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Ms. Ainna Kaundu
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26 November 2021

Comments: Draft Copyright and Related Rights Protection Bill (14 September 2021)

Dear Ms Kaundu,

EIFL appreciated the opportunity to participate in the National Conference of stakeholders to review the Draft Copyright and Related Rights Protection Bill (14 September 2021) that took place on 18th November 2021.

We are pleased to submit our comments in writing with some additional comments to address issues raised during the discussion. These comments incorporate the suggestions made at the National Conference by Jonathan Band of the Library Copyright Alliance concerning text and data mining and fair dealing.

Our comments are in three parts as follows: 1. Brief general remarks for context. 2. Specific comments from the perspective of users in five key areas: duration of protection, education, libraries, fair dealing and persons with disabilities. 3. Suggestions for amendments to Sections 23, 24, 32 and reinstatement of a flexible fair use / fair dealing provision.

Please do not hesitate to ask if you have any questions. Should you wish to discuss any of the issues further, we would be glad to arrange an online meeting.

Yours sincerely

A handwritten signature in purple ink that reads 'Teresa Hackett' with a horizontal line underneath.

Teresa Hackett
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Draft Copyright and Related Rights Protection Bill (14 September 2021)

Part One

General Remarks for Context

The 1994 Copyright Act has no explicit provisions for libraries or persons with disabilities. The review is an opportunity to address this issue and to update the law so that library users and society at large can benefit from digital developments that are transforming library and information services around the world.

Copyright laws around the world are being modernized, and copyright exceptions adapted for the digital, online and cross-border environment.

For example, in Europe, the Digital Single Market Directive (2019) introduced mandatory exceptions for preservation of cultural heritage, digital teaching activities, text and data mining, and out-of-commerce works. The uses apply online and cross-border for the EU's 27 member states. It also protected the exceptions from contract terms and Technological Protection Measures (TPMs) that prevent the enjoyment of the exceptions.

In Singapore, a major new copyright law has been enacted (2021). The changes include new exceptions for pre-emptive library preservation, inter-library document supply, online educational uses, and text and data mining. The existing "fair use" exception has been strengthened. Key exceptions are protected from contract terms that restrict use of the exception.

Over the last two years, the COVID-19 pandemic has caused libraries around the world to shift their operations online to support education, research and local communities. It has brought into focus the challenges of compliance with copyright laws, and a heightened awareness of the importance of copyright exceptions especially for the online environment.

It is an opportune moment for Namibia to adopt a world-class copyright law that provides fair access for people to enjoy copyrighted works for education, innovation and personal development, while protecting the rights of creators and other rightsholders.

Embracing the digital environment

During the National Conference, the view was expressed that digital uses should be removed from certain exceptions e.g. private copying (Section 21), library exception (Section 24).

If the objective of the copyright review is truly to update the law for the digital environment - and the exclusive rights apply to digital content - the corresponding exceptions must also be updated to facilitate digital uses. Otherwise the law becomes unbalanced and doesn't serve whole sectors of society such as research and education. Indeed, it might not serve the copyright system as a whole that is meant to foster the encouragement of learning, and to promote the progress of science and knowledge.

Copyright exceptions will support national policy objectives to create an enabling environment for science and technology and quality basic education and teaching, referenced in the National Development Plan (NDP5). They will also support attainment of the Sustainable Development Goals (especially SDG4 Quality Education), and plans to develop technology-based community information and training services through public libraries across Namibia.

In particular, the COVID pandemic has highlighted the strong need for digital exceptions during lockdowns when library buildings were closed and people couldn't get access to library books. For example, in some countries a mechanism known as 'Controlled Digital Lending' (CDL) became a lifesaver for students and teachers during lockdown. CDL is a practice whereby libraries lend digital versions of print books on an 'owned-to-loaned basis' (with controls to prevent users from redistributing or copying the digitized version). During this time, the fact is that licences weren't an option. They either weren't available at all for the books in question, the CMO didn't have the requisite rights, or the licence couldn't be delivered on time. In the U.S., academic libraries engaged in CDL to provide students and faculty with access to books when the libraries were closed due to COVID.

If the copyright law is out of step with the digital environment and the reality of how people are using and sharing information, the risk is that the public loses respect for the law. We recommend that the new law embraces the reality of the digital environment for both the rights and the exceptions.

Part Two

Specific comments from the perspective of users in five key areas: duration of protection, education, libraries, fair dealing and persons with disabilities

We appreciate the inclusion of new exceptions for libraries, education and persons with disabilities in the Bill. Our comments will focus on practical issues to improve the utility of the provisions for users of the exceptions, and to increase their longevity into the future.

