Abstract: Copyright law in South Africa was modelled on British copyright law but updated and enacted by the apartheid regime in 1978. Limitations and exceptions for libraries, archives, education and research are scant and have never been updated. The legislation makes no provision for people with disabilities and in view of its age, does not address the digital environment. This chapter provides a historical timeline of attempts since 1998 to amend the Copyright Act No. 98 of 1978. Advocates for fair and more balanced copyright laws have pursued a strong campaign for change within the framework of access to information as a human right. As a result of opposing perspectives and polarisation amongst stakeholders, the copyright reform process has been a long and contentious road, without a successful outcome to date. A progressive Copyright Amendment Bill was approved by the South African Parliament in March 2019. Legal action was taken by Blind SA; international pressure was applied by the US Trade Representative; representations came from the European Commission; and actions were taken by international and local rightsholder groups and collective management organisations. The President of South Africa referred the Bill back to Parliament in June 2020 for review of some sections on the grounds of constitutionality. Parliament made various recommendations in 2021 and called for more public comments and online public hearings, which were recorded during August 2021. A further call for comments on new amendments to the Bill was made in December 2021. The Bill was retagged as a Section 76 Bill for processing through the provincial legislatures, resulting in further delays. It is hoped the review will be expedited and produce a positive and efficient outcome for all stakeholders.

Keywords: Copyright – South Africa; Human rights; Intellectual property – South Africa; Libraries – South Africa


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An Intellectual Property Policy and Legislative Framework

Development of the copyright system should be driven as far as possible by strong doctrinal and empirical evidence (Berkman Center for Internet and Society 2012). “Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights” (Hargreaves 2011, 8). Well-drafted policy drives investigation, implementation and application of fair, balanced and appropriate laws, particularly in the context of a developing country. It is therefore incumbent on any government and in particular the South African government to develop and frame its intellectual property policies within the context of international intellectual property agreements and its constitutional and human rights commitments, in the context of a digital world and a fourth industrial revolution (Schwab 2016).

Information Access is a Human Right

To contextualise the need for copyright reform in South Africa, it is important to examine copyright and access issues within the framework of human rights, as well as international and regional copyright trends and legal commitments. Access to information is critical to human existence, development and quality of life. It is fundamentally important, accepted as a basic human right internationally, and entrenched in the Universal Declaration of Human Rights, to which South Africa is committed as a signatory, with Article 19 stating “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. Considerable change has occurred in relation to human rights.

The history of the concept of “human rights” reveals its historical evolution and political and social use from the Second World War until the Universal Declaration of Human Rights (1948). Since then the international instruments protecting human rights have broadened and developed, including at the regional level. The universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms are universally accepted (Griffo and Ortali 2007, 15).
Access to information is the lifeline for everyone to be able to function, exercise and enjoy human rights and dignity, and to participate fully in an equal and democratic society. “Human rights protection ... is not just linked to respect for individual freedoms but also to the social and cultural construction of inclusive societies, in which prejudices and barriers are eliminated and all can live without social, legal or practical stigma” (Griffo and Ortali 2007, 51). The community needs open and direct access to information to operate effectively within society.

**Need for Balance in Copyright Law**

Rightowners strive for more protection and control of their works, whilst users of information endeavour to exercise the access to information rights afforded to them by constitutional and other national legislation. Ayoubi claimed that “the main clash of human rights and intellectual property in general and copyright in particular manifest itself in the inconsistencies between the moral and material interests of the author being the owner of the copyright and the benefits of members of public as they claim their rights in enjoying the results of cultural literary and scientific progress of the society as a whole” (2011, 9). Polarisation of stakeholders is inevitable and copyright reform is a highly contested process in most countries with rightsholders seeking to enhance protection and users pursuing wider access. South Africa has seen strong evidence of such conflict amongst stakeholders, especially since the current *Copyright Act* No. 98 of 1978 (hereinafter the *Copyright Act*) lacks balance.

The *Berne Convention* recognises the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and information access. Other international declarations, treaties and research reports, including the previously mentioned Universal Declaration of Human Rights and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognise the significance of both sides of the equation. The emphasis on balance is also entrenched in the preambles of the World Intellectual Property Organization’s (WIPO) *Copyright Treaty* (WCT) and WIPO *Performances and Phonograms Treaty* (WPPT) which deals with the rights of performers and producers. There are other directives, reports, statements and proposals which recognise the need to maintain a balance between the rights of authors and the larger public interest, particularly for education, research and access to information. They include:

The legitimate interests of users are primarily safeguarded by mechanisms known as copyright limitations and exceptions (L&Es) to the exclusive rights of authors and creators which help to ensure a balance between the rights of authors and creators and the just demands of information users.

Most experts in intellectual property advocate a balance in copyright, yet the constant pressure from rightsholders to strengthen copyright protection with additional measures such as restrictive licensing and digital rights management systems (DRMs) with technological protection measures (TPMs) in the digital environment makes the hope of true balance in the copyright system ever unattainable. It is important that balance be restored and maintained. Sirinelli acknowledges the importance of balance:
To speak of the information society does not mean considering works of the mind as common merchandise and only envisaging copyright and related rights in the future in the light of consumers’ interests alone. Intellectual property rights have always and everywhere provided a balance among conflicting interests: authors, creation auxiliaries, investors or disseminators, the public, enriching mankind’s heritage .... This balance must be maintained (1999, 40).

Sirinelli claims that the historical, sociological and philosophical traditions of each country have influenced the way balance in copyright has been sought. He suggests there is a need for a new structure within the WIPO framework that will endeavour to find common solutions or attenuate the differences to achieve an acceptable balance. By inference, an international instrument may be a solution, but he, unfortunately, provides no suggestions or directions on how it could be achieved. Hugenholtz and Okediji note that:

Both in national and international forums copyright is traditionally conceived as a property right, as are its structure and its discourse. Exclusive rights are the rule, while freedoms are framed as “exceptions” that must be narrowly construed, especially in the authors’ rights tradition that dominates large parts of the world. Due to copyright law’s systemic pro right-holder bias, as reflected in the property model, achieving a proper balance between protecting the interests of copyright holders and the interests of users will always be an uphill struggle for user groups (2012, 28).

