



**SUBMISSION ON COPYRIGHT AMENDMENT BILL [B13D-2017] –  
17 JANUARY 2023**

I, Denise R. Nicholson ([see my attached bio](#)), wish to commend the National Assembly for finally passing the Copyright Amendment Bill a second time around, after the Parliamentary review process, and for transferring it to the National Council for Provinces for concurrence. Now the Bill is before the Western Cape and other Provincial Legislatures, due to it being retagged. I, urge Parliament, however, to expedite the process so the Bill can be passed as soon as possible.

**Outdated Copyright Act No. 98 of 1978**

The current 1978 copyright law is print-based, pre-dating the birth of the internet by 5 years. 'Digital' was not even a concept on the horizon at the time it was enacted. Since South Africa is part of the global world and a signatory to international IP agreements, we cannot isolate our copyright law or fully domesticate it, as some would like to. We must ensure our copyright law is updated to align itself with our Constitution, but also with progressive copyright regimes around the world. Developed countries have been enjoying flexible copyright exceptions for decades, whilst South Africans have been stymied by apartheid-era legislation that is outdated, restrictive and discriminatory towards people with disabilities, as well as museums and galleries.

The Copyright Amendment Bill is a shift away from harmful colonialism to more progressive global trends in the 21<sup>st</sup> century and to meet the needs of the Fourth Industrial Revolution (4IR). There are already many initiatives, innovations and programmes in South African tertiary institutions and industries relating to technologies for the 4IR, but the current copyright law is hampering their progress. The Bill prepares our copyright law to address the "confluence of emerging technology breakthroughs, covering wide-ranging fields such as artificial intelligence, robotics, the internet of things, autonomous vehicles, 3D printing, nanotechnology, biotechnology, materials science, energy storage and quantum computing, to name a few." (See: <https://www.sebata.co.za/fourth-industrial-revolution-knowledge-management-early-stageconceptualisation/>).

The delay in updating the current copyright law has stalled Phase Two amendments of a number of laws administered by the Department of Sports, Arts and Culture since 2008 (13 years ago), some of which relate to libraries, legal deposit, culture, and

archives, many of which are cultural treasures in your Province. The Bill's useful exceptions will update and enhance the activities of such entities. These DSAC amendments depend on the Copyright Act being amended.

### **Copyright Act is unconstitutional**

Blind, visually impaired and print-challenged persons have been subjected to a 'book famine' for decades but their pleas for reform have been ignored. As you know, the Constitutional Court in the matter of Blind SA vs Minister of Trade, Industry and Competition and Others, ruled on 21 September 2022, that the current Copyright Act is unconstitutional as it relates to people with disabilities. See:

[https://www.groundup.org.za/media/uploads/documents/judgment\\_cct\\_320-21\\_blind\\_sa.pdf](https://www.groundup.org.za/media/uploads/documents/judgment_cct_320-21_blind_sa.pdf). The Minister did not oppose this action. The Constitutional Court

has given Parliament 24 months to cure defects in the Copyright Act after declaring sections of the Act invalid, unconstitutional, and inconsistent with the rights of people who have visual and print disabilities. They have also been given immediate authorisation to make accessible formats - See:

<https://www.groundup.org.za/article/concourt-rules-that-copyright-act-is-unconstitutional/>.

In my humble opinion, I think the current Copyright law is arguably unconstitutional in other areas. It restricts or prohibits fair access to information, teaching and learning materials, research resources, etc. It prevents libraries and other information services from carrying out their statutory mandates, e.g. preserving their collections, including our historical records and cultural heritage, in the digital space. It fails to provide any exceptions for galleries and museums, yet they are important custodians of our cultural heritage. It fails to protect authors and creators from unfair contracts, resulting in unfair royalty payments, and excludes actors and performers. All these are against the spirit of our Constitution and impact on basic human rights. The Bill seeks to remedy these serious restrictions, discrimination, and omissions.

### **Stakeholder participation in reform process**

Some stakeholders claim there has been insufficient time provided for stakeholder participation. This is not true. All stakeholders have been given ample time and opportunities to engage and submit comments on various versions of the Bill since it was first published in 2015 (i.e. 7 ½ years ago). They have also had opportunities to present at public hearings in Parliament and online and were able to submit additional information to the PC on Trade and Industry, at the request of the Chairperson, after public hearings in 2017.