Section 17 Duration of copyright

EIFL supports the duration of protection in the Bill, that is life of the author plus 50 years. The reality is that works are often out-of-print or out-of-commerce long before the death of the author. A life plus 70 year term of protection would mean an additional 20 years for works by Namibian authors to become part of the public domain. It would increase transaction costs for education and libraries (that are often publicly funded), and it would delay the chance of a new lease of life for the work e.g. to be re-published, digitized, or built upon by the next generation of Namibian authors to create new or derivative works. It would certainly increase the problem of orphan works, where the copyright owner cannot be identified or located in order to obtain permission to use the work e.g. for a library to digitize a work and make it available.

While a longer term of protection might suit some countries that are net exporters of copyrighted material, it is not clear how it would benefit Namibia.

Section 23 Exception for educational purposes

We have three comments on Section 23.

First, Section 23 contains the obligation to seek, and negotiate, a licence before any copy can be made. In a classroom situation, where teaching and course material is needed in a timely manner, we are concerned at the unnecessary delays it would cause in using the exception. The proviso that the exception can be used, if the licence terms on offer are unreasonable, is of limited comfort because it places the burden on the teacher or educational institution of first having to

negotiate the licence, and then to decide what's reasonable and what's not. We suggest it's not something that a teacher in a classroom environment will take on, and it should be removed.

Second, the exception applies to published works only. However, all types of works, published and unpublished, are used in teaching, e.g., letters, diaries, manuscripts, photographs. The exception should apply to all types of works.

Third, the reproduction of articles and other short works is permissible only for face-to-face teaching, and not distance education. The COVID pandemic demonstrates the need for all exceptions relating to education to apply to online education.

Section 24 Exception for libraries, archives, museums and educational institutions

We have four comments on Section 24.

First, it is difficult to evaluate the utility of Section 24 because the number of copies permitted is to be "prescribed" at some point in the future. Instead, the provision should simply permit the number of copies necessary to achieve the permitted purpose.

Second, the obligation to negotiate a licence before a copy can be made for study or private research is problematic, as described in Section 23 above, and it should be removed.

Third, Section 24 does not permit a library to make a copy for a user to keep. Yet this is a common library activity, and permitted in copyright laws around the world e.g. U.S. (Section 108 (d) and (e)), Canada (Section 30.2), Singapore (Section 45). We believe that a library in Namibia should be permitted to transmit the copies to users in digital format.

Fourth, we agree with the Library Copyright Alliance that text and data mining should be not be subject to the same conditions as other library copies. As a practical matter, these conditions would render impossible any text and data mining in Namibia. Moreover, these conditions do not appear in the text and data mining exception in other recently updated laws, such as the EU and Singapore. Accordingly, we suggest adoption of a separate subsection addressing text and data mining.

Fair dealing

The current draft text (September 14, 2021) does not include the “fair use” provision introduced in draft Zero and retained in the March 2021 draft. Moreover, it does not even include the “fair dealing” provision in the existing Copyright Act. Although the current text contains helpful specific exceptions, the omission of a fair use or a fair dealing provision means that Namibian copyright law would be significantly less flexible than that of many countries at different stages of development.

Many jurisdictions around the world have a fair use exception, based on U.S. copyright law (17 USC 107) e.g. Bahamas, Korea, Israel, Liberia, Malaysia, Philippines, Sri Lanka, Taiwan. As mentioned earlier, Singapore is strengthening its “fair use” exception, introduced in 2004, in order to “create an even better environment conducive to the development of creative works, and to facilitate greater investment, research and development in the copyright industries in Singapore” (Singapore Copyright Review Report, 2019).

Fair use accommodates uses not foreseen when the law was developed. For example, during the COVID-19 pandemic, fair use provided vital support for remote teaching because it enabled the emergency provision of learning materials to teachers and students when educational institutions and libraries had to close their buildings during lockdowns.

A flexible exception also helps to keep the law up-to-date with new technology, and with new ways of learning and sharing. For legislators, the advantage is that law stays relevant for longer because it accommodates technologies that are rapidly changing. A good example is text and data mining (TDM), permitted in the U.S. under the fair use doctrine, while other countries have had to introduce amendments to their laws to catch-up with the TDM technology. It also accommodate uses not foreseen when the law was developed, such as lockdowns during a pandemic.

With respect to the question of legal uncertainty that was raised during the National Conference consultation, has the fair dealing provision in Section 15 of the 1994 Act created crippling uncertainty in Namibia? Of course not. Accordingly, a modest expansion of fair dealing would not precipitate unmanageable uncertainty either.

Section 32 Exception for persons with disabilities

We welcome implementation of Marrakesh Treaty provisions in Namibia. We have three comments on Section 32.

