



INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS
FEDERATION INTERNATIONALE DES ASSOCIATIONS DE BIBLIOTHECAIRES ET DES BIBLIOTHEQUES
INTERNATIONALE VEREINIGUNG BIBLIOTHEKARISCHER VERBÄNDE UND EINRICHTUNGEN
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МЕЖДУНАРОДНАЯ ФЕДЕРАЦИЯ БИБЛИОТЕЧНЫХ АССОЦИАЦИЙ И УЧРЕЖДЕНИЙ
国际图书馆协会与机构联合会
الاتحاد الدولي لجمعيات ومؤسسات المكتبات

Ms. J.L. Fubbs
Chairperson
Portfolio Committee on Trade and Industry

Via e-mail: jfubbs@parliament.gov.za

In copy: Ms. L.C. Theko
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The Hague, 29 March 2018

Comments by the International Federation of Library Associations and Institutions (IFLA) to the South African South African Copyright Amendment Bill [B13-2017]

Dear Honourable Ms. Fubbs,

The International Federation of Library Associations and Institutions represents over 1400 members in over 145 countries around the world. It is the global voice of the library profession, speaking in favour of millions of libraries worldwide and their users.

Copyright laws have a strong impact on the way people legally access information. Libraries are often the only guarantee of equitable access, enabling people to learn, grow and innovate, regardless of their background or resources. For this reason, IFLA follows closely the evolution of copyright reforms around the world, among which discussions on the South African Copyright Amendment Bill.

We are concerned by the news that the ambition of the Copyright Amendment Bill process could be significantly limited, with the risk that it may only address issues around music royalties and do nothing to modernise limitations and exceptions to copyright. While music royalties are important, the modernisation of limitations and exceptions is long overdue since the last major revision took place in 1978.

In the digital environment, the most forward-thinking countries are making efforts to bring copyright frameworks up to date. The South African Copyright Amendment Bill has the potential to lead the way in the region. With many of the provisions in the draft bill modelled on the EIFL Draft Copyright law, they are drawing on a widely recognised international standard in the area.

However, a reform that does not tackle the challenges to access to information raised by copyright in the digital environment would be a missed opportunity. At the World Intellectual Property Organisation, where South Africa engages positively in discussions on the topic of exceptions and limitations for libraries and archives, a failure to reform would be a great disappointment.

Needless to say, reducing the ambition of the bill may also delay South Africa's ratification of the Marrakesh Treaty, and will hamper the country's integration into global research and

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innovation networks. This would hurt both some of the most vulnerable people in South Africa and damage the country's potential to benefit from science and technology.

In IFLA's comments submitted in 7 July 2017¹, we already underlined the many benefits that a fair use provision would bring to cultural heritage institutions and their users. For that purpose, we insisted on the need to turn the exhaustive list under Section 12 into a set of examples by adding the words "such as" in the first paragraph, so that it would read: "In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, such as for the following purposes, does not infringe copyright in that work."

Nonetheless, we are aware that there are loud voices opposing this progress. Regrettably, these voices have made claims that do not stand up to inspection, and proposals that will first and foremost benefit those who exploit works on behalf of writers and other creators, rather than the writers and creators themselves.

Fair use is a system that has proven its benefits in other countries where copyright functions under this general principle. Academic studies², and the example of several developed countries, show how a more flexible approach to copyright is beneficial to users, creators, scholarship, research, innovation and the economy in general. It certainly is beneficial to the work of libraries and the service they provide to their users, with a framework that adapts to new needs.

South Africa should not miss the opportunity to move towards a regime that will most certainly be more advantageous to its creators, researchers, companies and to access to information in general.

For further information, please find the IFLA submission sent on 7 July 2017 as an annex at the following page.

We stay at your disposal for any questions.

Yours sincerely,

Gerald Leitner
IFLA Secretary General

¹ Submission by the International Federation of Library Associations and Institutions (IFLA) on the South African Copyright Amendment Bill [B13-2017]

² <http://infojustice.org/archives/38705>



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Annex

Submission by the International Federation of Library Associations and Institutions (IFLA) on the South African Copyright Amendment Bill [B13-2017]

The International Federation of Library Associations and Institutions (IFLA) represents the interests of library and information services worldwide. As advocates for laws that respond to libraries and their users' needs in a digital environment, we want to welcome a proposal that in many of its aspects will be highly beneficial to access to information and culture in South Africa, as well as making your country a model for others in the region and the world.

There are some elements which will require further amendment in order to fulfil the purpose of the reform. As such, following the possibility given by the Portfolio Committee on Trade and Industry to share written submissions, we would like to make comments on the South African Copyright Amendment Bill from a perspective that seeks to optimize and promote access to knowledge through library services.

We would like to call the Parliament's particular attention to the general exception in Section 12 of the Act that refers to fair use and fair dealing, to the exception about quotations (Section 12A), to the exception for orphan works (Section 22), as well as underline some of the most positive current provisions.

The fair dealing exception (Section 12)

We welcome the amendment to the general fair dealing exception to turn it into a fair use exception, a system that has proven its benefits in other countries where copyright functions under this general principle. However, while this step does allow for a considerable increase in the number of permitted uses of works under this umbrella, we consider that a non-exhaustive list would be more advantageous to South Africa, to its creators, researchers, companies and to access to culture globally.