From the outset, it is obvious that this Bill has been highly politicised. I presented in public hearings on 4 August 2017 and 11 August 2021 and was very aware of the political rhetoric. Some stakeholders and the political parties that objected to this Bill (B13D-2017) and earlier versions want the Bill to fail, regardless. Some insist it is poorly drafted and must go back to the drawing board. This is absurd and an insult to all the international and local IP experts and others who have drafted

clauses in various copyright regimes, which South Africa included in the Bill, and to all those who worked hard to improve the Bill, based on many public submissions and public presentations. It is also an insult to the Parliament legal team members, led by Adv. C. van der Merwe, who have worked tirelessly to address all stakeholders' comments and provide legal advice on many occasions in Parliament. Considering the time that has passed since its genesis in 2009 to its second approval in 2022, the reform process must proceed. It is long overdue! See genesis and process of Bill at: <https://wiredspace.wits.ac.za/handle/10539/12525>

### External interference

It seems the ongoing delays with the Bill have been orchestrated by multinationals who are more concerned about knowledge control and profit margins than human rights. They do not want South Africa to have similar flexibilities that they enjoy in their copyright laws. This is a selfish, monopolistic attitude they have adopted for decades towards developing countries. Unfortunately, conglomerates such as entertainment industries persuaded the USTR and EU to interfere in the domestic law-making of South Africa by threatening our economic stability and trade options. The EU consulted with rightsholders and creative industries, without consulting with any representatives of education, libraries, archives, museums or galleries, or people with disabilities. See: <https://www.politico.eu/article/how-washington-and-brussels-pressured-south-africa-to-delay-copyright-reform>.

This pattern of economic bullying and undue pressure on our sovereign State is deplorable and a threat to our democracy! Other countries that adopted fair use and progressive exceptions were not pressured to stall or revoke their copyright reforms.

*Will the EU and USTR object again if they do not like Bill B13D-2017?*

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

- 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/>
- 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_and_Related_Issues/tradeissues)
- See my submission to the USTR (Jan 2000) – [https://libguides.wits.ac.za/ld.php?content\\_id=51932196](https://libguides.wits.ac.za/ld.php?content_id=51932196)
- 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 - <https://www.apc.org/en/pubs/open-letter-president-ramaphosa-south-african-copyright-laws>
- IFLA and APC letter to President Ramphosa - [https://libguides.wits.ac.za/ld.php?content\\_id=54865085](https://libguides.wits.ac.za/ld.php?content_id=54865085)
- Letter from Creative Commons SA - [https://libguides.wits.ac.za/ld.php?content\\_id=53415889](https://libguides.wits.ac.za/ld.php?content_id=53415889)

## **Parliamentary review of Bill**

It seems opponents of the Bill succeeded in getting the President to 'dance to their tune'. He applied no urgency and took nearly 15 months to act on the Bill. It was only when Blind SA took him to the Constitutional Court in terms of Section 79(1) of the Constitution, that he was forced to act. The President's letter to the Speaker of Parliament to review certain Sections of the Bill, was remarkably like the submission by Adv Steven Budlender SC, dated 22 February 2019, made to the Select Committee on Trade and International Relations on behalf of a group of SA rightsholders, some of whom are part of multinational conglomerates such as Pearson PLC, Sony, Universal and Warner Music. All submissions in support of the Bill, IP opinions and communications to Parliament were ignored.

No urgency was applied to the review process either, as Parliament took another year before it worked on the Bill. These ongoing delays are detrimental to education, research and access to information in general for your Province and the broader population. They also perpetuate the 'book famine' for people with disabilities and delay the accession to the 2013 Marrakesh Treaty for Visually Impaired Persons, which would enable cross-border exchange of accessible formats.

## **Bill B13D-2017 is constitutional and compliant**

Legal opinions, academic research, adoptions from other copyright regimes and legal advice from IP lawyers and the Parliamentary legal team, as well as several public submissions and presentations, the Parliamentary review have all substantiated the constitutionality of the Bill and its compliance with international IP commitments and human rights conventions.

