



JOINT SUBMISSION BY LIASA AND CHELSA

ON THE COPYRIGHT AMENDMENT BILL PROPOSALS, ADVERTISED ON 6 DECEMBER 2021

The Library and Information Association of South Africa (LIASA) is a member of the International Federation of Library Associations and Institutions (IFLA) and is the SAQA-awarded Professional Body for the Library and Information services sector in South Africa. Through this, LIASA is mandated to contribute to national skills development aligning with LIASA's goals to unite, develop and empower all people in the library and information field. Furthermore, LIASA's scope of services encompasses all South Africans and supports national development through access to information. The integral role that libraries and information services entities play in education and research cannot be emphasised too greatly given it being crucial to access to knowledge, innovation and socio-economic development in our country. Together with the National Council for Library and Information Services, LIASA played a major role in the drafting of the Library Transformation Charter and LIS Policy for South Africa. The important functions and roles that libraries and information services entities play in our democracy were formally acknowledged by Minister Nathi Mthethwa and many other African Ministers in their Cape Town Declaration signed on 14 August 2015, and the Durban Communique signed on 6 July 2018.

The **Committee of Higher Education Libraries of South Africa (CHELSA)** is representative of twenty-nine (29) public higher educational institutions, research institutions, as well as the National Library of South Africa, and is an acknowledged community of practice of Universities South Africa (USAf). Our member libraries are also members of the International Federation of Library Associations and Institutions (IFLA), which represents more than 2 million libraries in 99 countries around the world. CHELSA strives through visionary and visible transformational leadership to ensure that the Higher Education sector is provided with optimal access to information for the purpose of learning, teaching, research, and community development. CHELSA is a non-profit organization that was established to promote the role of libraries in Higher Education, to transform the Higher Education Library and Information Services in terms of their fitness for purpose in a new era.

LIASA and CHELSA thank your Committee for once again giving us an opportunity to comment on the Copyright Amendment Bill, but we wish to place on record that we are unhappy with the ongoing delays with the Bill, which continue to exacerbate the problems of access to information, use of teaching and learning materials, research, digitisation and preservation of our collections and cultural heritage, etc. As a result, our members continue to be prevented from carrying out their statutory mandates to serve their user communities across the country and further afield, including people with disabilities, and to preserve our collections for future generations. You will know that the devastating fire at the University of Cape Town's Jagger Reading Room in 2021 highlighted the urgency of exceptions for

libraries and archives to be able to digitise and preserve their collections, especially priceless archives and artefacts which form part of our cultural heritage. The tragic loss of irreplaceable collections in that fire was a stark reminder how digitisation projects in libraries and archives have been seriously stymied because of our outdated copyright law.

In addition, in the Western Cape and other parts of South Africa, many public libraries will be closed in 2022, or their staff and services will be reduced, due to lack of resources and the impact of COVID-19 pandemic. This means that other libraries will now have to extend their services to assist the public who will be affected by these measures. The demands on libraries and related entities will increase substantially, without additional resources. It is therefore crucial that this round of submissions be attended to and the problems mentioned below remedied urgently, so that the process of the Copyright Amendment Bill can be expedited through Parliament and hopefully passed during the course of this year.

In our written submissions in July 2021, and in LIASA's oral presentation during the Parliamentary online public hearings in August 2021, we strongly supported the 2017 version of the CAB with fair use and useful exceptions for libraries, archives, museums and galleries, as well as for education and academic activity, and for people with disabilities. We had hoped it would be approved by Parliament last year, but it seems new changes have been proposed which will negatively affect research and education and create additional responsibilities for librarians, and more hurdles for users when reproducing or reusing copyright works. These will need to be corrected before the Bill can proceed further.

OUR JOINT COMMENTS ON THE PROPOSALS

A. Section 19C(4) – affecting library users

We note that your Committee plans to delete the words 'for commercial purposes' from this section on the basis that they are mere 'technical' changes. The public was not given an opportunity to comment on this change or other technical changes to the Bill. We would like to point out that this change, and others shown in 'green' text in your document emailed to us recently are more than 'technical changes'. In fact, they change the context in some instances, and create negative implications for libraries, education, research, people with disabilities – in fact, all users of copyright works.

Deletion of the words 'for commercial purposes', as well as the addition of the words 'a user may not make a copy or make a recording of the work' in fact change the entire meaning of this Section. It creates a serious problem for libraries and their users, especially in the COVID-19 environment where teaching and learning has become remote and digital, and away from physical lecture rooms and classrooms. It specifically prohibits a user from making a copy or making a recording of the work. It does not permit reproduction at all, which arguably is unconstitutional and also impractical, particularly in the above context. This Section needs to be amended to permit reproduction for educational and research purposes at least for personal or private use, and to enable conversions into accessible formats for persons with disabilities.

B. Section 12A. (a) – Fair Use

We note that the following sub-sections of Section 12A(a) will be deleted, without the public having had the chance to make comments on them:-

(i) *Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;*

(iv) *scholarship, teaching and education*;

(vi) *preservation of and access to the collections of libraries, archives and museums*.

