



The Portfolio Committee on Trade and Industry invites stakeholders and interested parties to submit written submissions on additional definitions and clauses in relation to the Copyright Amendment Bill [B13B-2017]. The proposed amendments being advertised for comment are indicated in blue.

Proposed amendments for advertising: Copyright Amendment Bill

Clause 1

“‘**authorized entity**’ means—

- (a) an entity that is authorized or recognised by the government to provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis; or
- (b) a government institution or non-profit organization that provides education, instructional training, adaptive reading or information access to persons with a disability as one of its primary activities or institutional obligations;”;

“‘**broadcast**’ means—

- (a) transmission, partially or wholly, by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;
- (b) transmission, partially or wholly, by satellite; or
- (c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;”;

“‘**lawfully acquired**’ means a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift and does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy;”;

“‘**technological protection measure**’ means any process, treatment, mechanism, technology, device, [product](#), system or component that in the normal course of its operation [is designed](#) to prevent or restrict the infringement of copyright in a work;”; and

‘**technological protection measure circumvention device or service**’ means a device [or service](#)—

(a) primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure;

(b) [promoted, advertised or marketed for the purpose of circumvention of a technological protection measure; or](#)

(c) [with a limited commercially significant purpose or use other than to circumvent a technological protection measure;](#)”; and”.

New Clause (*Amending sections 11A and 11B*)

Section 11A

“**11A.** Copyright in a published edition vests the exclusive right to make or to authorize the [doing of any of the following acts in the Republic:](#)

(a) [\[making\] Making](#) of a reproduction of the edition in any manner;

(b) [communicating the work to the public by wire or wireless means;](#)

(c) [making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person; and](#)

(d) [distributing the original or a copy of the work to the public.](#)”

Section 11B

“**11B.** Copyright in a computer program vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

(a) Reproducing the computer program in any manner or form;

(b) publishing the computer program if it was hitherto unpublished;

(c) performing the computer program in public;

(d) broadcasting the computer program;

(dA) [communicating the work to the public by wire or wireless means;](#)

(dB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person;

(dC) distributing the original or a copy of the work to the public;

- (e) causing the computer program to be transmitted in a diffusion services, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster;
- (f) making an adaptation of the computer program;
- (g) doing, in relation to an adaptation of a computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (f) inclusive; and
- (h) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program.”.

Clause 13

Section 12A

“General exceptions from copyright protection

12A. (a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
- (ii) criticism or review of that work or of another work;
- (iii) reporting current events;
- (iv) scholarship, teaching and education;
- (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
- (vi) preservation of and access to the collections of libraries, archives and museums; and
- (vii) ensuring proper performance of public administration.

(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—

- (i) the nature of the work in question;
- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
- (iii) the purpose and character of the use, including whether—
 - (aa) such use serves a purpose different from that of the work affected; and

- (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
- (iv) the substitution effect of the act upon the potential market for the work in question.
- (c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.
- (d) The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use, determined by the factors contemplated in paragraph (b).”.

Section 12B

“Specific exceptions from copyright protection applicable to all works

- 12B.** (1) Copyright in a work shall not be infringed by any of the following acts:
- (a) Any quotation: Provided that—
 - (i) the extent thereof shall not exceed the extent reasonably justified by the purpose; and
 - (ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;
 - (b)¹ any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;
 - (c) fixation or reproduction by a broadcaster of a performer’s performance or work, other than a cinematographic work, that is performed live, or a sound recording that is performed at the same time as the performer’s performance or work: Provided that the broadcaster—
 - (i) is authorized to communicate the performer’s performance, work or sound recording to the public by telecommunication;
 - (ii) makes the fixation or the reproduction itself, for its own broadcasts;
 - (iii) does not synchronize the fixation or reproduction with all or part of another recording, or other performer’s performance or work;
 - (iv) does not cause the fixation or reproduction to be used in an advertisement

¹ (b) is to be moved to 12D(9). The paragraph numbers will thus move one up.

intended to sell or promote, as the case may be, a product, service, cause or institution;

(v) records the dates of the making and destruction of all fixations and reproductions and any other prescribed information about the fixation or reproduction: Provided that the broadcaster shall keep the record current and shall make the record available to owners of copyright in the works, sound recordings or performer's performances, or their representatives, within twenty-four hours after receiving such a request;

