



# Copyright

## Are deaf persons getting a fair deal?

DENISE ROSEMARY NICHOLSON

Copyright Services Librarian, University of the Witwatersrand, Johannesburg

### Introduction

The current South African Copyright Act, No. 98 of 1978, as amended, is very out-dated and has few, if any, limitations and exceptions for persons who are deaf or hard of hearing. South Africa is obliged to provide equal opportunities to persons who are deaf and hard of hearing in accordance with its Constitution, International Treaties/Conventions and its various national anti-discriminatory laws. South Africa has one of the most liberal constitutions in the world. It specifically enshrines equality for persons with disabilities under Article 9(3) as follows:

- everyone is equal before the law and has the right to equal protection and benefit of the law
- equality includes the full and equal enjoyment of all rights and freedoms
- the state may not unfairly discriminate directly or indirectly against anyone on one or many grounds, including race, gender, disability and others.<sup>1</sup>

The Constitution also protects the right to freedom of expression, access to information and education and other human rights, all of which apply to deaf and hard of hearing persons too.

South Africa is a signatory to a number of international conventions and declarations, particularly relating to human rights, anti-discrimination, equality issues, and protection of people with disabilities. These are:

- The Universal Declaration of Human Rights<sup>2</sup>
- The UN Convention on the Rights of Persons with Disabilities

and its Protocol<sup>3</sup>

- Convention on the Elimination of all Forms of Discrimination Against Women<sup>4</sup>
- International Convention on the Elimination of All Forms of Racial Discrimination<sup>5</sup>
- Convention on the Rights of the Child and Youth Programmes.<sup>6</sup>

Since adopting its Integrated National Disability Strategy in 1997, the government has also passed the following laws relating to disabilities and discrimination:

- The Employment Equity Act, 1998
- The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000
- The Social Assistance Act, 2004
- The Social Assistance Amendment Bill, 2010.

The Government also established the Department of Women, Children and the Disabled, and within the Department of Higher Education, it has a Division for the Disabled.

In addition, South Africa is also a signatory to various international intellectual property agreements, which impact on access to information, resource-sharing and development. Copyright is categorised by its international nature, so national copyright laws are drafted within this framework. The key organisations that set the international copyright agenda are the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO). WIPO administers the Berne Convention and the two Internet Treaties, namely, the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. South Africa signed these two treaties in 1995, but has not yet ratified them. The WTO administers the TRIPS or 'Trade-Related Aspects of Intellectual Property Rights

Agreement', which South Africa signed in 1995. Member countries are obliged to adopt the minimum requirements of these agreements into their national laws.

### So what exactly is copyright?

In simple terms, it is a 'bundle' or 'suite' of exclusive rights that the copyright law gives to authors and creators, to protect certain activities with regard to their original works, for a certain period of time. 'Author' is used in a wide sense, and includes composers, indexers, artists, sculptors and even architects.<sup>7</sup>

Copyright law has long emphasised that copyright protection does not exist for its own sake but rather to serve the public interest. A balance between the interests of copyright owners in receiving fair reward for their efforts, and the interests of consumers in receiving reasonable access to copyright materials has been traditionally maintained in a number of ways. One of the most important of these is the implementation of a series of limitations and exceptions to the copyright owners' exclusive rights.<sup>8</sup>

The said international agreements allow member countries to adopt limitations and exceptions (or legal flexibilities) into their national laws, in the context of their domestic needs. Without limitations and exceptions, there would be no balance.

### What are limitations and exceptions?

They are legal flexibilities which the copyright law allows in certain circumstances, where protected works may be used without the rights holder's permission, and with or without payment of compensation. Historically, the international copyright system has not stressed the central importance of limitations and exceptions to fulfil copyright goals, that is, to promote the public interest. In the Berne Convention and the TRIPS Agreement, authors' rights were specifically identified, articulated and mandated, whilst limitations to these rights were general, ambiguous and discretionary, without any real force in the absence of state action. Basically it has left it up to national legislators to decide if and what legal flexibilities to include in national copyright laws.<sup>9</sup>

Before limitations or exceptions can be applied in national copyright law, they have to meet Berne '3 Step Test' criteria, namely,

- they shall be confined to certain special cases
- they must not conflict with a normal exploitation of the work
- they must not unreasonably prejudice the legitimate interests of the rights holder.

