



Presentation to the Portfolio Committee on Trade and Industry: Responses to the Public Submissions in the 2nd Call for comments

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the dtic

Department
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

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PRESENTATION OVERVIEW

- Purpose
- Background
- Advertised clauses and responses

PURPOSE

To brief the Portfolio Committee on Trade and Industry on the response of the Department to the public submissions in the second call for comments in terms of section 79(1) process.

BACKGROUND

- On 5 December 2018 the National Assembly adopted the Bills. On 28 March 2019, the NCOP adopted the Bills and they were referred to the President.
- On 16 June 2020, a letter was received from the President of the Republic to the Speaker of Parliament to refer the Copyright Amendment Bill, 2017 [B13-2017] and the Performers' Protection Amendment Bill, 2016 [B24-2016] to the National Assembly for consideration of the President's reservations on the basis of their constitutionality.
- Section 79(1) of the Constitution of the Republic of South Africa requires that the President must either assent to and sign a Bill, or if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

BACKGROUND

- The President raised reservation that the Copyright Amendment Bill may encounter constitutional challenges and he cited specific sections of the Bill: Sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C(3), 19C(4), 19C(5)(b) and 19C(9) may constitute deprivation of property; Sections 12A and 12D may further violate the right to freedom of trade, occupation and profession.
- There were 2 calls for public comments. The recent provisions on the Remitted Bills were advertised for public comment from 3 December 2021 to 21 January 2022 and the deadline was extended to 28 January 2022 (2nd call for comments). This was a follow up process from the process undertaken in 4 June to 9 July 2021 (1st call for comments) wherein parliament advertised the clauses (i.e sections 12A, 12B, 12C, 12D, 19B, 19C and compliance with international treaty obligations) and held public hearings in August 2021 (11 and 12 August), to address the concerns of the President.
- In terms of section 79(1), the Committee must limit the consideration of the inputs to clauses affected by the reservations only.
- The public comments led to further proposed amendments, recommended by the public, in an effort to address the President's reservation. The amendments were informed by the previous public submissions process of June-August 2021.
- 51 submissions were received in this current public comment process.

Background

- The stakeholders who made submissions did not support the amendments. Some argued that the amendments went beyond the President's reservations. In such instances, it was not the case but because of the international treaty obligations.
- The amendments advertised respond to the reservations of the President. The recent advertised clauses were informed by the previous public submissions.
- The issues raised by the public were substantive and that necessitated they be advertised and put forward for comment.
- The majority of the feedback or responses from the public pointed to the unintended consequences to some of the proposed changes.

ADVERTISED CLAUSES AND RESPONSES

Accessible format copy definition

- **Rational for the amendment:** It was submitted that the definition must be compliant with the Marrakesh Treaty and include the other wording that sets the standard on the definition. Amended to align with treaty wording
- **The advertised clause:** (2)(b) “accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, **including** to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.
- **Public Comments:** “Accessible format copy” in the Bill is diametrically opposed to the definition in the Marrakesh Treaty. This has not changed by the insertion of the phrase “including to” in the definition and the definition has not thereby been made to be more conformed to the definition in the Marrakesh Treaty. -SAMRO
- The proposed use of the term “including” in these of the CAB results in a material change to the construct of the provision as the use of “including” expands and widens the provision, resulting in instances of who may access copyright works and how such works may be accessed.-NAB

Accessible format copy definition

- **Response by the dtic:**
- The Marrakesh Treaty definition:
 - “accessible format copy” means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.
- This is to demonstrate that the advertised definition is similar except for the forms of disabilities.
- The works in the Bill are not limited to literary and artistic works but provides for all the works.
- The CAB definition extends beyond the beneficiary person of the visually impaired or other print disabled to other forms of disabilities.
- The word ‘including’ is in the Treaty. The difference between the definition is the other forms of disabilities and works that are included.
- There are countries with this exception beyond the Marrakesh Treaty and wherein works are not defined or specified. Many jurisdictions have included other forms of disability, and these considerations are not only limited to SA.
- The word including should be retained as well as the revised definition. The amendment is wider than the Marrakesh Treaty definition or phrase and provides more rights for persons with disabilities.

