

**Association for Progressive  
Communications**

**Draft Provisions for Amendment of  
the 1978 Copyright Act**

**March 2015**

## Executive Summary

South Africans should be able to make fair use of copyright materials. Fair use is important for technological innovation, reverse engineering, education and access to knowledge. Contracts and anti-circumvention rules should not be allowed to prevent South Africans from making fair use of copyright materials. South Africans should be able to bulk import copyright works including textbooks legitimately purchased outside South Africa.

## Contacts

Emilar Vushe, APC Africa Policy Coordinator – [emilar@apc.org](mailto:emilar@apc.org); Andrew Rens, APC Researcher on copyright – [andrewrens@gmail.com](mailto:andrewrens@gmail.com); Anriette Esterhuysen, APC Executive Director – [anriette@apc.org](mailto:anriette@apc.org) - <http://www.apc.org>

## Table of Contents

Executive Summary.....	
The Association for Progressive Communications.....	
Recommendations.....	
Access to knowledge in South Africa.....	
Draft language and commentary.....	
Fair use provision in South African copyright law.....	7
Proposed wording for fair use.....	7
Rationale for fair use.....	7
Wording of the United States fair use provisions for comparative purposes.....	10
Contracts should not prevent fair use and other exceptions.....	10
Proposed wording on contractual prevention.....	10
Rationale for preventing contractual prevention of fair use.....	11
Wording of the United Kingdom contractual unenforceability provision for comparative purposes.....	12
Further considerations on contracts and copyright exceptions.....	12
TPMs and anti-circumvention measures should not prevent fair use and exceptions.....	13
Proposed wording to protect exceptions from anti-circumvention.....	13
Rationale for protecting copyright exceptions from anti-circumvention.....	14
Importing legitimately purchased goods.....	16
Explanation of changes.....	16
Proposed rewording on parallel import.....	17
Rationale for ending the prohibition on parallel import.....	18

## **The Association for Progressive Communications**

The Association for Progressive Communications (APC) is an international network and non-profit organisation founded in 1990 that wants everyone to have access to a free and open internet to improve lives and create a more just world. APC helps people use the internet to develop their communities and further their rights, and works to make sure that government policies related to information and communication serve the best interests of the general population, especially people living in developing countries.

APC, through its network of 50 member organisations around the world, is able to build the capacity of civil society actors involved at national level to engage at global level, and vice versa, by supporting the participation of groups of people from civil society in global forums through creating spaces for learning and strategising. APC is uniquely placed to connect the strands of internet governance and human rights, particularly through national, regional and global mechanisms. Connecting the accountability of governments, and other stakeholders, across both human rights and issues of governance such as IP policy, is a key strategy for improving rights-affirming public policy.

## Recommendations

- 1 . That the 1978 Copyright Act be amended to insert a provision closely resembling the United States fair use provision. This provision would operate in addition to the existing exceptions and other exceptions introduced in the amendment process.
- 2 . That the 1978 Copyright Act be amended to insert a provision that explicitly prevents contractual terms from nullifying statutory user rights in copyright (exceptions and limitations) such as fair use. The provision should render contractual provisions that purport to nullify or exclude the operation of exceptions and limitations unenforceable.
- 3 . That the 1978 Copyright Act be amended to insert a provision that explicitly authorises circumvention of technical measures that prevent the use of exceptions and limitations in the Copyright Act.
- 4 . That the 1978 Copyright Act be amended to allow anyone to import into South Africa copyright works such as textbooks that are lawfully made in another country.

## Access to knowledge in South Africa

The Draft National Intellectual Property Policy (September 2013) recommends that “[t]o enhance access to copyright materials and achieve developmental goals for education and knowledge transfer South Africa must adopt pro-competitive measures under copyright legislation. The legislation must provide the maintenance and adoption of broad exemptions for educational, research and library use.”

