

Proposals for changes in the Copyright Bill 2010

Malawi Library and Information Consortium (MALICO)

and

Malawi Library Association (MALA)

MALICO represents 25 libraries serving 4000 students, and 75 researchers.

MALA represents 50 libraries and 120 library staff.

MALICO and MALA appreciate the opportunity to submit comments on the draft Copyright Bill 2010. Copyright is a key area of interest for us and we will follow developments closely. We will be glad to provide further advice or assistance.

General

Making use of flexibilities in international treaties

While international conventions, such as the TRIPS Agreement, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty set down minimum standards for the protection of intellectual property rights, they also provide for flexibilities that enable Contracting Parties to tailor national copyright laws to meet national priorities, as well as different levels of development. Use of flexibilities is supported by the WIPO Development Agenda.

Recommendation 14 of the WIPO Development Agenda states: "Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement."

Recommendation 17 states: "In its activities, including norm-setting, WIPO should take into account the flexibilities in international intellectual property agreements, especially those which are of interest to developing countries and LDCs."¹

¹ <http://www.wipo.int/ip-development/en/agenda/recommendations.html>

Exceptions and limitations are one such example of a flexibility. We believe that the focus should be to seek to use these flexibilities to facilitate access to knowledge, and to promote education and development in Malawi.

Updating the law for the digital environment

As one of the stated purposes of the Bill is to update the law to take into account the great developments that have taken place since 1989, this is a perfect opportunity to update the law of Malawi for the digital environment, and to include exceptions and limitations necessary for the digital age. It is essential that libraries, universities and the citizens of Malawi are able to take advantage of 21st century digital technologies. We are therefore disappointed to note that the provisions for free uses are very restrictive and are not adequate for the digital age. In this respect, the Bill is more restrictive than the copyright laws of many industrialized countries. We believe that it is important that the new copyright law caters for these new requirements and for modern modes of access and delivery and that it serves libraries, education and the people of Malawi into the future.

WIPO studies on exceptions and limitations for education

WIPO has published a series of studies on exceptions and limitations for education. The “Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa” was made available in December 2009². As suggested by the title this study was done in Africa and to inform African copyright laws. As argued by Fometeu we should avoid the situation where the Executive takes back with one hand that which the Legislative had given with the other³.

Definitions

The definition of *Adaptation* used in the bill is peculiar.

Permitted free uses

We propose that sub-section for **Permitted free uses of works for education and libraries** should be as follows:

² http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130241

³ Fometeu, J (2008) Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa, WIPO. Page 40

Reproduction for Educational Activities

11. (1) For the purpose of educational activities copies may be made of works, recordings of works, broadcast in radio and television provided the copying is done by a person giving or receiving instruction and does not exceed the extent justified by the purpose;

(2) Educational establishments may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in the course of instruction and/or in virtual learning environments, managed learning environments, virtual research environments and library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies;

(3) Persons receiving instruction may incorporate portions of works in printed or electronic form in assignments and portfolios, theses and in dissertations for personal use and library deposit;

(4) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies

(5) The permission under subsection (1) shall not extend to reproductions for commercial purposes and shall include the reproduction of a whole textbooks where the textbook is either out of print, the owner of the right cannot be found, authorized copies of the same edition of the text book are not for sale in the country or cannot be obtained at a price reasonably related to that normally charged in the country for comparable works.

Justification

Education is the key to economic and social development, acknowledged the world over. Countries with high literacy rates and educated populations score highest in the human development index and other quality of life indicators. Exceptions and limitations for education belong to the broad category that promotes the dissemination of knowledge and information. They facilitate day-to-day educational activities in teaching and learning institutions, and maximise the use of learning resources. Educational advancement would be impossible if

teachers, instructors or learners had to request permission every time they needed to reproduce material for teaching preparation, teaching, learning, instructing or other training activities. Costs would be prohibitive if fees had to be negotiated for every single transaction.

