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The Chairperson,
Select Committee on Trade and International Relations,
National Council of Provinces,
Parliament
Cape Town, 8000
Cape Town.

Attention: Mr Hlupheka Mtileni hmtileni@parliament.gov.za

Dear Sir,

Written comments on the Copyright Amendment Bill 2017

Please find attached the comments prepared by Eve Gray and Desmond Oriakhogba of the IP Unit, Faculty of Law, University of Cape Town on the Copyright Amendment Bill 2017. We thank you for the opportunity to share our views on the Bill.

Warm regards,



Eve Gray



Desmond Oriakhogba

INTRODUCTION

As teachers and former members of the publishing industry, we write to support the educational use provisions in the Copyright Amendment bill.

BACKGROUND OF THE AUTHORS

Eve Gray is a Senior Research Associate in the IP Unit at UCT. She has a background in academic publishing, bringing to her promotion of Access to Knowledge an awareness of the value of the professional skills that publishers contribute to knowledge dissemination and their understanding of the strategic importance of effective communication. She has been involved in many research and consultancy programmes researching the potential for digital media and open licensing to transcend the limitations of the traditional publishing models in the global South and the knowledge barriers that limit the reach of developing world research.

Desmond Oriakhogba is a PhD candidate and a Research Assistant in the IP-Unit at UCT. His PhD research focuses on the regulation of collecting societies in South Africa and Nigeria. Desmond obtained his LLB and LLM degrees from the University of Benin, Benin City, Nigeria where he is also a Lecturer (on training leave). He is a Barrister and Solicitor of the Supreme Court of Nigeria and a member of the Nigerian Bar Association. In the IP Unit at UCT, he has participated in research relating to specific projects executed by the IP Unit, in particular the Open African Innovation Research (Open AIR) and ASK Justice projects.

SUMMARY

We are aware that the international publishing industry is arguing that the Amendment Bill will be the end of local publishing. These arguments are alarmist and wrong-headed. The bill will HELP local authors and publishers while helping to restrain the excesses of foreign publishers to exploit our markets with excessive prices.

COPYING FOR EDUCATION IN SOUTH AFRICA

The core of the criticism being mounted by international publishers and their local affiliates is that South Africa – the most unequal country in the world - should not broaden the education rights for teachers and students. To assess this claim, one needs to know about both the proposed change in law and the current practices in South Africa.

The proposed change is not actually a major alteration of existing law. Since its enactment in the 1970s, South Africa's copyright law has always had strong and broad rights to use copyrighted materials for education and study purposes. The education rights in the current law state:

12(4) (4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

In addition to this right of educators, learners have a separate right to make private copies to facilitate their learning by virtue of the existing “fair dealing” right:

(1) Copyright shall not be infringed by any fair dealing with a literary or musical work-
(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

Together, these broad education rights provide for most of the uses that the Amendment Bill attempts to clarify into the law.

Throughout Apartheid, these provisions were used liberally to make copies of excerpts, and often whole books, to facilitate education in South Africa. With growing frequency in the 1970s and 80s, the construction of course packs and the copying of foreign books not available in South Africa were made as a “set of practical workarounds against censorship, the boycott, high costs, and inadequate distribution systems.”¹ In the more radical universities, these course packs also served to provide access to research content that challenged the apartheid regime, offering a different vision to the formally published textbooks.

In the new South Africa, these practices continued, with universities regularly supplying course packs of copied excerpts without licensing them from any copyright holder.

Things began changing with an aggressive campaign by rights holders in the 2000s.

