Copyright is a statutory monopoly, but international Treaties permit limitations and exceptions, or legal flexibilities, in national laws. Many developed countries have been enjoying such flexibilities in their copyright laws for years, whilst our law has very few exceptions. Such flexibilities are fundamental for access to knowledge, and thus for human and social development.

For 21 years, the educational and library sectors have been calling for better access to information and more balanced copyright laws. They challenged the Department of Trade and Industry’s (DTI) proposals to amend the Regulations in 1998 and the Act in 2000. As a result, both sets of restrictive proposals were excluded from the Copyright Amendment Act of 2002 which then only addressed needle-time for musicians. Thereafter, various attempts by the SA University Vice-Chancellors Association (SAUVCA) and Committee of Technikon Principals (CTP) at the time, to reach agreement with rights-owners on copyright exceptions, were unsuccessful. This led to an impasse for many years.

From 2007 to 2011, the African Copyright and Access to Knowledge Project (ACA2K), probed the relationship between national copyright environments and access to learning materials in eight African countries, including South Africa. A key finding was that copyright laws are, at best, unreliable access-enablers; and where laws lack balance for information-users, access to information was facilitated by infringing activities, not the copyright law.

The year 2009 saw the genesis of the current Amendment Bill, when the DTI commissioned the University of Pretoria (UP) to develop studies and positions (‘fair use’ was included). In 2011, the DTI established a Copyright Review Commission, led by Judge Ian Farlam, to address artists’ concerns that royalties were not being properly distributed to the rightful owners of copyright, by collecting societies. The DTI also commissioned a WIPO Study on “The Economic Contribution of Copyright-Based Industries in South Africa”. The report clearly states (with reference to the Gowers Review of 2006), that:

The existence of a general fair use exception that can adapt to new technical environments may explain why search engines were first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement.

In the report’s concluding recommendations, its states:

The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary.

In 2013, the DTI published its Draft Intellectual Property Policy for public comment. In 2017, Phase 1 of the Policy was passed. In 2014, the President approved the Intellectual Property Laws Amendment Act, 2013, but this has not yet been promulgated.

In his 2014 budget speech, DTI Minister, Mr. Rob Davies, announced that:

The existing intellectual property law regime requires a shift in order to take into account the trends, and developments, in the copyright environment, and address key challenges that have been raised by artists.

The Copyright Review Commission which was headed by Judge Ian Farlam made important recommendations, which will improve access to education, regulate collecting societies effectively, and facilitate fair and speedy payment of royalties to rightful owners.

We will propose amendments to the Copyright Act to bring an end to the plight of artists who continue to die as paupers. In this Bill, we will also propose measures to regulate fair use, and fair contract terms, given the challenges with contract negotiations within this industry.

Framework and Passage of the Bill

In 2015, the DTI held public consultations, and in July, published a Draft Amendment Bill for public comment. In August 2015, the DTI convened a Multi-Stakeholder Conference in Boksburg, Gauteng, and the deadline for submissions was extended to September 2015. Many stakeholders made submissions to the DTI. This resulted in various stakeholder workshops being organised. In 2016, the DTI’s Socio-Economic Impact Assessments were completed.
THE COPYRIGHT AMENDMENT BILL
Its Genesis and Passage through Parliament

The Amendment Bill was drafted within the framework of, and/or informed by:

- Human Rights and other international Conventions and Treaties
- Treaty proposals at WIPO by the Africa Group, and IFLA and its alliance partners.
- The EIFL Model Copyright Law
- Appropriate clauses from progressive copyright regimes
- The African Copyright and Access to Knowledge Project
- The SA Open Copyright Review
- The South African Constitution
- The National Development Plan and SDGs
- The 2015 Cape Town Declaration which commits South Africa (and 12 other countries in Africa) to fair and balanced copyright laws.

Various limitations and exceptions were included in the Bill for libraries, archives, galleries and museums, as well as for research, education and people with disabilities. The library and education sectors welcome these flexibilities which will enable them to carry out their statutory mandates in the digital environment. They will also be able to embrace the demands of the 21st century and the Fourth Industrial Revolution.

To address stakeholder comments and objections, the Bill was revised during 2016, and in 2017, it was presented to the Portfolio Committee on Trade and Industry in Parliament. Fresh calls for submissions on the Bill were published. Many submissions were made, either supporting or opposing the Bill. In early August 2017, a large number of stakeholders presented at the Committee’s public hearings in Parliament. The author, together with Nikki Crowster, presented in the LIASA slot on behalf of the library sector, including NCLIS and the Legal Deposit Committee, on 4 August 2017. The Chair, Ms. Fubbs, invited stakeholders to submit additional, but relevant, information to her Committee after the hearings. A small technical team of IP academics was appointed by the Committee to assist with the redrafting of the Bill, based on submissions received.

In October 2017, the ANC Legal Research Group convened a multi-stakeholder meeting in Sandton which was live-streamed for the public’s benefit. The National House of Traditional Leaders was also consulted on the Bill. Thereafter, the Portfolio Committee had regular meetings to deliberate on the Bill. Stakeholders had various opportunities to submit comments on revised versions, and even on specific clauses. Many international, regional and local organisations made formal submissions, including the International Federation of Library Associations and Institutions (IFLA), the International Council on Archives (ICA), the African Library and Information Association (AfLIA) and the Library and Information Association of South Africa (LIASA).

In February 2018, the Portfolio Committee appointed a small technical team, i.e. an advocate from the Johannesburg Bar, and some members from the Copyright Alliance (representing collecting societies) to help it align the Bill with the Constitution and relevant policies. In May, the Committee considered splitting the Bill into 2 phases, but after objections from the educational and library sectors, the Committee decided to keep it as one Bill.

The Portfolio Committee approved the Bill (version 5) on 15 November and the National Assembly approved it on 5 December 2018. It was referred to the Select Committee of the National Council of Provinces (NCoP) for discussion on 13 February 2019. This Committee called for final submissions by 22 February 2019, and met again on 27 February and 6 March to address the submissions. On 20 March 2019, the Select Committee approved the Bill. On 28 March 2019, members of the full NCoP voted and the Bill was passed.

The next step is for the Bill to go to President Cyril Ramaphosa for signature. Once signed, the DTI will have to draft Regulations for implementation of the Bill.

There has been a great deal of opposition to the Bill by the Copyright Alliance (made up of collecting societies) and a broader Coalition for Effective Copyright representing creators, artists and authors. Unfortunately, a great deal of misinformation on social media, and negative media reports and interviews, have caused panic amongst creators, authors, publishers and even academics. Some people have signed petitions opposing the Bill, yet they have not even read the Bill, or they have misunderstood the Bill. This is worrying, because many of the provisions benefit all stakeholders, including users and producers of information.

Conclusion

The Bill is progressive, forward-looking, and goes a long way to redressing omissions and imbalances in our current copyright law. It benefits all stakeholders, by:

- Giving access and dignity to people with disabilities
- Facilitating access for research, teaching and learning, and social development
- Enhancing creativity and innovation, and empowers authors and creators in the digital world
- Updating and ‘future-proofing’ our copyright law for the 21st century and Fourth industrial Revolution.
- Aligning South Africa’s copyright law with other progressive copyright regimes
- Enabling accessibility and preservation of library and related collections
- Securing our cultural documentary heritage for future generations
- Regulating Collecting Societies to protect authors and creators from dying as paupers
- Preventing unfair contracts from overriding legal exceptions

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