

WRITTEN SUBMISSION TO THE US TRADE REPRESENTATIVE WITH REGARD TO THE SA COPYRIGHT AMENDMENT BILL

I, **Denise Rosemary Nicholson**, wish to thank the US Government and its USTR for the opportunity to make submissions for this very important matter. I am writing these comments in my personal capacity, mainly due to the short period given for comments. It is near impossible to get all stakeholders in the educational, research and library and related sectors to discuss, prepare and get approval from their constituencies and then make submissions by 17 January 2020, or even February 2020. Many of these stakeholders have made formal submissions in support of the Bill to the various Parliamentary Committees and/or to President Ramaphosa. Most HE institutions are still closed for the end-of-year vacations and only re-open for the 2020 academic year in late January or early February 2020.

My Credentials:

For your records, I have a BA degree and a Higher Diploma in Library and Information Science from the University of South Africa, as well as a Master of Laws (in Copyright) from the University of the Witwatersrand, Johannesburg. I have also passed, with distinction, two WIPO/UNISA modules on copyright and related issues. I have been working in various library professional posts at the University of the Witwatersrand, Johannesburg, since 1 March 1983 (nearly 37 years). Since 1 November 1996, I have been working as a specialist copyright librarian for this institution, my titles having been Publishing Liaison Officer, Copyright Services Librarian and currently Scholarly Communications Librarian.

I have served or continue to serve on the following copyright committees:

- International Federation of Library Associations and Institutions (IFLA) Committee on Copyright and Other Legal Matters (CLM). I have served several terms on CLM and its Advisory Board since 2002. I am currently an expert advisor to CLM's Executive Advisory Board.
- IFLA Treaty on Limitations and Exceptions for Libraries and Archives (TLIB) Working Group (2009-2015)
- IFLA Access to Information Network – Africa (ATINA) – Co-organizer and Listserv Moderator (2006-2013). Resource person (2013 - present)
- IFLA eLending Workgroup - (1 February 2014 – August 2017).

- Electronic Information for Libraries Network (eIFL.net) – South African representative on eIFL-IP project (2005-2010) and currently a copyright advisor.
- Commonwealth of Learning's IP Virtual Group (2004 to 2010)
- Ministry of Arts & Culture's Legal Deposit Committee (2006-2009; 2013-2015). From 2016-2019, I was the official copyright advisor for this Committee. I am currently a copyright resource person for the Committee.
- Ministry of Arts & Culture's National Council for Libraries and Information Services (NCLIS) (2015-2018; currently serving 2019-2022 term)
- South African Universities' Vice-Chancellors' Association and Committee of Technikon Principals (SAUVCA/CTP) Copyright Task Team Convenor (1998-December 2000).
- SAUVCA/CTP Electronic Copyright Task Team Convenor (April 2000 – December 2000).
- IT – Public Knowledge Centre (IT-PKC) (Phase 1) (Co-Leader of Copyright Team) (an initiative between the IT industry in SA and higher educational sector)(2003)
- SAUVCA Intellectual Property Committee (2001 – 2005) – Was involved in negotiations with rightsholders for copyright licences for 26 public-funded higher education institutions.
- Library and Information Association of South Africa (LIASA)'s Committee on Freedom of Access to Information and Freedom of Expression (FAIFE) (2008 to 2013), and LIASA/FAIFE Standing Committee (2014-2016)
- South African National Council for the Blind Copyright Workgroup (2009 to 2014)
- BlindSA Alliance – currently provide copyright advice to the Alliance.
- Intellectual Property Sub-Committee of the University Research Committee, University of the Witwatersrand, Johannesburg (Wits) (2001) – Contributed to drafting of the Wits IP Policy and wrote the Preamble.
- Wits Blanket Licence/Copyright Workgroup (2005)
- FOTIM Disability Workgroup (2002 to 2010) (copyright advisor)
- National Research Foundation's Digitisation Workgroup (2008 to 2013) (copyright advisor).
- Academy of Science of South Africa (ASSAf) – Ad Hoc Sub-Committee for Scientific Writing Project (2011) (copyright advisor).

I have also been involved in many copyright projects, internationally, regionally and in South Africa, namely:

- Commonwealth of Learning Project on Copyright Limitations and Exceptions (2005) – co-authored the Guideline Document on Copyright Limitations and Exceptions, which was circulated to all Commonwealth Ministers of Education and other relevant Government Departments in Commonwealth countries.
- African Access to Knowledge Alliance (AAKA) – Spearheaded its establishment through presentations at SADC, Gaborone, and SCECSAL, Uganda in 2004. AAKA was established at the African Copyright Forum in Uganda, 2005. Registered as a Chapter in Uganda in 2006 and as a continental Trust in January 2007 – Co-founder and Interim Board member (2005 to 2010)
- Organizing Committee member for the Africa Copyright Forum Conference, 28-30 November, 2005, Kampala, Uganda
- African Copyright & Access to Knowledge (ACA2K) Project – funded by IDRC (Canada) and Shuttleworth Foundation (South Africa) (2007-2010) – Policy & Dissemination Advisor.
- Open Society Institute for Southern African (OSISA) – Access to Knowledge project (together with Centre for Education Policy Development (CEPD) and Wits Education Policy Unit) (2005-2007)
- Southern African Research Universities Association (SARUA) – Open Access and Scholarly Communication Project “Open Access Leadership Summit”, Botswana, 2007 – Co-organizer.
- Consumers’ Institute of South Africa – Steering Committee member for SAUVCA and CTP for “Access to Learning Materials for Southern Africa” Project and Conference (2004/2005)
- Wits Link Centre and Creative Commons – “African Digital Commons Project” (2005)
- Southern African Development Community - Centre for Distance Education (SADC-CDE) (formerly Southern African Research Development Centre (SARDEC) – IP Policy Development Project for Distance Learning (2005) – Copyright Advisor.
- Since 2015, I have worked closely with copyright groups, e.g. BlindSA Alliance; Program on Information Justice and Intellectual Property (PIJIP), at American University Washington College of Law; Education International (EI), International Council for Archives; Australian Digital Alliance, and since 2018, ReCreate SA.

I have published many journal articles and book chapters in international and national publications, and have presented at more than 150 conferences around the world (most of them by invitation and with full sponsorship). I have been acknowledged as an international copyright expert and have received an

international award and a number of national awards for my work in copyright and related issues.