After apartheid, the primary policy goal of the publishing industry was a collective licensing agreement that would establish a flat fee for all photocopying in the universities. This process was undertaken by DALRO—the Dramatic and Literary Rights Organization. As before, the negotiations were turbulent. DALRO threatened massive penalties for

¹ Eve Gray and Laura Czerniewicz, “Access to Learning Materials in Post-Apartheid South Africa” in Joe Karaganis (ed), *Shadow Libraries: Access to Knowledge in Global Higher Education* (2018), pp. 107-158. Available online at <https://mitpress.mit.edu/books/shadow-libraries>.

university departments that had embraced course pack copying during the academic boycott. Protests erupted across the university sector, especially from the black rural universities that in many cases still stocked libraries with photocopied books and journal articles. Nonetheless, strong government support and EU funding granted to the poorer universities as an inducement produced agreement in 1997–1998. The blanket licensing agreement was fully implemented by 2004–2005.²

The DALRO blanket license gives authorization, in exchange for a per pupil fee, for the creation of multiple copies of articles for course packs, placement on the library short-term loan system, and storage on electronic reserves.³ It authorizes, in other words, what universities were largely doing without payment until then – thus raising educational costs to schools and students while the country struggled to expand educational access.

Access to education materials in the new South Africa continues to be incredibly limited, largely because of the cost of materials. Drawing on a 2016 research project, Gray and Czerniewicz (2018) recount:

- Over 40 percent of households headed by black South Africans have annual incomes under R33,000 for a family of five, while text book costs frequently exceed R6,000 a year. An imported textbook could therefore retail at a price that cost as much as some months of food for a family in the lowest percentile of the population.
- Bursaries for books for university students only cover a fraction of the cost of books -- commonly between R1,000 and R2,000 per semester.
- Publishers, recognizing that all students do not purchase all the prescribed books, often stock for as few as 35 percent of students in a course.

70 percent of higher education students obtain the majority of their materials through informal digital sharing networks with other students. The students participating in these networks, the research made clear, were not ‘pirates’, but rather students concerned to succeed in their education but faced with severe economic and practical constraints. One student, asked about whether he had any fears about illegal downloading, answered: “No, worried about graduating.”

According to research by Juta Publishers, “a main cause of student underachievement is failure to buy textbooks.” And the underachievement in South Africa is marked. Just 25 percent of face-to-face university students, and 15 percent of distance education students, graduate on time.

THE NEW EDUCATION RIGHT

² Gray and Czerniewicz 2018, 133.

³ Gray and Czerniewicz 2018, 133.

The Bill makes a just and reasonable effort to clarify the degree to which teachers and students can lawfully make copies of excerpts to facilitate education. The practices permitted by the bill are more restricted than those routinely followed under Apartheid, and more liberal than are practiced at some universities that license all copying. It will usher in very little change in most schools where text book purchases supplemented by limited copies of excerpts of other works is the norm.

Section 12D of the Bill provides:

“a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities” as long as the “copying does not exceed the extent justified by the purpose.”

This part of the law appears to usher in no change from the existing standard, other than to clarify that it applies to all works (including, e.g., an audio-visual work).

The new aspects proposed in the Bill provide more specificity as to what educators can do in sharing materials with students, the most important of which is the explicit permission to create course packs of excerpts:

Educational institutions may incorporate excerpts of works, “to the extent justified by the purpose,” “in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.”

-Copyright Amendment Bill Section 12D(2)

The law specifically provides that course packs or other forms of copying may not “incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work” under normal circumstances. (12D(2)). It authorizes copying of full works only if “a licence to do so is not available from the copyright owner, collecting society, an indigenous community or the National Trust on reasonable terms and conditions”; “where the textbook is out of print”; “where the owner of the right cannot be found”; or where the right holder is engaged in anticompetitive conduct in the form of excessive pricing. (Copyright Amendment Bill Section 12D(3)-(4). In each case, no copying is permitted for commercial gain, (12D(5)), and the copying must be restricted to the “extent justified by the purpose.”

SUPPORTING SCHOOLS, STUDENTS AND LOCAL PUBLISHERS AND AUTHORS

The proposed new law does not ban the DALRO blanket license. But it will pressure DALRO to offer more in the license than the law makes clear can already be provided for free. Most importantly, the DALRO licence, or an individual site or specific work licence, may be useful to schools, colleges and universities that seek to copy whole or substantial parts of works, especially high priced foreign works in subjects for which there is little South African production.

The new law would expressly liberate schools and post-school educational institutions from paying fees for mere extracts, and will strengthen their hand in negotiating prices for licenses with DALRO. This should enable educational resource budgets to stretch further and toward more use of locally produced works.