Boyle suggests that:

As intellectual property protection has expanded exponentially in breadth, scope and term over the last 30 years, the fundamental principle of balance between the public domain and the realm of property seems to have been lost. The potential costs of this loss of balance are just as worrisome as the costs of piracy that so dominate discussion in international policy making. Where the traditional idea of intellectual property wound a thin layer of rights around a carefully preserved public domain, the contemporary attitude seems to be that the public domain should be eliminated wherever possible (2004, 2).

The importance of L&Es to ensure users of information have equal statutory rights to authors cannot be over-emphasised. Limitations and exceptions are the catalysts which bring about balance and practical resolution to protect access to information for the public good. Over and above the general L&Es required by users of information, additional and specific L&Es are required to provide equal access to persons with disabilities.

In furthering the public interest, there is frequently tension between those that control copyright of the works and those who want to use the works for research, educational, recreational and other purposes. It is only by consciously
and appropriately finding the correct balance that “a copyright regime will maximise both the creation and communication of new knowledge and ideas” (IFLA 2004, 2). Pilch stresses that the balancing mechanisms in copyright are L&Es:

Limitations and exceptions benefit all members of society. If they did not exist, copyright holders would have a monopoly over all uses except reading. In the case of visually impaired persons, even the act of reading is compromised if there are not sufficient exceptions in national copyright laws to support the creation and distribution of accessible and affordable versions of works (2009, 5).

Okediji posits that:

Without the appropriate balance between protection and access, the international copyright system not only impoverishes the global public but, ultimately, it undermines its own ability to sustain and reward the creative enterprise for the long-term future (2006, xii).

Pistorius is of the opinion that implementation of the WCT and anti-circumvention provisions in developed countries has disturbed the copyright balance. She raises issues about technological protection measures which have the potential to lock up information indefinitely and cautions that:

Content owners have gained the right to control both access to and use of copyright works in digital form through technological means. Encryption and the use of various digital locks effectively protect copyright owners against the piracy of their digital works. However, technology is blind and cannot distinguish between fair use for the purpose of research or private study and unfair use for commercial gain: all forms of unauthorised uses are barred. This has upset the delicate equilibrium between private and public rights (2006, 18/27).

Copyright Reform in South Africa

The Current Copyright Act

Copyright law in South Africa had its genesis in the British copyright model (University of The Witwatersrand 2021a; Nicholson 2015). The current Copyright Act No. 98 of 1978 (as amended) was drafted during the apartheid era. It is outdated and inadequate in the digital environment. The exceptions for education, research, libraries and archives have not been changed since 1978. The Act has no provisions for libraries and archives, galleries and museums, people with disabilities, or any digital uses. It has limited provisions for education and research.
through fair dealing in Section 12. In Section 13 Regulations, there are limited exceptions solely for copying for classroom use and for preservation and inter-library loans for libraries and archives. Since the Copyright Act pre-dates digital copying, the type of copying permitted in the Act applies to photocopies only.

The process of copyright reform in South Africa has been a long and difficult road. Although the Act has been amended several times over its history for other purposes, it has not been updated in forty-three years to address the needs of library and information services, research and education, and people with disabilities. It provides strict protection of copyright owners’ rights but little consideration for users’ rights.

**Reform Commences**

In August 1998, the Department of Trade and Industry (DTI)\(^2\) embarked on a process to amend the 1978 Copyright Act. Proposals drafted by the Publishers’ Association of South Africa (PASA) were submitted to the DTI for consideration in early 1998. PASA positions on copyright have been clearly stated on their archived website for 2000. On 7 August 1998, draft regulations to amend Section 13 of the Copyright Act were published for public comment by DTI in the South African Government Gazette No. 19112. In addition to endorsement from PASA, the proposals were supported by the Dramatic, Artistic and Literary Rights Organisation (DALRO), and international bodies such as the International Publishers’ Association (IPA) and the International Federation of Reprographic Rights Organisations (IFRRO), which has continued to take action on copyright issues in South Africa.

The proposals were more restrictive than the existing Copyright Act, had negative implications for education, research, libraries and archives, and contained inadequate exceptions for persons with disabilities. There were undesirable implications for information users. Strong objections were raised by the library and educational sectors who had been excluded from the legislative process. A Copyright Task Team was mandated by the South African Vice-Chancellors’ Association (SAUVCA) and the Committee of Technikon Principals (CTP), representing all publicly-financed universities and technikons, to challenge the proposed amendments. SAUVCA and CTP later merged to become Higher Education South Africa (HESA) now known as Universities South Africa (USAf). Nicholson was appointed as convenor of the Task Team. After a strong campaign against the proposed amendments by the educational and library sectors, the Minister of Trade

\(^2\) The Department of Trade and Industry merged with the Economic Development Department in 2019 to become the Department of Trade, Industry and Competition.
and Industry, Alex Erwin at the time, acknowledged that the drafting process had lacked transparency and broader consultation. He agreed to recommence the process and include all stakeholders, confirming the intention with a DTI multi-stakeholder workshop in Pretoria in March 1999. Stakeholders were invited to present brief position papers at the workshop. Nicholson presented on behalf of the library and educational sectors, as well as for people with disabilities.

With pro bono legal assistance for about eighteen months from a well-respected firm of intellectual property lawyers, John & Kernick, now part of Adams and Adams, the largest law firm in the southern hemisphere, the SAUVCA/CTP Task Team formally challenged the proposed amendments. Via a detailed questionnaire, the Task Team gathered comments from libraries, educational institutions, non-governmental organisations, and government departments in South Africa, and presented a consolidated submission to the DTI in May 1999. The Task Team sought support from the opposition political party, the Democratic Party at the time to help stop the amendments being passed. As a result of the interventions, the DTI withdrew the draft regulations, despite strong opposition from PASA, DALRO and their international partners who attempted unsuccessfully to have them reinstated.