I personally made various formal submissions to the Department of Trade and Industry and Parliamentary process during the period 2015 to 2019. As the nominated copyright advisor for the National Council for Library and Information Services and my professional body, the Library and Information Association of South Africa (LIASA), I was sponsored by the Department of Arts and Culture to present on behalf of the library and related sectors at the Parliamentary public hearings held in early August 2017.

Calls for Copyright Reform since 1998:

On an institutional and personal level, I have been calling for more balanced and fair copyright laws in South Africa since 1998. I was Convenor of two Copyright task teams for the Higher Education sector in 1998 and 2000, which successfully challenged and stopped two sets of restrictive proposals to amend the copyright law by the SA Government. These proposals would have been detrimental to access to information, research and education, libraries and related entities and were totally inadequate for people with disabilities, and failed to address developments being made in the digital environment at that time, and for the future.

I also raised concerns with the SA Department of Foreign Affairs and Department of Trade and Industry, about the TRIPS-Plus Chapter in the US/SACU FTA discussions in 2004. I was offered assistance relating to the TRIPS-Plus Chapter by the USAID and Department for International Development (DFID(SA)) and Australia academics, who were very unhappy about the signing of the US/AUS FTA. Fortunately, the SACU countries declined to sign the FTA in 2006. This Chapter would not have been beneficial to South Africa at that stage (or even today). See my article entitled: [Intellectual Property: Benefit or Burden for Africa?](#)

Current Copyright Law:

The current Copyright Act of 1978 is totally outdated and does not address the digital environment at all. It has not been amended to address the needs of the library and educational sectors in nearly 42 years. It has been amended for other stakeholders, e.g. musicians. The last such amendment was to address 'needle-time' for musicians in 2002. There are no provisions for education and research in the main Copyright Act. As an afterthought, very limited provisions were added into the Regulations (Section 13). The Act and its Regulations have no provisions at all for people with disabilities, which in fact is in conflict with the Constitution of South Africa, as well as international Conventions on Human Rights and for People with Disabilities.

The current copyright law has very limited exceptions for libraries and archives, related to reprographic reproduction, but not for digital reproduction or preservation. It has no exceptions for galleries and museums, or for legal deposit libraries, for preservation of our cultural and historical documentary records. It does not have any of the positive limitations and exceptions, such as fair use, permitting accessible formats for people with disabilities, provisions for research, education, libraries and archives, innovation, etc. that many developed countries, including the US, have enjoyed for years.

Genesis and Framework of SA Copyright Reform:

The process of copyright reform was initiated by the Department of Trade and Industry in 2009, when it commissioned various research studies to be done. See: [Genesis and Framework](#). In 2015, the Draft Copyright Amendment Bill was informed and drafted within the international, regional and IP documentary framework and empirical research emanating from WIPO, IFLA, EIFL, ACA2K and many other organisations and countries, and progressive copyright regimes including the US. It was published for public comment in July 2015. Due to widespread consultations, workshops, a large Government multi-stakeholder conference, a number of calls for written submissions and public presentations before the Portfolio Committee on Trade and Industry, the Bill underwent various re-drafts and updates. Two IP task teams (including rightsholders) were also appointed by Parliament to help redraft the Bills and provide clarity. Advice was regularly sought from Parliamentary Counsel and other legal experts. The final version was approved by the National Council of Provinces on 28 March 2019. It awaits assent by the President of South Africa, who constitutionally is obliged to sign it within a reasonable period, or return it to Parliament only if there are constitutional concerns – not for any other reason, including USTR trade sanction threats.

The Bill has been formally supported by many international, regional and local organisations, institutions, NGO's and alliances representing a very wide spectrum of stakeholders. Supportive submissions and letters can be found under various versions of the Bill under SA Copyright Proposed Amendments sub-tabs at: [https://libguides.wits.ac.za/Copyright and Related Issues](https://libguides.wits.ac.za/Copyright_and_Related_Issues). Statements and other supportive documents and a Declaration of Support signed by 30 organisations can be found at: <https://www.re-createza.org/>

Final Copyright Amendment Bill

In August 2015, the SA Minister of Arts and Culture, together with 13 other African Cultural Ministries, signed the [Cape Town Declaration](#), wherein the importance of libraries and archives was addressed in various statements and commitments. One

of the listed commitments states: *“Encourage the implementation of fair and balanced copyright laws to facilitate access to information for all”*.

In July 2018, the SA Minister of Arts and Culture, together with 35 other African Cultural Ministries signed the [Durban Communiqué](#) at the Ministerial Roundtable on Information Access Conference held in Durban. This Communiqué sets out needs and commitments for libraries and related information services. It also commits to: *“Ensuring and protecting intellectual property rights including copyright and neighbouring rights laws and balanced implementation”*.

In line with the above-mentioned commitments, the [final version of the Copyright Amendment Bill](#) includes fair and balanced provisions for research, education, libraries and archives, museums and galleries, and for people with disabilities. These also apply to all stakeholders, including creators, producers, publishers, and photographers; teachers of and students learning music, performance, art, drama, etc.; government officials, IP lawyers, academics and researchers; librarians, archivists, curators, etc.; AI, virtual reality, augmented reality and gaming experts, etc. – in fact all users of copyright works, for the purpose of creating new works and adding to national and/or global knowledge and innovation. In the digital environment, the line between users and producers of information has become blurred. Users have become producers, publishers, authors and creators, and vice versa. Librarians are custodians, creators, producers, publishers and users of copyright material. All stakeholders are users of information and need fair access to use, re-use, transform, innovate and create new works in print and/or in the digital space. Fair and balanced copyright limitations and exceptions are permitted by the Berne Convention, TRIPS Agreement and other international treaties, and make the above activities lawful and possible for all stakeholders.

Fair Use:

The Fair use provisions in the Bill have been adopted from the US copyright law and the other number of countries that are benefitting from fair use. They do not exceed the fair use provisions in the US, except that they specify more examples that apply, which, in the US, are covered under the words ‘such as’. All that the US can do under fair use, so the Bill allows, and vice versa. These provisions are not too broad and are drafted within the framework of the 4 fair use criteria applied in the US and other fair use countries. They will help to address the needs of a developing country in transformation. Many of these provisions have already been enjoyed by the US and other countries for years.