The Bill brings SA copyright law in line with international treaties and trends. It is not in conflict with the Berne 3-Step Test, as is claimed by some stakeholders. It also includes many of the provisions that South Africa (DIRCO) is strongly supporting at WIPO, e.g. Treaty proposals from the Africa Group, as well as those from the International Federation of Library Associations and Institutions (IFLA) and their alliance partners.

The Bill also adopts many fair and progressive clauses from the EIFL model law ([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)) which is an expansion of the WIPO Model Copyright law for developing countries, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, as well as clauses from other copyright regimes, e.g. Singapore, EU, USA, Germany and others, and research reports, etc. Many of these documents were submitted to the Chairperson of the PC on Trade and Industry for perusal in 2017. The Bill will also enable the DTI to sign and ratify the WIPO Internet Treaties, the Beijing Treaty, and the Marrakesh Treaty, as well as others that may not have been ratified to date.

## **Strong support for the Bill**

The Bill has been formally supported by many international, regional and local organisations, institutions, NGO's, Trade Unions and others (many of which are 'umbrella' representative bodies with many thousands of members). They have made various submissions to Parliament in support of the Bill during its legislative process to date. Various countries have been keeping a keen watch on developments with the Bill, as they favour many of the provisions in it. Some countries, especially in Africa, see it as a possible model for their copyright legislation.

## **Comments on some sections of the Bill**

I personally support the Bill, but here I add some comments regarding some specific sections: –

### **Provisions for authors and creators**

I support the sections that enhance the rights of authors and creators, giving them more control over their works, reversion of assignment, resale rights for visual artists, protection from unfair contracts, and the possibility of earning fairer royalties through regulating CMOs as per S.22B-F. The Bill should also enable future income for creators from past contracts where their works are still being exploited by rightsholders, from the date of enactment of the Bill (not retrospective royalties).

**S.22B-F** - In 1999, an employee of the National Library of South Africa requested that collection management organisations (CMOs) be regulated as a matter of urgency. Unfortunately, nothing was done for years. I am satisfied that Section 22B-F has been included in the Bill to ensure accreditation, transparency, and accountability of CMOs. The Bill finally provides a legal framework within which CMOs can function.

For too long, the CMOs in South Africa have had a free rein on how they collect, administer and distribute monies to authors and creators. This has resulted in low or no payments, causing much financial stress to authors and creators. Over the past few years, there have been several reports in the media about scandals and maladministration at SAMRO, RISA, and others, see: <https://www.groundup.org.za/article/sa-music-industry-exposed-money-not-going-artists/>.

The Competition Commission commenced investigations in 2018 into price-fixing of textbooks and other material by the Publishers' Association of South Africa and its members. Some publishers are "alleged to have engaged in price fixing and fixing of trading conditions in respect of the sale of TVET textbooks, schoolbooks, ABET workbooks, academic books, trade books and eBooks to retailers, government departments, universities and other educational institutions. They are also alleged to have fixed discounts provided to customers, fixing royalties to authors by publishers, as well as fixing commission to distributors of books and warehousing fees. This

collusion has affected several sectors of the society, including government (which procures VET textbooks, schoolbooks and ABET workbooks for public schools and colleges)". To date this report has not been released to the public, which is concerning. See p18 at: [https://www.compcom.co.za/wp-content/uploads/2021/02/CC\\_Annual-Report-2019\\_20s.pdf](https://www.compcom.co.za/wp-content/uploads/2021/02/CC_Annual-Report-2019_20s.pdf).

These unfair practices have shaken the creative industries and caused mistrust by the public in general. The publishing industry and collection management organisations should stop trying to predict what might happen in the future because of the Bill, and start cleaning up their acts right now, so they can give authors and creators a fair deal with regard to royalties. These organisations are all opponents of the Copyright Amendment Bill.

The Copyright Review Commission Report of 2011 detailed the issues affecting creators and made recommendations to remedy the situation. Sections 22B-F of the Bill will help to remove these unacceptable practices and ensure fair royalties are paid to deserving creators.