Proposed Amendments 2000 and 2002

On May 10, 2000, a second round of proposals to amend the Copyright Act and other IP laws was published for public consultation in the South African Government Gazette Notice 1805, No. 21156. This time, SAUVCA and the CTP mandated the establishment of an Electronic Copyright Task Team led by Nicholson to challenge the proposed amendments. The new proposals were once again restrictive towards education and research, libraries and archives, contained inadequate provisions for people with disabilities, and failed to address the digital environment. They also failed to provide the necessary balance between rightsholders and the public to enable and ensure the free flow of information for the good of society. As a result of a successful campaign by the educational and library sectors, this time engaging the Minister of Education, Dr Kadar Asmal, the DTI withdrew all the restrictive proposals except for the proposed amendments to Section 9 of the Copyright Act. Section 9 relates to sound recordings and changes suggested reintroduced needle time royalties for musicians. The proposed amendments were included in the Copyright Amendment Act No. 9 of 2002.

In October 2001, in response to the various actions and to apply pressure to the DTI, IFRRO, PASA and DALRO presented the following resolution at the IFRRO Annual General Meeting:
1. *Urges* the South African Government to pass proposed amendments in the South African Copyright Act that were published for comment in the Government Gazette of 10 May 2000


**Legislative Impasse**

As a result of the unsuccessful attempt to prevent the withdrawal of the proposals, with the exception of Section 9, from the Bill, rightsholder groups and *collective management organisations* also known as collecting societies in South Africa reacted by directing angry communications to the convenor of the SAUVCA/CTP Electronic Copyright Task Team. Both SAUVCA and the CTP decided to set up intellectual property committees in 2001 to formalise copyright advocacy activities. Committee members communicated in writing and met personally with PASA in Cape Town to try to find a compromise regarding L&Es for the educational and library sectors. Because of different and opposing perspectives, views and needs, discussions were not successful. Polarisation between supporters and opponents of more balanced copyright laws was clearly entrenched in South Africa and resulted in an impasse in the legislative process which lasted a decade.

**Related Legislative Endeavours**

While progress on copyright reform slowed to a halt, other legislative initiatives continued, including the *Electronic Communications and Transactions Act*, Collecting Society Regulations, and the development of a Free Trade Agreement with the US.

**Electronic Communications and Transactions (ECT) Act, 2002**

Although South Africa is a signatory to the WCT, it has not yet ratified it and treaty provisions have not been incorporated into the *Copyright Act*. To address the problem of cybercrime, and to ensure compliance with certain clauses of the WCT, the *Electronic Communications and Transaction Act* No. 25 (hereinafter the *ECT Act*) was promulgated in 2002 (Michalsons 2008). The Act includes strict provisions for technological protection measures and prohibition of circumvention
measures, without any exceptions for legitimate library or educational purposes, or for persons with disabilities. The *ECT Act*, particularly Article 86 on anti-circumvention protection measures, has no L&Es for fair use of digital works. It overrides existing legitimate uses of copyright works, for example, fair dealing, and exacerbates the access issues experienced by people with disabilities. It also prevents browsing electronic resources for library purposes, accessing ebooks via text-to-speech software by blind persons, and accessing public domain material when locked up with copyright works. Visser raised the issue about inflexibility and lack of exceptions in the *ECT Act* as follows:

In South Africa, the prohibition on the circumvention of TPMs that control access to copyright works is complete – not only the circumvention of access control is proscribed, but also trafficking in devices that are ‘designed primarily’ for circumventing access control. And the prohibition is absolute – there are no exceptions; no technical exception (such as for reverse engineering, encryption research, and security testing); nor an exception in favour of research or education. It is incomprehensible that South Africa, a developing country, should opt for a system of protecting TPMs that is far more destructive of research and education than the systems adopted in the United States and Europe (2006, 62).

Visser also expressed concern about:

The fact that possession of the physical object that contains the copyright work (e.g. a CD-ROM) no longer guarantees access to the work can have serious implications for the possessor of such object. Even a lawful possessor will not be able to access a copyright work shielded behind a TPM without an access key, or without circumventing the copyright work (2006, 60–61).

Once the copyright term has expired, works fall into the public domain. Visser pointed out that:

Works in the public domain protected by technological protection measures are rendered inaccessible, as any circumvention (even circumvention of technological protection applied to works in the public domain) will result in a contravention of the prohibition. This can, of course, result in a digital lock-up of works in the public domain (2006, 62).

Visser stressed that “where developing countries do adopt protection of TPMs against circumvention, appropriate L&Es in favour of research and education should be enacted at the same time” (2006, 61). Conroy in her attempt to provide solutions to problems with the *Copyright Act*, recommended:

... that the prohibition should strike only at the act of circumvention but should not concern itself with the devices used to perform such circumvention. Not only would this be in line with traditional copyright law, but it obviates the problem of legitimate uses being unable
to use the circumvention devices they require to exercise their privileges under a copyright exception (2006, 273).

Intellectual property experts cautioned that it was highly likely that the *ECT Act* could override the L&Es in the *Copyright Act*. Schönwetter, Ncube and Chetty assert that:

The ECT Act arguably prohibits the circumvention of technological protection measures, even to enable uses of copyright-protected materials that are expressly permitted under the Copyright Act (e.g. fair dealing, or accessing works in the public domain). It is recommended that this conflict between the Copyright Act and the ECT Act is addressed, for instance, by declaring the copyright exceptions and limitations contained in the Copyright Act as valid defences to any claims based upon the ECT Act (2009, 8).