BENEFIT TO LOCAL PUBLISHERS

The new law should be in the interests of local, as opposed to foreign, publishers and authors. Latest publically available figures show that DALRO collected R48 million as royalties from reprographic reproduction licenses. Collection from tertiary institutions accounted for a substantial part (R38 million) of the royalties.⁴ Currently the majority of this licensing revenue goes to foreign publishers and authors. This is confirmed by the fact that the list of academic publishers represented by DALRO is mainly local subsidiaries of foreign publishers. The foregoing is further confirmed by an earlier report of the Copyright Review Commission as follows:

“in the 2010 calendar year, the total amount collected from licensing was around \$4 million (R28,582,389) and the total amount distributed was \$3 million (R21,601,415), of which \$1.2 million (R9,477,661) was distributed to local rights holders. The low returns to domestic rights holders, moreover, have led to criticism that the system favors international publishers: most of the licensing revenue sent to DALRO leaves the country.”⁵

When budgets are spent on books, instead of licensing, the majority goes to local publishers and authors. PASA reported in 2013 that 60 percent of text books used in South African schools are locally produced.⁶ This percentage has increased since then.⁷ Thus, a policy to reorient resources toward local interests should seek to reduce licensing costs of education to make room for local book purchases, which the law does.

⁴ SAMRO Integrated Report 2017. Available at http://www.samro.org.za/sites/default/files/SAMRO%202017%20Integrated%20Report%20%28Single%20page%20spread%29_0.pdf.

⁵ Copyright Review Commission Report (2011) 69. Available at https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf.

⁶ PASA, Annual Book Publishing Industry Survey 2013 (December 2014). Available <http://www.publishsa.co.za/file/1441481157usx-2013-annual-publishing-industry-survey.pdf>.

⁷ See PASA Annual Book Publishing Industry Survey 2016 (January 2018). Available at <http://www.publishsa.co.za/file/1519203677awr-2016publishingindustrysurvey.pdf>.

We are aware of claims from some quarters that the expansion of the fair dealing in the Canadian Copyright Act is harming local publishing. Thus, it is very important to bring to the attention of the honourable members of the committee that there is evidence from very authoritative Canadian sources to the contrary.

For instance, according to Professor Michael Geist (renowned Canadian copyright law professor from the University of Ottawa), when Canada recently expanded its fair dealing rights to include educational purposes, ***the general trend was for schools and universities to shift from blanket licenses that required fees for copies of small excerpts toward a mix of site licenses for specific uses and works and an increase in book purchasing, with particular benefits to local Canadian publishers.***⁸ If the same occurs in South Africa, local authors and local publishers stand to gain.

HELP FOR OPEN EDUCATIONAL RESOURCES

Finally, the new law may help promote the use of so-called open educational resources. These are materials developed under a different model – where authors are paid up front for their work and the product is made freely available without copyright restrictions – permitting students and teachers to change and adapt the works freely. The recent announcement of the Digital Open Textbooks for Development at UCT,⁹ with substantial grants on offer for their production is just one example of a radically changing university textbook environment.

One barrier to the use of open educational resources can be legal ambiguity around the extent to which such texts can include excerpts of other works. The new educational right combined with the proposed adoption of a fair use model will make clear that open educational resources producers have a green light to produce the best possible materials. These provisions are in line with the Department of Education’s 2013 policy documents calling for more locally relevant materials and wider use of open educational resources and open licensing to address the chronic dilemmas of high cost and poor access.¹⁰

OUR SUPPORT FOR THE LEGISLATION

At its foundation, the Copyright Amendment Bill takes appropriate incremental steps to clarify the educational rights of teachers and every student. It should benefit, not harm, local publishers. It deserves all of our praise.

⁸ Michael Geist, “Canadian Copyright, Fair Dealing and Education, Part One: Making Sense of the Spending” (22 May 2018). Available at <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartone/>.

⁹ See <https://www.news.uct.ac.za/article/-2018-11-30-call-for-proposals-for-digital-open-textbooks>.

¹⁰ Gray and Czerniewicz 2018, 142-3.