



ALL PROPOSED AMENDMENTS

Key:

- **Blue font** indicates wording on which a call for comments are made
- **Green font** indicates wording that resulted from the previous call for comments, are not material in nature and on which the call for comments have accordingly closed
- **Black font** indicates that the wording of the Bill did not change – these are not open for comment.

AMENDMENTS RELATED TO A PERSON WITH A DISABILITY – ALIGNING THE BILL MORE CLOSELY WITH THE WORDING OF THE TREATY

Clause 1 – Copyright Amendment Bill (AB)

“**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, **including to**¹ permit the person to have access as feasibly and comfortably as a person without a disability;”

“**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;”

¹ This amendment is to align the definition as close as possible to the definition in the Marrakesh Treaty.

Clause 20 – Copyright AB

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) ~~in converting the copyright work to an accessible format copy, the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible in that alternative format and of the accessibility needs of the persons with disability²; and~~

(c) the activity under this subsection must be undertaken on a non-profit basis.

(2) (a) A person 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, ~~where that person is—~~

(i) a person with a disability, ~~for their personal use;~~ or

(ii) a person that serves persons with disabilities, ~~including an authorized entity,~~ for personal use ~~by a person with a disability.~~³

(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,

² This amendment is to align the definition as close as possible to the definition in the Marrakesh Treaty.

³ The format of this subsection was changed to enable the incorporation of a reference to “authorized entity”.

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, if it appears on the work, on any accessible format copy; and

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

Clause 33 – Copyright AB

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 28P⁴ 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

⁴ This amendment is correcting a cross reference.

(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.”

AMENDMENTS RELATED TO “BROADCAST” – TO ALIGN THE DEFINITION IN THE TWO ACTS (COPYRIGHT AND PERFORMERS’ PROTECTION)

Clause 1 – Copyright AB

“**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;”.

Clause 1 – Performers’ Protection AB

“**‘broadcast**” means—

(a) transmission, partially or wholly, by ~~wire or~~ 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;”;

AMENDMENTS RELATED TO PERSONAL COPIES (REQUIRING THAT THE WORK MUST HAVE BEEN LAWFULLY ACQUIRED)

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AMENDMENTS RELATED TO EPHEMERAL RIGHTS (ALIGNING THE WORDING WITH THE CANADIAN ACT)

Clause 1 – Copyright AB

“**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;”.

Clause 13 – Copyright AB

“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 be compatible with fair practice⁵; and

(ii) ~~to the extent that it is practicable,~~⁶ the source and the name of the author, if it appears on ~~or in~~ the work, shall be mentioned in the quotation;

~~(b) 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;~~⁷

(b)⁸ 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—

⁵ This amendment is technical – using the phrase “fair practice” instead of “extent justified by the purpose”.

⁶ This amendment is to align the wording iro moral rights with the existing wording of the Act.

⁷ Paragraph (b) is being moved to section 19C as subsection (9), to have all matters dealing with teaching in one section. All paragraphs will thus move one up.

⁸ This amendment in paragraph (c) is in respect of ephemeral rights.

- (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 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;
- (c) 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, if it appears on the work,⁹ and that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;
- (d) subject to the obligation to indicate the source and the name of the author, if it appears on the work¹⁰—

⁹ This amendment is to align the wording iro moral rights with the existing wording of the Act.

¹⁰ This amendment is to align the wording iro moral rights with the existing wording of the Act.

- ~~(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;¹⁴~~
- ~~(i) 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, which reporting, reproduction, broadcasting or communication shall be compatible with fair practice¹²; or~~
- ~~(ii) for purposes of providing current information, 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, which reproduction, broadcasting or communication shall be compatible with fair practice;¹³~~
- ~~(f) the translation of such work by a person giving or receiving instruction: Provided that such translation is—~~
- ~~(i) done for non-commercial purposes¹⁴;~~
- ~~(ii) used for personal, educational, teaching, judicial proceedings, research, for the furtherance of language and culture, or¹⁵ professional advice purposes only: Provided that such use shall be compatible with fair practice¹⁶; or~~
- ~~(iii) 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~~
- ~~(j)¹⁷ the making of a personal copy of such work by a natural person for their personal use, including the use of a lawful copy of the work at a different time or with a different device owned by that natural person, and made for ends which are not commercial: Provided that the work was lawfully acquired and that such personal use shall be compatible with fair practice.”.~~

¹¹ This amendment is to avoid duplication – it is already covered in section 12A.