Despite recommendations made to the government by various stakeholders and researchers for review of the *ECT Act*, the legislation remains unchanged and problematic.

**Collecting Society Regulations**

In 2006, the DTI introduced and enacted the *Collecting Society Regulations* which set out the conditions under which a collecting society may be established and operate under the *Copyright Act*, as provided for in Section 39 read together with section 9A of the *Copyright Act*, and with Section 5(3) of the *Performers’ Protection Act*, 1967 (Act I1 of 1967) (SAMRO n.d.).

**Proposed United States/Southern African Customs Union Free Trade Agreement**

South Africa is a signatory to the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) which came into effect on 1 January 1995. To date, TRIPS is the most comprehensive multilateral agreement in intellectual property. Its key features for Member States are setting minimum standards, enforcement of intellectual property rights (IPRs) and dispute prevention and settlement (TRIPS Agreement 2019). TRIPS affords least developed countries (LDCs) an extended transition period to protect intellectual property domestically in view of their economic, financial and administrative constraints, and the need for flexibility and the creation of a viable technological base.
From 2003 until 2006, the US Trade Representative (USTR) was involved in negotiations with the Southern African Customs Union (SACU) countries, regarding a Free Trade Agreement (FTA) with a TRIPS-Plus IP Chapter. SACU is the world’s oldest customs union and includes Botswana, Lesotho, Namibia, South Africa and Swaziland (renamed Eswatini in 2018). The FTA document was secret, and its contents were not made known to the public.

Four of the five SACU countries are developing countries, and the fifth, Eswatini, is a least developed country. The TRIPS-Plus IP Chapter in the US-SACU FTA required signatories to expand their obligations beyond TRIPS, and to adopt a stricter intellectual property regime including an extended 20-year copyright term in line with that of the US. Nicholson recommended that African countries, including South Africa, should “strongly resist pressure to adopt TRIPs-Plus or other proposals that strike at the very heart of their economic and development policies” (2006, 321).

Much has been written about the impact of TRIPS-Plus clauses (for example, Reid 2015). The potential negative impact of the Australia-United States Free Trade Agreement (AUSFTA) on education and research had been well-documented by intellectual property experts and researchers in Australia (for example McBurnie and Ziguras 2004; Rimmer 2006). Nicholson wrote to Xavier Carim, the Chief Negotiator of the South African Foreign Trade Office at the time, alerting him to the relevant documents. The UK Department for International Development (later replaced by the Foreign, Commonwealth & Development Office) and USAID heard about developments and contacted Nicholson, offering to place the concerns on their trade agenda with the SA DTI. Nicholson was invited to meet with Mr. Carim to discuss the TRIPs-Plus Chapter in the US FTAs. Key concerns and relevant documents were provided and the negative implications for research, education, library, and information services, and for persons with disabilities, in South Africa and other SACU countries highlighted. In particular, the extension of the copyright term for a further twenty years was considered not to be in the best interests of South Africa or other SACU countries that were all net importers of intellectual property.

Apart from the TRIPs-Plus IP Chapter in the US-SACU FTA, there were other controversial clauses which were not acceptable to the SACU countries. In late 2006, the SACU countries declined to sign the FTA and negotiations with the US Trade Representative were suspended. The outcome was positive. The provisions of TRIPs-Plus would have exacerbated the existing information access and copyright problems experienced by the library and educational sectors, and people with disabilities.
Issues Concerning Copyright and Disabilities

South Africa is a member of the African Group at WIPO and was a strong supporter of the World Blind Union (WBU) Treaty (Proposals for Blind, Visually Impaired and Other Reading Disabled Persons (TVI), as well as the Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives – Proposal by the African Group, presented at the Standing Committee on Copyright and Related Rights Twenty-Second Session, Geneva, June 15 to 24, 2011 (WIPO SCCR 2011). The DTI and the SA Department of Arts and Culture (DAC) co-hosted stakeholder seminars in Cape Town in 2004, Port Elizabeth in 2005 and Pretoria in 2010 and 2011, in an attempt to address access and related issues affecting people with visual impairment. Despite the consultative efforts, the DTI made no attempt at that stage to update the Copyright Act.

As a result of the ongoing access problems experienced by its members and failure by the DTI to remedy the situation, the South African National Council for the Blind (SANCB) established a Copyright Coalition in 2009. The coalition included Council members, the South African Library for the Blind, Tape Aids for the Blind, Pioneer Printers, Blind SA, the South African Disability Alliance (SADA), African Copyright and Access to Knowledge Alliance, representatives from the Universities of The Witwatersrand, Cape Town, Johannesburg and Kwa-zulu-Natal, and several other institutions and intellectual property academics. Nicholson was an active member of the Coalition. The Coalition arranged various workshops and meetings with the DTI to sensitisre the Government and other stakeholders about the urgency of addressing the access needs of blind and visually impaired communities.

A Copyright Treaty Consultative Workshop to formulate the South Africa position on the WBU’s TVI was organised by the DTI on September 13, 2010. The result of the workshop was a stakeholders’ memorandum The South African Position Regarding Copyright Limitations and Exceptions, which supported a two–phased treaty at WIPO, namely, Phase One being the TVI as proposed by Brazil, Ecuador and Paraguay at WIPO (WIPO SCCR 2009), and Phase Two, which included the African Group’s proposal already mentioned. The Summary of the position document reads as follows:

Although some countries have provision for conversions into alternative formats, their copyright laws are territorial and do not address the broader international situation of cross-border exchange of information. Phase 1 of the Two-phased Treaty would address these issues. The main beneficiaries of Phase 1 will be blind, visually impaired and reading disabled persons living in developing countries, as they will have far greater access to works currently only available in high-income countries.
However, even developed countries will benefit enormously from the liberalisation of access to foreign collections of accessible works and from the expansion of rights for blind, visually impaired and reading-disabled persons, e.g. in areas where access has been restricted by technological protection measures or restrictive licensing or contracts. Moreover, given the importance of economies of scale, everyone will benefit from the larger global market for accessible works. This will also create new markets for publishers and job opportunities for business persons interested in commercially producing works in in alternative formats (South African National Council for the Blind 2011).