As a result, limitations and exceptions vary from country to country due to particular political, socio-economic and historical conditions.

South Africa and other developing countries have a key role to play in this copyright system, by actively adopting appropriate limitations and exceptions in the context of their domestic needs.<sup>10</sup>

Many countries around the world have already adopted a number of limitations and exceptions in their national laws for persons with sensory-disabilities. Despite years of lobbying by the library and tertiary sectors, and more recently, by the South African National

Council for the Blind, the South African government has not yet amended the copyright law.

International Treaties, the European Union's Copyright Directive, the UK Commission on Intellectual Property (IP) Rights, the Gower's Report on Intellectual Property, the Hargreaves Report, as well as the World Summit Declaration of Principles, the CopySouth Dossier and the World Blind Union's Proposed Treaty for the Visually Impaired, all 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'.

South Africa supports the WIPO's Development Agenda and proposals for the Treaty for the Visually Impaired. So why is there still no balance in our Copyright Act?

### The South African Copyright Law and how it impacts on access to information and knowledge

The following categories of works are protected by the South African copyright law:

- literary, musical and artistic works
- sound recordings
- computer programs
- cinematographic films
- broadcasts
- programme-carrying signals
- published editions.

With some exceptions, the copyright term in South Africa is generally the lifetime of the author plus 50 years from the end of the year in which the author dies. When this period expires, the work goes into the public domain and can be used and reused freely.

The law gives authors and creators the following exclusive rights:

- to reproduce the work in any manner or form
- to publish the work if it has not been published before
- to perform the work in public
- to broadcast the work
- to cause the work to be transmitted in a diffusion service
- to make an adaptation of the work (that includes translations and derivative works). (All these acts also relate to adapted works.)

These rights can be transferred to a third party by assignment, licence, operation of law or bequest.

Although there are no specific users' rights, consumers, including deaf persons, can take advantage of Sections 12- and 13-exceptions in the Copyright Act. However, these are very limited and there are no provisions for visually impaired persons.

'Fair dealing' in Section 12 allows copying, without permission, for the following purposes:

- research or private study
- personal or private use
- criticism or review
- reporting current events (for example in a newspaper or broadcast).

One may also quote, or 'by way of illustration', include a fair portion of a work in a PowerPoint slide, poster, worksheet or other visual medium for teaching purposes.

Fair dealing is not defined in the Copyright Act, but the generally accepted amount for reproduction of a work for the above purposes is 10% or one chapter of a book, one journal article from an issue, one case study, or one law report. However, copying one page may not be fair, if it is the essence of the work. Users need to use their discretion when using other people's copyright works.

Section 13 regulations allow teachers to give a limited number of single hand-outs to each learner in a classroom, per course, per term, without permission. A learner may make a single 'fair dealing' copy for a teacher, for research, teaching or preparation for teaching. A librarian may make a single 'fair dealing' copy for a user; or obtain a copy from another library through interlibrary loan. Multiple copies may not be made by a librarian unless permission has been obtained. Digital copying and digitisation, even for preservation purposes, are not permitted without permission.

So, without permission one may only reproduce works under these limited exceptions; or only if it specifically says it is free to use; or if it is in the public domain (that is, copyright has expired), or if the work is under an open source licence like Creative Commons.

### Difficulties encountered by deaf learners

For most deaf learners, acquiring an oral language, being unheard, is tantamount to learning a foreign language. In most instances, South African Sign Language (SASL) is their first language, whilst Afrikaans or another indigenous language could be their second language and English could be their third language.<sup>11</sup>

Not all teachers at schools for deaf children know or understand the structure of SASL and therefore cannot really assist the learners to transfer between SASL and written English, Afrikaans or another language structure. For example, reading an English novel in above context is virtually impossible for the average deaf child. Vocabulary is overwhelming. Long descriptive sentences do not make much sense. Teachers therefore need to adapt material to present it in a more visual format, but what about copyright?