**S. 12A** - Fair use was encoded in the US copyright law in 1976 but has been used in the US and the UK for more than two centuries. Twelve other countries have also adopted 'fair use' in their copyright law, and others use the fair use factors, but still call it 'fair dealing'. Nigeria has recently adopted 'fair use' factors in its new Copyright Bill but still calls it 'fair dealing'. Courts in Kenya and South Africa have also used the 'fair use' factors in recent years. Australia, New Zealand, Ireland and Canada are considering fair use for their copyright laws.

No country that has adopted fair use or similar other exceptions in our Bill has ever been subjected to corrective action or dispute settlement mechanisms under WIPO, WTO or any other international entities. The durability and lack of controversy about the U.S. copyright flexibilities is ample evidence that this system is lawful and does not conflict with either South Africa or the U.S.A.'s international trade obligations, or the 3-step test.

Much of the opposition to fair use seems to come from misunderstanding how fair use works and its benefits to all users of information. They choose to reject it on a theoretical level rather than find out exactly how it works. They wish to ignore the real benefits of fair use and claim that it is a 'permit to infringe' or 'carte blanche for piracy', when in fact, it is a 'permit to increase access to knowledge' for all South Africans, including users, custodians, and producers of intellectual property.

It has been claimed that the provisions in the Bill are far wider than the US fair use clause. This is not correct. The US only lists a few examples, as "such as" is a catch-all phrase. All the examples listed in Section 12A of the Bill are also permitted under fair use in the U.S. It is not necessary to make a lengthy list of examples, as 'such as' covers many activities, including text and data mining, e-mailing a screenshot to a

colleague, playing a recording or music remix for music students, using an anonymous orphan work at short notice for educational or research purposes, etc.

There has been much disinformation and fearmongering in the media about the “catastrophic impact” fair use may have on our publishing and entertainment industries in the future. These assumptions have been widely debunked by IP experts and academics here and abroad. A flawed PWC report on fair use has been promoted by rights-owners, warning that fair use will collapse the SA publishing industry and authors will be poorer. A very similar document on fair use by PWC in the Australia copyright debates has been debunked, as well as claims made about the publishing industry in Canada. Fair use will help creativity and grow the economy, not damage or destroy it. See relevant articles below: -

- Joint Academic Opinion on CAB - <http://infojustice.org/wp-content/uploads/2021/05/South-Africa-CAB-Academic-Opinion-05102021.pdf>
- Opinion by S. Cowen SC et al. (2019) sent to President Ramaphosa - [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/Opinion](https://libguides.wits.ac.za/Copyright_and_Related_Issues/Opinion)
- Academic response to PWC report on economics of copyright fair use - <https://infojustice.org/archives/35919>
- Myth-busting speech by Deputy Chair of the Australian Productivity Commissions entitled 'What is Fair?' - <https://www.pc.gov.au/news-media/speeches/fair>
- Legal Opinion by Prof. Thomas Hoeren, former judge. and an academic at ITM University of Münster, Germany (2022) - [https://scholarlyhorizons.co.za/wp-content/uploads/2022/04/Prof-Hoeren-final-Legal\\_Opinion\\_CAB-2022.pdf](https://scholarlyhorizons.co.za/wp-content/uploads/2022/04/Prof-Hoeren-final-Legal_Opinion_CAB-2022.pdf)
- Why Fair Dealing Is Not Destroying Canada Publishing - <https://www.ip-watch.org/2017/07/25/fair-dealing-not-destroying-canada-publishing/>
- Fair Use vs Fair dealing – Fair use around the world [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/fairuse\\_fairdealing](https://libguides.wits.ac.za/Copyright_and_Related_Issues/fairuse_fairdealing)

Some years ago, when I managed the Copyright Services Office at Wits University, I personally wrote to librarians and IP experts in most of the countries with fair use asking what impact fair use had made on the creative industries. They all confirmed that fair use has not caused any catastrophic damage or negative effects on their creative industries. In fact, writers still write, musicians still create music, artists still create artworks, researchers still conduct research, inventors still invent, and publishers still publish. Fair use is in fact the enabler for publishing, creating and innovating, as all authors and creators need to use and reuse extracts of other copyright works to create new works. Trevor Noah, for instance, would not have been able to use a great deal of the material he shared in his Daily Show, in South Africa, due to the lack of fair use provisions in our copyright law.

