

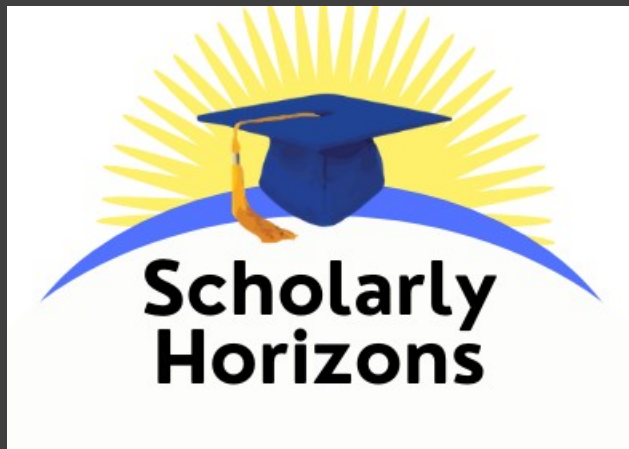
# Copyright Amendment Bill

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For my CV, publications and other information about me, please see: <https://scholarlyhorizons.co.za/about-denise>

Provincial Legislature Public Hearings - 2023



# Current Copyright Act & Regulations 1978

- ❑ Outdated, Apartheid-era legislation
- ❑ Print-based – pre-dates the birth of the Internet by 5 years
- ❑ Limited print-based exceptions for education, research, libraries & archives
- ❑ Unconstitutional – conflicts with Constitution and international conventions on human rights and disabilities. See: <https://blindsa.org.za/2020/06/19/blind-sa-constitutional-challenge-of-the-copyright-amendment-bill>
- ❑ No exceptions for legal deposit, museums and galleries, or for mass digitisation and preservation of cultural heritage.
- ❑ Fails to protect authors & creators in unfair contracts and royalty payments.
- ❑ Collecting societies are not regulated.
- ❑ Goes against the spirit of our Constitution.
- ❑ Bill will remedy these serious omissions and discriminatory practices.

# Framework of CAB

**Bill was drafted within the following international, regional and domestic legal framework:-**

- Human Rights and IP international Conventions and Treaties, including Berne and TRIPS
- WIPO Treaty proposals by IFLA & partners, and the Africa Group (supported by SA)
- WIPO Studies on L & Es for education in the African region, and for libraries & archives
- Progressive foreign copyright laws (U.S and 11 other fair use countries), incl. clauses from EU countries, Australia, UK, U.S., Singapore, etc.
- eIFL Model Copyright Law - that expands on WIPO Model Law for Developing Countries
- DTI commissioned research and assessments
- SA Constitution, National Development Plan & Sustainable Development Goals
- Various international, regional and domestic research reports
- 2015 Cape Town Declaration by DAC & others that committed to fair and balanced copyright laws
- Submissions, presentations, and advice & inputs by IP experts to Parliament since 2015.

# Compliance with International Treaties

Bill was drafted within this framework, so it must be compliant with our constitution and international IP commitments.

The review in Parliament is not about international commitments – its about constitutionality.

Parliamentary Legal Team and two formal opinions confirmed Bill is compliant with our Constitution and international treaties.

See Opinions: [https://libguides.wits.ac.za/ld.php?content\\_id=50611390](https://libguides.wits.ac.za/ld.php?content_id=50611390) and <http://infojustice.org/wp-content/uploads/2021/05/South-Africa-CABAcademic-Opinion-05102021.pdf>

No complaints through WIPO or the WTO dispute mechanisms.

South Africa would need a crystal ball if it had to draft its laws, based on what might happen in the future.

It is impossible for the Bill to be in conflict with treaties that have not yet been signed.

# Interference in SA's Copyright Reforms

*The deplorable pattern of economic bullying and pressure on our President by USTR and EU, orchestrated by multinationals, must NEVER be allowed to happen again.*

See articles and letters about U.S. and EU interference in SA's domestic copyright reforms below:

- How the US and EU pressured South Africa to delay copyright reform - <https://www.politico.eu/article/how-washington-and-brussels-pressured-south-africa-to-delay-copyright-reform/>

- See Nicholson's submission in this regard to the USTR in January 2020 - [https://libguides.wits.ac.za/ld.php?content\\_id=51932196](https://libguides.wits.ac.za/ld.php?content_id=51932196)

- The majority of submissions made at the USTR hearings opposed a USTR trade review and supported the Copyright Amendment Bill – see: [https://libguides.wits.ac.za/Copyright and Related Issues/tradeissues](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/tradeissues)

- Open letter to the EU Ambassador to South Africa on copyright laws - <https://www.apc.org/en/pubs/open-letter-eu-ambassador-south-africa-copyright-laws>

- Open letter to the President of South Africa on South African copyright laws

# Section 19B – Computer programs

This exception (adopted from Sec. 15 of EIFL Model Copyright Law) is welcomed as it addresses copyright software and its use and reproduction to enable interoperability, observation, study and testing for re-engineering and related legitimate purposes.