The practice of teaching and learning has changed greatly in recent years. New technologies have enabled the creation of secure virtual learning environments and exciting new ways to teach, learn and interact. Exceptions must keep pace so that the students of tomorrow benefit in the same way as their counterparts in the paper age.

Effect of the provision

This provision allows teachers, instructors and learners within a secure network to use knowledge resources from a broad spectrum of works to enhance the educational experience. This provision applies to educational activities using a variety of new media, as long as it does not exceed the extent justified by the purpose. It encompasses educational instruction on a one-to-one basis, in a classroom, via broadcast, multimedia, distance/open learning or Web-based facilities.

Some examples, including but not limited to:

- i. A copy may be made by or for a teacher, at his/her request, for research, teaching, assessment and/or preparation for teaching;
- ii. A copy may be made of parts of the work by a learner for criticism or review and/or for inclusion in an assignment, project, report, etc.
- iii. An teacher/instructor/examiner may make a copy to include in a worksheet, assignment, test, examination or similar document for assessment and/or evaluation;
- iv. A teacher/instructor/librarian may place a reproduced work on an access-controlled digital platform, e.g. electronic reserves, WebCT, Intranet, etc, for access by registered staff and learners of a particular institution for educational purposes.

Inter-Library Document Supply

11A. (1) Libraries may supply to each other whether by post, fax or secure electronic transmission, provided that the electronic file is deleted immediately after printing a paper copy of an electronic copy of a work. A paper copy may be supplied by the receiving library to a user of such library.

Translations

11B. (1) A person giving or receiving instruction may translate works provided this is not done for commercial purposes. Such translations may be used for private educational, teaching and research purposes only;

(2) A person or a public body may translate works from or into minority languages and communicate to the public such translations for non-commercial public information purposes.

Justification

Objective and rationale

No library within a country can own every book, journal or published work. Some libraries have general collections, others concentrate on special subject areas e.g. Africana or medicine. They may have in their collections rare or material that is difficult to find. It is customary practice for libraries to supply each other with material on a non-commercial basis, in response to requests from their users, in order to provide the widest access to knowledge and the best service to their patrons. The collaborative system of resource sharing is commonly known as “inter-library loan” for print material and “inter-library document supply” for digital material.

Effect of this provision

This provision would enable users to access a variety of general and specialist knowledge resources from libraries within their country, which may not be available within their own library. Without this provision, users would be limited to the materials available in libraries which they could personally visit or for which they have membership. Inter-library document supply also enables libraries to replace missing or damaged parts of works.

Some examples, including but not limited to:

- i. A librarian may receive a copy of a digital document or a chapter of a book from another library within its country for a user for their research, study or personal use;
- ii. A librarian may obtain a copy of a work via inter-library document supply for the purposes of replacing a missing or damaged work, that is out of print, not available in his/her country or not available at a reasonable market price.

Communication to the public for Educational and Research

Purposes

11C. (1) An educational establishment may communicate to persons affiliated as persons receiving instruction at or from such educational establishment the reproductions and the translations permitted by this Law solely for private, educational and research purposes provided this is done via a secure network.

Justification

Objective and rationale

The WIPO Copyright Treaty introduced a new right of communication to the public to cover new communication technologies, “by wire or wireless means”. This provision allows teachers and registered learners at an institution to exchange information for educational and research purposes via a secure network.

Effect of the provision

It allows unhampered exchange of information for educational and research purposes amongst a closed user-group i.e. the personnel and learners registered for instruction at a particular educational institution. Access can be from terminals on-site or off-site in a secure network. It facilitates the development of new ways of teaching and learning.

Some examples, including but not limited to:

- i. A teacher may make reproductions of copyright works accessible to registered students via the institution’s Intranet;
- ii. A teacher may reproduce, show or communicate to registered users of the institution a portion of a film, play an extract of a sound recording, CD or DVD, for purposes of criticism or review by learners receiving instruction in media studies or other disciplines.

Archives, Libraries, Museums and Galleries

12. (1) Archives, public libraries, other libraries, museums and galleries that are publicly funded in whole or in part, may use and distribute copies of works as part of their activities in accordance with subsections (2) – (7) provided this is not done for commercial purposes.