Provisions to Protect Authors, Creators and Rightsholders:

The Bill provides various provisions to enable creators and authors to have more say and control over their works and to benefit from royalties. It also provides the mechanism for regulating collecting societies in South Africa to ensure

transparency and accountability, which are both currently absent from most collecting societies in South Africa. In fact, over the past few years, the media has covered a number of scandals about serious maladministration and misuse of members' royalties by the collecting society, SAMRO, which serves the music industries. The media has also informed the public of the SA Competition Commission's formal enquiry into alleged price-fixing of textbooks and other material by the publishing industry in South Africa, going back 4 decades. The provisions in the Copyright Amendment Bill are intended to stop these unlawful acts or maladministration harmful to creators from happening in the future, and would certainly protect rightsholders in SA, in the US and elsewhere in the world.

The Bill also makes provisions for a Copyright Tribunal to address infringements and other related problems so as to avoid lengthy and expensive litigation – also protecting rightsholders. The Bill has introduced punitive measures, and our judiciary is fully versed in applying the law appropriately and fairly. Where necessary, South African courts can benefit from the wealth of online legal precedents and will in time, build up their own jurisprudence relating to fair use and other provisions in the Bill, just as Israel, Singapore and other countries with fair use provisions, have developed their own jurisprudence. Even though statutory penalties like the US are not specifically mentioned in the Bill, there is nothing stopping our judiciary from applying appropriate penalties if the case warrants this, or any other legal remedies to adequately punish copyright infringers. In the process, they will protect SA, American and other rightsholders.

Copyright term:

The Bill does not increase the copyright term, as has been raised by the IIPA lobby group. Why? Because it is not in the interests of any developing country to increase the copyright term. This reasoning was strongly borne out in the research findings in 8 African countries (including South Africa), conducted by the [African Copyright and Access to Knowledge Project \(ACA2K\)](#), which shows that those countries that have increased their copyright terms have not benefitted.

There is much literature on the negativity of extended copyright terms, especially for developing countries, see:

[https://libguides.wits.ac.za/Copyright and Related Issues/Copyright Terms and Extensions](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/Copyright%20Terms%20and%20Extensions) . Also, see recent and very relevant article by Paul Heald (University of Illinois College of Law) entitled: [“The Effect of Copyright Term Length on South African Book Markets \(With Reference to the Google Book Project\)”](#).

The main beneficiaries of extended copyright terms are developed countries, not developing countries. African countries including South Africa, are net importers of copyright material and pay huge amounts annually to developed countries in

royalties, reproduction fees and foreign exchange costs. Unfortunately there is also a great deal of duplication and double-dipping in the collection of copyright fees by international conglomerates and collecting societies. These practices negatively affect South Africa and other African countries that have limited budgets due to economies that cannot compete with the US, EU and other developed countries.

Contractual Provisions:

The Bill does not restrict rightsholders from contracting in the open market. In fact, it ensures fairness and equity amongst contracting parties. It ensures that lawful activities permitted under copyright limitations and exceptions are not overridden by parties that are intent on restricting other parties' rights, especially those with less bargaining power than multinational conglomerates. Organisations or private parties will not be hampered and can freely negotiate the terms of their relationships within a robust legal framework. If rights are lawful, there should be no need to override them through restrictive contracts. The practice of legitimate rights being overridden in licences for HE institutions and libraries is very common. The Bill will remedy this unfair practice. The contractual provisions in the Bill are not unique to South Africa. They are included in the [EIFL Model Copyright Law](#), and Recommendation 5.1 on page 4 of the [2017 Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements](#), which recommends a similar clause be included when its copyright law is amended. Also, once the EU's Copyright Directive is properly implemented, and assuming that Singapore's Copyright Reforms pass as currently planned, over 30 countries around the world will have more or less broad provisions protecting copyright exceptions against override by contract.

See: https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf

The Bill will not lead to the Minister of Trade and Industry being able to prescribe the terms of publishing contracts, taking bargaining power away from authors. The Bill empowers the Minister to enact Regulations bringing the Act into force, as is normal for South African legislation. The law also requires the Minister to make regulations specifically "setting out the process to give effect to the application of" the requirement to include royalty terms in existing contracts between creators and others for works that continue to make a profit and are not paying royalties to the creators of those works. This aspect of the law will add to, not take away from, the rights of authors or rightsholders. It is understood that the Minister would only set standard terms for contracts *if and when* abuses arise in the marketplace. If rights-holders treat authors and creators fairly, there would be no reason for the Minister to exercise such powers.

SUBMISSION REQUESTS:

1. Lack of access to information for education, research and other purposes in South Africa has impacted on educational and research outputs. Africa contributes less than 1% of global research outputs, the majority of which comes from South Africa. The Copyright Amendment Bill will facilitate better access to relevant material and help to improve educational standards, collaboration and resource-sharing for research projects, and help to increase research outputs to contribute to global knowledge. Libraries, archives and similar entities will be able to carry out their statutory mandates and provide fair access to relevant information and resources to benefit all South Africans and other stakeholders. They will also be able to collect, digitize and preserve their collections, including special collections, Africana and cultural heritage, archives and priceless artefacts, maps, etc. This will also help to expedite socio-economic development so that South Africa can achieve its Sustainable Development Goals, and meet the needs of its citizens in terms of its Constitution, as well as regional, continental and international commitments, including intellectual property.

I, therefore, earnestly request the US Government through its Trade Representative to take heed of the benefits of the Copyright Amendment Bill for all stakeholders, and to not pressure or prevent the President of South Africa from assenting to the Bill in terms of his constitutional obligations.

2. There has been an ongoing strategy by international and local rightsholders to derail the Bill to keep the status quo. Through perpetuating misinformation, myths and fear-mongering in the media, they have created confusion and panic amongst stakeholders, many of whom do not understand the complexities of copyright law. Why would international rightsholders, including the IIPA, not want a developing country like South Africa to benefit from these exceptions? Perhaps it is more about their profits, market-share and monopolies? Perhaps these issues are more important to them than sharing the benefits they enjoy from fair use with a developing country. Fair use contributes greatly to the US economy, so why can South Africa not also benefit from fair use? Why is the IIPA through the USTR seeking to punish South Africa, instead of considering issues around human rights and resource-sharing to assist South Africa, a country in transformation but currently trying to address an ailing economy, high levels of poverty, unemployment and millions of uneducated citizens, as well as millions of disabled people who face a '[book famine](#)' every day.

I, therefore, urge the USTR to kindly question the sinister motives and anti-competitive approach of the IIPA lobby group, which represents multi-billion-

dollar entertainment industries. Its members benefit from fair use and similar copyright exceptions on a daily basis, yet they want to deprive South Africa, a developing country, of similar benefits.