# Section 19 C

## Libraries, Archives, Museums & Galleries

- ❑ LIASA confirmed crucial role of libraries & archives, & Bill's urgency.
- ❑ Support expanded exceptions for libraries and archives, & exceptions for legal deposit, museums and galleries, orphan works, unenforceable contracts, etc.
- ❑ Empowers these entities to carry out their statutory functions in the 21<sup>st</sup> century and 4IR.
- ❑ Will enhance South Africa's collaborative programmes already in place with the EU and other countries, e.g. Open Science, Open Educational Resources (OERS), Open Data, SKA Project and many others.
- ❑ Will enable DSAC legislative updates, National Digital Policy, and Open Data & Cloud Policy to proceed.
- ❑ Adapted from progressive copyright laws around the world, the EIFL Model Copyright Law and other aforementioned IP documents

# International Support for the Bill

- Fully support all previous submissions by IFLA, ICA, and other international organisations, and their communications to Parliament & the President on this Bill, including their submissions in July 2021 – See list of supporters I know of, at end of these slides.

- The Bill follows international best practice for a fair and balanced copyright system that safeguards the fundamental rights of both users and authors.

- Many countries have hailed this Bill as a model for not only developing countries, but also developed countries. Australia and Ireland are following Bill with keen interest.

- As IFLA says: ***The delay caused by the reconsideration of exceptions and limitations in the Bill will have a costly impact on the development of libraries and archives, and therefore, on the development of the country by reducing the ability of citizens to have access to information, to knowledge and to research in the digital environment.***

# Section 12A – Fair use

- Countries with fair use (majority have hybrid models) are: **Ecuador, Israel, Liberia, Malaysia, Philippines, Poland, Singapore, Sri Lanka, South Korea, Taiwan, Uganda, Nigeria, and U.S.**
- Countries with fair dealing but use the 4 factors of fair use – **Canada, eSwatini, Hong Kong, Jamaica, Kenya, St. Christophe Nevis, St Lucia, St. Vincent and the Grenadines, and New Zealand**
- In the Handbook of South African Copyright Law, Dr. Owen Dean posits that “*the America and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts*”.
- Fair use – an alien implant? So what?

See: **The Fair Use/Fair Dealing Handbook** - <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>

# Fair Use – Enabler or Disruptor?

***“Everyone who makes culture or participates in the innovation economy relies on fair use routinely – whether they recognize it or not.”*** (IP Professor Peter Jaszi, AMU).

- ❑ ACA2K Project (2007-2010) found the stricter the copyright law, the higher level of infringement. ‘Infringing acts’ enabled access to information, not the copyright laws in place.
- ❑ No empirical evidence that shows that fair use destroys creative industries.
- ❑ Everyone needs access to knowledge.
- ❑ Fair dealing does not work in the digital space.
- ❑ Fair use is the digital key.

# Debunking Myths - Support for Fair Use

Q & As on Fair Use - Fair use/fair dealing resources - [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/fairuse\\_fairdealing](https://libguides.wits.ac.za/Copyright_and_Related_Issues/fairuse_fairdealing)

Best Practices for Fair Use for Various Stakeholders - [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/BestPractice](https://libguides.wits.ac.za/Copyright_and_Related_Issues/BestPractice)

SA Handbook of South African Copyright Law (O. Dean) – Para. 9.2.3, on pg. 1-96, author posits that “the American and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts”.

