

Nelson Mandela Metropolitan University
 P O Box 77000
 Port Elizabeth
 6031

Attention: Mrs Maria Hansford

Your Ref:

Our Ref: HG3000157/HME

Date 13 March 2008

Dear Ms Hansford

RE: Copyright Links

I refer to your correspondence dated 26 February 2008 and advise:

1. Copyright is governed in accordance with the provisions of the Copyright Act No. 98 of 1978 ("the Act). The Act stipulates certain works that, if they are original, will be illegible for copyright. These works include, amongst others, literary works; musical works; artistic works; published editions; and computer programmes.
2. The Act vests in the proprietor of those works, the exclusive right to do or authorise the doing of, amongst others, the following:
 - 2.1. reproducing the work;
 - 2.2. making an adaption of the work.

Therefore, any person who, without the authority of the proprietor of copyright in the specific work copy or reproduces the work would be infringing on the rights of copyright in that particular work.

3. Copyright, however, shall not be infringed by any fair dealing with a literary work for the following purposes:
 - 3.1. research or private study by, or the personal or private use of, the person using the work;
 - 3.2. criticism or review of the work;

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- 3.3. reporting on current events in a newspaper, magazine or similar periodical provided that, in the case of the source shall be mentioned, as well as the name of the author if it appears on the work.
4. The copyright in a literary work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration and in publication for teaching: provided that such use shall be compatible with fair practice and the source shall be mentioned, as well as the name of the author if it appears on the work.
5. Therefore, the Act has provided certain circumstances where the reproduction or copying of a literary work would not be regarded as infringing the proprietor's rights of copyright. These exceptions are fairly limited and, generally, apply to, in the main, copying by the individual who intends to use the work for study or criticism purposes. What is important to bear in mind, however, that the exceptions are qualified by the requirement that the reproduction must be compatible with "fair practice". This concept is somewhat vague but it is submitted by Dean in The Handbook of South African Copyright Law (page 1-52) that, "... as a general rule the making of a copy of a whole work would not constitute a fair dealing with that work in circumstances where the economic interests of the copyright owner are adversely affected in that he ought reasonably to have obtained remuneration for the copy acquired by the copyist."

Therefore, and as a general rule, should a work that is used as, by way of example, a set work or teaching guide, be commercially available to students; and should that work be made available to students on a website to be downloaded and copied by students without the authority of the owner of copyright in that work, this would, in our view, constitute an infringement of the rights of copyright in and to that work. This principle of entitlement of the owner of copyright in the work to derive an income from the work underscores the restrictions placed on the copying of a work. I point that it is not only the copying of the entire work that would constitute copyright infringement but, in addition, the copying of a "material part" of the work. What constitutes a "material part" of the work would depend on the work itself. Therefore, the copying of even a small portion of the work may well constitute copyright infringement.

6. In addition to reproductions permitted as set out, amongst others, above, reproductions of a work shall also be permitted as set out in the Regulations. The authority to reproduce works in accordance with the provisions of the Regulations, however, are qualified in that the reproduction of the work must not be in conflict with a normal exploitation of the work and must not be unreasonably prejudicial to the legitimate interest of the owner of the copyright in the work. In other words, similar considerations apply with regard to the interpretation of the Regulations as apply to the Act: the proprietor of copyright in the work must not be deprived of his/her legitimate entitlement to exploit the work and to derive an income from the work.
7. In terms of Regulation 2 of the Copyright Regulations, the reproduction of a work shall be permitted save where otherwise provided if not more than one copy of a reasonable portion of the work is made having regard to the totality and meaning of the work and

the accumulative effect of the reproduction does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interests and rights of the author.

8. In terms of Regulation 3, subject to what has been set out above, a library or archive depot may, after reproduction of a copy of a work, distribute such copy subject to the following conditions:
 - 8.1. the reproduction the distribution shall not be made with any intention of deriving direct or indirect commercial advantage;
 - 8.2. the collections of the library or archive depot shall be open to the public or available to researchers affiliated to the library or archive depot or to the institution of which it is a part, and to other persons doing research in a specialised field;
 - 8.3. the reproduction of the work shall incorporate a copyright warning;
 - 8.4. the right of reproduction shall apply to a copy of a published work duplicated in facsimile form solely for the purpose of replacing a copy that is deteriorating or that has been damaged, lost or stolen: provided that the library or archive depot has, after reasonable effort, determined that an unused replacement cannot be obtained at a fair price;
 - 8.5. the rights of reproduction and distribution shall apply to a copy made from the collection of a library or archive depot to which the user addressed his request or from that of another library or archive depot, of not more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a reasonable portion of any other copyrighted work: provided that the copy shall become the property of the user and the library or archive depot has had no notice that the copy would be used for any purpose other than for private study or the personal private use of the person using the work;
 - 8.6. the library or archive depot shall display prominently, at the place where orders are accepted, and include on its order form, a copyright warning in terms of Regulations 6; [Should you require it, this copyright warning can be sent through to you.]
 - 8.7. the rights of reproduction and distribution shall apply to the entire work, or to a substantial portion of it, copied from the collection of the library or archive depot to which the user addressed his request or from that of another library or archive depot, if the library or archive depot is first determined on the basis of a reasonably investigation, that an unused copy of the copyrighted work cannot be obtained at a fair price: provided that:

