

Country Report South Africa

Annual report to the IFLA CLM committee
Quebec Canada 2008

Copyright

Revision of copyright law

New legislation

Cultural Laws Third Amendment Bill, 2007

Since 2006, the South African Government has been undergoing a review of all legislation. As a result of a Consultative Workshop organized by the Department of Arts and Culture, and attended by officials of the Department of Trade and Industry, in July 2006, the Department of Arts and Culture published the Draft Cultural Laws Third Amendment Bill in the Government Gazette on 26 May 2008 (No. 31082 - Notice 652). The closing date was 13 June 2008, a relatively short period for submissions to be made by stakeholders.

This Bill proposes to amend eleven Acts, namely –

1. SA Legal Deposit Act No. 54/1997
2. National Library of South Africa Act 92 of 1998
3. SA Library for the Blind Act No. 91/1998
4. National Council for Library and Information Services (NCLIS) Act No. 6/2001
5. Culture Promotion Act No. 35/1983
6. National Heritage Resources Agency Act No. 25/1999
7. SA Geographical Names Council Act No. 118/1998
8. Cultural Institutions Act No. 119/1998
9. National Heritage Council Act No. 11/1999
10. National Arts Council Act No. 56/1997
11. National Film & Video Foundation Act No. 73/1997

All these Acts are administered by the Department of Arts and Culture. The three Acts which have particular relevance to the library community are the National Library of South Africa Act, the South African Library for the Blind Act and the Legal Deposit Act.

The proposed amendments were mainly of a technical nature and did not address the needs of libraries, particularly legal deposit libraries, education or persons with sensory-disabilities. Officials of the Department stated at workshops in Bloemfontein and Pretoria in 2008, that these amendments were part of the first phase and that other amendments could only be made in the second phase, since the Copyright law needed to be changed first. By keeping the above three Acts outdated for the sake of waiting for the Copyright law to be updated, proper functioning of libraries and access to information continue to be hampered.

Intellectual Property Bill from Public-Financed Research, 2007

This Bill was drafted by the Department of Science and Technology (not the Department of Trade and Industry whose portfolio includes intellectual property) and published for public during 2007. Its main focus was on patents but there were some implications for copyright. There were strong objections from the educational sector, the publishing sector and other stakeholders. From a copyright point of view, there were several concerns about the impact this Bill would have on open access publishing. This Bill proposes that universities and science councils retain intellectual property rights for public-funded discoveries made by their academic researchers.

After receiving submissions from many stakeholders, the Department revised the Bill and held a number of public workshops mainly for academics and researchers. A number of versions were informally circulated amongst academics. On 26 May 2008, I met with the Higher Education of South Africa (HESA), representing the tertiary institutions, together with two professors from the

University of Pretoria and the University of South Africa respectively, to discuss remaining concerns about the Bill and the way forward. HESA agreed to write to the Department of Education and the Department of Science and Technology to express these concerns. On 13 June 2008, the final version was published in the Government Gazette No. 31130 and on 17 June 2008, it was submitted to Parliament and public hearings have been scheduled for 29 and 30 July 2008.

Intellectual Property Amendment Bill, 2007 (Traditional Knowledge)

On 5 May 2008, the Department of Trade and Industry published the Intellectual Property Amendment Bill, 2007, in the Government Gazette No. 31026. This Bill attempts to address traditional knowledge systems through proposed amendments to four intellectual property Acts, namely, the Patents Act, the Designs Act, the Trademarks Act and the Copyright Act. The closing date for submissions was 15 June 2008, and was later extended informally to 23 June 2008.

The Department held a number of public consultation workshops around the country, the last one being in Pretoria on 13 June 2008. I attended this workshop. There were about 35-40 people present, mainly from intellectual property law firms and organizations, two music rights organizations, the Dramatic, Artistic and Literary Rights Organization, the Academic and Non-Fiction Authors' Association and representatives from the Shuttleworth Foundation. A small number of academics from tertiary institutions also attended.

The Bill raised several concerns and at times there was heated debate about some issues. Questions were raised as to why South Africa was taking a different route from other countries that have gone the 'sui generis' route. Participants questioned the vague definitions of 'indigenous communities' and 'traditional works' and the problems with 'traditional works' being treated as another category of works in the Copyright Act. Some pointed out that most of these works can either be protected through other IP laws, rather than the copyright law. Also many of them are either in the public domain already or are conventional copyrighted works with individual owners. The Bill proposed ownership by a National Trust, which would have no statutory powers. Conflicts around ownership and use of these works are therefore likely to occur when traditional knowledge works are published and become conventional copyright works under the Copyright Act. There were several other objections and recommendations made. I questioned why the Copyright Act was being amended for traditional works but has not included limitations and exceptions for libraries, education, research and persons with sensory-disabilities, since we have been calling for amendments for some ten years now. The Director of Commercial and Intellectual Property Law, Mr. Macdonald Netshitenzhe, then stated that such recommendations could be submitted and he extended the closing date informally to 23 June 2008. Various submissions have since been sent in to the Department. The Shuttleworth Foundation and the African Copyright and Access to Knowledge (ACA2K) Project have also submitted comments. At my request, Higher Education of South Africa (HESA) and the Library Association of South Africa (LIASA) wrote to the Department of Trade & Industry requesting that limitations and exceptions be addressed in this amended Bill.

The Department of Trade and Industry seems intent on passing this Bill during the 2008 Parliamentary session, in view of 2009 being an election year. Several delegates stressed that it would not be wise to rush the Bill and that more debate and even a conference or 'indaba' should be held to discuss the matter further before it proceeds in the legislative process. It was stressed that since other developing countries are likely to use this Bill (if enacted) as a precedent, it is very important that South Africa gets it 'right' before passing such a Bill. The Bill has been scheduled for submission to Parliament during July 2008.

Public lending rights

Two years in a row, the Academic and Non-Fiction Authors Association of South Africa (ANFASA) have held copyright workshops in Cape Town to promote public lending rights for

South Africa. I attended the first workshop and wrote to the Director of ANFASA afterwards, setting out my concerns about public lending rights at this stage of South Africa's transformation. I have since co-authored a paper on "*Public lending right: prospects in South Africa's public libraries?*" which will be published in the South African Journal of Libraries and Information Science in July 2008. The purpose of this paper is to raise awareness about public lending rights and the different systems used around the world. The paper shows that public lending rights are not advisable for South African public libraries at this stage and recommends that empirical research be done on the topic before such a system is introduced in South African public libraries.

Legal deposit

The Legal Deposit Preservation Workgroup held a workshop on digitization of legal deposit material in January 2008. It was clear that copyright is hindering digitization projects and that provisions need to be included in the Copyright Act, the Legal Deposit Act and other Acts relevant to libraries, to remedy this situation and to enable libraries to fulfil their mandates in terms of the above legislation.

Copyright research project

I have been appointed the Project Dissemination and Policy Engagement Advisor for the African Copyright and Access to Knowledge (ACA2K) Project which commenced on 1 October 2007 and will conclude at the end of January 2010. The African Copyright & Access to Knowledge (ACA2K) Project is probing the relationship in African countries between national copyright environments and access to hard-copy and digital learning materials, within an access to knowledge (A2K) framework. This project, supported by Canada's IDRC and South Africa's Shuttleworth Foundation, and managed by the Wits University LINK Centre in Johannesburg, involves legal researchers in eight African countries, i.e. Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda).

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