Gowers Review (UK, 2006) (p. 62), states: ‘Fair uses’ of copyright can create economic value without damaging the interests of copyright owners” - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf)

WIPO promotes Fair Use in ‘The Economic Contribution of Copyright-Based Industries in South Africa’ - [https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_za.pdf](https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf)

Why Fair Dealing Is Not Destroying Canada Publishing - <https://www.ip-watch.org/2017/07/25/fair-dealing-not-destroying-canada-publishing>

What is Fair? Debunking Fair Use Myths - Australian Productivity Commission - <https://www.pc.gov.au/news-media/speeches/fair>

Canada’s Statutory Review of the Copyright Act, Page 67 and Recommendation 18, recommend addition of “such as” to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one – one step closer to fair use - <http://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>

Australian – ‘Copyright and the Digital Economy’ - [https://www.alrc.gov.au/wp-content/uploads/2019/08/summary\\_report\\_alrc\\_122.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/summary_report_alrc_122.pdf)

Copyright in the digital age: An economic assessment of fair use in New Zealand” - <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf>

The Fair Use/Fair Dealing Handbook (J. Band - <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>

In the Public Interest: How Kenya Quietly Shifted from Fair Dealing to Fair Use - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2929252](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929252)

Fair use and Fair dealing - [https://libguides.wits.ac.za/copyright\\_and\\_related\\_issues/fairuse\\_fairdealing](https://libguides.wits.ac.za/copyright_and_related_issues/fairuse_fairdealing)

# Section 12 B & C

- ❑ Section 12 B (1-6) exceptions are relevant to scholarly communication, publishing, teaching and learning, and research, innovation and creativity, whether academic or otherwise. Urgently needed.
- ❑ Quotation will not encourage plagiarism - Acknowledgement is required whether it is copyrighted, out of copyright, never published, open access or freely available.

See: ***Does the South African Copyright Amendment Bill promote Plagiarism?*** - <http://infojustice.org/archives/41511>

- ❑ Section 12C permits transient copies and adaptations – inherent in digital processes.

# Section 12 D (1-8) – Education & Research

- These useful exceptions for education and research are long overdue.
- The circumstances in which educational institutions are permitted to make copies of whole or major parts of copyright works are limited to specific legitimate purposes, and not for commercial purposes. This is fair and reasonable.
- The incorporation of third party works in assignments, theses and dissertations (with acknowledgement) under fair dealing will now extend into the digital space.

# Section 12 D(2) – Course-packs

Sec 12D(1) allows extracts & journal articles to be included in course-packs – welcomed for educational purposes

Survey – 29 out of 40 international publishers allow course-packs in their licences

India - **Course Packs For Education Ruled Legal In India: Triumph For Access To Educational Materials (May 2017)** - <https://www.ip-watch.org/2017/07/12/course-packs-education-ruled-legal-india-huge-triumph-access-educational-materials/>

Canada - **The appeal case of York University against Access Copyright (July 2021)** – <https://www.scc-csc.ca/case-dossier/cb/2021/39222-eng.aspx> and <https://www.carl-abrc.ca/news/reaction-supreme-court-decision-on-york-case/?cn-reloaded=1&cn-reloaded=1>

Both support the inclusion of the exception for course packs in the Bill

# Section 12D 7(a-d) - OA Deposits

The Bill allows authors, or librarians assisting authors, to deposit a manuscript version of a publication (at least 50% from public funding) in an open access institutional repository. Adapted from Sec. 38(4) of the German Copyright law - [https://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html](https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html).

This provision should be fully supported. Provides access to those who funded the research.

Thousands of publishers allow deposit of manuscript or final PDF versions – See: **Sherpa Romeo website** - <https://v2.sherpa.ac.uk/Romeo>

See: **NRF Statement on Open Access to Research Publications** - <https://www.nrf.ac.za/media-room/news/statement-open-access-research-publications-national-research-foundation-nrf-funded>

# Section 12 D7e - Unenforceable Agreements

- Sec 12D 7e should be welcomed by authors and libraries, as many of them have been at the raw end of a contract.
- The Bill ensures that contracts will not override legitimate copyright exceptions in the future. (*Adopted from the EIFL Model Copyright Law and is in the Singapore copyright law and EU's Unfair Contract Terms Directive (93/13/EEC)*)
- It is intended to balance the playing fields between publishers/producers and those they contract with (e.g. authors, creators, libraries, etc.)
- It does not prohibit or otherwise interfere with open licences or voluntary dedications of a work to the public domain.