3. As I understand it, the WTO's Generalised System of Preferences' enabling clause requires that programme criteria be *"generalised", "non-reciprocal" and based on the development interests of the grantee, not the grantor*. GSPs are meant to uplift and improve economic development in developing countries, not to be used as tools to punish or sanction a developing country, like South Africa, especially for wanting to reform its copyright law. See two articles in this regard, "[Making sense of South Africa's new copyright bill and US trade threats](#)" and "[Could Sanctioning South Africa for Copyright Reform Violate the World Trade Organization?](#)"

I, therefore, earnestly request that the USTR retracts any plans to review trade agreements with South Africa, or to sanction South Africa in any way, because of South Africa's honourable and progressive endeavours to update and improve its Copyright law in line with the US and other fair use copyright regimes and global copyright trends.

Thank you sincerely for giving your attention to my submission and I trust its contents will be given sincere consideration in this process.

**Denise R. Nicholson (Mrs)
Johannesburg, South Africa
16 January 2020**

ATTACHMENTS (SEE BELOW)

**Attachment 1: Q and As about the Copyright Bill (General) (p11-22)
Attachment 2: Q and As about the Copyright Bill (Fair Use) (p23-27)**

ATTACHMENT 1: Q & As ABOUT THE COPYRIGHT BILL (GENERAL)

Question: Where can one find the latest version of the Copyright Amendment Bill?

Answer: The most recent version of the Bill can be found [here](#).

Question: Did any international, regional or domestic policies, documents or research form the framework of the Copyright Amendment Bill?

Answer: *Yes.* The Bill was informed by the Farlam Copyright Review Commission, the WIPO Study on the Economic Contribution of Copyright Based Industries in South Africa, IP Policy, SEIAs, an RIA and other studies done by the DTI. Human Rights and other international Conventions and Treaties, as well as Treaty proposals at WIPO SCCR (by the Africa Group, and IFLA and alliance partners) also provided important information and provisions for the Bill. The [Marrakesh Treaty](#), the [EIFL Model Copyright Law](#) (an expansion of WIPOs Model Law for Developing Countries), and appropriate clauses from other progressive copyright regimes provided many of the provisions in the Bill. Research conducted in 8 African countries, including SA, by the [African Copyright & Access to Knowledge Project \(ACA2K\)](#) and the [South African Open Copyright Review](#) provided invaluable information for the Bill. Other important documents that informed the drafting of the Bill were the SA Constitution, the National Development Plan, the Sustainable Development Goals, and the [Cape Town Declaration \(2015\)](#), which commits SA (and 12 other African countries) to fair and balanced copyright laws. The Gower Report (UK) and Report of the Australian Productivity Commission also provided useful insight into issues relating to fair use and more balanced copyright laws.

Question: What was the Farlam Copyright Review Commission (CRC)?

Answer: The Copyright Review Commission (CRC) was set up in 2010 by the Department of Trade and Industry, to look into issues of artists' royalties not being distributed correctly. The [Commission's Final Report](#) was published in 2011. The appointed members of the Commission were: the Honourable Mr Justice IG Farlam (chairperson), Mr Oupa Lebogo, Mr Nala Mhlongo, Prof. Tana Pistorius, Dr Jean Swanson-Jacobs, and Prof. Musa Xulu.

Question: Is the SA Bill in conflict with our international IP treaties?

Answer: *No.* Many of the provisions in the Bill come from international Treaties and Treaty proposals at WIPO, the EIFL model copyright law (an expansion of the WIPO model copyright law for developing countries) and progressive copyright regimes, research documents, etc. (See answer above). No country that has fair use has ever been challenged under the dispute settlement mechanism at the World Intellectual Property Organisation (WIPO) or other international forums that deal with copyright matters.

Question: Is the Bill compliant with the 2013 Marrakesh Treaty?

Answer: *Yes,* it is compliant but extends provisions to all disabilities. The Treaty does not prevent countries from expanding provisions to include other disabilities, which the Bill has done, e.g. deafness, dyslexia, learning and reading disabilities, inability to hold or turn pages of a book, etc. Indeed, other Treaties such as the Convention on the Rights of Persons with Disabilities, as well as our own Constitution, arguably require such extension.

Question: Is the Bill unconstitutional?

Answer: *No.* It in fact addresses many issues in our Constitution such as freedom of expression, freedom of association, access to information for education and development purposes, provisions for people with disabilities, protection of property and cultural heritage, etc. The Constitutional Court has affirmed the centrality of the right to education to human flourishing and the realisation of the other rights in the Bill of Rights. Our Constitution espouses the values of human dignity, achievement of equality and fundamental rights and freedoms. The Bill seeks to address these issues for everyone in South Africa. Our current Copyright Act has no provisions for people with disabilities. It is in fact in breach of our Constitution and International Conventions on Human Rights and Disabilities. The Bill will remedy this discrimination against people with disabilities.

See **Senior Counsel Opinion** on the Copyright Amendment Bill and the Constitution by Susannah Cowen SC, Jonathan Berger and Mehluli Nxumalo, Chambers, Sandton, South Africa, dated 13 October 2019 at: https://libguides.wits.ac.za/Copyright_and_Related_Issues/Opinion, and keynote address by Ms. J. Fubbs, former Chair of the Portfolio Committee on Trade and Industry (2.12.2019) at: https://libguides.wits.ac.za/ld.php?content_id=51403631

Question: Was the public given adequate time to participate in the process of CAB?

Answer: *Most definitely.* Ample time was given to all stakeholders. In fact, the genesis of the Bill was in 2009, when the DTI commissioned University of Pretoria to develop studies (including on fair use). In 2010 the DTI established the Farlam Copyright Review Commission to address royalty issues. Its final report was published in 2011. In 2011/2 the DTI commissioned the WIPO Study on “The Economic Contribution of Copyright Based Industries in South Africa”. In 2013, the Draft IP Policy was published for comments and its Phase 1 was passed in 2017. In 2014, the DTI completed its Regulatory Impact Assessment. In 2018, the IP Property Laws Amendment Act 2013 was approved but has not yet been promulgated. These were all steps taken in preparation for amending the Copyright Act No. 98 of 1978 (as amended).