First, Section 32(1)(a) imposes a “commercially available” requirement i.e. the reproduction and distribution of accessible format copies is permitted only if the work is not reasonably available in an accessible format in Namibia. While in theory this may sound like a reasonable requirement, in practice determining whether a work is reasonably available in an accessible format is problematic. For a library, it would be difficult and in many cases impossible to ascertain with certainty if a work is available in a particular accessible format, especially in cross-border situations. Commercial availability is not a permanent state (how can a library check when a book has stopped being available in a given country?), forcing the institution to check for each book every time it is requested. Many libraries do not have the resources to undertake such checks on a case-by-case basis, and the library might decide to opt out of providing the service at all because of the unnecessary bureaucracy and additional costs that would be created, and because legal risk might be too high if the library makes the wrong decision.

Bookshare, the global online accessible library, has said it won't include new books in its system from countries that have a commercial availability requirement because it cannot afford to police these kinds of provisions that increase the transaction costs of accepting a book. Since cross-border sharing of accessible formats is a key benefit of Marrakesh, it would be a great pity if libraries in Namibia were hampered from sending or receiving material from other countries, or participating in such global networks.

Many other jurisdictions that have implemented Marrakesh, including the U.S. and the EU, do not have a commercial availability requirement. It is not required by the treaty, and it should be removed.

Second, in Section 33(1), an entity that provides services to people with print disabilities must apply to the Minister for designation as an authorized entity, and Minister must so recognize the entity before the entity can take advantage of the exception provided by section 32 and 33. This

will serve to delay the ability of libraries and other entities to participate in the Marrakesh framework. In most other countries that have implemented the treaty, the entity may self-certify that it is an authorized entity. Thus, section 33(1)(a) should be made into the definition of “authorized entity” in section 1, and the rest of section 33(1) should be deleted.

Third, we support the inclusion of other types of disabilities in the exception, such as people who are deaf, so that libraries to serve all their users equally regardless of their disability. The Marrakesh Treaty expressly provides that its provisions are without prejudice to other exceptions for persons with disabilities in national law (Article 12(2)).

With regard to the issue of sound recordings, we would like to clarify that the Marrakesh Treaty includes works in audio forms, such as audio-books (Agreed Statement concerning Article 2(a)), while audio-visual works, such as films, are outside the treaty’s scope. However, textual works embedded in audio-visual works e.g. educational DVDs, would appear to be covered.

Part Three

Clarifications and Suggested Amendments

Section 19 General provisions on exceptions and limitations

The first sentence of Section 19 states, “Sections 20 and 32 do not apply where the acts referred to are concerned with - ...” We presume that the statutory reference should be to Section 11 Economic Rights, not Section 20 (temporary reproduction) or Section 32 (accessible format copies).

Section 23 Exception for educational purposes

23. (1) The use of a work is permitted where -

(a) the use is by way of illustration of a work in publications, broadcasts or sound or visual recordings for teaching and educational purposes if -

~~(i) the work has lawfully been made available to the public;~~

(i) such use is compatible with fair dealing and does not exceed the extent justified by the purpose; and

(ii) the source name of the author, if the name appears in the source from which the quote is taken, is acknowledged;

(b) it includes the making available of the works referred to in paragraph (a) in digital networks, provided that access to the works is only available to enrolled pupils or students and their teachers and other educators; or

(c) the reproduction of published articles, other short works or short extracts of works is for ~~face-to-face~~ teaching in educational institutions, and the activities do not serve direct or indirect commercial gain, to the extent justified by the purpose,

but -

- (i) the reproduction of any particular work is an isolated act occurring, if repeated, on separate and unrelated occasions; ~~and~~
- (ii) not more than a single copy for each pupil or student and the teacher is made; ~~and~~
- ~~(iii) there is no licence from a reproduction rights collective management organisation available under which such reproduction can be made, unless the terms of the licence are so unreasonable such that the purpose of the exception is defeated.~~

Section 24 Exception for libraries, archives, museums and educational institutions

24. (1) The reproduction ~~by reprography or otherwise, of a prescribed number of copies of a work~~ by a library, an educational establishment, a museum or an archive whose activities do not serve direct or indirect economic or commercial advantage is permitted where the -

- (a) reproduction is for the purposes of ~~text or data mining~~, deposit in another library, educational establishment, museum or archive or public lending of tangible copies of the work;
 - (b) work was lawfully acquired by the library, educational establishment, museum or archive; and
 - (c) conditions specified in subsection (2) are fulfilled.
- (2) The conditions referred to in subsection (1) are fulfilled where -
- (a) the work reproduced is a published article, other short work or short extract of a work, but -
 - (i) the library, educational establishment, museum or archive is satisfied that the copy will be used solely for the purposes of study, scholarship or private research;
 - (ii) the act of reproduction is an isolated act occurring, if repeated, only on separate and unrelated occasions;

~~(iii) there is no licence available from a reproduction rights collective management organisation under which such copies can be made, unless the terms of the licence are so unreasonable such that the purpose of the exception is defeated; and~~

~~(ivii) the source of the work and the author are acknowledged as such.~~

- (b) the copy of the work is made in order to preserve and, if necessary, replace a copy, which has been lost, destroyed or rendered unusable: provided that -
- (i) it is not possible to obtain such a copy under reasonable conditions; and
 - (ii) the reproduction of any particular work is an isolated act occurring, if repeated, on separate and unrelated occasions.