Is a teacher allowed to do visual overviews of a novel with her own drawings? May she create visual mind maps per chapter? May she make a summary based on the mind map; or a vocabulary list based on the summary; or set questions based on the summary and the original text? Can she use images and other copyright works to illustrate what she is trying to explain? Can she do all this or would she be infringing copyright?<sup>12</sup>

### Fair dealing or copyright infringement?

The fair dealing exception in Section 12(b) of the Copyright Act could apply to the above situation, if it is specifically for purposes of criticism or review, or commentary of the work. However, if the teacher takes the whole work as it is and translates it into a more visual format without permission, rather than picking sections and commenting on each of them, then this would be infringement.

Section 12(3) allows quotations from a literary work, including those that constitute a summary of that work, with certain conditions relating to fair practice.

Making a summary of a chapter of a book, and the vocabulary list, are likely to qualify as a review under this exception. The sources and authors must be acknowledged.

Section 12(4) allows the use of a book or other literary work to the 'extent justified by the purpose' (in this case adapting a work for purposes of making it accessible to deaf children), by 'way of illustration for teaching', (for example, a visual mind map, summary, poster, PowerPoint slide or workbook), provided the use is compatible with fair practice and the authors (if available) and source of all the materials used are acknowledged. Using the whole work though, or large sections of the work, for example, chapter for chapter, without permission, would be copyright infringement, and if not acknowledged, it would also be plagiarism.<sup>13</sup>

Is a deaf person allowed to convert material into a more accessible or visual format, for example, from audiotape to text; from text to video; from video or film to DVD; or from text to a stage play? No. The copyright law prohibits format-shifting. Without permission, this would be copyright infringement.

Copyright prohibits translation of a whole work or large section of a work into another language. As sign language is generally the first language of deaf persons, it is inevitable that many works used for teaching and information purposes will need to be translated either into English, Afrikaans or an indigenous language. Consider how copyright law restricts access to and sharing of information in our country!

Restrictive copyright laws in fact infringe the constitutional and human rights of deaf and blind persons. There are no provisions for blind, deafblind or visually impaired persons so they cannot even exercise their fair dealing rights.

Without permission, it is illegal to copy sheet music, audiotapes, films, videos, CDs or DVDs. There are many different copyrights in these works and permission may need to be obtained from a number of rights holders. The copyright law does not allow one to copy a whole journal issue, or a whole book or large portion of it, without permission. This includes out-of-print books, library and textbooks, exercise books, test booklets, answer sheets and other similar material. Copies may not be made to create, replace or substitute anthologies, compilations or collective works, or to avoid buying original works. Teachers may not use the same material term after term without permission.

Permission must be obtained before placing copies of any copyright works in a study-pack, or on any e-learning tool, or on CD, DVD or on the Web, for example, Facebook or a personal blog. Loading material onto mobile phones is also subject to copyright and licences.

### What about material on the Web?

Is everything on the Web free and in the public domain? No – in fact, a great deal is copyrighted. There is, however, an implied licence

to copy in terms of 'fair dealing'. Some web sites have strict copyright conditions and even charge a fee for access, whilst others allow copying for educational and non-commercial purposes, for example, the government web site.

Users should check the copyright notices or terms of use on the homepage, if they are not sure. Even if material is free, the source must be acknowledged. Neglecting to, or purposely omitting to acknowledge the source would be plagiarism.

### Adaptations/modifications

Can a copyright work be modified? Only with prior permission from the rights owner. Modifying a work, for example, cropping, colouring, distorting, enlarging, substituting or excluding images, et cetera, is the exclusive right of the author. Creating a derivative work or other form in which a work may be recast, transformed or adapted is an infringement.<sup>14</sup> Derivative works can include making videos or plays from texts, adding additional audio commentary tracks, or annotating a film. Translations, whether they are performed through dubbed audio tracks or by subtitles, are protected derivative works.<sup>15</sup> Translating to other mediums, like scanning a photo from a book and turning it into a JPEG file would also be an infringement without permission.<sup>16</sup>

Teachers must be aware that copying or modifying a substantial portion of a work, for example, including lots of copied images from one book or large sections of text, in a workbook or study-pack for distribution to learners is not permitted without permission.