In 2014 budget speech, Minister Davies announced plans to amend the Copyright law and proposed to address key findings in Copyright Review Commission & key challenges raised by artists. He also proposed measures to regulate fair use and fair contract terms.

In 2015, there were countrywide public consultations by the DTI and in July 2015, the DTI published the Draft Amendment Bill for public comment. On 27 August 2015, the DTI held a Multi-stakeholder Conference in Boksburg, attended by more than 500 stakeholders across the board, where everyone had a chance to discuss the Bill. Thereafter, a large number of submissions were received by the DTI, resulting in more stakeholder workshops. The DTI socio-economic impact assessments (SEIAS) were completed in 2016.

In 2017, a small team of IP academics was appointed by the PC to assist with the redrafting of the 2015 Bill. The Revised Bill was presented to the Portfolio Committee on Trade and Industry (PC) in 2017. During the first week of August 2017, the PC held public hearings for all stakeholders. Large groups of stakeholders from South Africa and abroad were given the chance to present on the Bill. Thereafter, these stakeholders were invited by the Chair to submit additional but relevant information to assist the PC in their deliberations.

On 14 October 2017, the ANC Legal Research Group organised a multi-stakeholder workshop in Sandton and it was streamed live on TV for the benefit of the public. During October 2017, the Bill was presented to National House of Traditional Leaders. The PC deliberated on Bill at many meetings in late 2017/early 2018. In February 2018, a technical team was appointed by the PC to align the Bill with Constitution, policies, etc. 4 of the 5 team members belonged to the Copyright Alliance (now part of the Coalition for Effective Copyright).

In May 2018, the PC planned a 2-phased Bill, but then reverted back to one Bill, due to concerns raised by the library and educational sectors, which have been calling

for amendments to the copyright law since 1998. They felt a further delay in addressing their needs would be unfair to millions of South Africans. The PC then made later redrafts and published further calls for public comment, even on a few clauses. All stakeholders had another opportunity to make submissions.

On 15 November 2018, the Portfolio Committee on Trade & Industry approved the Bill. On 5 December 2018, it was approved by the National Assembly. In February, 2019, two meetings were held by the Select Committee of the National Council of Provinces (NCoP), and there was a further call for submissions on the final Bill – deadline 22 February 2019. Stakeholders used this as a further opportunity to make submissions on the final Bill. The Select Committee of the NCoP then met on 6 and 20 March 2019, and approved the Bill. On 28 March 2019, the full National Council of Provinces (NCoP) voted and approved the Bill.

In response to a petition submitted by members of the Coalition for Effective Copyright, a further stakeholder meeting was held on 25 April 2019, at SABS in Pretoria. Both the Minister of Trade and Industry and the Minister of Arts and Culture were present as well as other relevant government officials. Stakeholders opposing and supporting the Bill were afforded a further opportunity to make presentations on the Bill. Although the process was open and publicised in the media, some stakeholders did not participate in the process at all, whilst others only showed an interest in the Bill in its late stages in Parliament.

The Bill is currently before the President for signature. Once the Bill has been signed, draft Regulations will be published by the DTI for public comments. Many of the issues raised by stakeholders will be addressed in the Draft Regulations.

See Genesis and Process of the Bill at:

https://libguides.wits.ac.za/Copyright_and_Related_Issues/Bill_Genesis_Process

Question: Does the Bill amount to expropriation of local content without compensation?

Answer: *Certainly not.* The uses set out in the Bill that are required to be paid for, will provide compensation to local creators. The Bill will not stop creators earning income from their works. Fair use is lawful and applies to uses that do not compete with the original works in the market, so it should not affect their income flows or limit their employment opportunities.

Question: Why was the copyright term not extended to 70 years in the Bill as many other countries have done?

Answer: The Bill adopts the standard protection period in international treaties, i.e. the lifetime of the author plus 50 years. In a digital world, this period is more than adequate for any country. Extending the period does not benefit developing or least developed countries, as these countries are net importers of intellectual property and the majority of copyright works used are from international publishers or producers. So it would just extend the period of royalty monies flowing out of the country for 20 more years. See “research article entitled: “*The Effect of Copyright Term Length on South African Book Markets (With Reference to the Google Book Project)*” at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3480127&download=yes.

Also see other relevant resources at:

https://libguides.wits.ac.za/Copyright_and_Related_Issues/Copyright_Terms_and_Extensions

Question: Is the clause on unenforceable contracts legal?

Answer: *Yes.* Any contract that includes unlawful clauses or overrides legal rights or lawful acts, whether permitted in copyright law or any other law, would not be legal and therefore would be unenforceable. In recent months, Singapore and the EU Directive have adopted a similar clause on unenforceable contracts in their copyright amendments. Recommendation 5.1 of the 2017 Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements, recommends a similar clause be included when its copyright law is amended.

Once the European Union’s Copyright Directive is properly implemented, and assuming that Singapore’s Copyright Reforms pass as currently planned, over 30 countries around the world will have more or less broad provisions protecting copyright exceptions against override by contract.

See: https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf

Question: Will the Bill limit the right to freedom of trade, occupation or profession as provided for in Section 22 of the Constitution?

Answer: *No.* There is no evidence to substantiate this. In fact, the opportunities provided by the Bill will most likely generate new trade, occupational and professional opportunities. The provisions in the Bill promote creative efforts and innovation and could result in new industries, such as the production of accessible

formats for people with disabilities; non-profit ventures and dealings in orphan works, robotics, AI, to name a few.

Question: Will the Bill lead to the Minister of Trade and Industry being able to prescribe the terms of publishing contracts, taking bargaining power away from authors?

Answer: *No.* The Bill empowers the Minister to enact Regulations bringing the Act into force, as is normal for South African legislation. The law also requires the Minister to make regulations specifically “setting out the process to give effect to the application of” the requirement to include royalty terms in existing contracts between creators and others for works that continue to make a profit and are not paying royalties to the creators of those works. This aspect of the law will add to, not take away from, the rights of authors. Granting the Minister this power does not require the Minister to exercise it. It is understood that the Minister would set standard terms for contracts only when abuses arise in the marketplace. Rights-owners can prevent the Minister from setting standard terms by treating authors fairly.

Question: Will authors/creators be affected by regulation of collecting societies?

