



26 March 2020  
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Dear Mr President

### **Signing the Copyright Amendment Bill**

Hereto our urgent request for the signing of the Copyright Amendment Bill, as was passed by both Houses and sent to your Office for assent after it was approved on 28 March 2019. We wish to specifically address the significance of the proposed amendments to the South African Copyright Act for access to learning materials in schools and higher education institutions in South Africa. The proposed “fair use” provision and specific exceptions for additional educational uses are not only compatible with international copyright law (the Berne Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and so on). They also pass the three-step test of international copyright law, as understood by the majority of international copyright law scholars<sup>1</sup>.

These amendments are, however, also required in terms of South Africa’s compliancy with international human rights law. In two major publications to appear soon in the *Journal of World Intellectual Property Law*<sup>2</sup> and the *Buffalo Human Rights Law Review*,<sup>3</sup> we conclude that access to copyrighted works in the educational sphere needs to be substantially strengthened, in especially in developing countries, such as South Africa. In

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<sup>1</sup> Max Planck Institute for Intellectual Property and Competition Law, Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law

<sup>2</sup> Beiter, K.D. Extraterritorial Human Rights Obligations to “Civilize” Intellectual Property Law: Access to Textbooks in Africa, Copyright, and the Right to Education. *Journal of World Intellectual Property*. 23, 2020. Forthcoming in April 2020.

<sup>3</sup> Beiter, K.D. Not the African Copyright Pirate is Perverse, but the Situation in which (s)he Lives: Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization “from below” in IP Law. *Buffalo Human Rights Law Review*. 26, 2020. Forthcoming in May 2020.

arriving at this conclusion, we rely on the work of the most reputable intellectual property law scholars worldwide (such as Profs. Christophe Geiger (Strasbourg), Daniel Gervais (Vanderbilt), Laurence Helfer (Vanderbilt), Ruth Okediji (Harvard), Peter Yu (Houston), and many others) and we closely examine international human rights instruments binding on the Republic of South Africa, notably the *U.N. Covenant on Economic, Social and Cultural Rights* of 1966. This protects the right to education in Article 13. Equitable access to learning materials in educational institutions under Article 13 is a demand that has been specifically articulated by the U.N. Committee on Economic, Social and Cultural Rights, supervising implementation of the Covenant. This demand calls for a human rights-mandated wider reading of the limitations and exceptions (L&Es) that are currently found in WIPO (World Intellectual Property Organization) and WTO (World Trade Organization (WTO) treaties).

As Ruth Okediji points out, current restrictive interpretations “rarely are ... sufficient to meet the development-related challenges – such as bulk access to educational works – facing many least-developed and developing countries. ... Existing limitations and exceptions available in international copyright law, and in many domestic copyright laws, [must be interpreted to] extend to institutional, community or group needs.”<sup>4</sup> Such an interpretation of WIPO and WTO instruments does not violate WTO law. It replicates the thinking evidenced in the WTO’s own *Doha Declaration on TRIPS and Public Health* of 2006, which allows for a wide use of compulsory licenses and parallel imports in another field where access had to be protected in light of specifically the global HIV-AIDS pandemic at the beginning of the century, particularly as relates to, access to affordable (patented) medicines. The changes now proposed to the South African Copyright Act do nothing more than make use of the policy space that *is* available to WTO members under international copyright law, to enable them to take adequate account of particular national development needs.

South Africa is not only internationally bound by the U.N. Covenant, but the Constitution also obliges courts to have regard to international human rights law whenever interpreting the Bill of Rights in the Constitution (Section 39(1)(b)). The Bill of Rights protects the right to education in Section 29. The Constitutional Court has repeatedly shown that it construes this provision in accordance with international human rights law (such as immediate availability of textbooks to all pupils).

The property clause in Section 25 of the Constitution protects copyright – as all other property – against arbitrary deprivation. However, Section 25 also needs to be construed in accordance with international human rights law. In international human rights law, property is always a socially constricted concept. Especially the property of juristic persons (and this covers all publishing companies), in a balancing of rights, does not rank on a par with fundamental access rights to the necessities of life. These include free learning materials in schools and free (or at least affordable) learning materials in higher

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<sup>4</sup> Okediji, R.L. Does Intellectual Property Need Human Rights? 51 *N.Y.U. Journal of International Law and Policy*, 1, 34 (2018).

education institutions. Given that the proposed fair use clause largely replicates the U.S. fair use clause long since in existence, the limitations on copyright as property (if they are that whatsoever) produced by the proposed Copyright Bill must be held to be justified.

We wish to specifically address the significance of the proposed amendments to the South African Copyright Act for education and access to learning materials in schools and universities in South Africa. The proposed copyright exceptions and limitations that would allow for wider use (including reproduction, in educational settings (see, e.g., s12D)) as well as the proposed fair use provision in s12A permitting additional educational uses are compatible with international copyright law (the Berne Convention, the WIPO Copyright Treaty, TRIPS, and so on). In particular, they pass the three step-test for copyright exceptions and limitations as contained in these international copyright and IP instruments – and as interpreted by the majority of international copyright law scholars and as captured in the Max Planck Institute for Intellectual Property and Competition *Law's Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law*.

The fair use provision and additional limitations and exceptions in the Bill are crucial, particularly for educational purposes, and for libraries and archives that provide learning materials. They would go a long way to addressing access issues and availability of material in accessible format for people with disabilities during this COVID-19 pandemic and for future digital educational purposes within a context of opening up access to much needed educational content.

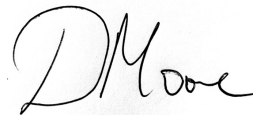
Please accept, Mr President, the assurances of our highest consideration.

Yours faithfully

The South African Chapter of Creative Commons



Paul G. West  
Creative Commons South Africa Chapter Lead



Derek Moore  
Creative Commons Global Council Representative



Prof. Klaus Beiter  
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