The explanation given in footnotes to these proposed deletions is that these sub-sections are duplicated in other exceptions in the Bill. We strongly disagree. Firstly, these are important examples of fair use and should remain in Section 12(A)(a), even if they are included elsewhere in the Bill. The US law does just this. Apart from S.107 (fair use), there are S.108 (for libraries) and S.110 (for education). In some instances, duplication gives more clarity for users. Secondly, the exceptions in Sections 12B, C and D, and 19B and C, are specific and limited in scope (especially following the amendments proposed), whilst these sub-sections provide more flexibility within the scope of fair use factors, to enable broader uses. For instance, 'research' extends beyond scholarly research (e.g. someone researching a particular topic for a legal case, journalism, family history, career development, , innovation, leisure or other purposes); 'teaching and education' extend beyond schools, colleges and universities (e.g. online education, self-development courses, teaching or learning a new skill, hobby, language, etc.) and 'scholarship' can extend beyond a university or research institute (e.g. post-doctoral work, self-initiated self-development in one's professional field, etc.); and 'private study or personal use' requires flexibility to access and use copyright material in different contexts or situations and for various uses and purposes. These are not specifically listed elsewhere in the Bill and it would be impossible to list all such acts or uses and unforeseen or future uses too. The provision in Section 12A(a) would enable such acts to be done, subject to the 4 fair use factors. In fact, the new proposed amendments relating to personal use create serious barriers and are arguably unconstitutional – See our comments in C below.

By being listed under Section 12A(a), these sub-sections provide the flexibility explicitly to include or enable legitimate acts to be done that are not specifically covered under any of the other exceptions in the Bill or that will become necessary as technologies change. For instance, since the specific exceptions for research are minimal in other parts of the Bill, it is very importance that subsection (i) remains under Section 12A(a) as well. By being listed under the "catch-all" fair use clause, crucial activities in the digital space can be done to enable and enhance research, e.g., computational analysis (text and data mining), artificial intelligence, 3D applications, etc. If this sub-section is moved to Section 12D, then it should be greatly expanded to include the above acts and unforeseen acts that may arise in the future. For reasons explained above, and for purposes of avoiding further delays, we recommend that sub-section (i), (iv) and (vi) remain in Section 12A(a), as well as in their separate Sections where their application and context are more specific or limited.

C. Section 12B(1)(i) – Principle of Non-retrogression

The principle of non-retrogression would be applicable if this Section is included in the Bill. The current copyright law allows for '*research or private study by, or the personal or private use of, the person using the work*' and is not restricted by any conditions. The new proposed amendment is subject to two new conditions: it requires that the works are 'lawfully acquired' and that fair practice be added, which in essence overrides the current rights in Section 12(1)(a) of our Copyright Act. This is not permitted in international human rights law, to which our Bill of Rights is aligned.

We recommend that the words "*Provided that the work was lawfully acquired and that such personal use shall be compatible with fair practice*" be deleted from Section 12B(1)(i) and that the new definition of 'lawfully acquired' be deleted from the Definitions section as well.

Copying for non-commercial purposes should be permitted, even though the material may be from a loaned library book or donated or inherited work.

D. Sections 12B, 12C, 12D, 19B AND 19C – Addition of various conditions to limitations and exceptions

We strongly support the fair use provisions (with 4 criteria/factors) in Section 12A and the separate or more explicit exceptions in Section 12B, 12C, 12D and 19C.

We, however, reject the proposal to include restrictive conditions or additional criteria to the above exceptions, (e.g. fair use factors and fair practice, and in some cases, the 3-step test criteria as well). The version of the 3-step test provided here is out of line with that set out in international law, which specifically does not claim to provide an exhaustive list of cases that are covered by exceptions. Furthermore, these layers of conditions will be difficult for all users (including educators, students, librarians, researchers, etc.) to navigate and interpret, before being able to make any reproductions. They will create unnecessary hurdles and inhibit or prevent users from making copies of works. The purpose of limitations and exceptions is to facilitate access to copyright works and to provide clarity so that users know what can be done, without fear of litigation.

We strongly recommend that –

- the 4 factors of fair use be applied solely to Section 12A;
- only if really necessary, 'fair practice' be applied to Sections 12B, C and D, Sections 19B and C in line with other sections in the Bill;
- the 3-step test criteria should be deleted completely, since Parliament has already agreed that the Bill is compliant with the 3-step test. It is not necessary to add the test to any exceptions.

E. Section 19D(3) and (4)(b) – Accessible formats

Section 19D(3)(b) of the Bill states that *"a person contemplated in paragraph (a) may only so export or import where such person knows or has reasonable grounds to believe that the accessible format copy, will only be used to aid persons with a disability."* This creates a greater burden on importers/exporters, including libraries, to positively know that only persons with disabilities will use the work. Section 19D(3)(b)'s proposed wording is not aligned with that of the Marrakesh Treaty, which gives more clarity by stating that *"prior to such distribution or making available, the authorized entity must not know or have reasonable grounds to know that the accessible format copy would be used by others"*.

Similarly, Section 19D(4)(b) is problematic, suggesting that the applicability of the exception is subject to the end-use of works (are they used by beneficiaries) rather than the basis on which they are supplied (are they only supplied to beneficiaries). This creates significant potential liability for libraries, which reasonably can only have a say over the latter (the position also taken by the Treaty). The Bill risks creating major liability concerns for libraries, and so having a chilling effect on their activities, undermining the goal of the Treaty.

We recommend that the proposed wording be deleted, and that the relevant wording from the Marrakesh Treaty be inserted instead.

We trust that our comments and recommendations will be taken into account when your Committee deliberates all submissions made this month.

Thank you.

On behalf of the **COMMITTEE OF HIGHER EDUCATION LIBRARIES OF SOUTH AFRICA (CHELSA)**

A handwritten signature in black ink, appearing to read 'Shirlene Neerputh', written in a cursive style.

Dr Shirlene Neerputh
CHELSA Chairperson

On behalf of the **LIBRARY AND INFORMATION ASSOCIATION OF SOUTH AFRICA (LIASA)**

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Mr Nazeem Hardy
LIASA President 2021 - 2023