Any adaptation will be legally regarded as a derivative work. So, if one simply adapts the work of others, without permission, it will still be their work, and they will have every right to object and are also entitled to any money one might make from their work.<sup>17</sup> Derivative materials that present the original work as part of a new, self-contained piece may be acceptable, if substantially new material is added to change the context of the original piece. This does not, however, apply to the addition of subtitles.<sup>18</sup>

As SASL is not recognised as the official language of deaf people, no government measures are in place to encourage media and other forms of public information to make their services accessible to persons with disabilities.<sup>19</sup> However, the South African Broadcasting Corporation's project on Digital Terrestrial Television is likely to improve TV viewing and enjoyment for blind and deaf viewers. Some audio services for the blind were available during the World Cup. Currently, there are some programmes with subtitles, TV news broadcasts with SASL, and DTV for deaf viewers.

Adding subtitles is an adaptation or derivative of the original copyright work. So would-be editors or translators would need permission before adding subtitles to a video or DVD. Some DVD machines add temporary subtitles for home viewing. There are some web sites (but not many) that provide subtitles to free videos and films. Viewing of movies, documentaries and other multimedia are therefore a frustrating experience for deaf viewers. Copyright law exacerbates this problem.

Adding subtitles to privately-owned home videos for personal use may qualify as 'fair dealing'. However, copies may not be shared, sold, or distributed to anyone else, as this would be copyright infringement.<sup>20</sup>



### Cross-border exchange of accessible formats

Several countries (mostly developed countries) have adopted limitations and exceptions into their national copyright laws.

However, copyright law is territorial and it prevents cross-border exchange of material in accessible formats. A deaf or blind person in the United States, for instance, may have a copyright exception in his national law which permits him to convert a work into an accessible format, for example, Braille or a sub-titled video. However, he is not permitted to send the Braille version or video, or a copy of it, to a friend, say, in South Africa. If he does, he would be infringing his national law and the friend in South Africa would be in possession of an illegal copy.

Copyright law therefore causes duplication of effort by libraries and organisations servicing persons with disabilities around the world. It also causes unnecessary duplication of production costs, equipment and copyright fees. If the copyright law had an exception to address this issue, so many more books and other information could be shared globally amongst persons with sensory-disabilities.

### Restrictive licences and digital rights management

Apart from copyright, there are also restrictive licences and digital rights management systems that restrict or prevent access to information, particularly for persons with sensory-disabilities. Access to digital content, for example, e-databases, Web resources and mobile applications, is determined by different licences, with different usage and copyright conditions. Unless the licence permits downloading, conversions, e-mailing to others, derivative works, et cetera, users may not do so without permission.

When purchasing digital material, librarians and organisations like DEAFSA, need to ensure that the specific needs of deaf persons are included in the electronic licences. Contract law should not be allowed to override the few copyright exceptions that are available to deaf and hard-of-hearing persons.

Digital rights management systems (DRMS) with technological protection measures (TPMs) are often used by publishers to protect and control access to and use of their digital works. International intellectual property agreements support DRMs. Some DRMs prevent downloading or printing, or can only be used in a specific geographic region. Some tie users to certain products or specific

hardware, or they implode after a certain period. DRM embedded in many e-books block the 'text-to-speech' software functions for blind persons.

DRM devices cannot distinguish between legitimate and infringing use, so they block all users from the content. They can also lock up content indefinitely, or render it totally inaccessible when technologies become obsolete. DRMs prescribe and control how users can access and use digital content by overriding copyright exceptions and creating technological barriers where no legal barriers exist.<sup>21</sup>

In some countries national copyright laws prohibit users from circumventing or bypassing these protection measures, even for legitimate access purposes. South Africa's Copyright Law is very old so it does not include anti-circumvention measures. They are, however, provided for in the Electronic Communications and Transactions Act No. 25 of 2002, but without any exceptions for legitimate uses.<sup>22</sup>

Libraries, NGOs and other organisations serving the needs of deaf and hard-of-hearing persons should ensure that any material they purchase from publishers or digital providers, does not have DRM-software embedded in them. They should insist that the DRMs are removed before delivery and payment of the works. Otherwise, they should refuse to buy them as they may be partly or wholly inaccessible to the people they serve.

