

Submission to parliament on Copyright Amendment Bill

July 2017

1. This submission is made by the Centre for Health Innovation and the Public Interest (CHIP) – a South African voluntary association. The primary drafter of this submission is Mr Marcus Low of CHIP. Mr Low is a legally blind South African citizen who was involved with advocacy and negotiations relating to the conclusion of the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled. This submission is mainly concerned with the domestication of this treaty in South Africa.
2. This submission is endorsed by SECTION27 (as confirmed in a letter submitted to the committee by SECTION27 under separate cover).
3. We welcome this opportunity to submit comments to members of parliament on the Copyright Amendment Bill.

4. This submission has the following sections:

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Background on the book famine and the 1978 Copyright Act

5. Act No. of 1978 (the 1978 Copyright Act prohibits blind and visually impaired people from using copyright material by reading and using it as other people may through prohibiting blind and visually impaired people from reformatting and otherwise changing copyright material so that they can read or use it.

6. For example, to make a printed book legible to a blind person typically involves either making an audio recording of a person with normal eyesight reading the book or electronic scanning of the text so that it can then be printed in braille or read using text-to-speech computer software. Under the 1978 Copyright Act the making of such accessible format copies (recordings, braille books, or electronic books) is only lawful if permission has been obtained from the copyright holder. Blind and other visually impaired people thus face two additional obstacles in reading the books that others can read – the time and expense of producing accessible format copies and the requirement to obtain the permission of the copyright holder. If a copyright holder denies permission to read the book then blind people have no legal recourse.
7. This situation is further aggravated by the 1978 Copyright Act's prohibition on sharing of accessible copies of works. The Act prohibits the sharing of accessible format copies of printed works both inside South Africa and across national borders without the permission of the copyright holder. This latter prohibition on imports often results in the expensive and time-consuming process of making accessible format copies of printed books having to be repeated multiple times for the same book in different countries. Thus even when a book has been reformatted for blind people in one country precious resources must be used to reformat it again in South Africa.
8. The end result, is that blind people only have access to a very small fraction of the books that people with normal eyesight have access to.
9. The World Blind Union describes this state of affairs as the “book famine”. They have calculated that globally blind people typically have access to only between 1% and 7% of the books people with normal eyesight have access to (with the 7% figure reflecting developing countries). It is thus unlikely that the figure for South Africa would be higher than 7%.
10. In some other countries the effect of copyright prohibitions on reformatting and copying books is reduced to some extent by exceptions to and limitations on copyright. The 1978 Copyright Act does contain a few exceptions to its prohibitions on copying and reformatting of books and other works but it does not contain exceptions for blind and visually impaired South Africans.

11. Even so, South Africa is not alone in having laws such as the 1978 Copyright Act, that discriminate against blind people as described above. This is why the World Blind Union and others advocated (successfully) for a solution to the book famine in international law in the form of the Marrakesh Treaty (see Marrakesh Treaty section below). Since its conclusion in 2013 the Marrakesh Treaty has been ratified in 29 countries – with many more countries in the process of ratification.

The state's relevant obligations in terms of the Constitution of South Africa

12. Section 7 (2) of the Bill of Rights in the Constitution of South Africa 1996 (Bill of Rights) stipulates: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”
13. According to Section 9(3) of the Bill of Rights: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” (emphasis added)
14. The copyright legislation currently in force, the 1978 Copyright Act, pre-dates the Bill of Rights by more than a decade, was passed during the apartheid era, and thus, unsurprisingly, fails to uphold the values of the Bill of Rights. These shortcomings in the Act constitutes discrimination against people with disabilities as contemplated in section 9.3 of the Constitution.
15. Section 9(2) of the Bill of Rights makes it clear that the state must intervene to limit such discrimination: “To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”
16. While Section 9(2) establishes that such legislative reform “may” be undertaken, Section 9(3) cited above and 16(1.b.) establishes that the state is obliged to undertake such legal reform in certain cases.
17. Section 16(1.b) of the Bill of Rights states “Everyone has the right to freedom of expression which includes: Freedom to receive or impart information.” At present the right of blind and

visually impaired people to receive information is violated by the lack of appropriate limitations and exceptions in South African copyright law.

18. Section 29 (1) of the Bill of Rights states “Everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible”. In the case of *Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198* the Supreme Court of Appeal ruled that the right to education includes the right to appropriate learning materials. At present the right of blind and visually impaired people to a basic education and to realisation of further education is violated by the lack of appropriate limitations and exceptions in South African copyright law.

