

COPYRIGHT AND THE PUBLIC INTEREST

PASA Position submitted to NCLIS

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1. Introduction

Publishers have always acknowledged that copyright must be fair and balanced to all concerned. This remains true for the digital environment. Copyright exceptions may be suitable under the changed circumstances. This paper sets out the general principles under which copyright exceptions in the public interest may be acceptable.

Education, research, preservation and access to works for disabled persons are crucial public policy areas. A vibrant and diverse book culture contributes to policy goals in this area. This is particularly true for the publishing industry sectors that directly serve libraries, educational institutions and research facilities.

Copyright laws must recognise the public interest both in support of the institutions that require content, and the commercial and non-commercial publishers that provide the needed services. They cannot therefore weigh the interests of publishers against the public interest but must balance the interests of partners who both serve the public good.

2. Basic Principles:

Need to update South African Copyright Act in line with International Treaties – WIPO COPYRIGHT TREATY 1996

For years PASA, and indeed the whole of the creative sector in South Africa have demanded that South Africa ratify and accede the WIPO Copyright Treaty (WCT) of 1996 and the WIPO Performance Protection Treaty (WPPT) of the same year.¹ Unless South Africa accedes to WCT, South African works may be used abroad with impunity and without compensation. The benefit of signing onto an agreement like the WCT provides immediate relief and benefits SA creators and publishers instantly, without any harm to SA users at all (foreign rightsholders enjoy the same protection as South Africans abroad anyway in South Africa, already now).

When discussing updating the South African Copyright Act it is vital not to limit the discussion to “exceptions” – they are after all called “exceptions” for a reason – but the general rules of copyright and the Internet. This is best achieved by ratifying the above treaties, WCT and WPPT.

Ratifying the said treaties creates an incentive that will contribute to view South Africa as a country ready for the knowledge economy, rather than a jurisdiction that is left behind.

The one issue that is not popular in the WCT is Digital Rights Management (DRM). Some may mistakenly think that without WCT there is no DRM protection in SA. That is simply wrong. There already is DRM protection much more stringent than it need be under WCT/WPPT.²

¹ South Africa is a signatory to those treaties, but still has taken no practical steps to implement them.

² Marlize Jansen, Access to Works Protected by Copyright, Right or Privilege, Dep. of Mercantile Law, UNISA “[...] 4. Although South Africa is a signatory to the WIPO Copyright Treaty, it has not yet implemented the provisions of Article 11 of the WCT in national legislation. There is currently no provisions in South African copyright legislation that specifically protects access to works protected by copyright. However, Article 86(1) of the Electronic Communications and Transaction Act 25 of 2002 (the

WCT would give an opportunity to implement DRM protection in ways that would take into account the needs of beneficiaries of exceptions and limitations compatible with fair practice. Publishers would be willing to lend a hand to do so.

Support for the Berne Convention Three Step Test

Any possible future exceptions or limitation introduced in South Africa must of course be developed in the context of the Berne Convention's 3-step test, which requires that any exception must be confined to

*"certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holder"*³

The Berne Convention three step test has historically allowed balanced copyright exceptions to be achieved. Publishers remain supportive of the three step test. It is a tool that is flexible enough to allow copyright exceptions to be adapted to change. It also draws sufficiently clear boundaries to the possible extent of national exceptions.

It is often stated that because education and research are in the public interest, they constitute a "certain special case" on which any copyright exception is premised (first step under the Berne Convention). Moreover, the presumed non-commercial nature of many educational and research activities is frequently cited as a strong indicator that the use should be legitimised under an exception and does not "interfere with the normal exploitation", ie the market, of the rights-holder (the second step), or is not "unreasonably prejudicial" to his/her interests (the third step).

