



INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS  
FEDERATION INTERNATIONALE DES ASSOCIATIONS DE BIBLIOTHECAIRES ET DES BIBLIOTHEQUES  
INTERNATIONALE VEREINIGUNG BIBLIOTHEKARISCHER VERBÄNDE UND EINRICHTUNGEN  
FEDERACION INTERNACIONAL DE ASOCIACIONES DE BIBLIOTECARIOS Y BIBLIOTECAS  
МЕЖДУНАРОДНАЯ ФЕДЕРАЦИЯ БИБЛИОТЕЧНЫХ АССОЦИАЦИЙ И УЧРЕЖДЕНИЙ  
国际图书馆协会与机构联合会

الاتحاد الدولي لجمعيات ومؤسسات المكتبات

Mr. Andre Hermans, Secretary  
Portfolio Committee on Trade and Industry  
Parliament of the Republic of South Africa

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28 January 2022

## **Re: Copyright Amendment Bill [B13B-2017] Call for Public Submissions and Comments**

Dear Mr Hermans,

I am writing on behalf of the International Federation of Library Associations and Institutions (IFLA) in order to comment on the proposed amendments to the Copyright Amendment Bill. We are grateful for the opportunity to provide input, based on the experience both of our South African members, and those of libraries around the world.

IFLA itself is the global organisation for libraries of all types, working both to bring together professionals from around the world to share ideas, experiences and insights, and to advocate for the laws and policies needed for libraries to carry out their missions.

As most recently highlighted in the UN Secretary General's Our Common Agenda report, universal access to education and quality information are essential preconditions for sustainable development. The Copyright Amendment Bill carries with it the possibility to make a significant step towards this goal, helping to balance a copyright system that, thanks to the possibilities created by digital technologies, has tipped a long way in favour of corporate rightholder interests.

The CAB is an opportunity to correct, or pre-empt the market failures that are created by over-broad application of the monopoly powers granted by copyright, without causing unreasonable prejudice to the legitimate interests of rightholders.

Our comments are therefore provided below:

### **AMENDMENTS RELATED TO A PERSON WITH A DISABILITY – ALIGNING THE BILL MORE CLOSELY WITH THE WORDING OF THE TREATY**

We appreciate the proposal to ensure stronger alignment between the Bill and the Marrakesh Treaty, although are concerned that despite this title, the suggested amendments in fact risk doing the precise opposite in some cases.

#### **Section 19D, Article 3b**

The proposed amendment incorrectly copies the language of the Marrakesh Treaty.

In the Treaty, the condition is that: 'prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy



would be used for other than beneficiary persons'. However, the amendment reverses this logic, focusing on authorised entities having positive knowledge.

This is an important difference, implying a much greater burden on authorised entities to seek information about how works will be used. The effect is likely to be to block the sharing of works, and impose greater administrative costs, taking resources away from frontline work.

While the agreed statements open the possibility for authorised entities themselves to seek further information, in case of doubt, it is both inappropriate and contrary to the text and spirit of the Treaty to impose such obligations in law.

- ⇒ Recommendation: that the CAB implements the language of the Marrakesh Treaty on this point

### **Section 19D, Article 4b**

The new text proposed here is deeply concerning in that it creates a new liability for anyone using the possibilities created by the law. The implication is that if a copy legitimately made and provided to a person with a print disability ends up in the hands of someone who is not covered by the law, for example due to unauthorised sharing out of the control of the authorised entity or individual, then the original exception no longer applies. As such, the authorised entity or individual who relied on it is then liable.

Again, the risk of this provision is that there will be a significant chilling effect on the work of libraries and other authorised entities, who will in effect never be able to use possibilities to copy and give access to works with certainty. It would effectively sabotage the implementation of the Treaty into South African law.

- ⇒ Recommendation: that Article 4b be deleted

## **AMENDMENTS RELATED TO PERSONAL COPIES (REQUIRING THAT THE WORK MUST HAVE BEEN LAWFULLY ACQUIRED)**

### **Clause 1**

We are very concerned about the exclusion of borrowing from the list of ways in which a work can be considered as lawfully acquired, when it comes to rules around personal copying.

Library lending has long played an essential equalising function in society, ensuring that people who do not have the resources to pay the sums necessary to buy copies of books (which the [2018 launching of an investigation](#) into price-fixing in the textbook market indicate could have been kept artificially high) are still able to access them. A blanket ban on such readers being able to enjoy the possibilities to make personal copies (carefully defined as being non-commercial – see below) risks being discriminatory, further reducing the opportunities open to people in this situation to gain a full education or participate in research.



- ⇒ Recommendation: to move the reference to borrowing as follows: “*lawfully acquired*’ means a copy which has been purchased, obtained by way of a gift, **borrowed from a library, archive or museum**, or acquired by means of a download resulting from a purchase or a gift and does not include a copy which has been ~~borrowed~~, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy;”.