The state’s relevant obligations in terms of the United Nations Convention on the Rights of Persons with Disabilities

19. According to section 38(1) (b) of the Bill of Rights “When interpreting the Bill of Rights, a court, tribunal or forum..must consider international law”. International human rights law as well as international Copyright and trade treaties are immediately relevant to the constitutionality of the Copyright Act.
20. South Africa has both signed and ratified the United Nations Convention on the Rights of People with Disabilities (UNCRPD) in 2007.
21. Article 4 of the CRPD states, “Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, parties undertake: (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention; (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.”
22. Article 30.3 of the CRPD states that “Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

23. Read together, Article 4 and 30.3 of the CRPD places a clear obligation on the state to take legislative measures to address discrimination against persons with disabilities, which necessarily includes reform of discriminatory laws such as the 1978 Copyright Act.
24. The injunction in section 30.3 that such steps should be “in accordance with international law” provides no obstacle. The World Intellectual Property Organisation negotiated a treaty which enables signatory countries to import and export books formatted so that they can be read by the blind and other visually impaired people. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the Marrakesh Treaty) provides an elegant means by which South Africa can reform South African copyright law. By definition this reform is in accordance with international law.
25. Thus, together, the Constitution and the UNCRPD places an urgent obligation on the state to enact law reform that will enable greater access to printed works for people with disabilities.
26. For the sake of clarity it is worth noting that even if the Marrakesh Treaty had not been agreed, and even if there were no other issues with the 1978 Copyright Act that needed to be addressed, there would still be a constitutional imperative to amend the 1978 Copyright Act as a matter of urgency.

Relevant international copyright law considerations

27. Both the Berne Treaty and the WTO TRIPS agreement allows various copyright exceptions and limitations.
28. Exceptions and limitations for blind, visually impaired and other print disabled persons have been explicitly permitted by international copyright law for decades. The 1978 Copyright Act could have contained suitable provisions when it was passed. To the extent that it discriminates against blind and visually impaired persons the 1978 Copyright Act should have been amended shortly after the 1996 Constitution since it is discriminatory and unconstitutional.

29. Prior to the conclusion of the Marrakesh Treaty a number of countries had copyright exceptions for blind, visually impaired and other print disabled persons in their domestic laws. The so-called “Chafee Amendment” of 1996 in the United States is a well-known example.
30. However, the content and scope of such limitations and exceptions differed between countries and there was no international framework to guide export of accessible format books between countries. This situation has changed with the change to international copyright law in the form of the Marrakesh Treaty.

The Marrakesh Treaty

31. On June 28 2013 the member states of the World Intellectual Property Organization (WIPO) concluded and agreed the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled.
32. The treaty came into force on September 30, 2016, 39 months after its conclusion on June 28, 2013, and three months after the 20th ratification was deposited with WIPO in June 2016.
33. As of July 2017 29 countries were party to the treaty. Of these only 5 are African: Botswana, Liberia, Malawi, Mali and Tunisia.
34. The Marrakesh Treaty aims to bring an end to what the World Blind Union (WBU) describes as the “book famine”. According to the WBU, “currently only some 1-7per cent of the world’s published books ever make it into accessible formats.” The WBU argues that this is “partly due to access barriers in copyright law.”
35. The treaty aims to end the “book famine” by providing for exceptions and limitations to copyright law with the express intention of facilitating increased access to published works for blind and visually impaired people. Most notably, these exceptions (a) allow for the making of accessible format copies of published works without the permission of the copyright holder and (b) allows for the cross-border exchange of accessible format copies of printed works.

36. The Marrakesh Treaty is expressly designed to address the need of blind and visually impaired people to access information through appropriate copyright exceptions and limitations. As such, ratification of the Marrakesh Treaty simultaneously with the reform of the 1978 Copyright Act will enable South Africa to comply with the requirements of the Bill of Rights discussed above.
37. Additionally, ratification of the Marrakesh Treaty will insulate new exceptions for the blind and visually impaired in the 1978 Copyright Act in line with the Marrakesh Treaty from challenges under the World Trade Organisation's Trade-Related Aspects of Intellectual Property Agreement (WTO-TRIPS) since compliance with Marrakesh is according to international law in accordance with the limitations and exceptions provisions of WTO-TRIPS.

The Copyright Amendment Bill

38. For more than a decade civil society organisations have engaged the Department of Trade and Industry, urging the department to amend the 1978 Copyright so that it does not unconstitutionally discriminate against blind and visually impaired persons.
39. The Copyright Amendment Bill [B 13—2017] contains an exception that authorises reformatting of books so that blind and visually impaired persons can read books in section 19D discussed in the next section.
40. There are other proposed amendments in the Bill which are welcome, such as the provision in 12B that the first transfer of a copy of a work exhausts the rights of importation and distribution. Welcome as these provisions are they are no substitute for a specific amendment.
41. There are other proposed amendments which are irrelevant to the book famine. Some of these have apparently been introduced to enable compliance with other treaties. We note that nothing in international law requires a country to ratify or accede to an earlier treaty before ratifying or acceding to a later treaty. Acceding to the Marrakesh Treaty is

thus not dependent in any way on South Africa's stance towards any other unratified treaties.