The public interest of research and education is best served by encouraging the creation of new publications and information services with these audiences and markets in mind. For example, journal articles, academic treatises and textbooks are published for the very purpose of contributing to scholarly communication and education. Libraries for non-commercial research or non-commercial educational institutions are the primary (and pivotal) purchasers of (or licensees for) these materials and services. Offering publications and information services is the main business of educational and academic publishers and "research" and "education" are, therefore not "certain special cases" for copyright exceptions. On the other hand, "illustration for teaching" is.

"Normal exploitation" includes digital delivery and licensing to libraries, education and research institutions. This includes the delivery of individual articles which has now become part of the product and service offering of publishers and their agents. "Normal exploitation" may also include the provision of content to course packs, or accessible formats to disabled persons and their institutions.

"Unreasonable prejudice" occurs where the argument brought forward for exceptions fundamentally lies not with technical problems with copyright clearance but with the insufficient funding of the relevant institutions.

ECT Act) criminalizes the conduct of unlawful accessing data. Section 86(3) does the same to the trafficking in devices designed to overcome security measures or access codes. The ECT Act therefore effectively recognizes the right to control access to data. In terms of section 1 of the ECT Act the term "data" "means electronic representations of information in any form". Digitization is the dematerialization of content into electronic format readable by technologies such as computers. Once a copyrighted work is digitized, it becomes an electronic representation of information or content. The definition of "data" is thus broad enough to include digital copyright works. South Africa in this way protects the right to control access to works protected by copyright through criminal sanctions. [...]"

³ Art. 9(2) Berne Convention, Art. 13 TRIPS, Art. 10 WIPO Copyright Treaty.

3. Copying for Preservation:

Publishers recognize the importance of the long-term preservation of their works. In many sectors, such as scholarly journal publishing, publishers have acknowledged the shared responsibility that new publishing technologies bring and have developed practical solutions both within and outside of licensing relationships.

Publishers therefore support copyright exceptions that ensure that copies are preserved and maintained for general access after copyright has expired.

Publishers oppose copyright exceptions that provide access to such copies during the term of copyright, in particular where it would compete with commercial offerings. Copying for preservation and copying for current access must be strictly separated.

4. “On-the-spot consultation” on dedicated terminals within library premises

Publishers want the works they sell or license to libraries to be accessible to the patrons of that library. The use of electronic generated content should be governed exclusively by licensing terms.

Publishers believe that the permission to scan and display works acquired in paper form can be acceptable under a copyright exceptions under specific terms. These would need to be subject to the commercial availability of the works in electronic form. Because the use of works in copyright must be agreed and adjusted over time, collective licensing can provide a solution. In any case a royalty to the rightsholders must be paid.

5. Interlibrary Copying

Publishers recognise the increasing interlinking between libraries and similar institutions. Where copies of works are not commercially available the provision by libraries to other non-commercial libraries is important and copyright exceptions may be necessary.

Where publishers offer articles, directly or through collective licensing arrangement, the sale of articles is part of the normal exploitation by publishers. Publishers therefore oppose copyright exceptions. A copyright exception is not required.

6. Course-packs

Course packs, whether in paper or digital “Electronic Reserves” are an important part of modern teaching technique. Publishers have responded and are collaborating through their own commercial services or through licensing schemes to enable rights clearance of course pack content.

Copyrights exceptions are not needed and can, indeed impede the growth of the developing market for customised teaching products that many dynamic and innovative publishers are serving.

There may remain some areas, in particular where different kinds of resources are combined where a licensing clearing house like DALRO, ie a properly mandated collective licensing society provides the most convenient and fair solutions. Publishers support the approach taken by DALRO and also in the USA, for example, by the American Association of Publishers and Cornell University.

7. Orphan works

Works in copyright whose copyright owner cannot be identified (“orphan works”) are an important issue that publishers would like to see resolved. At international level, publishers have offered practical solutions to this effect and PASA would support a similar exercise in South Africa.

8. Restrictions

In all cases where publishers accept the principle of an exception the terms must be clearly specified and specific terms may be required to ensure that the exceptions are applied in the spirit of the three step test. Publishers are prepared to discuss such details when specific solutions are sought in the context of specific national circumstances.