Answer: *Yes, positively.* Currently collecting societies are not formally regulated, which has led to authors and creators not receiving their fair share of royalties, and members’ monies being spent on unrelated projects, etc. To remedy this situation, the DTI set up the Farlam Copyright Review Commission (CRC). By accreditation and regulation, collecting societies will be obliged to be more transparent, and to improve the collection and distribution of royalties to those whose works have been used. Effective regulation should put a stop to irregularities and mismanagement experienced by many authors and creators in the past. In the Australian Government’s response to the Australian Productivity Commission Inquiry in 2017, regulation of collecting societies was also recommended. A number of member countries of WIPO have regulated collecting societies. Such regulation will also protect the interests of rightsholders.

Question: Does reversion of assigned copyright after 25 years negatively affect authors?

Answer: *No.* It is a fair period for publishers and enhances authors’ rights. Authors have the choice of owning and controlling their copyright for the rest of their lives, or they can re-assign copyright to publisher(s) for a further period. Publishers will not stop investing in authors, as each new work will have a new period of copyright

and assignment. Reversion of copyright is not something new. The UK, U.S. and recent EU Directive also make provision for a reversion mechanism for authors. Such reversion rights exist in the US, 35 years after the transfer, and as in Copyright Amendment Bill, this reversion can occur notwithstanding any agreement to the contrary.

Question: Does Section 12B (1)(a) in the Bill encourage plagiarism?

Answer: *Definitely not.* It means that acknowledgement is necessary when the source and author's name(s) are on or in the work. Acknowledgement is not practicable when this information is not provided on the work or is unavailable. This is the same requirement in Section 12(3) of the current Act. Whether extracts are quoted or paraphrased from a work (copyrighted or not), acknowledgement is required. Plagiarism is an offence and academic dishonesty. Educational institutions generally have codes of integrity and/or plagiarism policies and disciplinary procedures to address plagiarism issues. (Read: <http://infojustice.org/archives/41511>)

Question: Is the exception for course-packs for educational purposes unique to South African copyright law?

Answer: *No.* It is not unique to South African copyright law. It is in fact consistent with recent fair use decisions in the United States. In a lawsuit brought by publishers against Georgia State University, the U.S. Court of Appeals for the Eleventh Circuit rejected the publishers' effort to find GSU's electronic reserve system was infringing as a matter of law. Importantly, the court distinguished earlier cases publishers had brought against commercial photocopy shops that assembled course-packs from this case, where the university maintained the copies on its servers for non-commercial educational purposes. Additionally, the fair use analysis of the U.S. Court of Appeals for the Second Circuit in *Authors Guild v. HathiTrust* was influenced by the security measures employed by HathiTrust, a consortium of research libraries that stored the full text of millions of digitized books. The South African provision requires similar security measures.

On 9 May 2017, after a 5-year court battle between publishers and universities, the Supreme Court of India dismissed an appeal by the Indian Reprographic Rights Organization (IRRO) challenging an earlier judgment of Delhi High Court that ruled course packs in India legal for educational purposes. The case highlighted the socio-economic context of university level education in India, in particular the cost of textbooks. Students became advocates for access to knowledge, and this advanced the law on access to educational materials in India.

In Canada, York University lost a case against publishers in 2017 with regard to coursepacks and fair dealing (not fair use), but they intend appealing this matter, as they believe that coursepacks should be a lawful exception.

The use of printed coursepacks is declining in higher education in South Africa and in other countries around the world, due to the move to electronic resources and digital course management systems, and the availability of open access resources. Many e-publishers now permit print and/or electronic coursepacks in their e-licence agreements, which means that licensees no longer have to apply for copyright clearances for coursepacks, and pay additional fees (often duplication of copyright fees) via a reprographic rights organisation (RRO). Libraries and institutions can now re-allocate monies for the purchase of new books and other resources for research, educational and other purposes, which in turn, will help publishers, particularly local publishers, and authors.

Question: Does the Bill protect data?

Answer: On its own data is not always copyrighted, but a particular database may be subject to copyright. Section 2A(2) amends the 1978 Act: *"(2) A table or compilation which by reason of the selection or arrangement of its content, constitutes an original work, shall be protected as such by copyright."* What is required is that the selection or arrangement must be sufficiently creative as to be original, i.e. not be copied from elsewhere. This is quite a high bar and some databases will not qualify. One unanswered question is whether data which is only intelligible to a computer can be said to be selected or arranged to be original. Section 2A(3) suggests that not all data is subject to copyright. *"(3) The copyright protection of a table or compilation contemplated in subsection (2) does not extend to its content."*

Question: Does the Bill allow text and data mining?

Answer: The Bill allows data and text mining in many but not all circumstances. The first step is to ascertain whether the data being analysed is subject to copyright (see question above). The situation is a little different with texts which are more likely to be subject to copyright, unless in the public domain, because they are legislative texts or the term has expired or some other reason that they are in the public domain.

Even if data or texts are subject to copyright this does not mean that data or text mining necessarily requires copyright permission. They require permission or an exception only if the computational operations require reproduction or adaptation or

some other exclusive act. It might be that particular technology 'reads' i.e. processes digital records in a transient operation which does not reproduce the whole work or even a substantial part at any one time.

Only if particular data or text(s) are subject to copyright and then only if the computational analysis requires engaging in an exclusive act is an exception needed for data and text mining. There are a number of relevant exceptions: -

Data and text mining carried out by academics may be authorised by 12D. "*(1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose.*" Academic purposes include research. Of course this is subject to "*(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.*" But this proviso in (3) applies only to course packs and the like made under subsection 2 and is not applicable to persons engaged in research activities. However the entire section applies only to copying and not to adaptations which may be necessary for data mining.

Subsection 5 is somewhat ambivalent on whether universities could offer data mining as a commercial service. "*(5) The right to make copies shall not extend to reproductions for commercial purposes.*" If this is read as a prohibition on commercial copies, then universities may do so because they do not sell copies or sell access to copies. However, if it is a prohibition on making copies for commercial purposes even when that does not involve selling the copies, then it seems universities could not offer this as a commercial service.

Section 12A may also permit data and/or text mining. 12A explicitly lists research (i) and scholarly activities (iv). Data and text mining usually falls into at least one of these categories. If it does not, it is sufficiently similar to be categorised as a 12A(a) purpose. It is also usually under (b) (iii) (aa) "*such use serves a purpose different from that of the work affected*". Text and data mining by university or other non-commercial researchers is not-for-profit (b)(iii)(bb), but even commercial text mining is usually not a substitute for the works used in data. One possible case where text and data mining is not authorised by section 12A is where it is a substitute for the original work, or it creates a substitution effect, as when results in an algorithm create substitutions for the original works.