New definition: authorized entity

- **Rational for the amendment:** Several stakeholders proposed the inclusion of authorized entity in section 19D(3) including its definition.
- The Bill does not currently include the ‘authorized entity’.
 - “authorized entity” means an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.
- **Advertised definition of authorized entity:**
- **“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.”

New definition: authorized entity

Public Comments:

- The current definition is potentially open to abuse by persons who are not really concerned with persons with the relevant disabilities. The words “as one of its primary activities or institutional obligations” should be changed to “as its primary activity or institutional obligation” or “as its principal activity or institutional obligation”. Anton Mostert
- This definition is too narrow. In (b) – the word ‘primary’ should be deleted, because lawful entities, even if the activity is not one of their primary activities or institutional obligations, should be permitted to provide such a service to people with disabilities, especially in a country where they have been deprived from copyright exceptions for decades.-Shakila Maharaj, SADTU
- The heading, ‘authorized entity’, does not cover (b) as no mention is made of authorization by government for these entities (a government institution or non-profit organization). In any case, (a) does not exclude the entities under (b), provided they are authorized.-Denise Nicholson, Future Managers
- Apart from its use in the definition of ‘authorized entity’, the word ‘government’ in the proposed amendments should be changed to ‘relevant government department’ or ‘relevant government entity responsible for ...’. Denise Nicholson
- Government is vague (e.g which of the three sphere. Rather refer to the applicable regulatory bodies which are recognized in terms of legislation for the purposes of providing education, instructional training, etc. -WCG
- Define government institution or non profit organization to enhance clarity.-WCG
- The phrase ‘one of its primary activities’ must be interpreted broadly, to include organisations whose key purpose is to advocate for the interests of people with visual and print disabilities. This is in line with the practice of several countries including Australia,¹⁵ Kenya,¹⁶ Malawi,¹⁷ Botswana,¹⁸ and Peru.-Blind SA and Section 27
- **Response by the dtic:**
- This is the language currently used in the Treaty, applicable entities will apply. Regulations will guide further on the prescribed authorized entities.
- It is recommended the definition of authorized entity be retained, including the words ‘as one of its primary activities’ and reference to government. The language is similar to the one in the treaty.

Section 19D(1)

- **Rational:** The amendment in 19D(1) removed prescribed to include authorized entity.
- **The advertised clause**
- **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:
- **Public comments**
 - The proposed deletion of the phrase “... as may be prescribed and ...” may result in unintended consequences for works that have already been transformed into an accessible format (inter alia braille and audio recordings) that are proprietary to the entity that transformed or converted such accessible copies. This would infringe any copyright ownership rights that a Non Profit or authorized entity may enjoy from the creation of the accessible format.-SANCB
 - The grammar is incorrect in 3 places, i.e. in Section 19(D)(1), (2) and (3). ‘Any person that serves ...’ should be changed to ‘any person who serves...’
Denise Nicholson
 - It is submitted that the insertion of the expression “authorized entity” in this section does not cure the defect of the section, in that, by keeping the phrase, “any person that serves persons with disability, including an authorized entity” (s 19D(1)), the facilitation of access to accessible format copies is not limited to authorized entities, as contemplated in the Marrakesh Agreement, but also includes other persons serving persons with disability. This defeats the purpose of having authorized entities to facilitate access to copies by beneficiaries and in fact removes the incentive to seek authorisation and / or recognition by government as an authorized entity – if any other person, even though not an authorized entity, may also provide those services. SAMRO
- **The dtic response**
 - As prescribed is necessary because there is a need to ensure the entities are authorized. Prescribed is recommended to be retained.
 - It is recommended that the proposed language should be considered, that is amend ‘any person that serves’ to ‘any person who serves’.

19D(3): include a reference to an authorized entity

- **Rational for the amendment:** The reference to authorized entity was recommended to be included in section 19D(2) and 19D(3), to align to the Marrakesh Treaty.
- Section 19D(3) provides that the authorized entity or person with disability may without the authorization of the copyright owner export to or import from another country any copy of an accessible format copy as long as the activity is for a non profit basis by that person; provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used other than for persons with disability.
- It was proposed that the EU directives wording regarding the use of the accessible format copy be reworded to state a positive obligation rather than a negative one and that the tense of the obligation be aligned with the timing of exporting / importing. The issue was with the language (future and past tense) and that it is worded as a defence.
- **The advertised amendment:** 19D(3)(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.