# A2K - Expensive Commodity!

- ❑ Access to knowledge (A2K) is an expensive commodity in SA!
- ❑ Copyright Amendment Bill enables and increases A2K.
- ❑ Price of books and ebooks in SA excessive – 2 examples:

- **Long Walk to Freedom (Nelson Mandela)**

- South Africa - \$ 21.70 ; USA and UK - \$10.15

- **Oxford English Dictionary**

- South Africa - \$ 23.70 ; USA - \$ 11.60 - UK - \$ 16.30

(Source: [https://libguides.wits.ac.za/ld.php?content\\_id=50111158](https://libguides.wits.ac.za/ld.php?content_id=50111158) - Genesis report 2014 , p.91. Table 4. Price differential of South African books)

- ❑ Price-fixing investigations – this practice hurts everyone in the knowledge chain!
  - ❑ In SA – see: <https://www.news24.com/fin24/economy/competition-commission-in-vestigating-book-publishing-cartel-over-price-fixing-claims-20180829>
  - ❑ Internationally - see: <https://www.theguardian.com/books/2021/jan/15/amazoncom-and-big-five-publishers-accused-of-ebook-price-fixing>

# Cost of Knowledge in SA

- ❑ SA-produced research repackaged and sold back to SA libraries at excessive prices.
- ❑ Publishers hold the copyright in journal publications – main beneficiaries of copyright monies.
- ❑ Research sources, article processing charges & copyright fees (incl. double dipping) – exorbitant costs for SA institutions and academics.
- ❑ 70% of copyright fees collected from public universities flows out to developed countries.
- ❑ Publishers control who can publish through APCs, and what goes onto institutional repositories!

See: ***The cost of accessing academic research is way too high. This must change*** - <https://theconversation.com/the-cost-of-accessing-academic-research-is-way-too-high-this-must-change-105583>

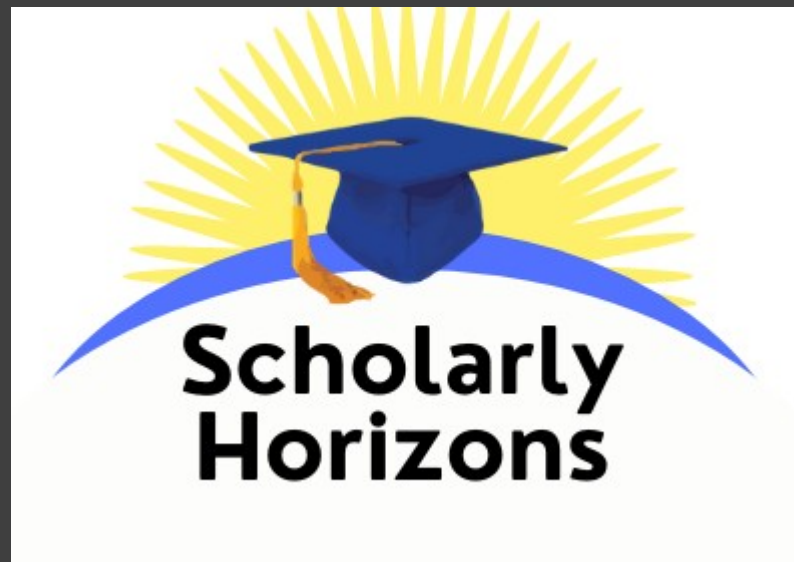
***If our copyright law is supposed to protect our authors and creators, then why are multinational conglomerates the main beneficiaries of copyright?***

# Conclusion

- ❑ The history of South Africa makes it a national imperative to build an informed nation, remove inequalities, create self-reliance amongst individuals through access to information and technologies, as well as to build and sustain vibrant communities.
- ❑ Parliament, please prioritise the needs of South Africans!
- ❑ Please act urgently to pass the Bill - or else it will create an incongruent situation, where South Africa's own copyright laws cannot do domestically, what it is asking for at the international level.

Thank You

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# Supporting Resources

- ❑ Copyright & Related Issues – SA Proposed Amendments (main tab and subtabs) - [https://libguides.wits.ac.za/Copyright and Related Issues](https://libguides.wits.ac.za/Copyright_and_Related_Issues)
- ❑ Treaty Proposals of IFLA and its Alliance Partners (supported by the Africa Group at WIPO) - [https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/tlib v4 4.pdf](https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/tlib_v4_4.pdf)
- ❑ Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (Africa Group – SA plays a leading role in the Africa Group) - [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_12.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf)
- ❑ EIFL Model Copyright law (Sec 8-16) - [https://www.eifl.net/system/files/resources/201607/eifl draft law 2016 online.pdf](https://www.eifl.net/system/files/resources/201607/eifl_draft_law_2016_online.pdf)
- ❑ 2015 Cape Town Declaration by DAC & others - <https://www.ifla.org/files/asset/wlic/2015/documents/cape-town-declaration-of-ministers.pdf>
- WIPO Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa - [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_19/sccr\\_19\\_5.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_5.pdf)
- WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (2015) - [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_30/sccr\\_30\\_3.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_3.pdf)
- WIPO Study Copyright Limitations and Exceptions for Museums (2015) - [https://www.wipo.int/export/sites/www/copyright/en/limitations/pdf/limitations\\_exceptions\\_copyright\\_museums.pdf](https://www.wipo.int/export/sites/www/copyright/en/limitations/pdf/limitations_exceptions_copyright_museums.pdf)