In summary, text and data mining may not always require a copyright exception but when it does, then Section 12A authorises it in most but not all cases. Fair use may also be applied in some instances.

Question: Why is the Bill important for all stakeholders?

Answer: The current copyright law is outdated and does not address the digital environment. It creates many barriers to accessing, using, re-using and sharing material. A key feature of the Bill is the provision of limitations and exceptions to enable better access to information and knowledge for **ALL** stakeholders. Users, creators, producers, publishers, students, teachers, authors, artists, filmmakers, etc. all need **ACCESS** to knowledge, whether for personal use, sharing, using, re-using, remixing, transformative uses, innovation, creation of new works, etc. Access gives stakeholders a treasure trove of material to create new works, advance innovation and benefit from others' contributions to the knowledge pool. Knowledge builds on knowledge. Without proper access to knowledge, new creations and innovations are restricted or prevented. "Ask any creator of any work — an author, a photographer, a filmmaker — what their creative process involves and there will be a common thread running through their accounts: **access. Being able to access existing work is a prerequisite for creation.** (Read: <https://mg.co.za/article/2019-08-19-00-the-new-draft-copyright-bill-could-help-unlock-the-doors-of-learning-and-culture>)

Question: Does the Bill enable SA to benefit from the 4th Industrial Revolution?

Answer: *Yes.* The Bill features appropriate copyright flexibilities which SA needs to be able to benefit from the 4IR. These will enable SA entrepreneurs to develop innovative techniques of data analysis without holdup from copyright holders, to grow local data analysis capacity and allow innovation in robotics, artificial intelligence (AI) and the Internet of Things. (Read: <https://www.businesslive.co.za/bd/opinion/2019-10-15-copyright-flexibility-opens-the-door-to-decisive-ai-advantages/>)

Question: What is Parallel Importation?

Answer: Parallel Importation and the Exhaustion of Rights Principle are provisions in the TRIPS Agreement and are confirmed in the Doha Declaration. Parallel importation is a term that is applied to goods protected by intellectual property rights, including copyrights, and produced with the permission of the rights-holder overseas, but then imported into another country without the rights-holders' permission in that country. Parallel importation is basically the application of the 'first sale doctrine' to the first sale of the book internationally rather than its first sale in South Africa. The Copyright Amendment Bill has introduced provisions that will allow parallel importation into South Africa. This will enhance access to knowledge for education and research, and provide more affordable learning materials for South African students. It will create a fairer and more competitive

market for books and other learning materials in print and digital formats in South Africa. If publications are reasonably priced in South Africa, there will be little need to import works from other countries.

Question: Are Parallel Importation Restrictions (PIRs) prescribed in international intellectual property agreements?

Answer: Parallel Importation Restrictions (PIRs) are not prescribed in the Berne Convention or the TRIPS Agreement, yet South Africa's current Copyright Act still has provisions for PIRs. PIRs stem from colonial protective publishing practices that result in price differentiation or price discrimination across different territories. PIRs essentially violate the principle of exhaustion of rights after the first sale of a work, substituting it with ongoing contractual control of price and distribution by the originating publisher. PIRs prevent more affordable publications from being lawfully imported from other countries. They have a particularly negative impact on access to information for research and education in our country. Clause 12B(6) of the Copyright Amendment Bill removes PIRs.

Question: Why has the Bill not included provisions for content filters, similar to the recent EU Directive?

Answer: Although the EU Directive's clause on content filters was passed recently, there has been, and there still is, strong opposition to these provisions from various stakeholders in the EU and further afield. There is also uncertainty on how these provisions will be implemented. It is therefore prudent of the SA Government to monitor the EU situation, before adopting similar provisions in its national copyright law. If appropriate for South Africa, such provisions can be addressed in a future amendment of the copyright law. South Africa does in fact have some similar exceptions to the EU Directive with regard to education, text and data mining, libraries, contracts, etc.

Question: What are the President's obligations with regard to a Bill approved by the National Assembly and the National Council of Provinces?

Answer: Section 79 of the Constitution requires that the President must assent to and sign a Bill before him, within a reasonable period, or if he has reservations about the constitutionality of the Bill (whether the provisions of a Bill are in line with the Constitution or not), then he may refer it back to the National Assembly for reconsideration. He can only return the Bill on constitutionality issues, not for any other reason. The President may not refuse to sign a bill into law because he

disagrees politically with the bill, or merely because he believes it is flawed in some way, or that some stakeholders or external entities oppose an approved bill.

Section 79(1) of the Constitution states that:

“The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.”

Section 79(4)(b) further allows the president to refer a bill already reconsidered by Parliament in terms of section 79(1) to the Constitutional Court for a decision on its constitutionality.

See: <https://www.dailymaverick.co.za/opinionista/2019-11-21-no-sir-the-president-does-not-have-the-power-to-veto-the-copyright-bill/>

Additional Resources:

[https://libguides.wits.ac.za/Copyright and Related Issues](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues) (see SA Copyright Proposed Amendments tab and its several sub-tabs)

ATTACHMENT 2: Q & AS ABOUT COPYRIGHT BILL (FAIR USE)

Question: Why has the Bill adopted concepts such as fair use, which originated in other countries?

Answer: Copyright laws in all countries borrow ideas and principles from international treaties and from the domestic law of other countries. We should never shut out good ideas, even if we did not invent them here. Fair dealing in our current Copyright Act is outdated, limited and static, and does not address the digital world. Fair use, on the other hand, is progressive, dynamic and future proof and 'digital-friendly'. Fair use has been used in courts in the U.S. and Europe for about 200 years and there is a wealth of jurisprudence to draw on. The first case was in *Folsom v Marsh* 9.F.Cas.342 (C.C.D. Mass 1841). Fair use was coded in the U.S. Copyright Act of 1976 and has not had to be amended, as it applies to new technologies as they arise. Ten other countries have also adopted fair use in their copyright laws and more countries are considering it, because it is 'future-proof' and benefits users and producers of information and knowledge. Its 4 factors give clarity to what can be used and reused, whereas fair dealing does not. Recommendation 6.1 of the Australian Government's Response to the Productivity Commission states: "*The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia*". There are also many [Best Practice Guidelines on Fair Use](#) available for different users and creators, which help to avoid litigation on these issues.

Question: Will fair use lead to greater recourse to the courts and a dependence on U.S. jurisprudence, causing unnecessary financial problems for authors or publishers?

