle in section 86.”

Despite this policy the anti-circumvention provisions in the Bill remain problematic. There are two problems; overlap and lack of clarity through treating circumvention as copyright infringement and an inadequate provision authorizing circumvention to do an act already authorized by the legislation.

Section 27 of the current Copyright Act lists a number of acts which are deemed to be ‘s which infringe copyright’. Section 27 of the Bill would add a number of acts to those already regarded as infringing. However many of these acts are not copyright infringement at all, for example publishing information that enables a person to circumvent a technological protection measure with the intention of inciting that other person to unlawfully circumvent a technological prevention measure is treated as a copyright infringement by section 27(5A)(a)(iii). This will create confusion. Would a person then be guilty of two separate offences, including an offence of copyright infringement even if he gave information about circumvention with no particular copyright work in mind or if no copyright infringement occurred? Similar wording to that used in S27(5A)(a)(iii) is used in Section 28O(3), which is to be inserted by section 29 of the Bill. There are multiple overlaps between the proposed section 27(5A) and the prohibitions in 28O. The result is to create two sets of prohibitions that are similar but not precisely the same. For example section 28O is made subject to the Electronic Communications and Transactions Act but Section 27(5A) is not. This results in confusion and overlap. Section 27(5A) should be eliminated from the Bill and all the prohibitions on circumvention issues dealt with clearly in one place; Section 28O.

The prohibitions on circumvention are meant to prevent someone from circumventing a technical protection measure in order to infringe copyright. But there are many acts which do not infringe copyright and are authorized by copyright law, including all the acts listed in exceptions and limitations. These are all technically prevented by technical protection measures, circumventing the technical protection measures to perform exceptional acts that are authorized by copyright law is prohibited by the proposed sections 27(5A) and 28O. As a consequence section 29 of the Bill introduces section 28P which is meant to permit overcoming technological protection measures in order to do something authorized by an exception. However a number of issues affect section 28P.

Although the section refers to Section 86 of the Electronic Communications and Transactions Act (ECTA), which prohibits making unauthorised changes to data unclear and should be reworded to ensure that no person engaged in an act permitted is potentially guilty of an offence under Section 86.

As technology changes new issues continually arise so there will be a continual need for new exceptions to circumvention provisions. For example ‘smart’ televisions have cameras and microphones that record what people are doing in their homes, and send the information to the manufacturer or seller of the device. Disabling this surveillance requires circumventing technical protection measures. US legislation permits circumvention to protect privacy and prevent surveillance, and draft wording to enable this suggested below. But this is just an example and new issues will continue to arise. Therefore the Minister should have the power to make regulations exempting prescribed actions from the prohibition on circumvention.

Anti-circumvention in particular is highly complex, and interacts with a number of other areas of law. If the issues with anti-circumvention cannot be adequately addressed in the current Bill process then anti-circumvention should be removed from the Bill while the remainder of the Bill is passed.

### **Suggested Amendments to the Bill and the current Copyright Act**

<b>Rationale for Amendment</b>	<b>Suggested Wording of Amendment</b>
Definition of infringing copy conflicts with authorization of import in s12B(6) of the Bill. Therefore introduce the following	by the substitution for the definition of “infringing copy” of the following definition: “infringing copy”, in relation to -

<p>amendment into section 1 of the Bil, substitution of the definition of “infringing copy” by the suggested definition:</p>	<p>(a) a literary, musical or artistic work or a published edition, means a copy thereof;  (b) a sound recording, means a record embodying that recording;  (c) a cinematograph film, means a copy of the film or a still photograph made therefrom;  (d) a broadcast, means a cinematograph film of it or a copy of a cinematograph film of it or a sound recording of it or a record embodying a sound recording of it or a still photograph made therefrom; and  (e) a computer program, means a copy of such computer program,</p> <p>being in any such case an article the making of which constituted an infringement of the copyright in the work, recording, cinematograph film, broadcast or computer program or, in the case of an imported article, <b>[would have]</b> constituted an infringement of <b>[that]</b> copyright <b>[if the article had been made in the Republic]</b> <u>in the country in which the article was made;</u></p>
<p>The definition of ‘open license’ in Section 1 should specify that someone who does not comply with the requirements of that license may not continue to use the work under that license. Granting permission to “the public” is less clear than granting permission to an member of the public, in other words anyone. Replace the definition open licence in the Bill with the suggested definition.</p>	<p>“‘open licence’ means a royalty-free, non-exclusive, perpetual, <b>[irrevocable]</b> copyright licence granting <b>[the public]</b> <u>any person</u> permission to do an act for which the permission of the owner of copyright, or the author, is required, <u>provided that the person complies with the terms of the license;</u></p>
<p>Clarify the wording of Section 12(1)(b) and add</p>	<p>(1) Copyright in a work shall not be infringed by any of the following acts:  “(b) <u>use as [any]</u> illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose <u>and is compatible with fair practice;</u> Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;”</p>
<p>Section 19D(1) of the Bill permits someone serving persons with disabilities to make copies in accessible formats. But disabled persons should be entitled to act on their own behalf and not be dependent on others if they can themselves make the accessible copies.</p>	<p>19D. (1) <u>A person with a disability</u> and <b>[A]</b>any person as may be prescribed and that serves persons with disabilities may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:...</p>
<p>The wording of section 23 (2) conflicts with the authorization of import in s12B(6) of the Bill. Section 23(2) should be amended by in section 26 of the Bill which currently amends section 23(1) by substituting 23(2) with the suggested</p>	<p>Section 23  (2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work -</p>