~~(3) A library, an educational establishment, a museum or an archive whose activities do not serve direct or indirect economic or commercial advantage is permitted to make a copy of a work and provide it to a user if the copy becomes the property of a user;~~

~~(4) A library, an educational establishment, a museum, or an archive whose activities do not serve direct or indirect economic or commercial advantage is permitted to make copies of a work for purposes of text and data-mining.~~

Fair use / fair dealing

We recommend reinstating the fair use language as it appears in Draft Zero. Alternatively, Section 15(1) General exceptions regarding protection of literary and musical works in the Copyright Act 1994 should be reinstated with the addition of the word “including”:

(1) Copyright shall not be infringed by a fair dealing in the use of a literary or musical work,

including-

(a) for the purpose of research or private study by, or the personal or private use of, the person using the work;

(b) for the purpose of criticism or review of the work or of another work; or

(c) for the purpose of reporting on a current event-

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film,

provided, in the case of paragraphs (b) and (c) (i), the source and the name of the author, if that name appears on the work, are mentioned.

Section 32 Exception for persons with disabilities

32. (1) The reproduction in an accessible format, of a published work or work that has been made available to the public, by an authorised entity or a person acting on behalf of a beneficiary person, for use by a beneficiary person, and for distribution of the copies exclusively to beneficiary persons is permitted, provided that -

~~(a) the work is not reasonably available in an identical or accessible format in Namibia; and,~~

~~(b) the reproduction and distribution are made on a non-profit basis.~~

(2) A distribution contemplated in subsection (1) is also permitted in case the accessible format copies have been made outside Namibia provided that the conditions mentioned in subsection (1) have been fulfilled.

(3) The provisions of subsections (1) and (2) are subject to the obligation to acknowledge the source and the name of the author.

Authorised entities

33. ~~(1) The Minister, on application made to him or her in the prescribed manner, may by notice in the Gazette recognise~~ (1) An “authorized entity” is an entity -

~~(a)~~ whose main objectives are to provide education, institutional training, adaptive reading or information access needs to beneficiary persons on a non-profit basis, including a non-profit organisation or governmental agency that provides those services to beneficiary persons as one of its primary objectives or functions; and

~~(b) which meets any prescribed requirements,~~

~~as an authorised entity for purposes of this Act.~~

(2) In relation only to works or subject matter protected under this Act that are in the form of text, notation or related illustrations, whether published or otherwise made publicly available in any media, including works in audio-visual form, and subject to the conditions in subsection (2) -

- (a) an authorised entity is permitted, to make an accessible format copy of a work or subject matter, obtain from another authorised entity an accessible format copy, and supply that copy to a beneficiary person by any means, undertaking any intermediate steps to achieve those objectives, subject to the following conditions:
 - (i) the authorised entity has lawful access to a copy of the work or subject matter;
 - (ii) the work or subject matter is converted to an accessible format copy;
 - (iii) such accessible format copy is supplied exclusively to be used by a beneficiary person; and
 - (iv) the activity is undertaken on a non-profit basis;
- (b) a beneficiary person, or a person acting on behalf of a beneficiary person, is permitted to make and use an accessible format copy of a work or subject matter for personal use of a beneficiary person where beneficiary person or other person has lawful access to a copy of that work or subject matter.
- (c) an authorised entity is permitted to export by any means accessible format copies to another authorised entity and directly to a beneficiary person or to someone acting on behalf of the beneficiary person, subject to the following conditions:

- (i) the authorised entity or beneficiary person is located in a country party to
 -
 - (aa) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled of 27 June 2013; or
 - (bb) an international convention or agreement that regulates the right of access by blind or visually impaired persons to works or subject matter protected by this Act;
 - (ii) prior to exporting the accessible format copy the authorised entity did not know or have reasonable grounds to know that the accessible format copy would be used for anyone other than a beneficiary person;
 - (d) a beneficiary person, or someone acting on his or her behalf, or an authorised entity, is permitted to import an accessible format copy for the benefit of the beneficiary person.
- (3) Acts pursuant to subsection (2) are subject to the following conditions -
- (a) an accessible format copy must be used exclusively by beneficiary persons;
 - (b) when creating and supplying an accessible format copy the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible for beneficiary persons.