(2) Such institutions may make copies of works in their collection for the purpose of back-up and preservation.

(3) If a work or a copy of such work, in such an institution's collection, is incomplete, such an institution may make or procure a copy of the missing parts from another institution, unless the work can reasonably be acquired through general trade or from the publisher.

(4) Such institutions may make copies of works that are or should be available in their collections in their chosen format, if they cannot reasonably be acquired in such format through general trade or from the publisher.

(5) This Law does not prevent the making of copies in accordance with the provisions of the Act [on legal deposit of published works].

(6) Such institutions may make copies of works where the permission of the author or other owner of copyright cannot after reasonable endeavour be obtained or where the work is not available by general trade or from the publisher.

(7) Copies in whatever format made in accordance with subsections 3-6 or acquired pursuant to the Act [on legal deposit of published works] may be used by users for personal use or study on the premises of the establishment with or without the means of technical equipment and can be lent to users. The same applies in special cases to copies made in accordance with subsection (2).

Justification

Objective and rationale

"Documentary heritage reflects the diversity of languages, peoples and cultures. It is the mirror of the world and its memory. But this memory is fragile. Every day, irreplaceable parts of this memory disappear for ever".⁴⁸ Archives, libraries, museums and galleries are central to the "knowledge ecosystem". With defined collection policies, they systematically preserve and make available the world's cultural and scientific heritage for future generations. The advent of digital technologies has brought new challenges in preservation techniques, as data formats change and storage capacity increases every few years.

The author of the WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives (Crews, 2008) found that while most countries surveyed have at least one statutory library exception, suggesting that they play an important role in facilitating library services and the ability of citizens to have continuing access to materials held in libraries, they are otherwise

distinct in nearly all aspects⁴⁹. This means that there are wide differences between countries in what is permitted by libraries for purposes such as private research and study, preservation and replacement of materials and document supply. These provisions enable memory institutions to continue to fulfil their important societal function. They also enable material that has been acquired under deposit schemes to be copied and used on the premises for personal use or study.

Effect of this provision

This provision enables memory institutions to reproduce copyrighted works as part of their institutional responsibility in collecting, preserving and unlocking their valuable holdings, so that they are permanently accessible. Access to such reproductions is limited to on-site access only.

Some examples, including but not limited to

Personnel in the said institutions may make:

- i. A backup copy of a work to safeguard against lost, damage or theft;
- ii. To replace missing parts in a collection, provided they are not available for purchase;
- iii. To format-shift to a format appropriate for the institution;
- iv. To enable copies to be made of out-of-print works or where the rightsholder cannot be traced;
- v. Visitors of memory institutions will be able to access their holdings on-site only for their personal use or study.

We also propose that any beneficiary of an exception or limitation under should have the means of benefiting from that exception or limitation where technological protection measures have been applied to a work, including where necessary the right to circumvent the technological protection measure so as to render the work accessible.

Rationale for the proposed changes

The major agenda for the Malawi Government is to turn the country from predominantly importing and consuming nation to a predominantly exporting and producing nation. Education is key to the achievement of this agenda. Countries with high literacy rates and educated populations score highest in the human development index and other quality of life indicators. Exceptions and limitations for education belong to the broad category that promotes the dissemination of knowledge and information.

This provision allows teachers, instructors and learners within a secure network to use knowledge resources from a broad spectrum of works to enhance the educational experience. This provision applies to educational activities using a variety of new media, as long as it does not exceed the extent justified by the purpose. It encompasses educational instruction on a one-to-one basis, in a classroom, via broadcast, multimedia, distance/open learning or Web-based facilities.

The statement "...the copies are made in the same form as the copy from which the reproduction was made" on page 46 is too restrictive considering that the acts in section are to be performed by libraries which may have among their clientele visually impaired clients. Besides, this is contrary to the needs of digital technology and it makes it impossible for libraries to digitise some materials as part of preservation.

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