(vi) destroys the fixation or reproduction within thirty days after making it, unless the fixation or reproduction is deposited in an archive in accordance with subparagraph (vii), or where the copyright owner authorizes the retention thereof, which authorization may be subject to the payment of applicable royalties; and

(vii) is authorized to, with the consent of an official archive, deposit the fixation or reproduction in that official archive where the broadcaster considers that fixation or reproduction to be of an exceptional documentary character: Provided that the broadcaster shall, within thirty days of such deposit, notify the copyright owner thereof;

(d) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the source and the name of the author should be indicated and that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;

(e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—

(i) the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;

(ii) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or

(iii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of

a similar nature delivered in public, to the extent justified by the purpose of providing current information;

(f) the translation of such work by a person giving or receiving instruction: Provided that—

(i) such translation is not done for commercial purposes;

(ii) such translation is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes only: Provided that such use shall not exceed the extent justified by the purpose; or

(iii) such work is translated and communicated to the public for non-commercial purposes;

(g) the use of such work in a *bona fide* demonstration of electronic equipment to a client by a dealer in such equipment;

(h) the use of such work is for the purposes of judicial proceedings or preparing a report of judicial proceedings; or

(i) the making of a personal copy of such work by an individual for the individual's personal use and made for ends which are not commercial: Provided [that the work was lawfully acquired and](#) that such use shall not exceed the extent justified by the purpose.

[\(2\) Subsection \(1\)\(b\) does not apply where a licence is available from a collecting society to make the fixation or reproduction of the performer's performance, work or sound recording.](#)

(3) (a) For the purposes of subsection (1)(i), permitted personal uses include—

(i) the making of a back-up copy;

(ii) time or format-shifting; or

(iii) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.

[\(b\) The factors associated with making a personal copy, set out in subsection \(1\)\(i\), do not apply to a copy made in terms of another exception provided for in this Act.](#)

(4) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.

(5) An authorization to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.

(6) The provisions of subsection (1)(d) and (e) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

(7) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other assignment of ownership of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy.”.

Section 12C

“Temporary reproduction and adaptation

12C. (1) Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—

(a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or

(b) to adapt the work to allow use on different technological devices, such as mobile devices,

as long as there is no independent, economic significance to these acts.

(2) Transient or incidental copies or adaptations of a work contemplated in subsection (1), may—

(a) only be made in the cases stipulated in subsection (1);

(b) not conflict with the normal exploitation of the copyright work; and

(c) not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.

Section 12D

“Reproduction for educational and academic activities

12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that—

(a) the copying does not exceed the extent justified by the purpose;

(b) a reproduction may only be made in the cases stipulated in this section;

(c) the reproduction does not conflict with the normal exploitation of the copyright work; and

(d) the reproduction does not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.

(2) Educational institutions 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 a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or 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) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.

(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—

(a) where the textbook is out of print;

(b) where the owner of the right cannot be found; or

(c) where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.

(5) The right to make copies shall not extend to reproductions for commercial purposes.

(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.

(7) (a) The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.

(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.

(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.

(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.

(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.

(8) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (6)."

Clause 20

Section 19C

"General exceptions regarding protection of copyright work for libraries, archives, museums and galleries

19C. (1) A library, archive, museum or gallery may, without the authorization of the copyright owner, use a copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work is not used for commercial purposes.

(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.

(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.

(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, [but may not permit a user to make a copy or recording of the work.](#)

(5) A library, archive, museum or gallery may make a copy of —

(a) any work in its collection for the purposes of back-up and preservation; and

(b) a publicly accessible website for the purposes of preservation.

(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery.

(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from aging or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.

(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act, 1997 (Act No. 54 of 1997).

(9) A library, archive, museum or gallery may make a copy of a copyright work for its own collection when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot, after reasonable endeavour, be obtained or where the work is not available by general trade or from the publisher.

(10) Notwithstanding any other section, a library, archive, museum or gallery may buy, import or otherwise acquire any copyright work that is legally available in any country.

(11) A library, archive, museum or gallery may reproduce for preservation purposes, in any format, any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for scholarship, research or any other legal use.

(12) (a) A library, archive, museum or gallery may make a copy of any copyright work and make it available to another library, archive, museum or gallery or for a public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.

(b) A library, archive, museum or gallery contemplated in paragraph (a) may also, for the purposes of that paragraph—

(i) take and show a photograph of such work or show video footage of such work;

(ii) create other images such as paintings of buildings; or

(iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place.

