

## COMMENTS: COPYRIGHT AMENDMENT BILL

Proposed amendments to the Copyright Amendment Bill [B 13B – 2017] (the amendment Bill) were published by the Portfolio Committee on Trade and Industry for comment on 3 December 2021. The closing date for comments is 21 January 2022.		
<b>Clause</b> (Indicate clause number)	<b>Comment</b> (State why the clause or proposed amendment is not supported or what the problem is with the provision)	<b>Suggestion</b> (Suggested deletion/amendment/ addition)
General comment	It is not clear from the document containing the proposed amendments whether this is a formal amendment Bill or merely informal proposed amendments to the amendment Bill.	The clauses need to be numbered correctly. As it stands in the document, the clauses are not numbered and the only numbering refers to either the Copyright Act, 1978 (Act 98 of 1978) (the Act) or the amendment Bill. Furthermore, the clauses should be correctly titled e.g. the clause containing the proposed amendment to section 11A of the Act should be titled "Substitution of section 11A of Act 98 of 1978, as inserted by section 8 of Act 52 of 1984". The clauses should be properly numbered and titled throughout the document.
1 – definition of 'authorized entry'	The definition refers to "government".	It is submitted that this is an imprecise word that can have numerous meanings e.g. national government, provincial government and local government. The word "government" has also not been defined. It is submitted that it would be better to refer to an entity that is recognised by regulatory bodies which are recognised in terms of legislation for the purposes of providing education, instructional training etc.
1 – definition of 'authorized entry'	Paragraph (b) refers to a "government institution" or "non-profit organization".	It is submitted that definitions need to be provided for these terms to enhance clarity.
1 – definition of 'broadcast'	The additional amendments make provision for the insertion of a definition for "broadcast".	It is submitted that consideration should be given to aligning the definition with that is used in the Electronic Communications Act, 2005 (Act 36 of 2005), which reads: <i>““broadcasting” means any form of unidirectional electronic communications intended for reception by—            (a) the public;</i>

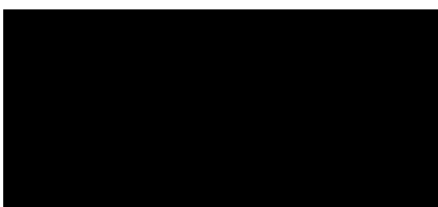
		<p>(b) sections of the public; or</p> <p>(c) subscribers to any broadcasting service,</p> <p>whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof, and "broadcast" is construed accordingly;"</p> <p>It is submitted that this definition of "broadcasting" in the Electronic Communications Act, 2005, is more concise and provides for greater clarity.</p>
11B	Paragraph (e) of this section in the proposed amendments refers to "...transmitted in a diffusion services,...".	This is incorrect. It should refer to "service".
13	<p>Clause 13 provides for the insertion of new sections in the Act. Proposed section 12A provides for general exceptions from copyright protection. This proposed section reduces the protection that a copyright owner has over his or her copyright. In this regard, four new purposes for which works may be used without constituting copyright infringement have been introduced, namely proposed section 12A(a)(iv) to (vii). Those purposes contemplated in paragraphs (i) to (iii) are found in the existing section 12(1)(a) to (c) of the Act, which stands to be repealed. Copyright owners will no longer be remunerated for their work when it is used for purposes such as those contemplated in proposed paragraph (a)(i) to (vii). Furthermore, the wording has been amended broadening the scope of the purposes for which a work may be legitimately used. Section 12(1) of the Act provides for a closed list of purposes. Proposed section 12A(1) refers to "purposes <u>such as the following</u>". This is an open list so copyright owners may not receive</p>	<p>It is submitted that this deprivation is arbitrary as contemplated in section 25(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution). In <i>South African Diamond Producers Organisation v Minister of Minerals and Energy and Others</i> 2017 (6) SA 331 (CC) it was held that in order for there to be an infringement of section 25(1):</p> <p>(i) The thing in question must be property. Intellectual property has been recognised by the Constitutional Court as constitutionally protectable property [<i>Laugh It Off Promotions CC v SAB International (Finance) t/a Sabmark International</i> 2006 (1) SA 144 (CC)].</p> <p>(ii) There must be deprivation which is substantial i.e. the intrusion must be so extensive as to have a legally significant impact on the rights of the affected party.</p> <p>(iii) The deprivation must be arbitrary i.e. the depriving law does not provide sufficient reason for the deprivation or is procedurally unfair.</p> <p>The purpose of the proposed legislation is presumably to provide access to copyright material without having to obtain the copyright owner's permission. However, the open list is far too wide and the circumstances in which copyright</p>

	remuneration if their work is used for purposes similar to those listed. It is submitted that this substantially limits the owner's right to enjoyment of his or her property.	works can be used in terms of this provision are imprecise and unknown. The purpose of enhancing access to copyright material is not justified by the extent of the deprivation and weakens copyright protection.
13	It is also submitted that proposed section 12A contravenes section 22 of the Constitution which states that every citizen has a right to choose their trade, occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law.	In the <i>South African Diamond Producers Organisation</i> case the court held that if a legislative provision has a negative impact on the choice of trade, occupation or profession then the provision must be reasonable and justifiable in terms of the criterion in section 36(1) of the Constitution. If a legislative provision makes the practice of a trade or profession so undesirable, difficult or unprofitable that the choice to enter that trade or profession is limited, then section 22 of the Constitution is contravened as it negatively affects the "choice" element of that section. It is submitted that proposed section 12A contravenes section 22 in that its provisions are so onerous as to render the occupations of anyone who produces a work contemplated in that proposed section and who deals in copyright (e.g. an author or composer) to be undesirable, difficult or unprofitable. The provisions negatively affect a copyright owner's ability to make a living and thereby negatively affect the choice to pursue that occupation. Furthermore, proposed section 12A violates section 22 of the Constitution because there is no justification or rational reason for the provisions. As far as is known, no research has been done to determine the impact of proposed section 12A. It is therefore submitted that proposed section 12A is unconstitutional and needs to be reassessed.
13	Proposed section 12A(a)(i) provides for "fair use" of copyright work for research, private study or private use. Proposed paragraph (b)(iii)(bb) states	It is submitted that where the use is for commercial purposes then it cannot be considered to be "fair" for the purposes of determining an exception in terms of this