The Association for Progressive Communications agrees on the importance of access to knowledge in South Africa and in particular in copyright legislation. The Bill of Rights sets out fundamental human rights which in turn give rise to access to knowledge requirements including the right to educational materials. Research on the 1978 Copyright Act finds it to be deficient in enabling access to knowledge, and that the Act itself restricts access to knowledge. The policy basis for the recommendations and the draft provisions for amendment of the 1978 Copyright Act in this document are set out in *Realising Human Rights in South African Copyright Legislation*<sup>1</sup>, *Report on Fundamental Rights, and Global Copyright Legislative Best Practice for Access to Knowledge in South Africa*<sup>2</sup> by the Association for Progressive Communications. Further policy analysis and support for the recommended changes is set out in the *Access to Knowledge Civil Society Coalition Submission on the Draft Policy on Intellectual Property of South Africa* by the Association for Progressive Communications on behalf of the Access to Knowledge Civil Society Coalition (15 October 2013) co-authored by the Association for Progressive Communications.

---

<sup>1</sup>[http://www.apc.org/en/system/files/Model+Legislation\\_Advocacy+for+A2K.pdf](http://www.apc.org/en/system/files/Model+Legislation_Advocacy+for+A2K.pdf)

<sup>2</sup><http://www.apc.org/fr/pubs/research/report-fundamental-rights-and-global-copyright-leg>

# Draft language and commentary

## Fair use provision in South African copyright law

### Proposed wording for fair use

*Notwithstanding **any other provision in this Act** the fair use of a work including **but not limited** to such use by reproduction, **performance, broadcast, transmission in a diffusion service or the making of adaptations**, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright **or moral rights**. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

*(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*

*(2) The nature of the work;*

*(3) The amount and substantiality of the portion used in relation to the work as a whole; and*

*(4) The effect of the use upon the potential market for or value of the work.*

*The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.*

Notes: Changes from the wording in the United States Copyright Code are in bold.

### Rationale for fair use

- **Fair use enables online education.**

The United States has both a fair use provision and detailed specific legislation intended to

enable use of copyright materials in online education: the Technology, Education and Copyright Harmonization Act of 2002, codified as 17 U.S. Code § 110 “Limitations on exclusive rights: Exemption of certain performances and displays”. The experience has shown that detailed exceptions for online education are burdensome to comply with and fair use is often preferable.<sup>3</sup>

- **Fair use takes into account the rights of copyright owners.**

The factors that must be taken into account include the nature of the use and the effect of the use upon the potential market for or value of the work. Commercial uses are less likely to be fair. The provision has an internal balance between the interests of rights holders and artists, teachers, students, etc.

- **Fair use future-proofs copyright legislation.**

It is impossible for legislation to imagine future technological developments. A fair use provision gives courts the flexibility to determine which uses of copyright works drive innovation and which are illegitimate.

- **Fair use is already compliant with the three-step test.**

The United States, where fair use originated, acceded to the Berne Convention in 1989 and was a major negotiator of the Trade-Related Aspects of Intellectual Property Agreement (WTO-TRIPS). The United States would not have entered into these agreements unless they permitted fair use, because fair use is required by United States constitutional law. The United State would be unable to challenge the introduction of fair use into South African law, because the United States itself uses fair use. While several countries, such as the United Kingdom, have recently introduced greater flexibilities in their copyright regimes, each exception or limitation must be carefully constructed for compliance with the three-step test. However, a fair use provision that closely follows the United States wording covers many of the same issues, such as parody, but is presumptively compliant with the three-step test.

---

<sup>3</sup> See Crews, K. D. (2010). *Copyright Law and Distance Education: Overview of the TEACH Act*. Copyright Advisory Office, Columbia University.

- **Fair use is increasingly being incorporated in the copyright law of many countries including developing countries.**

The following countries have fair use type provisions: Bangladesh (Copyright Act, 2000, s 72), Liberia (Copyright Law, 1997, s 2.7), Sri Lanka (Intellectual Property Act, 2003, s 11-12), Taiwan (Copyright Act, 2007, s 65), Uganda (Copyrights and Neighbouring Rights Act, 2006, s 15), South Korea (Copyright Act 1967, art 35–3), Israel (Copyright Act 2007, s 19), the Philippines (Intellectual Property Code of the Philippines, Republic Act No 8293, s 185.) The Australian Law Reform Commission recently recommended that Australia adopt a fair use provision (Copyright and Digital Economy Review, February 2014).

