Comments by the International Federation of Library Associations and Institutions on the Copyright Amendment Bill, 13D-2017
26 January 2023

Clause 1 (Relating to Section 1i)
We welcome the definition of open licences, but are concerned that this is not sufficiently specific about what the acts that may be undertaken are. We would recommend adding in this detail, for example drawing on the standards applied in the Horizon 2020 Programme whereby an open licence implies that a work is freely available online, and with no restrictions on use.

We suggest that the definition of orphan works be extended to include works in which related rights subsist also, in order to avoid a situation where copyrights can be cleared, but that related rights are still an issue.

Clause 15 (Relating to Section 12A)
We very much welcome this proposal, which will provide a strong support for the work of libraries, and draws on best practices from countries around the world. It is valuable for this to be provided in addition to the specific provisions under Sections 12B-D and 19B-D, providing both valuable clarity, but also flexibility to adapt to unforeseen uses.

We would suggest that, in the bullet points listing potential purposes covered, that the following be included as a point a(viii) and a(ix):

- repair and the sharing of repair information
- provision of access to orphan works

In including provision on repair, South Africa would both remove a key barrier identified to the circular economy, and potentially enable the domestic repair industry, which risks otherwise being held back by rules limiting access to and copying of software, as well as the sharing of repair information. Alternatively a reference to the right to repair could feature in Section 12B.

Including reference to orphan works here would be preferable to the long and likely impractical text currently proposed in Clause 26 (see below). It would also enable an approach based much more on the ‘fairness’ of the use in question.
Concerning Section 12D, we strongly welcome the text proposed here, which recognises both the importance of protecting rights and that of enabling learning. Nonetheless, we would suggest a number of changes:

- Firstly, the current title is misleading, given that ‘reproduction’ does not cover all of the rights at play – it would be better to talk about ‘exception for educational and academic activities’.
- Regarding sub-section 7, we would suggest that provisions recently adopted in Spain and the United States, as well as that in place for the European Union’s own research funding, should be followed, and no embargo period permitted. As such, we would recommend deleting all of 7(b).
- Also regarding sub-section 7, we would recommend addition of a 7(f), to the effect of: ‘7(f) The provisions contemplated in paragraphs (a) to (e) (or (d) if our previous point is taken into account) shall also apply to data produced in the course of such publicly funded research. This shall be made available by default through repositories, notwithstanding the need for proportionate steps to protect privacy and other valid interests.’
- Finally, we would question whether Subsection 8(a) is necessary, given that the first six subsections already set out a number of clear restrictions on what may be done in the context of education and learning. This Subsection is likely to reduce the impact of the exception provided by the rest of the Section through creating doubt and uncertainty.

Clause 21 (Relating to Section 19B)
If the proposed reference to include repair in Section 12A is not accepted, we would therefore suggest amending the 2nd paragraph as follows, for the reasons given above:

(2) The authorization of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, as well as to carry out and support repair, both of software itself and of products of which it is a part, if the following conditions are met:

Clause 22 (Relating to Section 19C)
We welcome the content of this section, which broadly represents a strong vote in favour of a library system in South Africa properly enabled to fulfil its public interest missions. It accurately sets out the needs of the library field and provides good solutions.

The only change we would urge for comes in subparagraph 3, which should be amended to read as below. This would be highly valuable in ensuring that libraries are able to serve users
in times of emergency, such as during pandemics, or to support users who are unable to visit library premises in person, for example for reasons of illness, distance or beyond.

(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, including digitised versions of analogue works, to which it has lawful access, to a user or to another library, archive, museum or gallery

Regarding section 19D, we strongly support the proposal in place.

Clause 26 (Relating to Section 22A)
While the effort of the government to address the orphan works problem is welcome, we have serious reservations about the process set out in this clause. As shown by the evaluation of the European Union’s Orphan Works Directive, which includes a similarly open-ended list of sources that need to be consulted in order for a search to be classified as ‘diligent’, such an approach simply doesn’t work. The list of resources to check in Subsection 6 is therefore impractical, and should be reduced at least to just points (a) and (b).

Furthermore, the process suggested here is unlikely to work for larger collections. To this end, it could be valuable to make clear that collections made up of materials from a single or similar sources can be treated as one.

A further weakness is the proposal to oblige the payment of licences with no guarantee that the money will be paid out. As has been shown through research into potentially orphan works in the United Kingdom, in the vast majority of cases the immediate reaction of creators of works previously considered as being orphan was in fact happiness at having their expression shared, and not a desire to claim money. A far preferable approach would be to avoid the moral hazard that such a fund can create, and rather give a confirmed rightholder, once identified, the right to stop any use of orphan works (outside of those permitted under exceptions), and then negotiate.

Clause 27 (Relating to Section 22E)
We would suggest that it is also in the interests of libraries and others who may need to pay considerable sums to collecting societies to be able to show that this money (often public) is well spent. As such, we would recommend that the word ‘shall’ be used rather than ‘may’ in 22E(2).

Clause 31 (Relating to Section 28P)
We welcome the clear protection of exceptions from being undermined by technological protection measures, although are concerned that the current drafting of 28P(1)(b) makes little sense. We would suggesting bringing this out into a new subsection (28)(1A), along the lines of:
Nothing in this Act shall prevent 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 technological protection measures in order to enable the performance of any act permitted in terms of any exception provided for in, or prescribed under, this Act.

This would clarify the point helpfully.

Point 36 (Referring to Section 39B)
We very much support this point, and urge it to be maintained in its current form.

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