For years, the South African government has ignored the trends in many other countries to address the needs of persons with disabilities in copyright law, or to ratify the 2013 Marrakesh Treaty for the Visually Impaired. The current Copyright Act is arguably in conflict with the South African Constitution and obligations in terms of various international human rights conventions, including the Convention and Protocol of the UN Convention on the Rights of Persons with Disabilities (CRPD) ratified in 2007 by South Africa especially with regard to Articles 9, 21 and 24. The Copyright Act perpetuates contradictions with other domestic laws that promote and protect access to information and education, as well as the right to equality, and freedom of participation and expression. It is also in conflict with laws that govern library and information services. The South African National Library for the Blind Act 91 of 1998 and the National Library of South Africa Act 92 of 1998 mandate libraries to provide optimal access to information for their users. Yet, the lack of appropriate copyright L&Es effectively renders the mandates ineffectual, particularly in the digital environment, and restricts services to persons with disabilities.

**Breaking the Impasse on Copyright Reform**

The legislative impasse seemed never-ending. Copyright reform was long overdue. Stakeholders were getting impatient. Musicians, in particular, started making demands for urgent reform. The government realised it had to initiate copyright amendments without further delay. Finally, in 2009, DTI embarked on a new process of copyright reform to bring it in line with the progressive laws of many developed countries and to meet the needs of the 21st century. The genesis of the Copyright Amendment Bill emerged from a number of influential copyright reviews.

DTI commissioned the University of Pretoria (UP) to develop studies and positions on copyright law, including fair use. At the same time, the African Copyright and Access to Knowledge Project (ACA2K), was probing the relationship between
national copyright environments and access to learning materials in eight African countries, including South Africa. The ACA2K research showed that the customary practices, processes and behaviour that prevail in a copyright environment are often even more important and revealing than the laws themselves. It seems the stricter the law, the more people tend to infringe copyright to ensure information access, albeit unlawful. The ACA2K researchers “found that copyright laws are, at best, unreliable access-enablers, regardless of the fact that copyright law is founded on the notion of the need to balance the economic interests of rights-holders with the access rights of users” (Armstrong et al. 2020, 36). The ACA2K work demonstrated that appropriate and adequate copyright flexibilities are fundamental for access to knowledge, and thus for human and social development (ACA2K Output Repository n.d.).

In 2010, the South African Open Copyright Review produced research findings and recommendations for fair use and appropriate L&Es for the library and educational sectors (Rens et al. 2010). From 2010 to 2014, the DTI embarked on an anti-piracy multimedia campaign where events were organised in various provinces to raise awareness about copyright issues. In 2011, the DTI established a Copyright Review Commission which was led by Judge Ian Farlam. Its mandate was to address artists’ concerns that royalties were not being properly distributed to the rightful owners of copyright by collecting societies (South Africa Copyright Review Commission 2011). The DTI also commissioned a WIPO study: The Economic Contribution of Copyright-Based Industries in South Africa (Pouris and Inglesi-Lotz 2011). The study makes reference to Google’s statement: “The existence of a general fair use exception that can adapt to new technical environments may explain why the search engines first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement” (Gowers Review of Intellectual Property 2006, 62). Pouris and Inglesi-Lotz concluded:

The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review the Copyright Act to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary (2011, 53).
In 2011, at a multi-stakeholder conference, DTI informed stakeholders that it was preparing an intellectual property policy framework document which would be circulated for public comment later that year and provide the basis for updating the current intellectual property laws.

At the request of DTI, the SANCB Coalition submitted recommendations to amend the Copyright Act to the DTI Standing Advisory Committee on IP Rights. The recommendations included L&Es for people with disabilities, and introduction of new exceptions for, among other things:

- Transformative works
- Educational purposes including distance learning and elearning
- Translation into local languages
- Re-engineering of software
- Open licensing, open standards, and open formats
- Digital archiving
- Orphan works
- Parallel importation
- Backup copies for digital consumer products and most importantly,
- Fair use.

Also sought was explicit protection of the public domain and standard terms of copyright protection.³

As noted at the beginning of this chapter, copyright reform must be framed within the ambit of international obligations and national policies and legislation. Many of the treaties, proposals, conventions, and other sources have already been mentioned, ranging from the Berne Convention to the South African Constitution. They provided guidance, information, content and the framework for proposals to amend the Copyright Act and included WIPO studies on L&Es for libraries, archives and educational establishments (Crews 2017); the Beijing Treaty on Audiovisual Performances; IFLA’s Treaty Proposal on Limitations and Exceptions for Libraries and Archives (IFLA 2013); South Africa’s National Development Plan 2030; IFLA’s Cape Town Declaration (IFLA 2015). Relevant goals from the United Nations Sustainable Development Goals were examined along with EIFL’s Draft Law on Copyright (EIFL 2016) and appropriate clauses from progressive copyright regimes, particularly the US and other countries with fair use and related exceptions. DTI prepared a draft national intellectual property policy in 2013 and sought input and comment (South Africa Department of Trade and Industry 2013) as well as a regulatory impact statement (Pistorius, Bryer, Morar, and Jackson 2014).

³ Personal communication with the author.
After nine years of policy development, two different draft policies and various rounds of public consultation, Cabinet, the highest decision-making body of government, approved the new Intellectual Property Policy (Phase 1) in May 2018. There was high level input into the IP policy, with contributions from the United Nations Conference on Trade and Development (UNCTAD) and the UN Development Program (UNDP), as well as the UN Office of the High Commissioner for Human Rights (OHCHR) (Daniels 2018).