¹² This amendment is technical – using the phrase “fair practice” instead of “extent justified by the purpose”.

¹³ This amendment is technical – using the phrase “fair practice” instead of “extent justified by the purpose”. The purpose (current information) is moved from the end to the start of the paragraph for ease of reading.

¹⁴ Reworded to a positive statement for purposes of plain language guidelines.

¹⁵ This amendment was proposed by the public in the previous call for comments.

¹⁶ This amendment is technical – using the phrase “fair practice” instead of “extent justified by the purpose”.

¹⁷ Paragraph (i) deals with personal copies.

(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.¹⁸

(3)¹⁹ (a) For the purposes of subsection (1)(i) permitted personal use 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.”

¹⁸ The new subsection (2) relates to ephemeral rights.

¹⁹ Subsection (3) (was subsection (2) in the Bill that was referred back) deals with personal copies.

AMENDMENTS RELATED TO TECHNOLOGICAL PROTECTION MEASURES (ALIGNING CLOSER WITH THE TREATIES)

Clause 1 – Copyright AB

“‘**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;

‘**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”

Clause 29 – Copyright AB

S280

“**280.** (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a technological protection measure circumvention **device or service** if such a person knows, or **has reason to believe should reasonably have known**²⁰, that it will or is likely to be used to infringe copyright in a technologically protected work.

(2) No person may provide a service to any other person if—

(a) such other person intends to use the service to circumvent an effective technological protection measure; or

(b) such person knows, or **has reason to believe should reasonably have known**²¹, that the service will or is likely to be used by another person to infringe copyright in a technologically protected work.

²⁰ Also see the amendment to clause 27 as these amendments are consequential to the amendments to section 27 providing for offences.

²¹ Also see the amendment to clause 27 as these amendments are consequential to the amendments to section 27 providing for offences.

(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.

(4) No person may, during the subsistence of copyright in a work and without a licence of the owner of the copyright in such work, circumvent an effective technological protection measure applied by the owner of the copyright to such work.

(5) A technological protection measure shall be deemed to be effective if the use of the work is controlled by the exclusive licensee or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

~~(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).²²~~

Section 28P

~~“28P. (1) For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002),²³ Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following:~~

~~(a) An act permitted in terms of any exception provided for in, or prescribed under, this Act; or~~

~~(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).~~

~~(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—~~

~~(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or~~

²² This is a technical amendment to bring the Bill up to date with events that happened since it was passed by both Houses.

²³ This is a technical amendment to bring the Bill up to date with events that happened since it was passed by both Houses.

(b) if the copyright owner has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.

(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—

(a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and

(b) purpose for which the services of such other person has been engaged.”

“28S. The prohibition in section 28R does not apply if a person—

(a) is authorized by the performer or copyright owner to remove or modify the copyright management information;

(b) does not know, ~~and has no reason to believe or could reasonably not have known~~²⁴, that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work; or

(c) does not know, or ~~has no reason to believe could reasonably not have known~~²⁵, that the copyright management information has been removed or modified without the authority of the performer or copyright owner.”.

²⁴ Also see the amendment to clause 27 as these amendments are consequential to the amendments to section 27 providing for offences.

²⁵ Also see the amendment to clause 27 as these amendments are consequential to the amendments to section 27 providing for offences.

AMENDMENTS RELATED TO EXTENDING DIGITAL RIGHTS TO PUBLISHED EDITIONS AND COMPUTER PROGRAMMES

New clause - *Amending sections 11A and 11B – Copyright AB*

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.”.

AMENDMENTS PROVIDING FOR OFFENCES FOR TPMS AND DIGITAL RIGHTS

Clause 27 - Section 27 – Copyright AB

“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 ~~has reason to believe~~ 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 effective²⁶ 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 ~~has reason to believe~~ 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

²⁶ Wording of 28O copied. See 28O(5) for a definition of what is an effective TPM.

other person to unlawfully circumvent an effective technological protection measure in the Republic; or

(c) circumvents such an effective technological protection measure when ~~he or she is they are~~²⁷ not authorized to do so,

shall be guilty of an offence ~~and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment~~²⁸.

(5C) Subject to section 28S²⁹, 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

²⁷ The Committee requested gender neutral drafting.

²⁸ This is covered by S27(6) – the deletion is to avoid duplication or conflicting wording.