19D(3): include a reference to an authorized entity

- **Public Comments:** 19D(3)(b)'s proposed wording is not aligned with that of the Marrakesh Treaty. Imposes additional burdens/obligations upon people with disabilities. Delete the proposed amended wording and replace them with the relevant text from the Marrakesh Treaty. -LIASA and CHELSA, AFLIA, Creative Commons, NCLIS, Blind SA and Section 27 (**similar comments grouped together**)
- A drafting suggestion. Section 19D(3)(b) to read: "A person contemplated in paragraph (a) may only so export or import provided that prior to the distribution or making available they did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons."-Joint Academic Opinion

19D(3): include a reference to an authorized entity

- **Response from the dtic:**
- Marrakesh Treaty language: “(a) authorized entities shall be permitted, without the authorization of the right holder, to distribute or make available for the exclusive use of beneficiary persons accessible format copies to an authorized entity in another Contracting Party; **provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons**”.
- It is recommended that the wording be amended to reflect the exact language in the Treaty. Some stakeholders interpreted it as increasing the burden on this provision and the burden of proof for persons with disabilities or people serving people with disabilities.
- Other proposed wording can be considered to ensure alignment with drafting rules and other considerations.

19D(4): include a reference to an authorized entity

- **Rational for the amendment:** To ensure alignment with the Treaty.
- **The advertised amendment:** The provision provides as follows:
 - (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.”.
- **Public comment:** Section 19D(4)(b) is problematic, suggesting that the applicability of the exception is subject to the end-use of works (are they used by beneficiaries) rather than the basis on which they are supplied (are they only supplied to beneficiaries). This creates significant potential liability for libraries, which reasonably can only have a say over the latter (the position also taken by the Treaty). –LIASA and CHELSA, Dennis Nicholson
- Recommend that the proposed wording be deleted.
- **Response by the dtic:**
- It is recommended that the wording be deleted. Section 19D(4)(b) to be deleted.

Clause 33, Section 39

- **Rational of the amendment:** To provide for the regulations of authorised entities and a correction of a cross reference in cH.
- **Advertised clause: Section 39(cI)**
- New subsection (2) – current subsection (2) to become (3):

“(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.”.

- **Public comments:** This amendment is to provide that the Minister may prescribe processes and formalities for “authorised entities” to be recognised - the definition speaks of what “authorised entities” are, but not how that happens. We need to put this as a separate subsection as subsection (1) provides for discretionary regulations only and these processes must be prescribed.
- Section 39(cH) of the CAB endows the Secretary of State with powers to prescribe ‘permitted acts’ for the circumvention of TPMs as provided in the Act. However, the CAB proposes no arbitration or adjudication in the event when a copyright owner would have good grounds to challenge whether the intended circumvention fell under that definition.-
- In addition to the above, although not a material change, they request that the Portfolio Committee amend the title of section 39(cI) of the Act to “section 39(cL)”, with an upper-case letter “L”, for consistency and to avoid confusion.
- The words “to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport” must be deleted from the Section 39B.
- “Clause 33 Section 39 (c) (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.”-SANCB
- **the dtic response**
- The prescribed for the authorized entities is supported. The Regulations will ensure the processes are provided for.
- The correction of 39(cI) is recommended for a correction, to 39(cL)
- Section 39B does not form part of this amendments. It deals with unenforceable contractual term.

definition: “broadcast”

- **Rational for the amendment:** It was submitted that in clause 1 section 1(b): the proposed amendment to the definition of “broadcast” is incompatible with international law because of the inclusion of transmissions by wire within the meaning of “broadcast”. “Broadcast” is defined in international treaties, including the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and the WPPT, as a technical term referring specifically to wireless, over the air, one-to-many transmissions.
- The initial policy position was that broadcast can include wire to allow for flexibility and options. Wire was included to ensure for instances where the broadcast cannot be wireless. Wire is another channel of transmission and not having any particular negative implication.
- It was recommended that wire is removed from the definition to ensure compliance with the Treaty and as an issue raised in the public submissions.
- Removed wire from the definition of broadcast. There are questions about recent broadcast developments and about “wired” broadcasts. The definition has links to Clause 4, 6, 10 re communicating the work to the public. The public requested that wire be removed – but there may be examples of wired broadcasts.
- **Advertised clause:**
- “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;”.