The Saga Continues

Unfortunately, the delays in the introduction of the reforms were not over. Things begin to sour. In 2013, the President assented to the *Intellectual Property Laws Amendment Act*, to incorporate Indigenous knowledge works as an extra category of protected works in the current *Copyright Act* and other intellectual property legislation, for example, trademarks, patents and designs, but the Act has not yet been promulgated. The legislation was controversial, and there was consensus amongst the stakeholders that protection of indigenous works should not be included in copyright legislation but addressed in separate *sui generis* legislation. As a result, a *sui generis* Bill was submitted to Parliament in 2015 by the Department of Science and Technology (DST). Originally called the Indigenous Knowledge Systems (IKS) Bill, it was amended and changed to the *Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill* in 2016 and passed as Act 6 of 2019. This legislation is more appropriately drafted to deal with Indigenous knowledge issues, but due to conflicting provisions with the Intellectual Property Laws Amendment Act, the future of both pieces of legislation is unclear. The latter Act has not yet been implemented as Regulations still need to be drafted.

In his 2014 budget speech, the DTI Minister, Rob Davies, announced proposed legislative changes, including the *Copyright Act*.

*Copyright Act*: The existing intellectual property law regime requires a shift in order to take into account the trends, and developments, in the copyright environment, and address key challenges that have been raised by artists. The Copyright Review Commission which was headed by Judge Ian Farlam made important recommendations, which will improve access to education, regulate collecting societies effectively, and facilitate fair and speedy payment of royalties to rightful owners. We will propose amendments to the Copyright Act to bring an end to the plight of artists who continue to die as paupers. In this Bill, we will also propose measures to regulate fair use, and fair contract terms, given the challenges with contract negotiations within this industry (Davies 2014).
Library representatives wrote to the Minister’s office respectfully requesting that L&Es for libraries and archives, education and research and for people with disabilities be included in the planned amendments. They stressed the urgency for such exceptions in view of the lengthy legislative impasse and existing copyright barriers affecting information access, education, research, and library and information services, and preventing conversion of copyright works into accessible formats for people with disabilities. In response to the request, the DTI’s copyright and legal team met with the representatives in August 2014 to discuss the way forward.

**The Copyright Amendment Bill**

In 2015, DTI held public consultations and published a Draft Copyright Amendment Bill for public comment with a multi-stakeholder conference in Boksburg, Gauteng, after which, the deadline for submissions was extended to September 2015. Many stakeholders made submissions, some supporting the Bill and others strongly opposing it. Various stakeholder workshops were organised in some provinces for further discussion and debate and the Bill was revised during 2016, with DTI engaging in socioeconomic impact assessments with regard to the Bill. The revised Copyright Amendment Bill 2017 and the Performers’ Protection Amendment Bill 2016, which are intrinsically-linked, were introduced into Parliament through the Portfolio Committee on Trade and Industry (Nicholson 2019).

The Portfolio Committee deliberated on the Bill at regular meetings and stakeholders were given many opportunities to submit comments on revised versions, and sometimes, on specific new or amended clauses. During early August 2017, public hearings were held in Parliament with international and local stakeholders presenting their views on the Bill. Nicholson presented on behalf of the library and educational sectors on August 4, 2017. The Chairperson of the Committee invited presenters to submit more information. A small technical team of IP academics from the University of Cape Town was appointed by the Committee to assist with the redrafting of the Bill, based on submissions received. Although there was no parliamentary requirement, the Bill was sent to the National House of Traditional Leaders for further consultation.

In October 2017, the African National Congress Legal Research Group convened a multi-stakeholder meeting in Johannesburg, which was live-streamed for the public’s benefit and provided another opportunity to debate the contents of the Bill. In February 2018, the Portfolio Committee appointed a small technical team of IP experts, representing rightsholders and collecting societies, to help align the Bill with the Constitution and relevant policies, and Michele Woods, Director of the WIPO Copyright Law Division was consulted. In May 2018, the Committee
proposed to split the Bill into two phases, namely, Phase 1 to address the needs of musicians only, as recommended by the Farlam Commission in 2011, and Phase 2 at a later stage, to consider exceptions for the library and educational sectors and people with disabilities. Since Phase 2 would undoubtedly cause another long delay in the reform process, the library and educational sectors objected to the splitting of the Bill. Their representatives wrote to the Chairperson of the Portfolio Committee and met with the DTI’s Deputy Director General and legal team expressing concern and stressing the urgency of the long-awaited L&Es for the library and education sectors and requesting that the Bill be reformed holistically and not in two phases. After deliberation, the Portfolio Committee agreed not to split the Bill and to continue working with the original consolidated Bill that was tabled for discussion and approval.

Approval of the Copyright Amendment Bill

The Portfolio Committee approved the Bill (version 5) on 15 November 2018 and the National Assembly approved it on 5 December 2018. It was referred to the Select Committee of the National Council of Provinces (NCOP) for discussion on 13 February 2019. This Committee called for final submissions from stakeholders by 22 February, 2019 and met again on 27 February and 6 March to address the submissions. On 20 March 2019, the Select Committee approved the Bill. On 28 March 2019, members of the full NCOP voted and finally passed the Bill.

The Bill was forwarded to the President of South Africa to act in terms of Section 79 of the Constitution. Section 79(1) reads as follows: “The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration”.

Sidebar – South Africa Commits to WIPO Treaties

It was noted earlier in this chapter that South Africa had not acceded to various WIPO treaties. By signing a treaty, a Member State of WIPO expresses the intention to comply with a treaty, but an expression of intent is not binding. It is only when a State accedes or ratifies a treaty that it becomes officially binding. Section 231 (2) of the South African Constitution determines the process for approval of international agreements. DTI made a presentation on March 26, 2019, to the Select Committee on Trade and International Relations and stated that accession to three international treaties, the Beijing Treaty on Audiovisual Performances,
the WIPO Performances and Phonographs Treaty and the WIPO Copyright Treaty, would ensure:

– keeping pace with technological developments
– protection for rightsholders in the digital environment
– new technological methods of exploiting copyright works
– strengthening of the position of performers; producers and authors in local and other markets, and
– access to copyright works specifically by those most vulnerable (South Africa. Department of Trade and Industry and Competition 2019).