### Clause 13 Section 12B

We believe that there may be an error in the footnote associated with the deleted Article 1(b), which should refer to 12D, rather than 19C

In Article 1(i), we believe that the inclusion of ‘lawfully acquired’ can only be acceptable from an equity point of view with the proposed change to Clause 1.

However, the redrafting of the Bill, including the proposed deletion of paragraph 12A(a)(i) has made the text in general far more complicated and restrictive than it needs to be, and has completely lost reference to private study.

In order not to lose provision for private study (itself certainly a substantive change), it would be preferable by far to return to the original text of the Bill as regards private study and personal use , and to reinstate paragraph 12A(a)(i), which provides a much clearer permission to undertake private study, which otherwise risks being excluded through the overly narrow and complicated education exception (see below).

- ⇒ Recommendation: that the treatment of education, private study and personal use in the previous version of Section 12B be returned.

## AMENDMENTS TO MAKE THE FAIR USE FACTORS APPLICABLE TO EXCEPTIONS IN SECTIONS 12B, 12C, 12D, 19B AND 19C

### Clause 13 – Section 12A

Despite the claim that the deletions proposed in Section 12A are not substantive, we are concerned that the loss of references to research, scholarship and preservation risk having a substantive effect on the way in which the law is applied, not least given that the subsequent sections are far narrower, for example dealing only with reproduction, and not other activities. Leaving these references in (sub-sections 12A(a)(i), (iv) and (vi)) provides a useful signal to librarians and users about what the law allows.

Taking them out leads to confusion, with Section 12A providing flexibility, but the redrafted Sections 12C and 12D now claim to offer exhaustive lists of what is possible. Furthermore, it is not made clear in Sections 12C and 12D that these are without prejudice to the terms of Section 12A.

Concerning the argument that it is confusing to refer to certain activities both under a fair use article, and specific exceptions and limitations, this is not borne out by experience elsewhere. United States



law, for example, refers to education both in Section 107 (fair use) and Section 110 (performance and use in educational settings). In effect, it can be helpful for (often risk-averse) libraries to have the explicit list of what is permitted, providing greater certainty, but also the guidance offered by fair use in assessing whether unforeseen uses are permissible.

We would also be concerned about the new sub-section 12A(d). This is arguably a misapplication of the principle of fair use. This should act in parallel with specific exceptions, rather than trying to mix things together in a way that is likely to lead to confusion, doubt, and litigation. Indeed, fair use may often be a tougher standard to meet than that set out in sections 12B, 12C, 12D, 19B and 19C.

⇒ Recommendation: that sub-sections 12A(a)(i), (iv) and (vi) be reinstated and paragraph 12A(d) be removed

## AMENDMENTS RELATED TO ADDING THE WORKING OF THE THREE-STEP TEST

### Clause 13 – Section 12C and Section 12D

First of all, we would argue that the version of the three-step test included in the amended Bill is inaccurate. Whereas the TRIPS Agreement and Berne Convention only apply it to ‘certain special cases’, the proposed amendments rather suggest that what is set out in the law is exhaustive (an assertion that is already undermined by the fair use principle in Section 12A).

In particular as concerns Section 12C, the idea of declaring that the cases stipulated in subsection (1) are exhaustive seems absurd, given the speed at which technology develops. The long process needed to reform the Copyright Act underlines that it would be better to avoid introducing unnecessary rigidities into the system which could take years to fix.

Secondly, we would argue that it is mistake to apply the three-step test at all here. The test typically applies to the way in which governments themselves make laws, rather than in the way they are interpreted. The European Union, for example, includes it in recitals to its laws, rather than in the articles which establish rules.

Particularly troubling is the confusion created by applying all of the three-step test (which was never intended to be applied in this way), the test of fair practice, and a fair use test (see comments on Section 12A above). For educators, researchers and users, this would have a major chilling effect on their activities, and open the door to significant risk of litigation.

If there is a need to refer to the three step test, it should be done in the preamble to the law, underlining that the law is designed in such a way as to be consistent with the test.

⇒ Recommendation: delete Section 12C, Sub-Section (2), and Section 12D, sub-section (1), points (b), (c) and (d).



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## GENERAL EXCEPTION REGARDING PROTECTION OF COPYRIGHT WORK FOR LIBRARIES, ARCHIVES, MUSEUMS AND GALLERIES

### Clause 20 – section 19C

In line with our comments above, we believe that preventing users who rely on libraries to access books from making copies, in line with fair practice, for education, private study or personal reasons risks being discriminatory and deepening inequalities.

As such, the proposed change in Section 19C, sub-section 4, is regrettable, potentially holding back use of library materials for research purposes or text and data mining.

⇒ Recommendation: remove the addition to sub-section 4

Yours faithfully,

IFLA