



**SOUTH AFRICAN
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To: Mr. Duma Moses Nkosi – Chairperson, Portfolio Committee on Trade and Industry

Dear Honourable Mr Nkosi

RE: Copyright Amendment Bill [B13B – 2017]: access for persons with disabilities

I write to submit the attached comments on the Copyright Amendment Bill. The views expressed in this opinion are informed by a Scoping Study conducted for the World Intellectual Property Organisation (WIPO)'s Standing Committee on Copyright and Related Rights (SCCR) with Prof Blake Reid of the University of Colorado and a supporting team of researchers from our respective research universities, which entailed a detailed review of WIPO member states' copyright legislation on how they provide access for persons with disabilities.

References:

1. Caroline B Ncube, Blake E Reid and Desmond O Oriakhogba '[Beyond the Marrakesh VIP Treaty: Typology of copyright access-enabling provisions for persons with disabilities](#)'. J World Intellect Prop. 2020; 1– 17.
2. Reid, B. E., & Ncube, C. B. (2019). *Revised scoping study on access to copyright protected works by persons with disabilities* (SCCR/38/3). Retrieved from https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf
3. Reid, B. E., & Ncube, C. B. (2017). *Scoping study on access to copyright protected works by persons with disabilities* (SCCR/35/3/REV). Retrieved from https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_3_rev.pdf

* the views expressed in this submission are my personal views and not those of the WIPO SCCR, nor of any interested party.

I am available to make oral presentations on these comments at the public hearings to be held in August 2021 and request that such an opportunity be extended to me.

Sincerely

[signature redacted]

Caroline B Ncube

---Comments follow on next page ---

COMMENTS

1. GENERAL POSITION REGARDING COPYRIGHT EXCEPTIONS AND LIMITATIONS FOR PERSONS WITH DISABILITIES

The significance of obtaining and implementing access to copyright protected works for persons with disabilities is incontestable in view of South Africa's constitutional¹ and international obligations² to secure equality for persons with disability. As far as I am aware, there is general consensus amongst all stakeholders that such provisions are necessary. Indeed, there is a compelling case for why the failure to enact these provisions means the current copyright legislation does not pass constitutional muster, hence the pending litigation on this aspect.³ Persons with disabilities e.g. visual,⁴ aural⁵ physical,⁶ cognitive⁷ and multiple disabilities⁸ need works to be adapted into forms that they can perceive e.g. a person with a hearing disability viewing an audio-visual work will require subtitles to provide a text version of the spoken word other sounds.

The World Intellectual Property Organisation (WIPO)'s Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled (Marrakesh Treaty)⁹ provides for exceptions and limitations for persons with visual disabilities in relation to text or printed materials. **It is narrow in its scope.** It does not provide for other disabilities and other types of works beyond print therefore there is a need to attend to these hence the Standing Committee on Copyright and Related Rights (SCCR) scoping studies which we conducted on other disabilities to inform the ongoing

¹ section 9 of the Constitution of South Africa.

² Article 30(3) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) requires state parties to ensure, in line with international law, that their intellectual property (IP) legislation does not "constitute unreasonable or discriminatory barrier to access by persons with disabilities." South Africa ratified the CRPD in 2007

³ *BlindSA v Minister of Trade, Industry and Competition, Minister of international Relations and Co-operation, Speaker of the National Assembly, Chairperson of the National Council of Provinces and The President of the Republic of South Africa* case number 14996/21.

⁴ Visual: People who are deafblind or otherwise blind and hard of hearing or deaf and visually impaired face challenges to accessing visual, audio, and audiovisual works.

⁵ Aural: People who are deaf or hard of hearing face barriers to accessing audio or audiovisual materials.

⁶ Physical: People with physical or motor disabilities are unable to interact physically with the copyrighted material, preventing them from accessing its content including visual, audio, and audiovisual works

⁷ Cognitive: People with cognitive and intellectual disabilities face a spectrum of challenges to accessing a range of protected media including visual, audio, and audiovisual works.

⁸ Multiple: People with multiple disabilities face unique challenges as different or multiple transformations are required to access content.