A broader fair-use exception as described above would allow cultural heritage institutions to serve their users better, for instance by enabling them, in their educational activities, to illustrate arguments and points with historical political pamphlets or with audio-visual materials. They would be able to make copies of works for internal purposes, such as cataloguing or for insurances, to guarantee a better functioning of the institution, and would be able to supply unique works held only in their collections to other institutions on a non-commercial basis, among other examples.

In general, a broad fair use exception would suppose less legal insecurity for librarians and would generally benefit citizens in their use and sharing of information.

We would therefore recommend slightly modifying the language of the article by adding the words "such as" in the first paragraph, so that it would read: "In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, such as for the following purposes, does not infringe copyright in that work". With this minor change, the list would consist of a set of examples and not on an exhaustive list.

Quotations (Section 12)

Under the same section it is established that quotations would have to be in the form of the summary of a work. Although this might look unimportant, it is likely to have a big impact on education and research, where properly attributed quotes are fundamental as a means of referring to earlier works, and summaries might not be accurate or detailed enough. We therefore suggest either deleting reference to "summaries" or deleting the comma between "periodical" and "that", so that the form of a summary would only be required for quotations of newspapers or periodicals, as the sentence would then read "Any quotation, including a quotation from articles in a newspaper or periodical that is in the form of a summary of that work: (...)".

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Without this, quotations that would be allowed under the current legal framework risk becoming infringing references. We consider this an unnecessary and harmful step backwards that will be harmful to good scholarship and scientific rigour.

Orphan works (Section 22)

We welcome the initiative that aims to solve the problem of orphan works. Cultural heritage institutions hold enormous numbers such works in their collections. To avoid seeing them locked away, a flexible system needs to be implemented.

The provision in Section 22 establishes a list of mandatory sources to be checked, and proof of this research needs to be provided to be able to get a licence for the use of the work. This requirement will most likely make the functioning of the system burdensome and even impossible in many occasions. The amount of human and economic resources that would need to be spent for each of the searches – not least given that a single work may have many different rightholders – would make mass digitization projects inviable for many institutions. Use of such material for purposes of teaching or research would also be severely hampered, if not impossible.

An example of the flaws of such a system is provided by Europe, where many countries have not been able to “declare” any works orphan because of the impossibility to meet the requirements, even though large amounts of potential orphan works lie within their collections. The result is that a high proportion of the cultural heritage of the 20th century hidden from coming generations.

In order to address this problem, it would be helpful to make the list of sources to be checked optional, or alternatively to provide that the digitization and communication to the public of orphan works should be covered by a flexible fair-use exception.

Anti-circumvention provisions (Section 28), unenforceability of contractual terms (Section 39), right to repair and text and data mining

We welcome the introduction of an exception that gives the possibility for users to use a circumvention measure to perform an act that is allowed under an exception. This is an important provision for cultural heritage institutions, since it can affect a large amount of digital content that is legally acquired and that can legitimately be used.

In this regard, we would suggest adding a provision that specifies that someone who assists the final user of the work in circumventing the technological protection measures, in order to allow the user to benefit from an exception, should not be held liable.

We are also very supportive of the provision that recognises the unenforceability of contractual terms that override exceptions to copyright. This will help solve the recurrent problem that licensed-based agreements often contain provisions that limit the possibility that exceptions to copyright offer.

Furthermore, we would recommend two additional provisions to be included, on text and data mining and on the right to repair, or alternatively a broader fair use exception, as mentioned above, that would cover those activities. The right to repair should be allowed, where software may need to be circumvented, for purposes of repairing a scanner, digitisation equipment or other. Text and data mining is a fundamental process for researchers, journalists, educators, cultural heritage institutions, and citizens in general, having a positive impact in the economy. To our understanding, the right to read is the right to mine, and therefore any individual or legal entity should be allowed to do so. Legal uncertainty should be addressed through a clear and flexible provision.

Library provisions (Section 19)

We find the proposals concerning libraries and archives (Section 19) particular positive, notably the lending of e-books, the possibility to supply documents digitally, the making available of collections on secure computer

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networks, the limitations of liability and the provision on out of commerce works. If adopted, they will help to notably improve the public service that libraries offer.

In terms of access to information, we also welcome the provisions on open licensing (Section 13B), allowing authors whose published works are publicly financed to make their contributions available to the public after a certain period of time. We argue that this period should be kept as short as possible, with immediate open access a desirable goal.

Implementation of the Marrakesh Treaty (Section 19)

Finally, we welcome provisions that implement the Marrakesh Treaty into South African legislation. In this regard, we would like to suggest a minor change in Clause 19(D) 1 and 3, that consists of changing the term “author” for “rightsholder” in the first sentence (“any person may, without the authorisation of the author”). If the current wording is maintained, the exception will not apply to all those cases where authors have licensed their copyrights to third parties such as editors or publishers, which is a very frequent case.

The South African reform will set an example not only to neighbouring countries, but internationally. If done in the right way, notably taking account of the changes proposed in this letter, it will have a very positive effect on those countries who will follow its lead. This will not harm any legitimate interests, but rather make progress towards universal access to culture and information, and promote literacy in the digital environment.