²⁹ Section 28S gives the exceptions. So if you have a defense as set out in 28S, you did not commit an offence.

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.”

AMENDMENTS TO MAKE THE FAIR USE FACTORS APPLICABLE TO EXCEPTIONS IN SECTIONS 12B, 12C, 12D, 19B AND 19C

Clause 13 - Section 12A – Copyright AB

“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;³⁰~~

(ii) criticism or review of that work or of another work;

(iii) reporting current events;

~~(iv) scholarship, teaching and education;³¹~~

(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;

~~(vi) preservation of and access to the collections of libraries, archives and museums;³² 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.

³⁰ This amendment is to remove a duplication – education and academic is provided for in section 12D. The exception for personal copies is provided for in section 12B(1)(i).

³¹ This amendment is to remove a duplication – education and academic is provided for in section 12D.

³² This amendment is to remove a duplication – libraries, archives and museums are provided for in section 19C.

(c) For the purposes of paragraphs (a) and (b) the source, as well as ~~and~~ the name of the author shall be mentioned, if it appears on the work³³.

(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)."

³³ This amendment is iro aligning the wording related to moral rights in the Bill with the existing wording of the Act.

AMENDMENTS RELATED TO ADDING THE WORDING OF THE THREE STEP TEST

Clause 13 - Section 12C – Copyright AB

“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 commercial significance to these acts.³⁴

(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.”³⁵

Section 12D

“Reproduction for educational and academic activities

12D. (1) Subject to subsection (3), a person may make a reproduction of a work, including the use of a lawful copy of the work at a different time or with a different device owned by that person,³⁶ or may broadcast it, for the purposes of educational and academic activities: Provided that—

- (a) the extent of the reproduction or the portion of the broadcast shall be compatible with fair practice;³⁷

³⁴ This amendment was to correct the alignment of the wording as the proviso applies to both paragraphs (a) and (b).

³⁵ (2) is a proposal for incorporation of the three step test.

³⁶ This amendment relates to removing duplications – section 12A’s wording is included here.

³⁷ This amendment is technical – “fair practice” is to be used instead of “extent justified by the purpose”.

- (b) a reproduction may only be made in the cases stipulated in this section;³⁸
- (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

³⁸ (b), (c) and (d) are a proposal for incorporation of the three step test.

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) (a) The source of the work reproduced and the name of the author, if it appears on the work,³⁹ shall be indicated on all copies contemplated in subsections (1) to (6).

(b) The use of the work as contemplated in subsections (1) to (6) shall be compatible with fair practice⁴⁰.”

(9⁴¹) Copyright in a work shall not be infringed by any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall be compatible with fair practice: Provided further that 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.”

³⁹ This amendment is to align the wording iro moral rights in the Bill with the existing wording of the Act

⁴⁰ This amendment is technical – “fair practice” is to be used instead of “extent justified by the purpose”.

⁴¹ Section 12B(1)(b) has been moved here to 12D(9) to consolidate all aspects dealing with education. Technical amendments have been added iro moral rights and using “fair practice” instead of “extent justified by the purpose”.

**AMENDMENT IRO A DUPLICATION – ADVERTISEMENT IS RECOMMENDED
BECAUSE OF THE CHANGE IN MEANING**

Clause 20 - Section 19C – Copyright AB

“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 for commercial purposes.](#)

(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.”.

**RETROSPECTIVE CLAUSES AND DELEGATIONS TO MINISTER
(FROM FIRST DISCUSSIONS ON THE PRESIDENT'S RESERVATIONS)⁴²**

Copyright AB

Clause 5 (Retrospective clause and re delegations to Minister)

1. On page 5, from line 50, to omit subsection (7)(a) and (b)(i) and (ii).
2. On page 6, from line 1, to omit subsection (7)(b)(iii) and (c).

Clause 7 (Retrospective clause and re delegations to Minister)

1. On page 7, from line 8, to omit subsection (7)(a), (b) and (c).

Clause 9 (Retrospective clause and re delegations to Minister)

1. On page 9, from line 48, to omit subsection (5)(a) and (b).
2. On page 10, from line 1, to omit the continuation of subsection (5)(b)(iii) and subsection (5)(c).

⁴² These amendments were already agreed to when the President's reservations were considered.