	that in determining “fair use” all relevant factors must be considered, including the purpose and character of the use including whether it is of a commercial nature or for non-profit research, library or educational purposes.	provision. It is submitted that private study and private use can be undertaken for a commercial purpose. If an exception from copyright protection were to be granted for research, private study and private use for commercial purposes the effect would be to deprive the copyright owner of the fruits of his intellectual property for the purposes of enriching another.
13	Proposed section 12A(a)(iv) provides for an exception to be made in those instances where a copyright work is used for the purposes of scholarship, teaching and education. The amendment Bill does not define what is meant by “teaching” and “education”. In this regard, see also proposed sections 12B(1)(b), 12B(1)(f)(ii) and 12D(1).	It is submitted that this can be interpreted to mean informal teaching between two individuals. In such instances, an exception from copyright protection should not be granted. It is submitted that the Bill should clarify what is meant by “teaching” and “education”, perhaps by way of definitions.
13	Proposed section 12A(a)(vii) states that an exception is made from copyright protection for ensuring proper performance of public administration.	It is submitted that this provision is very wide. The wording should be amended so that the proper performance must be reasonable. It is submitted that both “proper performance” and “public administration” need to be clarified so that the copyright owner is not unnecessarily deprived of his property.
13	Proposed section 12B provides for specific exceptions from copyright protection applicable to all works. Proposed section 12B(1)(a) states that copyright shall not be infringed by “any quotation”. The existing quotation exception found in section 12(3) of the Act limits the exception to literary or musical works. Proposed section 12B(1)(a) does not have this limitation and has expanded the exception considerably to include e.g. visual artistic works, which by their nature cannot be quoted but must be reproduced as a whole. Proposed section 12B(1)(c) refers to reproduction of a work by a broadcaster. Section 12(5) of the Act limits the broadcasting to literary or	It is submitted that this constitutes arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. The deprivation is substantial and overly broad. Copyright owners will no longer be entitled to profit from an exploitation of a work as contemplated in this proposed section. It is therefore submitted that proposed section 12B needs to be reassessed.

	musical works. Proposed section 12B(1)(c) does not have this limitation and the exception has now been extended to the broadcasting of any work.	
13	Proposed section 12C provides for exceptions from copyright protection applicable to temporary reproduction and adaptation where the copies and adaptations are an integral and essential part of a technical process. Proposed paragraphs (a) and (b) provide for the purpose for which these copies or adaptations may be made. A caveat is provided that "there is no independent, economic significance to these acts".	It is not clear what is meant by "economic significance". The term is imprecise and vague. Elsewhere the term "commercial" is used. In the interests of consistency, it is submitted that the wording should be amended to "there is no commercial significance to these acts".
20	Clause 20 provides for the insertion of proposed section 19C providing for general exceptions from copyright protection applicable to the protection of copyright work for libraries, archives, museums and galleries.	It is submitted that the exceptions regarding protection of copyright work for libraries, archives, museums and galleries also constitute an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution. Proposed section 19C(3) provides for a library, archive, museum and gallery to provide "temporary access" to a copyright work to a user or another library. It is not clear from this what is meant by "access". Proposed section 19C(5)(b) permits a library, archive, museum and gallery to make a copy of a publicly accessible website for the purposes of preservation. Proposed section 19C(9) permits a library, archive, museum and gallery to make a copy of a copyright work for its own collection when the permission of the copyright owner, after a reasonable endeavor, cannot be obtained or when the work is not available by general trade or from the publisher. It is not clear from the wording what "reasonable endeavor" to obtain the permission means. Does this mean that a reasonable endeavor was made to obtain permission when the copyright owner expressly forbade the copying of the work, or does it mean that

		a reasonable endeavor was made to locate the copyright owner? It is submitted that these provisions constitute a substantial loss of profit for copyright owners. Furthermore, they are too broad or vague to support the purposes contemplated in the provisions and the deprivation of the copyright owner's property is therefore arbitrary. It is therefore submitted that proposed section 19C needs to be reassessed.
27	<p>This clause provides for the proposed insertion of proposed section 27(5A). The proposed provision reads, "Any person who at the time when copyright subsists in a work, without the authority of the owner of the copyright and for commercial purposes—</p> <p>(eA) communicates the work...; and</p> <p>(eB) makes the work available..., <u>which they know</u> to be infringing copyright in the work,...".</p>	<p>It is submitted that the words "which they know" should be amended to "which such person knows, or should reasonably have known". This is consistent with wording in proposed section 27(5B)(a). Furthermore, the paragraphs should be lettered (a) and (b) and not (eA) and (eB).</p>



**MR D MAYNIER**  
**MINISTER OF FINANCE AND ECONOMIC OPPORTUNITIES**  
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