I strongly support the provisions of fair use in Section 12A as they will greatly improve access to information for everyone, particularly in the digital environment. They are also progressive, flexible, future-proof and address the needs of the 21st century. They will enable and advance development, innovation, AI, robotics, gaming, inventions and prosthetic enhancements through 3D printing, augmented reality, inventions, and futuristic technologies in relation to the Third and Fourth Industrial Revolutions. Fair use should certainly be welcomed by scientists, educators and

researchers in the Western Cape, being a high-tech province, with several tertiary institutions, the Medical Research Council of South Africa, and many other research entities that are embracing the 3IR and 4IR.

Many universities and research institutes in South Africa are already embracing the above technologies, but the current copyright law is hampering their progress. Schools are now teaching robotics, for instance, but again the copyright law does not cater for this. These provisions are also necessary for people with disabilities, researchers, educators, librarians and other information specialists, authors, creators, employers and employees, artists, gamers, politicians, programmers, lawyers and other professionals, government officials and even parliamentarians, including officials in your Legislature – in fact, everyone who uses or reuses information.

For some helpful information on Fair Use, see resources below:-

- Q & As about Fair use – [https://libguides.wits.ac.za/ld.php?content\\_id=48140257](https://libguides.wits.ac.za/ld.php?content_id=48140257)
- Fair use in South Africa [short video]- <https://infojustice.org/archives/40384>
- Fair use vs Fair dealing - [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/fairuse\\_fairdealing](https://libguides.wits.ac.za/Copyright_and_Related_Issues/fairuse_fairdealing)
- Fair Use/Fair Dealing Handbook (J. Band) - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2333863](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333863)
- Fair use does not conflict with Berne – <https://bit.ly/2PGrDkl>
- Why Fair Use is so important for South African copyright law - <https://theconversation.com/why-fair-use-is-so-important-for-south-african-copyright-law-107098>
- Why Fair Use in new Copyright Bill benefits everyone – <https://www.dailymaverick.co.za/article/2019-09-17-fair-use-in-new-copyright-bill-benefits-everyone>

Some guidelines on how to judge fairness are set in law, but some things are left to the courts to interpret. Concerns have been raised that the Bill's punitive measures for infringement are inadequate, and that South Africa lacks the wealth of jurisprudence and precedents in the US to deal with fair use.

In the US, and under the Bill in Parliament, the financial impact on the rightsholders must be considered when judging fairness. Under fair use systems piracy remains an infringement of copyright, just as it is now. Fair use is subject to four criteria and is not carte blanche for copying everything and anything free without compensation to rightsholders. Copying anything more than what is fair would require permission from rightsholders. Without permission or a licence, it would be infringement, e.g. copying one textbook and making 2000 copies for students.

Some opponents of the Bill have suggested that SA courts do not have the expertise or the hundreds of years' jurisprudence that the US has, and that punitive measures in the Bill are inadequate. This is incorrect and myopic, as there is a wealth of freely available online jurisprudence and other legal resources to assist our judiciary.



Other countries with fair use continue to develop their own jurisprudence, and so will South Africa, just as it has been addressing constitutional issues since 1994. Our respected judiciary will decide on appropriate restitution where necessary. It does not have to specify punitive and/or statutory penalties in the Bill to be able to apply appropriate restitution. Each case will be determined on its merits and will create appropriate precedents for future cases. Not every case will have to go to court for interpretation of the application of fair use, since there are already many useful online Best Practice Guidelines on Fair Use that will assist users, custodians, producers and creators of information, when using copyright material. See: [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/BestPractice](https://libguides.wits.ac.za/Copyright_and_Related_Issues/BestPractice).

The Bill also provides for a Copyright Tribunal to avoid court litigation, where possible, and to mitigate against high court fees. There are pro bono legal services in various institutions and legal firms in South Africa that will also assist people who do not have the financial means to institute court action to protect their rights.

I welcome and strongly support limitations and exceptions for education and academic activities, libraries, archives, museums and galleries, and persons with disabilities, as well as provisions for orphan works, unenforceable contracts, and computer programs.