Agreement was reached on acceding to the treaties.

Polarisation and Strong Opposition to the Copyright Amendment Bill

The Copyright Amendment Bill is progressive, forward-looking, and goes a long way to redress omissions and imbalances in the current Copyright Act for the benefit of all stakeholders. It aligns with progressive copyright laws in developed countries. Despite this, there has been a concerted effort by certain stakeholders to derail the Bill. In early 2018, rightsholder groups and collective management organisations (known as collecting societies in South Africa) formed the Coalition for Effective Copyright, now called the Copyright Coalition of South Africa, specifically to oppose the Bill. They have received support from international publishing and entertainment conglomerates who wish to maintain the status quo in South Africa, a developing country and net importer of intellectual property. The Coalition and its intellectual property legal advisors adopted an ongoing strategy to discredit the Bill through newspaper and blog articles, radio and television interviews, petitions and workshops to encourage stakeholders to oppose the Bill (Copyright Coalition 2019; Dean 2021a; Dean 2021b; Gilbert 2015; Karjiker 2015).

To counter opposition and to inform the public about the benefits of the Bill, a diverse group of creators, artists, musicians and other stakeholders established ReCreate SA on May 8, 2018. ReCreate SA’s mission is to help creators by expanding their ability to earn from, own and create copyright-protected works and has made information available on the Bill.

During 2019, the President was put under immense pressure from the US Trade Representative (USTR), which threatened to review its preferential trade agreements with South Africa if the Bill were passed. South Africa’s Generalized System of Preferences (GSP) eligibility could be withdrawn, causing dire economic consequences. The USTR called for submissions and held public hearings
in Washington DC on January 31, 2020, to persuade President Ramaphosa to refer the Bill back to Parliament for review. The University of The Witwatersrand Lib-Guide on Copyright includes a section: Copyright and Related Issues: USTR GSP Trade Threats re: Bill (University of The Witwatersrand 2021b).

The European Commission became involved in opposition to the Bill. Questions regarding the involvement were raised about the intervention in South African copyright reform on behalf of international rightsholders in the European Parliament. The response from the European Parliament included the following:

The Commission fully supports the commendable efforts undertaken by the South African Government to revise its current copyright regime with a view to modernising it and bringing it in line with the international copyright conventions, including the Marrakesh Treaty, the WIPO [World Intellectual Property Organization] Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Commission hopes that this reform will give a boost to the South African creative community and cultural industries, enhancing access to knowledge, culture and research for the society as the whole.

Since 2015, Commission services have participated in the public consultations on the Draft Copyright Amendment Bill, by submitting their comments on the proposed amendments, drawing also on and in full consistency with the EU Directive on copyright in the digital single market [Directive (EU) 2019/790 of 17.4.2019, OJ L 130, 17.5.2019, p.92]. ...

the EU Ambassador to the Republic of South Africa to the Director-General in the Office of the South African President reiterated some of the points expressed in the course of the public consultations ....

The Commission also heard the views of various stakeholders and experts on the Draft Bill ...including organisations representing audiovisual producers, collecting societies of authors and composers book publishers as well authors’ and publishers’ reproduction rights organisations. (European Parliament 2020)

The European Commission process was secretive, involved only stakeholders representing rightsholders and failed to consult with organisations representing libraries, archives, museums and galleries, education or research, people with disabilities, or others who strongly supported the Copyright Amendment Bill.

The Next Stage – Copyright Amendment Bill Returned for Parliamentary Review

More than one year passed and the President had not assented to the Bill, nor had he sent it back to Parliament. Blind SA instituted legal proceedings in the Constitutional Court against President Ramaphosa in May 2020 to force the issue (Blind
The President reacted by referring the Bill back to Parliament for review on the grounds of constitutional concerns (South African Government 2020). Surprisingly, all the L&Es for education and research, and libraries and archives, museums and galleries, were referred back for review, despite their inclusion in the copyright laws of many countries around the world. The President’s referral states along with other reservations that the Bill is “likely to be declared unconstitutional in terms of Section 25(1) of the Constitution and the Three-Step test binding South Africa under international law” (Ramaphosa 2020, 10). Inappropriate tagging or classification of the Bill was also cited along with a need for the Bill to be approved by provincial legislatures. In July 2020, letters of concern about the situation were sent to the South African Parliament by IFLA, the International Council of Archives, the African Library and Information Association, the Library and Information Association of South Africa, the Committee of Higher Education Libraries of South Africa, and BlindSA. Other organisations in support of the Bill undertook to raise their concerns during the Parliamentary review process. IFLA issued a press release with a statement by Gerald Leitner, the General Secretary:

It is disappointing to see that learners, researchers and creators in South Africa will need to wait even longer for an already long-overdue reform, and particularly so given that the issues raised in the President’s statement have already been extensively discussed. ... I hope that the South African Parliament will now stay true to its desire to support education, innovation, creation and development, and move rapidly to pass a law that will provide a model for the continent and the world (IFLA 2020).

In October 2020, the National Council for Library and Information Services (NCLIS), a statutory advisory body to the Minister of Sports, Arts and Culture, Nathi Mthethwa, communicated its grave concern to the Minister about the turn of events. NCLIS reminded the Minister that until the Copyright Amendment Bill is enacted, ratification of the Marrakesh Treaty for Visually Impaired people will continue to be delayed, subjecting people with disabilities to an ongoing book famine. In addition, some of Phase 2 amendments of the Third Cultural Amendments Bill of 2008, including the National Library of South Africa Act, the Legal Deposit Act and eight other legislative pieces related to cultural matters administered by the Department of Sports, Arts and Culture are impacted.