<p>wording .</p>	<p>(a) imports an article into the Republic for a purpose other than for his private and domestic use;</p> <p>(b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article;</p> <p>(c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or</p> <p>(d) acquires an article relating to a computer program in the Republic, if to his knowledge the making of that article constituted an infringement of that copyright <u>in the Republic or in county in which the article was made [or would have constituted such an infringement if the article had been made in the Republic].</u></p>
<p>The wording of section 28 of the Copyright Act, and the suggested amendment by Section 28 of the Bill conflict with the authorization of import in s12B(6) of the Bill. The suggested amendments of section 28 in the Bill attempt to address this but fail to do so. The Bill uses the phrase “without authorization of the copyright holder” but this is ambiguous, it could refer to the copyright holder in the Republic or it could refer to the copyright holder in the country where the imported copy was made. Therefore the wording should reflect that something legitimately made and sold in another country may be imported in to South Africa without requiring permission of a copyright holder in South Africa. Words in brackets and italics is used to show the suggested insertions in the Bill which should be omitted from the Bill.</p>	<p>Section 28 of the principal Act is hereby amended—</p> <p>(a) by the substitution for subsection (2) of the following subsection:  “(2) This section shall apply to any copy of the work in question made outside the Republic [<b>which if it had been made in the Republic would be an infringing copy of the work</b>] if the making of such copy [<i>was without the authorization of the copyright owner</i>] <u>constituted an infringement of copyright in the country in which the copy was made;</u>”</p> <p>(b) by the substitution for subsection (5) of the following subsection:  “(5) This section shall [mutatis mutandis] with the necessary changes, apply with reference to an exclusive licensee who has the right to import into the Republic any work published elsewhere, if the making of such copy [<i>was without the authorization of the copyright owner.</i>] <u>constituted an infringement of copyright in the country in which the copy was made;</u> ”.</p>
<p>Section 28P to be introduced by the Bill as currently worded does not make it clear that circumventing a technical protection measure for a use permitted by an exception is also not an offense in terms of Section 86 of the Electronic Communications and Transactions Act 2002. S28P(1) should be clarified.</p> <p>Although section 28O and Section 27(5A) prohibit the publication of information which enables a person to circumvent a technological protection measure section 28P does not state that publishing such information to enable someone to carry out an act permitted in 28P(1)(a). This should</p>	<p>28P. (1) <u>Nothing in this Act nor in [For the purposes of this Act] [and of] section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), [nothing in this Act]</u> shall prevent any person from using a technological protection measure circumvention device to perform any of the following:</p> <p>(a) An act permitted in terms of any exception provided for in this Act; or</p> <p>(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).</p> <p><u>(c) the publication of information enabling or assisting another person to circumvent an effective technological protection measure in order to enable the performance of any act permitted in terms of</u></p>

<p>be clarified by the insertion of 28P(1)(c).</p> <p>Section 28O should be amended to enable the owners of Internet of Things devices to prevent those devices from surveilling them.</p> <p>To keep pace with technological changes the Minister should have power to create new exemptions from the prohibition on circumvention,</p>	<p><u>paragraph (a).</u></p> <p>(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—</p> <p>(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or</p> <p>(b) if the copyright owner has refused such person’s request or has failed to respond to it within reasonable time, <u>or has previously refused or failed to respond in a reasonable time</u>, to a similar request by the same person, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.</p> <p>(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—</p> <p>(a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and</p> <p>(b) purpose for which the services of such other person has been engaged.</p> <p>(4) <u>Nothing in this Act nor in section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002) shall prevent any person from assisting another person as permitted by subsection (2).</u></p> <p>(5) <u>Nothing in this Act nor in section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002) shall prevent any person from performing any act for the purpose of preventing the collection or dissemination of any information relating to an identified or identifiable natural person. For the purposes of this section an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.</u></p> <p>(6) <u>The Minister may make regulations prescribing exemptions from the provisions of section 27(5A), 28O, 28R and 28S.</u></p>
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