**S.12B-D** – these are very helpful exceptions, especially for education, research, but also for journalists, newsreaders, motivational speakers, TV hosts, etc. The educational and academic activities exceptions in the Bill are welcomed and will provide better access to teaching and learning material and research resources, and free up more public funding for new library acquisitions and infrastructure. The exceptions for course-packs (which India and Canada already have in their copyright laws under ‘fair dealing’) will be very helpful to schools and tertiary institutions, including distance learning institutions. The annual amounts that public universities are compelled to pay for copyright licences are exorbitant. Much of the material is included in e-subscription licences, so there is duplication of fees as well. See: <https://theconversation.com/the-cost-of-accessing-academic-research-is-way-too-high-this-must-change-105583>. About 70-80% of the library collections in public universities and many public libraries come from international publishers, so the bulk of monies collected for copyright fees flows outside the country annually.

Serious challenges in accessing and providing teaching and learning and other information were experienced countrywide (including the Western Cape) by educators, researchers, librarians, students, and the general public during the COVID-19 lockdowns. Glaring deficiencies and failures in our outdated copyright law were highlighted. These issues persist today as teaching and learning is now blended, hybrid or fully digital and our copyright law does not address the digital space.

Globally, teaching and learning and research were negatively affected in the pandemic lockdowns. What could be done in the analogue world, suddenly became impossible in the digital space and permission had to be obtained before transferring material to digital platforms or sharing material digitally. Librarians had to get permission to read sections of books out aloud on YouTube or e-learning platforms, yet for decades, they

have been reading from printed books to children and others in their libraries, reading circles and literacy programmes.

Had the Bill been enacted some few years ago, the exceptions would have been extremely helpful to educators, students, researchers, libraries and others, during the pandemic lockdown. Challenges with copyright in the digital space in various countries (including South Africa) were highlighted in Case Studies presented in May 2022 at WIPO's Session on 'Impact of the COVID-19 Pandemic on the Copyright Ecosystem' – see: [https://www.eifl.net/system/files/resources/202206/eifl\\_covid-19\\_case\\_studies\\_2022-.pdf](https://www.eifl.net/system/files/resources/202206/eifl_covid-19_case_studies_2022-.pdf)

As you may know, some years ago the #FeesMustFall and other protests on university campuses, including at least 4 institutions in the Western Cape, highlighted the plight of SA students and financial crises facing young people and institutions themselves in our country. The cost of study material and difficulties in accessing material due to restrictive copyright laws affect the chances of students successfully completing their studies and eventually contributing to the economy. The copyright law and restrictive licences have also hampered, if not prohibited, public-funded institutions from sharing information with other institutions and the public who through their taxes pay for their resources, but do not have access to up-to-date collections and expensive subscription-based journals, books, and electronic databases.

It is therefore urgent that the Bill be passed to facilitate access to information for education, research, development and various other purposes, especially in the context of a country in transformation, where many historical issues still need to be redressed, and where literacy rates and educational standards need to be improved.

**S.15(I)** – this exception allows 'freedom of panorama' which lawfully allows the public to take photographs of public sculptures, monuments, etc. The current law does not allow this, but most people are not aware that these structures may be copyrighted. This section will be very helpful to journalists, newspapers, photographers, platforms like Wikipedia and Wikimedia, as well as researchers, historians and the general public.

**S.19B** – this exception enables interoperability which will enhance access to information but also the development of open content, e.g. open access, open science, open educational resources, open licensing, etc. In South Africa, the public and private sectors have many programmes with the EU and other countries relating to open science and open learning resources. These and many other programmes will benefit from this exception and others in the Bill.

**S.19C** – this section gives museums and galleries exceptions for the first time. This is very positive as they are important custodians of our cultural heritage, as well as research resources for South Africans and foreign researchers, historians, artists, etc. It also expands the current limited exceptions into the digital space for libraries and archives. Tertiary and public libraries have huge financial challenges but try their best to provide up-to-date and relevant resources to users and producers of information.