The Portfolio Committee on Trade and Industry in Parliament met three times to discuss the way forward and agreed that the Bill would be retagged or reclassified for provincial approval as sought by the President despite advice to the contrary from Chambers, Sandton provided to Recreate. It was also agreed that the fair use provisions would be opened for more public consultations. During November 2021, the Portfolio Committee on Trade and Industry met several times to deliberate on the Bill. In July 2021, stakeholders were invited to comment on the specific clauses
under review and to state whether the Bill complied or not with international treaties. On 11 and 12 August 2021, online public hearings were held by Parliament for stakeholders who had made written submissions. In November and December 2021, the Portfolio Committee on Trade and Industry discussed the written submissions and public hearings and made some decisions concerning deletions removing duplication in the Bill and including additional amendments which would need authorisation from the House of Assembly to be advertised for public comments. Subsequently, a call was made in early December 2021 for public submissions on new amendments to the Bill with a deadline of January 28, 2022, for comments.

Parliament received more than fifty submissions from stakeholders. The educational, research, library and other sectors, which supported the approved 2017 version of the Bill, strongly opposed the new amendments in their submissions in January 2022. The proposed amendments are overly restrictive and even prohibitive and arguably unconstitutional in some sections. It is unfortunate that the 2017 version of the Bill, which was fair and balanced, and provided for fair use and very helpful exceptions for education and academic activities, libraries, archives, museums and galleries and persons with disabilities, has essentially been overridden by impractical, unfair, and regressive proposals. If the Copyright Amendment Bill (version December 2021) is adopted in its current form, it will risk failing in a key policy objective: “to ensure access to information for research, education, libraries and archives and developmental goals” (EIFL 2022).

In May 2022, Parliament and the Department of Trade and Industry reviewed the submissions made by stakeholders in January 2022 and have recommended that some of the problematic proposals be removed or amended. It is now up to the Portfolio Committee on Trade and Industry through the National Assembly to approve or reject these recommendations before the Bill proceeds to the National Council of Provinces.

Once approved by the Portfolio Committee on Trade and Industry, the Bill will proceed to the National Council of Provinces (NCoP) for deliberation and will then be forwarded to the nine Provincial Legislatures for further deliberation and voting. A further call for public comments could arise during its passage through the Provincial legislatures.

South Africa’s hopes for an updated and progressive Copyright Act have once again been delayed. When the Bill is finally approved and passed by Parliament, it will return to the President for assent. Thereafter, draft regulations will be published by DTI for public comment to enable the amended Act to be implemented. Although regulations follow a shorter process than a Bill, the copyright reform process will still take a long time before it is completed. Barriers to information access, education and research, particularly for people with disabilities, will continue.
Copyright Law and COVID-19

The COVID-19 pandemic in 2020 not only harmed the economy, education, health, lives and livelihoods of millions of South Africans, but also highlighted the omissions, inadequacies and restrictions in the current legislation that negatively affect or prevent access to information and educational resources, and hamper knowledge-sharing and the provision of relevant teaching and research materials, particularly in the digital environment.

Like other counties in the world, South Africa went under strict lockdown conditions due to the pandemic in March 2020. With level five restrictions, all libraries, archives and museums, educational institutions and businesses were closed at short notice. Print materials, multimedia and other works in library and related collections became inaccessible. Educational institutions at primary, secondary and tertiary level had no way of providing courses or teaching material unless they moved to online platforms immediately. Students were forced to leave their textbooks when they were swiftly evacuated from university residences. Educators and librarians provided course and other study materials, where they could, via password-protected elearning platforms, resulting in unforeseen expenditure on technology and equipment, data, training, software, and other related necessities, as well as unplanned-for copyright fees and countless difficulties for educators, librarians and users. Materials were unavailable digitally (EIFL 2020).

The current Copyright Act does not address the digital environment and its inadequacies became even more apparent in the COVID-19 lockdown. Educators and librarians have done their best to provide study materials under exceedingly difficult circumstances. Inadequate copyright L&Es and restrictive licences, especially relating to databases and ebooks, have prevented or limited what can and cannot be used, shared, converted, or uploaded to elearning platforms. Even institutions with blanket copyright licences with collective management organisations had to find additional funding for separate transactional licences to use additional or extra portions from copyright materials, as print copies were inaccessible due to library closures. Public libraries that, as a matter of course, promote authors’ works by reading books to school children were forced to apply for permission and/or pay copyright fees to read books on online platforms, or to use alternative works for this important library function. A handful of South African publishers and some international publishers made concessions for the duration of the lockdown to open content usually locked behind paywalls. Unfortunately, in many instances the concessions were discipline-specific or country-specific, and not as helpful to South African educational institutions or libraries as originally expected (Nicholson 2020).
Conclusion

The ongoing delays in copyright reform in South Africa are seriously affecting information access, the provision of relevant and up-to-date materials for education, research and innovation, and the conversion of material into accessible formats for people with disabilities. It is crucial that Parliament address the constitutional concerns raised by the President expeditiously, astutely and transparently, so that the Bill can finally be assented to and enacted for the benefit of all South Africans. Failure to resolve the matter is hampering the work of libraries, archives and other information services that need an up-to-date and appropriate Copyright Act to enable them to conduct their statutory-mandated functions. Without amendments to the Copyright Act, South Africa will find it difficult to engage and compete in the digital space, especially as the demands of online teaching and learning, as well as research, publishing and innovation evolve within the ever-changing framework of the Fourth Industrial Revolution. Had the Bill been signed by the President in 2019 and enacted promptly, its L&Es would have been exceptionally helpful for educators, librarians, students, researchers, authors and creators, and people with disabilities during the COVID-19 lockdown. Although the pandemic protocols have eased, the challenges experienced in the digital space by educational institutions and libraries will persist until the Copyright Act is finally amended. Access delayed is access denied.

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