AMENDMENTS TO PROVIDE CLARITY (ALIGNING WORDING MORE CLOSELY TO TREATY WORDING)

Clause 3 – Performers’ Protection AB

Insertion of sections 3A and 3B in Act 11 of 1967

3. The principal Act is hereby amended by the insertion after section 3 of the following sections:

“Transfer of rights

3A. (1) Where a performer has consented to fixation of his or her performance in an audiovisual fixation or sound recording, the exclusive rights of authorisation granted to a performer in terms of section 3(4)(c), (d), (e), (f), (g) and (h) shall be transferred to the producer of such audiovisual fixation or sound recording, or his or her licensee.

(2) Any consent contemplated in subsection (1) must be contained in a written agreement between the performer and the producer.

(3) The written agreement contemplated in subsection (2)—

(a) must at least contain the compulsory and standard contractual terms as may be prescribed;

(b) must set out the—

(i) royalties or equitable remuneration in respect of audiovisual works; and

(ii) equitable remuneration in respect of sound recordings,⁴³

due and payable to the performer for any use of the fixation of the performance;

and

(c) shall be valid for a period of up to 25 years from the date of commencement of that agreement in the case of a sound recording, where after the exclusive rights contemplated in subsection (1) reverts to the performer.”

⁴³ This amendment is to clarify that “royalties or equitable remuneration” do not apply to sound recordings. The request for clarity was made during the previous call for comments.

AMENDMENTS TO INSERT A MISSING WORD

Clause 6 – Performers’ Protection AB

Amendment of section 8D of Act 11 of 1967 as inserted by section 2 of Act 28 of 2013

6. Section 8D of the principal Act is hereby amended by the addition of the following subsections:

“(3) The Minister must make regulations prescribing compulsory and standard contractual terms to be included in agreements to be entered into in terms of this Act, which contractual terms must include—

- (a) The rights and obligations of the performer and the relevant producer, broadcaster or user;
 - (b) the royalties or equitable remuneration payable to the performer agreed on as the case may be;
 - (c) the method and period within which any royalty or equitable remuneration must be paid by the relevant producer, broadcaster or user, to the performer;
 - (d) the period of the agreement;
 - (e) a dispute resolution mechanism; and
 - (f) provision for both parties to sign the written agreement as proof of consensus.
- (4) The Minister may prescribe guidelines for a performer to grant consent under this Act.”.

Clause 7 (following from the technical amendments made to 28O and 28P) – Performers’ Protection AB

Insertion of sections 8E, 8F, 8G and 8H in Act 11 of 1967

7. The principal Act is hereby amended by the insertion after section 8D of the following sections:

“Prohibited conduct in respect of technological protection measures

8E. (1) No person may make, import, sell, distribute, rent out, offer or expose for sale, rental or advertise for sale a technological protection measure circumvention device if such a person knows or has reason to believe that it will or is likely to be used to infringe the right of a performer in respect of a performance that is fixed in a technologically protected audiovisual fixation or sound recording.

(2) No person may provide a service to any other person if—

(a) such other person intends to use the service to circumvent an effective technological protection measure in an audiovisual fixation or sound recording; or

(b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright or the right of a performer in a technologically protected audiovisual fixation or sound recording.

(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.

(4) No person may, during the subsistence of the right of a performer in respect of a performance that is fixed in a technologically protected audiovisual fixation or sound recording and without a licence of that performer and the owner of copyright in the relevant work, circumvent an effective technological protection measure applied to such work.

(5) A technological protection measure shall be deemed to be effective if the use of the audiovisual fixation or sound recording is controlled by the exclusive licensee, producer or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

~~(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).~~⁴⁴

Exceptions in respect of technological protection measure

8F. (1) ~~For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002),~~⁴⁵ Nothing in this Act shall prevent any person from using a technological protection measure circumvention device applied to an audiovisual fixation or sound recording to perform any of the following:

(a) An act permitted in terms of any exception provided for in this Act or the Copyright Act; or

(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the

⁴⁴ This is a technical amendment to bring the Bill up to date with events that happened since it was passed by both Houses.

⁴⁵ This is a technical amendment to bring the Bill up to date with events that happened since it was passed by both Houses.

protection of data in order to enable the performance of any act permitted in terms of paragraph (a).

(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—

(a) apply to the performer and the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or

(b) if either the copyright owner, or the performer has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.

(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—

(a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and

(b) purpose for which the services of such other person has been engaged.”.