⁹ Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled, Marrakesh, UNTC Reg. No. 54134.

international reform agenda on this.¹⁰ Indeed, it is probable that in the future an ‘*appropriate International Legal Instrument (In Whatever Form)*’ will be agreed upon at WIPO.¹¹ The studies referred to above showed that many WIPO member states, who are bound by the Marrakesh Treaty, have already introduced provisions that go beyond the treaty to cater for other disabilities and other works in their laws, which right is confirmed by article 12 of the treaty. Therefore, South Africa’s reform proposals are to be commended for catering for visual and other disabilities and for works beyond text/print works to meet constitutional and CRPD obligations. Crafting laws that include other disabilities does not mean that a state is non-compliant with the Marrakesh Treaty. What is required is that the legislation meet the standards set in the treaty by providing for access to print/text works by persons with visual disabilities. This has been achieved by the proposed S19D as will be shown below at section 2. The section will also engage with some objections made in relation to the Marrakesh Treaty by others (and possibly implied in the President’s letter) in relation to authorised entities and cross border exchanges.

2. THE PRESIDENT’S REFERRAL

The President’s letter of referral back to parliament dated 16 June 2020 introduced the disability access aspects as follows:

2. The Copyright Amendment Bill [8138-2017] ("the Copyright Bill") raises important matters that inter alia seek to accommodate the visually impaired and otherwise print disabled persons by introducing exceptions to the exclusive right of authors or their assignees preventing the reproducing or copying of their work in any manner or form. The proponents of the exception contend that without such exception, the visually impaired will have limited access to copyright literary works as such works cannot be transcribed to braille and other formats for the print disabled.

Paragraphs 19 and 20 of the letter then summarise the significance and import of the Marrakesh Treaty as follows:

19 The Marrakesh Treaty is a multilateral treaty on copyright and was adopted in Marrakesh, Morocco, on 28 June 2013. It has a bearing on the rights contained in the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. Since first signed by India, many other countries seeking to cater for their visually impaired have signed it and enacted statutes that seek to facilitate the terms of the treaty within their relevant national statutes. Its objective is to facilitate access to published

¹⁰ Reid, B. E., & Ncube, C. B. (2019). *Revised scoping study on access to copyright protected works by persons with disabilities* (SCCR/38/3). Retrieved from https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf

Reid, B. E., & Ncube, C. B. (2017). *Scoping study on access to copyright protected works by persons with disabilities* (SCCR/35/3/REV). Retrieved from https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_3_rev.pdf

¹¹ See WIPO SCCR/26/4PROV; SCCR/28/38.

works by visually impaired persons and persons with print disabilities. It is the first treaty to deal with copyright exceptions. It seeks to harmonize and strike a balance between the interests of rights-holders and vulnerable users, particularly the visually impaired and print disabled persons. It does this by allowing for copyright exceptions to facilitate accessible versions published books and other copyrighted works for visually impaired persons. It also requires contracting parties to include limitations and exceptions in order to allow reproduction, distribution and formats of published works designed for the visually impaired persons. It also seeks to facilitate exchange of published works between different countries.

20 The Marrakesh Treaty also includes in its definition of affected persons, persons with physical disabilities that prevent them from holding a book or any such published work if it requires holding in order for one to read. In its definition of "works" it includes works "... in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media."

Observation 1: NO SPECIFIC COMPLAINT OR REFERRAL REGARDING S19D

I note that the above paragraphs merely summarise the treaty's provisions and do not expressly highlight any specific substantive issues with the disability provisions in the proposed section 19D so it is surprising that the next paragraph (21), puts forward this conclusion in respect of the disability provisions: 'I have reservations about whether the Bills comply with the above Treaties and am therefore referring the Bills back to Parliament in order that it may consider the Bills against South Africa's International Law obligations'. Indeed, if one proceeds to the following paragraph (22) which sets out the referral in detail, one will not find a reference to the proposed section 19D.

Referral

22 I have considered both the Bills, all submissions received and the process followed by Parliament in passing the Bills. Having done so, I have reservations about the constitutionality of the Bills for the following reasons:

...

22.3 The new exceptions introduced by sections 12A, 12B, 12C, 12D and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law.

One may dispose of this matter by noting that the referral letter does not in fact expressly raise any specific substantive issues regarding s19D and therefore parliament may maintain the provisions as they stand. However, it is prudent to engage further, as some concerns may be implied or read into paragraphs 19 and 20. This is done below.

Observation 2: other sources of objections to the section

Notwithstanding the above observation about a lack of specificity in the referral about s19D, since parliament has been presented with an opportunity to again consider these provisions, it is an opportune time to address some objections that have previously been raised as follows:

1. That the definition of ‘accessible format copies’ includes more than print/text works covered by the Marrakesh Treaty;
2. That the definition of disabilities that is too broad and goes beyond the definition of ‘beneficiary person’ in the Marrakesh Treaty;
3. That the provisions do not contain a definition of works covered and authorised entities nor does it contain adequate cross-border provisions.