### Conclusion

Our copyright laws are out-dated, restrictive and in many ways, infringe the constitutional rights of persons with disabilities, and very possibly contravene some of South Africa's international obligations. Our Copyright Act needs to be amended to facilitate, not restrict, access to knowledge; to encourage innovation, research and resource-sharing; to allow conversions into accessible formats and cross-border exchange in all formats. In the process, access to knowledge will be enhanced and this will help South Africa meet its development goals.

To date the needs of deaf persons have not been considered in international copyright debates. Nor are they getting a fair deal in our national copyright law! Librarians, educators and organisations serving the needs of deaf and hard-of-hearing persons should lobby strongly to our government for more appropriate copyright laws to ensure that all persons with sensory-disabilities do get a 'fair deal'. *(This paper is an updated version of the author's presentation on 19 July 2011, at the XVI World Congress of the Federation for the Deaf, held at the Durban International Convention Centre)*

- <sup>1</sup> <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#7>
- <sup>2</sup> <http://www.un.org/en/documents/udhr/index.shtml>
- <sup>3</sup> <http://www.un.org/disabilities/convention/conventionfull.shtml>
- <sup>4</sup> <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>
- <sup>5</sup> <http://www2.ohchr.org/english/law/cerd.htm>
- <sup>6</sup> <http://www.yapi.org/uncrc/>
- <sup>7</sup> <http://wikipedia.org>
- <sup>8</sup> <http://archive.ifla.org/III/clm/pl/ilp.htm>
- <sup>9</sup> Okediji, R. The International Copyright System: Limitations, Exceptions and Public Interests Considerations for Developing

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Librarians, educators  
and organisations  
serving the needs  
of deaf and hard-of-  
hearing persons should  
lobby strongly to our  
government for more  
appropriate copyright  
laws to ensure that all  
persons with sensory-  
disabilities do get a  
'fair deal'

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Countries. Par. 2.4. See: [http://www.unctad.org/en/docs/iteipc200610\\_en.pdf](http://www.unctad.org/en/docs/iteipc200610_en.pdf)

- <sup>10</sup> Ibid. p. 8
- <sup>11</sup> McColl, H. Teaching a Second Language to Learners who are Deaf. See: <http://www.languageswithoutlimits.co.uk/deafness.html>
- <sup>12</sup> Personal Communication from N. Jansen van Vuuren via email to author on 6.4.2011
- <sup>13</sup> Personal Communication from Adv. J. Baloyi via email to author [s.n.].
- <sup>14</sup> <http://www.pdimages.com/modify.htm>
- <sup>15</sup> [http://www.ehow.com/list\\_6799201\\_copyright-laws-adding-subtitles-movies.html](http://www.ehow.com/list_6799201_copyright-laws-adding-subtitles-movies.html)
- <sup>16</sup> <http://www.pdimages.com/modify.htm>
- <sup>17</sup> [http://www.copyrightservice.co.uk/copyright/copyright\\_myths](http://www.copyrightservice.co.uk/copyright/copyright_myths)
- <sup>18</sup> [http://www.ehow.com/list\\_6799201\\_copyright-laws-adding-subtitles-movies.html](http://www.ehow.com/list_6799201_copyright-laws-adding-subtitles-movies.html)
- <sup>19</sup> [http://www.independentliving.org/standardrules/WFD\\_Answers/SAfrica.html](http://www.independentliving.org/standardrules/WFD_Answers/SAfrica.html)
- <sup>20</sup> Schnotz, W. Copyright Laws for Adding Subtitle to Movies. See: [http://www.ehow.com/list\\_6799201\\_copyright-laws-adding-subtitles-movies.html](http://www.ehow.com/list_6799201_copyright-laws-adding-subtitles-movies.html)
- <sup>21</sup> Nicholson, D.R. Copyright – Are people with sensory disabilities getting a fair deal? See: <http://pcf4.dec.uwi.edu/viewpaper.php?id=379&print=1>.
- <sup>22</sup> Ibid.