- **Fair use does not prevent other exceptions**

The introduction of a fair use section that copies the United States section into South African copyright law does not mean that there cannot be more detailed specific exceptions and limitations. The United States has detailed exceptions in addition to fair use. There is no reason in international law why a country cannot have both fair use and some detailed exceptions. Detailed exceptions are certainly needed to create exceptions and limitations for persons with disabilities, such as blind and visually disabled persons.

- **Fair dealing is inadequate for the digital environment.**

Although some responses to the Draft National Intellectual Property Policy claimed that the current exceptions are adequate for South Africa as a developing country, those responses failed to take into account developments in the rest of the world. The United Kingdom, which is the originator of fair dealing provisions, passed extensive exceptions to copyright in June 2014 to enable many activities that its fair dealing provisions, recently amended in 2003, still prohibited. The Republic of Ireland has found fair dealing to be inadequate for its purposes, and is considering introducing a fair use provision (Modernising Copyright, the Review of the Copyright Reform Committee 2013). However, like the United Kingdom, the Republic of Ireland is limited by the European Copyright Directive, which makes introducing fair use more difficult for Ireland than for South Africa, which is not bound by the European Copyright Directive.

- **Fair use is broad.**

Fair use covers a wide variety of situations including transformative use, parody, educational use and research use. South African courts can learn from the many decisions on fair use in other countries that have fair use provisions but will not be bound to follow them. Instead South African courts will interpret the provision in accordance with the South African Bill of Rights.

## **Wording of the United States fair use provisions for comparative purposes**

Section 107 of the US Copyright Act:

*Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

*(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;*

*(2) The nature of the copyrighted work;*

*(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*

*(4) The effect of the use upon the potential market for or value of the copyrighted work.*

*The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.*

## Contracts should not prevent fair use and other exceptions

### Proposed wording on contractual prevention

*To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of sections [list of sections granting user rights including new section on fair use], would not infringe any right conferred by Chapter 1, that term is unenforceable.*

Alternative wording:

*To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of sections [list of sections granting user rights including new section on fair use], would not infringe any right conferred by Chapter 1, that term is **void**.*

The UK legislation, which serves as a precedent for this proposed provision, uses the word “unenforceable”; however, South African courts tend to refer to contract provisions that are contrary to a statutory provision as void.

### Rationale for preventing contractual prevention of fair use

The Copyright Act grants certain exclusive rights to authors and other persons. However, to achieve important public policy objectives, the same Act sets out certain rights for other people to make lawful use of copyright works for education, criticism and the like; these are usually referred to as exceptions and limitations. Contract terms which claim to restrict the use of these rights try to turn conduct permitted by the Copyright Act into conduct which it prohibits. In other words, contract terms that try to prevent people from using exceptions and limitations are an attempt to defeat the objectives of the Copyright Act and are aimed against

the public interest provisions in the statute. As a result, these types of provisions are likely already unenforceable because they are contrary to statute.

However, there is no case law on the issue in South Africa. Because of the spread of digital technology, consumers now enter into numerous contracts dealing with licensing of software, music and video, and these often contain provisions claiming to prevent the consumer from making use of the exceptions and limitations granted by statute. These provisions are usually broadly drawn and so will also operate against exceptions and provisions created by new amendments to the Act. The Draft National Intellectual Property Policy circulated for comment in September 2013 states: "South Africa internet users must be entitled to fair use rights such as making and distributing copies from electronic sources in reasonable numbers for educational and research purposes and using reasonable excerpts in commentary and criticism" (p. 33). This policy recommendation will be defeated if existing contract provisions are allowed to override it.

To protect the public, the Copyright Act should clearly state that contractual provisions that claim to prohibit conduct permitted by the Act are unenforceable. This is not so much a change to the substance of the Act as a clarification of the existing situation.

