

Submission on the 2015 South Africa Copyright Amendment Bill

Submission by Mr Marcus Low

Submitted by e-mail on September 15 2015 to Attn Meshendn Padayachy, Director General
of the Department of Trade and Industry

1. I am a legally blind South African citizen. I have a direct interest in the introduction of appropriate copyright exceptions and limitations in South African law to allow for the progressive realisation of the rights of disabled people.
2. In my primary, secondary and tertiary education and in my professional life I have faced very significant obstacles in obtaining books required for study or work in accessible formats. My situation is not unique. Blind and visually impaired people in South Africa, as in most of the world, struggle to get books in accessible formats. The World Blind Union rightly describes the current state of affairs where only between 1% and 7% of books are available in accessible formats as a “book famine”.
3. In June 2013 I acted as Senior Advisor to the Civil Society Coalition (CSC) at the World Intellectual Property Organisation’s (WIPO) Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. I delivered two statements to the Diplomatic Conference on behalf of the CSC. The Diplomatic Conference concluded with the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (the Marrakesh Treaty).

4. The Marrakesh Treaty aims to bring an end to the “book famine”. It does this 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.
5. South Africa supported the creation of the Marrakesh treaty in the World Intellectual Property Organisation as a member of the African Group.
6. On 19 June 2013 at the Diplomatic Conference in Marrakesh the then Deputy Minister for Women, Children and Persons with Disabilities, Minister Ipeleng Bogopane-Zulu, stated: “This is not a treaty being negotiated between the developed and developing worlds, as often portrayed, but is essentially between governments protecting industry and governments protecting their citizens who are marginalised from accessing the products of industry. This treaty is about equality of opportunity for people who have to date been excluded and marginalised due to limitations placed on converting print for people requiring access to it in alternative media. This treaty is therefore about removing barriers to access and fighting discrimination...We would like to assure you of South Africa’s commitment to engage constructively within a human rights context on the treaty.”
7. This submission argues that the domestication of the Marrakesh Treaty in South Africa must proceed as proposed in the bill.
8. This submission is divided into four sections:
 - a. Obligations in terms of the Constitution of South Africa
 - b. Obligations in terms of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)
 - c. Copyright exceptions relating to blind and visually impaired people, (19D)
 - d. Conclusion and key recommendations

Obligations in terms of the Constitution of South Africa

9. Section 7 (2) of the Bill of Rights in the Constitution of South Africa requires: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”
10. 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.”
11. The copyright legislation currently in force, the 1978 Copyright Act, pre-dates the Bill of Rights by several decades, was passed during the apartheid era, and, unsurprisingly, fails to uphold the values of the Bill of Rights.
12. 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.
13. The 1978 Copyright Act fails to provide for exceptions and limitations to copyright in order to facilitate access to printed works for blind and visually impaired people so that blind and visually impaired people can enjoy the same rights to use printed works as other people.
14. Section 9(2) of the Bill of Rights makes it clear that the state may 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.”

15. While Section 9(2) establishes that such legislative reform may be undertaken, Section 9(3) cited above and 16(1.b.) and 32 establish that the state is obliged to undertake such legal reform in this case.
16. 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.”
17. At present the right of blind and visually impaired people to receive information is infringed upon by the lack of appropriate limitations and exceptions in South African copyright law.
18. Section 32 of the Bill of Rights states: “(1) Everyone has the right of access to— (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right,…”
19. The required legislation, the Promotion of Access to Information Act, however does not adequately protect the rights of blind and visually impaired people.
20. The Marrakesh Treaty is expressly design to address the need of blind and visually impaired people to access information through appropriate copyright exceptions and limitations.
21. Ratification of the Marrakesh Treaty will make reform of the 1978 Copyright Act so that it complies with the requirements of the Bill of Rights effective.
22. In light of the above, I urge that it must be explicitly stated in the preamble of the Bill that a key purpose of the bill is to help fulfil the state’s Constitutional obligations toward disabled people and to ensure the maximum fulfilment of the rights of disabled people in all matters relating to copyright.
23. Such explicit statements of the intent of the Bill are important since it will provide important guidance to courts who will in future have to interpret South Africa’s amended copyright law.

Obligations in terms of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)

24. South Africa both signed and ratified the CRPD in 2007.
25. Article 4 of the CRPD states as follows: “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;
26. 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.
27. Read together, Article 4 and 30.3 of the CRPD requires the immediate domestication of the Marrakesh Treaty.
28. In light of the above, I urge that it must be explicitly stated in the preamble of the Bill that a key purpose of the bill is to meet the state’s copyright-related obligations in terms of the United Nations Convention on the Rights of Persons with Disabilities.