Points 1 and 2: going beyond Marrakesh

As noted in the introductory section of these comments, going beyond the Marrakesh Treaty by covering more disabilities and works than those covered in the treaty does not make legislation non-compliant with that treaty. What is required is that the legislation meet the standards set in the treaty by providing for access to print/text works by persons with visual disabilities. This has been achieved by the proposed S19D. The definition includes the disabilities and works covered in Marrakesh as shown below.

| Definitions – CAB | Comment |
|--|--|
| <p>‘accessible format copy’ means a copy of a work in an alternative manner or form, which gives a person with a disability access to the work and which permits such person to have access as feasibly and comfortably as a person without a disability;</p> | <p>Marrakesh definition: b) "accessible format copy" means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.</p> <p>The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;</p> <p>The CAB definition uses much of the same language except that it uses ‘person with a disability’ instead of beneficiary person because it covers all disabilities. However, it omits the highlighted portion which it includes in s19D(1)’s conditions (a) –(c).¹²</p> |
| <p>‘person with a disability’ means a person who has a physical, intellectual, neurological, or sensory impairment and who requires the work to be in a format that enables that person to access and use the work in the same manner as a person</p> | <p>The CAB does have a definition of ‘beneficiary person’ instead it uses and defines ‘person with a disability’ since it goes beyond Marrakesh.</p> <p>Marrakesh definition: A beneficiary person is a</p> |

¹² S19D(1)(a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work; (b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and (c) the activity under this subsection must be undertaken on a non-profit basis

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| without a disability;”; | <p>person who: (a) is blind; (b) has a visual impairment or 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 (c) 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.</p> <p>The CAB definition of a person with a disability includes all the above. See for example, in the table 3 below the list of countries that have a similarly broad definition.</p> |
|-------------------------|---|

Table 1: comments on definition of accessible format copy and person with disabilities

A Marrakesh Treaty contracting state may choose to enact only those exceptions and limitations provided for in the treaty as has been done by the following:

<extract from Scoping Study, 2019 SCCR/38/3>

| Exceptions | Number of Countries | WIPO member states [yellow: Marrakesh Treaty is in force pursuant accession or ratification] |
|--|---------------------|--|
| Exception for persons with visual disabilities only limited to print/text works [Marrakesh Scope only] | 24 | Argentina, Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Cameroon, China, Democratic People's Republic of Korea, Georgia, Grenada, Indonesia, Kazakhstan, Lao People's Democratic Republic, Mauritius, Nicaragua, Panama, Paraguay, Peru, Philippines, Rwanda, Ukraine, Uruguay, Vietnam |

Table 2: list of countries limiting their provisions to the Marrakesh Treaty

A Marrakesh Treaty contracting state may also choose to go beyond the treaty's provisions. Indeed, the treaty itself recognises the ability of states to go beyond its provisions in article 12 which reads:

1. Contracting Parties recognise that a Contracting Party may implement in its national law other copyright limitations and exceptions for the benefit of beneficiary persons than are provided by this Treaty having regard to that Contracting Party's economic situation, and its social and cultural needs, in conformity with that Contracting Party's international rights and obligations, and in the case of a least-developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.

2. This Treaty is without prejudice to other limitations and exceptions for persons with disabilities provided by national law.

As noted in the 2019 Scoping Study, at that time, the following WIPO member states went beyond the Marrakesh Treaty. The countries highlighted in yellow are

Marrakesh Treaty contracting states, in which the treaty is in force. The details of these states' specific provisions are provided in the 2019 Scoping Study and are not repeated here. Suffice it to say that to have such a wide reach, the relevant provisions have definitions of disability, works and accessible format copy that are broader than those in the Marrakesh Treaty. The formulation of these provisions also takes varying forms, as detailed in the Scoping Study.