In 2014 the United Kingdom introduced a number of new exceptions into the Copyright, Designs and Patents Act 1988. Each of the exceptions for quotation, parody and private copying renders contract provisions claiming to restrict the exception unenforceable. This followed the Hargreaves Commission which recommended: "The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract."<sup>4</sup> The proposed wording follows the wording used in the UK amendments closely. This has several advantages: (i) South African courts would be able to draw on decisions of UK courts considering similar wording but without being bound to follow those courts; (ii) this wording has not been challenged at the WTO under the TRIPS agreement; and (iii) a challenge to this wording under TRIPS would probably draw the United Kingdom in on the same side as South Africa, and therefore, UK trade partners may be more reluctant to challenge it.

---

<sup>4</sup> Hargreaves, I. (2011). *Digital opportunity: a review of intellectual property and growth*. Newport: IPO.

## Wording of the United Kingdom contractual unenforceability provision for comparative purposes

*30A Caricature, parody or pastiche*

*(1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.*

***(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.***

### Further considerations on contracts and copyright exceptions

#### Existing contracts

As discussed above, contractual provisions that seek to defeat the objectives of the Copyright Act should be regarded as already illegal and therefore unenforceable. Therefore it would be useful to be clear that existing contractual provisions purporting to prevent use of exceptions and limitations are unenforceable. This could be achieved by additional wording along the following lines:

*This section shall apply to all agreements whether entered into before or after this section came into force.*

#### Which actions should not be prevented by contract?

The simplest approach would be to apply this provision to all the exceptions from 12 to 19B and all new exceptions and limitations introduced by the amendment. At a minimum, this should include the fair use section to be introduced and the existing exceptions in 12 (1), (3) and (4), but applied to the different kinds of works by 15 (4), 16 (1), 17, 18, 19A and 19B.

# TPMs and anti-circumvention measures should not prevent fair use and exceptions

## Proposed wording to protect exceptions from anti-circumvention

*For the purposes of Section 86 of the Electronic Communications and Transactions Act No. 25 of 2002 a person who accesses data in order to perform any act permitted by sections [list of sections granting user rights including new exceptions] is authorised to do so by virtue of this section.*

*Notwithstanding the provisions of any other law modifying, destroying or rendering ineffective data or overcoming security measures designed to protect data or access thereto or attempting to do so in order to perform any act permitted by sections [list of sections granting user rights including new exceptions] is not unlawful*

*Notwithstanding the provisions of any other law 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 security measures for the protection of data, in order to enable the performance of any act permitted by sections [list of sections granting user rights including new exceptions] is not unlawful.*

*Notwithstanding the provisions of any other law copying, adapting, distributing or making available a copyright work in order to perform any act permitted by sections [list of sections granting user rights including new exceptions] is not unlawful.*

## Rationale for protecting copyright exceptions from anti-circumvention

As noted above, the Copyright Act grants certain exclusive rights to authors and other persons, but to achieve important public policy objectives, it also sets out certain rights for

other people to make lawful use of copyright works for education, criticism and the like, usually referred to as exceptions and limitations. Technical blocks commonly referred to as TPMs (technical protection measures) prevent people from using books, videos and other media that they own in ways that are specifically allowed by the Copyright Act. In other words, TPMs that prevent people from making use of exceptions and limitations are an attempt to defeat the objectives of the Copyright Act and are aimed against the public interest provisions in the statute.

Copyright legislation gives South Africans the right to make use of books and videos that they own or to which they have lawful access by making copies or adaptations for the purposes of learning, criticism or quotation. Therefore, whenever TPMs prevent these uses, then those affected should be allowed to use technical means of their own to make lawful use of copyright works.

In 1998 the United States passed a law prohibiting people from circumventing TPMs, known as the Digital Millennium Copyright Act (DMCA). The United States did this to implement the World Intellectual Property Copyright Treaty (WCT) of 1996. At the time that the Treaty was created, the internet and associated technology were not well understood. More than 15 years later there is no evidence that anti-circumvention has prevented large-scale copyright infringement.