(13) (a) Subject to paragraph (b), a library, archive, museum or gallery may supply to any other library, archive, museum or gallery a copy of a copyright work in its collection, whether by post, fax or secure digital transmission.

(b) The receiving library, archive, museum or gallery must delete any digital file received from the other library, archive, museum or gallery immediately after supplying the person who has requested it with a digital or paper copy of the work.

(14) An officer or employee of a library, archive, museum or gallery acting within the scope of his or her duties shall be protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—

(a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or

(b) the copyright work, or material protected by related rights is in the public domain or licensed to the public under an open licence.

(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in section 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.”

Section 19D

“(1) Any person ~~as may be prescribed and~~ that serves persons with disabilities, [including an authorized entity](#), may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

(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.

(2) (a) A person with a disability, or a person that serves persons with disabilities, [including an authorized entity](#), to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorization of the owner of the copyright work, reproduce the work for personal use.

(b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.

(3) (a) A person with a disability or a person that serves persons with disabilities, [including an authorized entity](#), may, without the authorization 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), [for distribution or to make it available to persons with a disability](#), as long as such activity is undertaken on a non-profit basis by that person.

(b) [A person contemplated in paragraph \(a\) may only so export or import where such](#)

person knows, or has reasonable grounds to believe that the accessible format copy, will only be used to aid persons with a disability.

(4) The exception created by this section is subject to—

(a) the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable; and

(b) use of the accessible format copy exclusively by a person with a disability.”.

Clause 27 - Section 27 (Penalties and proceedings in respect of dealings which infringe copyright.)

“27. Section 27 of the principal Act is hereby amended—

(a) by the insertion of the following subsections:

“(5A) Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright and for commercial purposes—

(a) communicates the work to the public by wire or wireless means; and

(b) makes the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person,

which they know to be infringing copyright in the work, shall be guilty of an offence.

(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if—

(i) such person knows, or should reasonably have known, that that device or service will or is likely to be used to infringe copyright in a work protected by an effective technological protection measure;

(ii) such person provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure;
or

(iii) such person knows or should reasonably have known, that the service contemplated in subparagraph (ii) will or is likely to be used by another

person to infringe copyright in a work protected by an effective technological protection measure;

(b) publishes information enabling or assisting any other person to circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic; or

(c) circumvents such an effective technological protection measure when they are not authorized to do so,

shall be guilty of an offence.

(5C) Subject to section 28S, any person who—

(a) in respect of any copy of a work, remove or modify any copyright management information; or

(b) make, import, sell, let for hire, offer or expose for sale, advertise for sale or hire or communicate to the public a work or a copy of a work, if the copyright management information in respect of that work or copy of that work, has been removed or modified without the authority of the copyright owner,

shall be guilty of an offence.”;

(b) by the substitution for subsection (6) of the following subsection:

“(6) A person convicted of an offence under this section shall be liable—

(a) in the case of a first conviction, to a fine **[not exceeding five thousand rand]** or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates; or

(b) in any **[other]** case other than that contemplated in paragraph (a), to a fine **[not exceeding ten thousand rand]** or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.”; and

(c) by the addition after subsection (8) of the following subsection:

“(9) (a) For the purpose of subsection (6), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences, as the case may be, were committed and if that financial year has not yet been

completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, in respect of all uses to which this Act applies.

(b) If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsection (6), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”.

Clause 33 - Section 39

Amendment of section 39 of Act 98 of 1978, as amended by section 4 of Act 9 of 2002 and section 5 of Act 28 of 2013

33. Section 39 of the principal Act is hereby amended—

(a) by the deletion of the word “and” at the end of paragraph (cD);

(b) by the insertion of the following paragraphs after paragraph (cE):

“(cF) prescribing rules regulating the processes and proceedings of the Tribunal;

(cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;

(cH) prescribing permitted acts for circumvention of technological protection measures contemplated in section 28B after due consideration of the following factors:

(i) The availability for use of works protected by copyright;

(ii) the availability for use of works for non-profit archival and educational purposes;

(iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or

(iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;

(cI) prescribing royalty rates or tariffs for various forms of use;

(cJ) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;

(cK) prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a collecting society; and”; and

(c) by the addition of the following subsections, the existing section becoming subsection (1):

“(2) The Minister must make regulations providing for processes and formalities related to the authorization, or recognition, by the government of entities that provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis.

(3) Before making any regulations in terms of subsection (1) or (2), the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”.