I fully support all these exceptions which align with copyright laws in many developed countries around the globe. Currently many library projects have been stopped, or material is inaccessible, or there are gaps in the collection, due to our restrictive copyright laws. The Bill expands on the very limited exceptions for libraries and archives in the current law and enables them to carry out their statutory mandates, especially in the digital space. Digitisation and preservation of library and archival collections, including legal deposit, special and historical collections, etc., will enhance accessibility and enable format-shifting, conversions from old to new technologies, and ongoing digital curation of our historical records and cultural heritage for future generations. These provisions will also mitigate against damage, theft, loss, fire, floods, etc. of collections in libraries, archives and museums.

You are aware of the two terrible fires in your Province that cause immeasurable damage to our cultural heritage in the last two years. Had our Bill been in place for some years and digitisation was permitted at the time, the terrible fire damage and loss of the African Studies Collection and other cultural heritage and special collections at the UCT Library in April 2021 could have been mitigated. It is still unknown what records and cultural heritage were destroyed in the fire at the House of Assembly on 1 January 2022, but no doubt some losses will be directly due to the material not having been digitised, and the originals having been damaged or burnt.

**S.19D** – this section is welcomed and has helpful exceptions for people with disabilities to access information via accessible formats, so they can access teaching and learning materials, newspapers, forms, official notices, draft Bills, and other documents, in fact, any information, at the same time as non-disabled persons. These exceptions will help end discriminatory practices against people with disabilities. South Africa will finally be able to accede to the 2013 Marrakesh Treaty for the Visually Impaired, so that accessible formats can be exchanged across borders. Publishers and authors will also benefit, as this Section opens new opportunities for the production and sale of accessible formats through commercial channels.

**S.22A** - I am happy that orphan works have been considered in the Bill, although the process is cumbersome. I believe, though, that use of such works, especially those that are anonymous, have pseudonyms, have defunct rightsholders, or are needed at short notice, are more likely to be allowed under fair use in Section 12A.

**S.39B** – The inclusion of a clause to address unenforceable contracts from the EIFL Model copyright law, is very helpful for many stakeholders. Singapore and the EU have similar provisions in their copyright laws. Creators, authors, librarians and others very often are pressured into signing unfair contracts where lawful rights are overridden by third parties, e.g. producers, publishers, commissioning agents, etc. This Section should curb such practices in the future. It will also enable open licensing and public domain deposits by authors and creators, should they wish to do this.

See: blog articles and resources about the Copyright Amendment Bill – see: <https://scholarlyhorizons.co.za/blog/> and <https://scholarlyhorizons.co.za/resources/copyright/> and see a historical record

relating to the Bill, under Tab: SA Proposed Amendments (with many subtabs) at:  
[https://libguides.wits.ac.za/copyright\\_and\\_related\\_issues](https://libguides.wits.ac.za/copyright_and_related_issues)

**S.39(1)-(2)** – This section (and point 3.36 of the Memorandum to the Bill) refers to the impractical ‘Intellectual Property Laws Amendment Act 28 of 2013’ (IPLA Act) (*not yet operational after 10 years!*). There is a more practical and appropriate piece of legislation which is outside copyright law. It is the “sui generis” ‘Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019’, that addresses IK and TK but conflicts with the IPLA Act.

I recommend that any reference to the IP Laws Amendment Act 28 of 2013 should be removed from the Bill if it is likely to affect the passage or enactment of the Bill. Alternatively, reference could be made to the ‘current IK legislation’ rather than mentioning the actual piece of legislation.

### **Conclusionary remarks**

I trust that facts, common sense, and the interests of ALL South Africans will prevail in the consideration of this Bill. Through this Bill, our copyright law takes a quantum leap into the 21st century and anticipates changes for SA to embrace the Fourth Industrial Revolution. It would be a sad day if this Bill was ‘derailed’, due to misunderstanding, disinformation, political tactics, and/or pressure from multinationals that favour huge profits over the critical needs of education, research, libraries, archives, etc., particularly in the context of a developing country in transformation.

I have confidence that the Western Cape Legislature will treat this Bill as extremely urgent, and that it will be passed soon.

I would like to be considered for an oral presentation in the public hearings in Cape Town on 7 March 2023. However, I am aware that the NCoP Select Committee on Trade and Industry, ... may also be holding hearings on that day, so there may be an overlap for stakeholders wanting to present at both hearings. I await to hear from you in this regard.

Thank you  
Sincerely  
Denise Nicholson

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