

The Copyright Amendment Bill in 2020: Diversions, Debates, and the Cost of Delay

15 minutes on 4 December between 3 pm and 5 pm

WITS OA Day

Jonathan.klaaren@wits.ac.za

Diversion (theme/meme)

- Was the Bill itself a diversion? A diversion from more directly remedying the problems of unconstitutionality in the current copyright regime?
- The President certainly diverted the Bill from passage
 - This is a constitutional diversion with Constitutional blessing
- Was the referral a diversion from other pressing issue at the global level between particularly the EU and SA?
- Diversion many times and oft-used as a tactic by opponents of the Bill (e.g. Copyright Coalition)

Debates: Tagging

- Re-tagging the bill is not constitutionally required. Copyright law is national-level legislation bound by international treaty requirements.
- More than incidental or indirect effects are needed to trigger Section 76. We find no provincial role in regulating copyright law that would require application of the section 76 process.
- It would set a poor precedent for other laws to require copyright and other intellectual property legislation to follow the section 76 process.

Debates: Fair Use

- The fair use clause was adequately considered by Parliament and is carefully drafted to be consistent with international law, the Constitution and South Africa's public interests.
- The fair use clause is an open general exception which applies in addition to specifically authorized uses.
 - In this way, it operates similarly to the general exceptions in the United States, Singapore, Korea, Thailand, and many other countries around the world.
- The policy reason to include an opening term like “such as” to a list of permitted purpose is to ensure that fair uses of the future – that cannot be known today – are permitted without further legislative amendment.

Debates: Fair Education

- Article 12D(4) permits reproduction of “a whole textbook” if the “textbook is out of print,” “the owner of the right cannot be found,” or “authorised copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.”
- This section only operates when the work cannot be purchased or licensed on reasonable terms in South Africa
- The CAB also reflects Article 8(a) of the Competition Act, which makes it illegal for a dominant firm to “charge an excessive price to the detriment of consumers.”

Debates: Creator Royalties

- There was ample record before Parliament of unfairness in current and past contracts between publishers and labels.
- This evidence included that creators must often bargain with highly concentrated industries dominated by a small number of multinational firms.
- President sent back Bill as potential deprivation of property, property of the multinational firms

The Cost(s) of Delay(s)

- Hypothetical of costing the delays
- Opportunity costs
 - Worth to education
 - Worth to research
 - Worth to heritage
- Revenue to publishers