<extract from Scoping Study, 2019 SCCR/38/3>

| Exceptions | Number of Countries | WIPO member states [yellow: Marrakesh Treaty is in force pursuant accession or ratification; *EU ratification] |
|---|---------------------|--|
| Exception for all disabilities (*does not specify disability) | 28 | Austria*, Belgium*, Bosnia and Herzegovina, Croatia, Czech Republic*, Ecuador, Estonia, * Gabon, Germany*, Hungary*, India, Israel, Italy*, Liechtenstein, Malta, * Mexico, Montenegro, Netherlands*, Poland*, Republic of Moldova, Romania, Sao Tome and Principe, Serbia, Slovakia*, Slovenia*, Switzerland, Republic of Macedonia, Turkey |
| Exception for persons with aural disabilities | 25 | Australia, Bahamas, Belize, Cabo Verde, Chile, Cote d'Ivoire, Denmark, Fiji, Greece*, Ireland, * Jamaica, Japan, Liberia, Lithuania, * Luxembourg, * Malaysia, Mongolia, New Zealand, Niue, Norway, Saint Vincent and the Grenadines, Thailand, Uganda, United Kingdom, United States of America |
| Exception for persons with cognitive/mental disabilities | 22 | Albania, Argentina, Australia, Belize, Cabo Verde, Canada, Fiji, France, * Ireland, Japan, Latvia, * Lithuania, Malaysia, New Zealand, Niue, Philippines, Saint Vincent and the Grenadines, Singapore, Spain, Thailand, United Kingdom, Uruguay |
| Exception for persons with physical disabilities | 19 | Argentina, Australia, Belize, Cote d'Ivoire, Denmark, Dominican Republic, Fiji, France, Ireland, Latvia, Lithuania, Malaysia, New Zealand, Niue, Saint Vincent and the Grenadines, Spain, * Thailand, United Kingdom, Uruguay |
| Exception for persons with visual disabilities beyond print/text works/works not specified | 72 | Albania, Australia, Austria, Bahamas, Belize, Bosnia and Herzegovina, Cabo Verde, Canada, Chile, Colombia, Cook Islands, Cote d'Ivoire, Croatia, * Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Gabon, Germany, * Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Kuwait, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, * Malawi, Malaysia, Malta, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Nigeria, Niue, Norway, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, * Saint Vincent and the Grenadines, Sao Tome and Principe, Serbia, Seychelles, Singapore, Slovakia, * Spain, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Turkey, Uganda, United Kingdom, United States of America |

| | | |
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| General provisions (fair use) that enable the making of accessible format copies | 6 | Dominica, Israel , Kyrgyzstan, Micronesia, Sri Lanka , United States of America |
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Table 3: list of countries going beyond the Marrakesh Treaty

Point 3: provisions on authorised entities and cross border exchanges of works

It has been pointed out that the CAB does not contain a provision or definition setting out the works covered by s19D. The Marrakesh Treaty defines works as “literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.” **This is due to the treaty’s focus on blind and visually impaired persons. The CAB caters for all disabilities and all works, hence the absence of a definition or other provision delineating the works covered.**

It has also been pointed out that more detail pertaining to authorised entities and cross border exchanges is necessary and there has been some debate as to whether this can be done by regulation or in the CAB. There also have been discussions about whether the CAB’s terminology of ‘a person that serves persons with disabilities’ is broad enough to include authorised entities. These debates will not be fully engaged here. Section 19D broadly conceives of cross border activities and subsection 3 expressly refers to import and export. Since parliament is reconsidering the bill, it is an opportune time to more closely align the CAB to the terms of the Marrakesh Treaty designed to enable cross-border exchanges of works and to facilitate these exchanges, and the following recommended provisions ought to be added.

- 1. Definitions - add:** "authorised entity" means an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

Note: This is the Marrakesh Treaty definition

- 2. Amend Section 19D(3)** to read: (3) A person with a disability or a person that serves persons with disabilities, including an authorised entity, may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person, provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used for other than for

persons with disability.

Note: The proviso above is taken verbatim from the Marrakesh Treaty art 5(2).

Whilst the recommended text above uses Marrakesh Treaty language, it is important to reiterate that contracting states may use alternate language in their legislation, if its substantive meaning is the same. Verbatim text is suggested here in the context of cross border exchanges merely to aid comprehension and co-operation with other treaty contracting states.

3. CONCLUSION

On a literal reading, the President's letter of referral did not expressly raise any specific matters in relation to the proposed s19D. The opportunity has been taken to engage with some objections made in relation to the Marrakesh Treaty by others in relation to (1) going beyond Marrakesh and (2) authorised entities cross border exchanges since it may be argued that they are implied in the referral. As has been shown, many Marrakesh Treaty contracting states, in which the treaty is in force, go beyond the treaty by providing exceptions and limitations beyond the treaty's narrow scope. Further, discussions at international level have been focussed on the broader concerns of other disabilities and other works beyond those provided for by the Marrakesh Treaty. It is therefore prudent for South Africa to take the broader approach. More importantly, the country is bound by both the constitution and the CRPD to ensure equal access to copyright protected works (not only print/text works) for persons with disabilities (not only visual disabilities). Some recommendations have been made pertaining to authorised entities and cross border exchanges of works to more closely align the CAB to the Marrakesh Treaty.