The Draft National Intellectual Property Policy (October 2013) explicitly rejects the idea that anti-circumvention provisions should be allowed to affect exceptions and limitations, and states:

*Access to the internet in developing countries is limited and impacted upon by various factors. In this regard, the “fair use” principle under copyright regime may be limited or severely restricted by forms of technological protection, e.g. encryption that restricts access more severely than that under copyright principles. This is clearly demonstrated by the EU and US jurisdictions. The 1996 WIPO Copyright Treaty (WCT) contains elements that restrict access of developing countries to information.*

*The Department of Communications (DOC) is responsible for electronic commerce*

*regulation in the country. Principles of IP per se should not change just because the medium has changed. [...] The WCT and foreign jurisdictions such as those of the US and the EU seem to abrogate this policymaking option available to member states. It is submitted that the Electronic Communications and Transactions Act, 2002, which is administered by DOC, contradicts this principle in section 86.*

Professor Tana Pistorius, in an analysis of the relevant provisions of the Electronic Communications and Transactions Act, 2002, found that section 86 of the Act is “in essence, an anti-circumvention prohibition.”<sup>5</sup>

The relevant portions of Section 86 state:

*86. Unauthorised access to, interception of or interference with data*

*(1) Subject to the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992), a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.*

*(2) A person who intentionally and without authority to do so, interferes with data in a way which causes such data to be modified, destroyed or otherwise rendered ineffective, is guilty of an offence.*

*(3) A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.*

*(4) A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.*

---

<sup>5</sup> Pistorius, T. (2006). Developing countries and copyright in the information age – the functional equivalent implementation of the WCT. *Potchefstroom Electronic Law Journal*. [www.saflii.org/za/journals/PER/2006/11.html](http://www.saflii.org/za/journals/PER/2006/11.html)

An amendment to the Copyright Act would make it clear that someone who is lawfully entitled to copy or make a derivative work under an exception or limitation in the Copyright Act may continue to do so in the digital environment. If it is necessary for her to overcome a technological barrier in order to do so, then she should not be prevented by law from overcoming the technical barrier.

## **Importing legitimately purchased goods**

### **Explanation of changes**

Under the 1978 Copyright Act, importing multiple copies of a copyright work that were made and sold with the permission of the copyright holder in another country into South Africa is prohibited. The prohibition operates not through a single section but through language in multiple sections, including section 23, which defines infringement, and section 28, which creates a mechanism by which a rights holder can require Customs to seize allegedly infringing goods. Section 28 is contrary to the principles of natural justice and the right to administrative justice, enshrined in the Bill of Rights. It should therefore be repealed in its entirety and replaced with a provision that complies with the Bill of Rights. A suggested amendment to the language of section 28 that would permit parallel import is included for the sake of illustrating how a replacement section could avoid limiting parallel import. Amending the section only by the draft language will not, however, render the section compliant with the requirements of administrative justice.

### **Proposed rewording on parallel import**

The existing sections are presented below; words that should be inserted are shown in bold, and words that should be deleted are struck through.

#### **Section 23**

*(2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work -*

*(a) imports an article into the Republic for a purpose other than for his private and domestic use;*

*(b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article;*

*(c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or*

*(d) acquires an article relating to a computer program in the Republic,*

*if to his knowledge the making of that article constituted an infringement of ~~that the~~ **copyright or would have constituted such an infringement if the article had been made in the Republic in the country in which the article was made.***

## Section 28. Provision for restricting importation of copies

*(2) This section shall apply to any copy of the work in question made outside the Republic which if it had been made in the Republic would be an infringing copy of the ~~work~~ **the making of which constituted an infringement of copyright in the country in which the copy was made.***

## Rationale for ending the prohibition on parallel import

A person who purchases multiple copies of a textbook that is made and sold with permission of the copyright holder cannot bring those copies into South Africa without infringing copyright – unless the copyright holder in South Africa also gives permission. Neither the Berne Convention nor the WTO-TRIPS Agreement require that South Africa prohibit parallel import. TRIPS explicitly states that it does not prohibit parallel import in Article 6:

*For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.*

South Africa is thus free to permit parallel imports. That neither of these international instruments requires a prohibition on parallel import also demonstrates that such a

prohibition is not necessary to achieve the primary purpose of copyright. South Africa can thus achieve the purposes of copyright by prohibiting the importation of copies only when those copies were not authorised in the country of manufacture. In India, books are printed and distributed much more cheaply than they are in South Africa. If parallel imports were permitted, educators would be able to import cheap, quality, legitimate books at a much lower price.