Answer: *No.* Fair use is lawful, and by its nature, must be fair, and is determined by the application of 4 factors to each specific situation. Compliance will avoid the need for litigation. There is also a large international body of jurisprudence available on fair use, which countries with fair use can draw on as they build up their own jurisprudence. Israel is one example. Many countries have begun to enact fair use statutes, but each country's courts may then interpret the provisions in their own way. Just as the SA judiciary has developed jurisprudence on constitutional and other matters, so it will do the same with matters relating to fair use and other copyright matters.

Question: Under fair use, can a whole textbook be copied and 2000 copies be made for students, without permission?

Answer: *Absolutely not.* That is copyright infringement, and also piracy, if they are sold to students. This is definitely not fair use, as it impacts on the rights-owners' exploitation of that work in the market. It does not comply with the 4th factor of fair use and would exceed any reasonable application of the 3rd factor. Fair use calls for a reasonable application of the factors. No reasonable person would call such copying reasonable.

Question: Are the provisions for fair use in SA Bill much wider than fair use in the U.S.?

Answer: *No.* The SA Bill lists examples of acts permitted under fair use to provide some clarity for users and producers of copyright works, but all those acts would be covered under "such as" in the U.S. fair use provisions. The U.S. has precisely the same model as the Bill proposes. In addition to fair use, the U.S. Copyright Act has specific exceptions for libraries, archives, educational institutions, people with print disabilities, users of software, religious institutions, charitable organizations, small restaurants, agricultural or horticultural organizations, vending machine operators, and families that want to censor inappropriate material.

Question: Should the fair use provisions in the Bill be accompanied by statutory damages?

Answer: *No.* The lack of inordinate statutory damages (which, in the internet age, make little sense) does not remove the right of South African judges to determine penalties for infringement, when this occurs. The Bill supplements the existing framework of remedies and penalties with criminal penalties for the removal of copyright management information and the circumvention of technological protection measures. Thus, the Bill provides additional means of targeting infringement online.

Question: Does the PWC Report quoted by rights owners present the true picture about fair use and other provisions in the Bill?

Answer: The PwC report has been repeatedly debunked for its misunderstanding of the issues at stake. PwC's work on copyright was, in particular, dismissed by IP experts, researchers, librarians and the Australian Productivity Commission (PC), which criticised its narrow focus for failing to take account of the public benefits of greater access to information. In the same report the PC called for fair use. Karen Chester, Deputy Chair, Productivity Commission, addressed this topic very

practically in her speech [“What is fair?”](#) Fair use is not ‘carte blanche’ to copy textbooks and everything else for free. In fact, its 4 factors make it quite clear what the parameters are for copying. Any copying that competes with the rights-owner’s right to exploit the work in the market is not fair use.

Question: What impact did ‘expanded fair dealing’ (not fair use) have on the Canadian publishing industry?

Answer: The direct link between exceptions for education and the decline in the publishing industry has largely been debunked by researchers and librarians in Canada. The Deputy Chair of the Australian Productivity Commission, also stated in her abovementioned speech “What is fair?” that the claim that fair use destroys publishing industries and has done so in Canada “*did not stand up to even modest scrutiny: the experience in Canada has been grossly misrepresented and ignores specific market factors there*”. Spending on educational publishing has in fact risen in Canada, with local producers gaining market share. Disruptions in the market such as open access publishing, student preferences for second-hand books, online works, reduced spending on new curricula, new media players such as Google and Apple, etc., have contributed to some of the financial challenges experienced by Canadian publishers. Ongoing consolidation within the sector and global economic trends have also led to the disappearance of some smaller players, as is the case in any market.

In Canada’s recent [Statutory Review of the Copyright Act](#), Recommendation 18, a more illustrative fair dealing, not exhaustive provision has been recommended, by including the words ‘such as’, which is a step towards adopting fair use.

Question: Did the introduction of fair use negatively affect the publishing industries of countries that adopted it?

Answer: There is no evidence that the introduction of fair use in the U.S. and ten other countries has led to the decline or destruction of their publishing industries. To the contrary, the U.S. boasts the largest and wealthiest publishing industries in the world, as do their entertainment and IT industries, because of the flexibilities permitted by fair use. In fact, there is [some evidence](#) that fair use actually helps industries. In other countries that have fair use, publishers continue to publish and authors continue to write.

Question: Do transformative uses of copyright works compete with the market of the original work of the authors and publishers?

Answer: *No.* When a use is transformative, it does not compete with the original market – in fact, it may even boost it. The obligation to pay an original rights-holder could make many new ideas uneconomical. Rights-holders of course remain free to set original prices at a level they deem fit, bearing in mind the value of the work to a user.

Question: Will every case relating to fair use have to go to the courts for a decision?

Answer: *No.* Fair use is lawful and its 4 factors provide the framework for use of copyright works. Only cases of copyright infringement would need to go before the courts. It is appropriate and within a user's or rights-holders' rights to seek legal recourse, when appropriate. In such instances, the user is most often in a far weaker position than the rights-holder. The Bill provides for a Copyright Tribunal which will serve as a channel for assessing and resolving issues for affected parties, and in the process, help to avoid court action, where possible.

Question: Was fair use recommended in the WIPO Study commissioned by the DTI in 2011?

Answer: *Indeed, it was.* In 2011, the DTI commissioned a WIPO Study on "[The Economic Contribution of Copyright-Based Industries in South Africa](#)". WIPO's 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 its concluding recommendations, it 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.

Question: What does the Handbook of South African Copyright Law say about fair use?

Answer: In paragraph 9.2.3, on page 1-96, the author, Owen H. Dean, posits that “the America and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts”.

Question: Does the Australian Law Reform Commission's Report 122 (2014) entitled "[Copyright and the Digital Economy](#)" say anything about fair use?

Answer: Yes, in fact it supports **fair use** and confirms that it is compliant with Berne and TRIPS Agreements. The Australian Government, in its response to the Productivity Commission Inquiry, also recommends a **fair use** exception for Australia.

Question: What is New Zealand's approach to fair use?

Answer: A 2018 Study by Deloitte in March 2018, entitled “[Copyright in the digital age: An economic assessment of fair use in New Zealand](#)” recommends fair use for New Zealand.

Question: Where can one find more information about fair use?

Answer: This [Libguide](#) provides useful resources on fair use, its benefits and best practices, etc.