- 8.7.1. the copy shall become the property of the user and the archive depot has had no notice that the copy would be used for any purpose other than private study or personal and private use of the person using the works; and
 - 8.7.2. the copyright warning as set out above, has been displayed.
- 9. The Regulations cannot be construed as imposing any liability for copyright infringement upon a library or archive depot or its employees for the unsupervised use of reproducing equipment located on the premises: provided that a notice to the effect that the making of a copy may be subject to the Copyright Act shall be prominently displayed on such equipment and, furthermore, nothing in the Regulations shall absolve any person who uses such reproducing equipment or who requests a copy from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds the extent of the copying permitted in terms of the Act.
- 10. The rights of reproduction and distribution shall extend to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions, but shall not extend to cases where the library or archive depot or its employee:
 - 10.1. is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies of the same material, other than periodical articles of a scientific or technical nature, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
 - 10.2. engages in the systematic reproduction or distribution of single or multiple copies of material referred to in paragraph 8.7 above other than periodical articles of a technical or scientific nature: provided that nothing shall prevent a library or archive depot from participating in inter-library arrangements that are not designed or do not have the effect of providing a library or archive depot receiving such copies for distribution with such aggregate quantities that are a substitute for a subscription to or purchase of such works.
- 11. Multiple copies, however, subject to what has been set out above and not exceeding one copy per pupil per course, may be made by or for a teacher for class room use or discussion.
- 12. The foregoing Regulations, on the face of it, authorise libraries or educational institution, to make and to authorise the making of copies of works. However, these Regulations will, in my view, be interpreted restrictively as they create inroads to the exclusive rights the copyright owner has.

- 12.1. It may be possible to structure an argument to the effect that the downloading of a literary work onto a computer does not constitute a reproduction or copy of the specific work. I am of the view, however, that this argument really has no foundation and is highly technical in nature. In any event, should one regard the computer in a similar way as one would a photocopying machine, it will be necessary to ensure that the relevant copyright notice as referred to in paragraph 8 and paragraph 9 above is prominently displayed. It is inevitable, however, that multiple copies would be made of that particular work and there would be no possibility of, save for what is set out below, preventing the reproduction or distribution of multiple copies of the same material being reproduced. Therefore, the considerations of paragraph 10 above need to be taken into account. I am not convinced that an argument to the effect that a website can be viewed in a similar light to a photocopying machine and that the regulations relating to photocopying would, accordingly apply to websites has any foundation.
- 12.2. The proviso to the foregoing is that works being placed on the website are encrypted such that they cannot be printed by the user of the website. In this regard, I refer to what is being set out in paragraph 13 below.
- 12.3. Notwithstanding the foregoing, it must be borne in mind that, in my view, the mere reproduction of the literary work on the website without authority of the copyright proprietor would constitute copyright infringement.
13. In terms of Section 23 of the Act, copyright is infringed by any person who, not being the owner of the copyright, without the license of the owner does or causes to do any of the acts exclusively reserved for the copyright owner. In addition, copyright is infringed by any person who, without the license of the owner sells, lets or by way of trade offers or exposes for sale or hire in the Republic any such article or distribute in the Republic of South Africa any article for the purposes of trade, **or for any other purpose** to such an extent that the owner of copyright in question is prejudicially affected.
14. It is, therefore, clear that, should an individual reproduce (copy) a literary work capable of copyright protection, that individual would be liable for copyright infringement. However, it is possible for a party to be guilty of contributory infringement by aiding and abetting the commission of an infringement by another. This issue is specifically covered in Section 23 of the Act which provides that copyright would be infringed by any person who "does or causes any other person to do" one of the restricted acts without the authority of the copyright proprietor. Therefore, copyright would not only be infringed by a person who actually makes the copy the particular literary work but, in addition, somebody who instigates or assists the doing of that act.
15. In the matter of Atari, Inc. & Another v J.B. Radio Parts (Pty) Ltd Case No. 17419/83 (Transvaal Provincial Division), the respondents sold a device which had as its primary function the making of reproductions of the applicant's computer games. Atari proceeded against the respondent on the basis that the respondent was instigating and

facilitating the making of unauthorised copies of the Atari computer games by third parties. The Court found that the respondent was infringing copyright even though there was no evidence on the actual reproduction of the Atari games.

16. I am of the view that similar considerations would apply where articles are posted on a website without the authority of the copyright proprietor. I am of the view that, not only would the posting of the article on the website constitute a breach of copyright in that it is, of necessity, a reproduction of the original work, but it is probable that that article would be downloaded and used by other individuals. In such event, the principles pertaining to aiding and abetting would apply.
17. Insofar as links to other sites are concerned, this is a common practice and I do not, in principle, have any issue with that. However, one should ensure that the terms and conditions of use of the website specifically cater for the fact that there will be links and that the University would not be responsible for the contents of those links.
18. In the event, however, that the University becomes aware of the fact that certain links contain access to copyrighted works in respect of which authority has not been granted for those works to be loaded onto that particular site, the University should terminate that link. My concern is that, the University could be held liable for assisting in the commission of an offence as set out more fully elaborated in paragraphs 13 to 16 above.

The contents of this opinion constitute topics that are hotly debated and the extent of the rights of reproduction is often somewhat vague, particularly having regard to the requirement of "fair dealing". Therefore, should you have any queries, please do not hesitate to contact me.

Yours sincerely

Hugh Melamdowitz

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