Copyright exceptions relating to disabled people (19D)

29. I welcome the inclusion of section 22 in the draft bill which provides for the insertion of section 19D in the Copyright Act.
30. Section 19D will introduce copyright exceptions and limitations into South African law as provided for in the Marrakesh treaty.
31. Section 19D will pave the way for South Africa to ratify the Marrakesh treaty and for blind, partially sighted, and otherwise print handicapped people to benefit from the provisions of the treaty.
32. The proposed section 19D applies to all disabled people and not just blind and visually impaired people. In this the bill goes beyond the requirements of the Marrakesh Treaty by extending its benefits to people with other disabilities such as deafness.
33. The arguments made earlier in this submission relating to the state's Constitutional obligations and obligations in terms of the CRPD apply to all disabilities and not just blindness and visual impairment. It is thus correct that the benefits of section 19D are not limited to only blind and visually impaired people and that people who have other disabilities like deafness are not excluded from benefiting from the copyright exceptions and limitations introduced by section 19D.
34. However, there is some confusion created by the differing definitions of a person with a disability provided in the definitions section of the Bill and the definition provided in section 19D.5. In addition, the definition provided in the definitions section of the Bill is too narrow and excludes many disabilities – such as deafness.
 - a. In the definitions section the following definition is introduced: "person with a disability' means a person who is blind, has a visual impairment, a perceptual or reading disability which cannot be improved to give visual function substantially, equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability or is otherwise unable,

through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, regardless of any other disabilities;"

- b. By contrast, section 19D.5 states: "For the purposes of this section, a person with a disability means a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability."

35. I recommend that the definition of a disabled person in the definition section of the Bill be replaced by the following definition: "A person with a disability means a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability."

36. As it stands section 19D together with an appropriately reformulated definition in the definitions section of the Bill will take significant steps toward satisfying the state's obligations toward disabled people in terms of the Constitution of South Africa and the United Nations Convention on the Rights of Persons with Disabilities.

37. Section 19D is excellently drafted and captures all the essential elements of the Marrakesh Treaty. I urge that no substantive changes be made to it.

38. I specifically urge that no so-called "commercial availability" provisions be introduced into section 19D. The Marrakesh treaty allows countries the freedom to decide whether or not to include commercial availability provisions.

39. A commercial availability provision would undermine the intentions and effectiveness of section 19D in at least two ways:

- a. Books may at times be commercially available in some partially accessible formats, but not in the specific accessible formats required by a specific user. So, for example, some Kindle books have partial accessibility. However, the level of accessibility of Kindle books is in many cases not sufficient to allow for its full use in research and study by blind people – in such a case a commercial availability provision would leave a blind person with no option but to struggle with a partially accessible book. A commercial availability provision could thus prevent blind people from accessing texts in the ways that they need to.
- b. A commercial availability provision would introduce a substantial burden on disabled persons or persons acting on their behalf to establish whether books are available in appropriate accessible formats. Extensive searches would have to be done before any accessible copies are made as provided for in section 19D. In this way a commercial availability provision would have a chilling effect and limit the extent to which blind people could benefit from section 19D.

Conclusion and key recommendations

40. Section 19D of the Bill provides for legislative changes that will dramatically improve the access that disabled people have to information – and thereby to education and to the cultural life of society.

41. I therefor welcome the proposed introduction of Section 19D into the Copyright Act and I urge parliament to ensure that the currently proposed provisions in this section become law.

42. To recap, the following are the key recommendations of this submission:

- a. It must be explicitly stated in the preamble of the Bill that a key purpose of the bill is to help fulfil the state's Constitutional obligations toward disabled

people and to ensure the maximum fulfilment of the rights of disabled people in all matters relating to copyright.

- b. It must be explicitly stated in the preamble of the Bill that a key purpose of the bill is to meet the state's obligations in terms of the United Nations Convention on the Rights of Persons with Disabilities.
- c. The definition of a disabled person in the definition section of the Bill must be replaced by the following definition: "A person with a disability means a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability."
- d. The proposed section 19D must be maintained in its current form without any substantive changes to any of its provisions.
- e. No so-called "commercial availability" provisions must be introduced into section 19D.

43. I thank you again for the opportunity to provide comment on this important bill.

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