42. It is urgent that the Copyright Act be amended to address discrimination against blind and visually impaired persons. Thus should any issues with the other provisions of the Bill lead to delay of the Bill we urge the committee to nevertheless proceed with processing those sections of the bill aimed at ensuring access to published works for people with disabilities (Section 19D and the newly introduced definitions of "persons with disabilities" and "accessible work"). If necessary these provisions should be passed in a separate Bill.

Comment on section 19D of the bill

43. Section 19D "General exceptions regarding protection of copyright work for persons with disability" of the bill elegantly provides for copyright exceptions and limitations as envisaged in the Marrakesh Treaty and as required (explained in earlier sections) by the Constitution and South Africa's obligations in terms of the UNCRPD.
44. Section 19D(1) of the bill provides for the making of accessible copies of works without first obtaining the permission of the copyright holder, providing that certain conditions are met. These conditions, set out in subsections (a), (b) and (c) provide reasonable and sufficient safeguards against abuse of this copyright exception.
45. As such, section 19D(1) will allow blind people and visually impaired persons to access more books, more easily, and more quickly by dramatically streamlining the making of accessible format books. At the same time, it provides sufficient safeguards to protect copyright holders against abuse. We submit that the current formulation achieves a fair balance between the rights of people with disabilities and the private interests of holders of copyright.
46. While section 19D(1) is concerned with the making of accessible format copies of works, section 19D(3) is concerned with how accessible format copies may be shared. This is of

critical importance since it reduces the need for duplication of work. For example, rather than a normal printed book having to undergo the labour-intensive process of scanning and quality control ten times for making accessible copies for ten different blind people, this provision provides for the process to be conducted only once and for the resultant work to then be shared amongst all ten blind people.

47. A critical element of section 19D(3) is that it allows for the cross-border sharing of accessible format books (as expressly provided for in the Marrakesh Treaty). The enactment of this provision and accession to the Marrakesh Treaty would almost instantaneously allow blind people in South Africa to benefit from large libraries of accessible format copies of printed works held in other countries – thus massively increasing access to education and cultural works. A secondary benefit of this cross-border exchange of accessible format works is that it would free up domestic resources to produce more accessible format copies of local works as opposed to repeating work that has already been done in other countries.

48. We consider the condition in section 19D(3) that such sharing may only be done on a non-profit basis to be reasonable and to strike a fair and sufficient balance between the rights of people with disabilities and the private interests of holders of copyright.

49. One technical issue with 19D of the Bill is that it refers to author where it should refer to the owner of the copyright. While the author is usually the first owner of copyright, although not in all cases, the author may assign copyright to subsequent owners. In order for 19D to be clear it should read as follows:

“General exceptions regarding protection of copyright work for persons with disability

19D. (1) Any person may, without the authorisation of the [author] owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

- (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;
 - (b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and
 - (c) the activity under this subsection must be undertaken on a non-profit basis.
- (2) (a) A person with a disability to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the [author] owner of the copyright work, reproduce the work for personal use.”

50. In particular, we recommend against the insertion of so-called “commercial availability” clauses or any mention of “commercial availability”. The vast majority of countries do not include such clauses. But we note with concern that Malawi has recently included such a clause in their copyright law. . In essence, such clauses require that accessible format copies may only be made once the person planning to make the accessible format copy has established that no accessible format copies are on the market. Thus someone planning to make an accessible copy must make a full survey of all commercially available versions of that work and for each an assessment must be made as to whether that particular commercially available work is sufficiently accessible for the needs of the specific person who needs access to the work. The result of “commercially available” clauses is significant transactions costs , administrative burdens, and uncertainty when making accessible format copies of works. In this way such clauses can make the copyright exception unworkable and defeat the fundamental purpose of ensuring that people with disabilities have access to more works.

Recommendations

51. In summary, and for the reasons described above, we recommend as follows:

- a. That when weighing up and balancing different interests and points of view relating to section 19D of the bill, the members of the committee considers the extreme seriousness of the book famine being experienced by blind people, as well as the state's obligations in terms of the Constitution and the UNCRPD.
- b. That section 19D of the bill should be passed in the form set out above.
- c. That due to the urgent moral and Constitutional prerogative, the processing and enactment of section 19D and the definitions of 'accessible format copy' and 'person with a disability' of the Bill should proceed speedily, even if the enactment of other provisions in the bill are delayed.
- d. That, should the addition of so-called "commercial availability" clauses to section 19D of the bill be proposed, that such additions should be rejected as unnecessary and unworkable.

52. We thank you for the opportunity to comment.

53. For any further questions on this submission please contact Marcus Low at low.marcus@gmail.com or on 082 962 8309.