# Formal Support for CAB in 2017

- International Federation of Libraries & Institutions (IFLA) – represents libraries in 150 countries

- Global Expert Network on Copyright User Rights

- Library Copyright Alliance (USA)

- Australian Digital Alliance

- Australian Libraries Copyright Commission,

- German Coalition for Action “Copyright for Education and Research”,

- African Union for the Blind (relating to persons with disabilities)

- Electronic Information for Libraries (eIFL)

- Department of Arts and Culture

- National Department of Education

- DAC Legal Deposit Committee

- National Council for Library and Information Services (NCLIS)

- Library and Information Association of SA (LIASA)

- Universities South Africa (USAf)

- Southern African Research Universities Association (SARUA)

- Denise Nicholson (Personal capacity)

- Informally by NGOs, e.g. Freedom of Expression Institute, Media Monitoring Group, Wikipedia, and ENCODE

# Support for CAB – Submissions in 2021

- |                                                                                |                                                                                                                  |
|--------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------|
| 1. International Federation of Library Associations & Institutions (IFLA)      | 20. South African National Library Consortium (SANLIC)                                                           |
| 2. Electronic Information for Libraries (EIFL)                                 | 20. Academy of Science of South Africa (ASSAf)                                                                   |
| 3. Higher Education Disabilities Of SA (HEDSA) and DEAFSA                      | 20. Electronic Frontier Foundation (EFF) – Cory Doctorow                                                         |
| 4. ReCreate SA, SA Guild of Actors, Section 27, Right to Know, Joint Academics | 20. Prof. Maximus Sefotho – (University of Johannesburg) (Personal Capacity)                                     |
| 5. Organisation of SA Law Librarians (OSALL)                                   | 20. Aysha Patel (Dep. Law Librarian, Wits) – (Personal Capacity)                                                 |
| 6. African Library and Information Association (AfLIA)                         | 20. National Professional Teachers' Organisation of SA (NAPTOSA)                                                 |
| 7. National Council for Library and Information Services (NCLIS)               | 20. Library and Information Association of SA (LIASA)                                                            |
| 8. Committee of Higher Education Libraries of SA (CHELSA)                      | 20. Scholarly Horizons – (Denise Nicholson, CEO)                                                                 |
| 9. South African Democratic Teachers' Union (SADTU)                            | 20. Prof G. Fester (Academic at UCT - Author/Poet)                                                               |
| 10. Library Copyright Alliance (LCA) – Jonathan Band                           | 20. Dr D. Kawooya (Personal Capacity)                                                                            |
| 11. National Library of South Africa (NLSA)                                    | 20. COMMUNIA – (Teresa Nobre, Europe)                                                                            |
| 12. Prof K. Kirstin (IT Academic) (Personal Capacity)                          | 20. Dept. Of Higher Education & Training: Open Learning Division – Trudie Vd Walt (Social Inclusion And Quality) |
| 13. Training Academy Of SA (Liz Hewson)                                        | 20. Shakila Maharaj (Blind Professional) – (Personal Capacity)                                                   |
| 14. L. Fouche (Principal, Primary School) (Personal Capacity)                  | 20. Julia Reda (Harvard and Former EU MP - 2014-2019) – (Personal Capacity)                                      |
| 15. Mr. S. Jugdav (Snr Librarian at UNISA) (Personal Capacity)                 | 20. Paul West – independent consultant - signed submission from CCSA                                             |
| 16. St. Andrews Private School, Bedfordview                                    | 20. Derek Moore – independent consultant - submissions from CCSA and one other                                   |
| 17. Ilse Assman (Archivist) (Personal Capacity)                                | 20. SA National Council for the Blind (SANCb) – Supported by SA National Library for the Blind SANLB)            |
| 18. Creative Commons SA Chapter (CCSA)                                         | 20. L. Nhlapo – (Librarian at UNISA) - (Personal Capacity)                                                       |
| 19. J. Croll (Academic/Librarian) (Personal Capacity)                          | 20. Wikimedia, SARUA, DSAC Legal Deposit Committee                                                               |