definition: “broadcast”

- **Public Comments:** Amending the definition of “broadcast” in the Copyright Act in this manner is apt in that the definition in the Copyright Act was based on the traditional description of broadcasting services, as understood within the regulations of the International Telecommunications Union (ITU), where a broadcasting service is defined in terms of transmissions using Hertzian waves. It is therefore appropriate to have similar definitions of broadcast in the two legislations.-SAMRO
- The definition of “broadcast” in both bills is inconsistent with the definition set out in the Electronic Communications Act (ECA), which is the primary legislation on all broadcasting matters. The change in definition is very problematic.-NAB, WCG
- The Beijing Treaty context is not always applicable to the South African context.-NAB
- South Africa does not have broadcasting organisations.
- The definition of broadcast in the Copyright Bill and PPA Bill has introduced features to the Beijing Treaty definition such as "partially or wholly" that are unclear as to what they contemplate.-NAB, Multichoice
- The proposed definition does not include current or new broadcast technologies-rather use telecommunication.-eMedia Investments
- Definition of broadcast in South Africa being discussed under current white paper and applicability in South African context.-NAB
- There is no recognition of the relationship between the definitions of “broadcast” and that of “programme-carrying signal.”-Anton Mostert

definition: “broadcast”

- **Public comments:**
- By excluding transmissions “by wire” from the definition that currently exists in the Performers’ Protection Amendment Bill, the definition excludes licensed broadcasters who currently broadcast content by wire in South Africa.-eMedia Investments
- Proposal to replace the definition of "broadcast" in the PPA Bill with the existing definition of "broadcast" in the current Copyright Act would both ensure consistency between the two bills and address the defects in the current PPA Bill definition of the term.-Multichoice
- The definition of "broadcast" in the Copyright Bill and the PPA Bill separates transmission by satellite from the previous definition of broadcasting in (a) the result being that all transmissions by satellite are considered to be broadcasting irrespective of the nature of the services. -Multichoice
- What is the meaning of the phrase “by wireless means”? Does it cover the Internet and Telecommunications? What is the meaning of the phrase “for public reception”? Does it cover transmission to parts of the public – for example a broadcasting service that is aimed at sections of the public rather than the public as a whole?-NAB
- **Response by the dtic:** It is recommended that wire be retained in the Bill due to unintended consequences and concerns raised by the public.
- In the South African telecommunications context, wire transmission is still applicable. Removing it may also have implications for other laws and industries that apply ‘wire’ transmission such as in the broadcasting industry.
- There is a link between this definition and other provisions related to communicating to the public, making available to the public and programme carrying signal. Removing wire will impact the Bill in other provisions.
- The alignment of the definition of broadcast has been included in the performers’ protection amendment Bill. It is one of the proposed amendments.
- The definition is not exactly as the one in the Electronic Communication Act (ECA) but **the dtic** has not identified a conflict in the laws. The using of the definitions can be considered. It is recommended that for now, the definitions in the CAB be retained. The review of the definitions may require time and consultations to assess them and other implications. It should also be noted that there are international discussions on broadcasting (WIPO Treaty discussions) and legislation under review, this definition likely to be reviewed from other legislative perspective and may change.

Lawfully acquired

- **Rational for the amendment:** Personal copies are the exceptions provided in section 12(1)(i) of the Bill.
- It was submitted that the provisions in the Bill are too broad and subject to exploitation and may lead to deprivation of property.
- The current Bill allows for the making of personal copies with some restrictions:
 - 12B(1)(i) provides-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 such use shall not exceed the extent justified by the purpose.
- It was recommended that lawfully acquired should be defined as --“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.”
- There are concerns about unintended consequences with this definition. The provision has excluded copies made under other exceptions.
- **Advertised provisions:**
- Clause 1: “‘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;
- **12B(1)(i):**

“(i) 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.”

Lawfully acquired

- **Public comments:** Regarding 12B(1)(i): The principle of non-retrogression would be applicable if this Section is included in the Bill. The current copyright law allows for ‘research or private study, or the personal or private use of, the person using the work’ and is not restricted by any conditions.-LIASA and CHELSA, Blind SA, Creative Commons, NCLIS
- There was proposal to introduce private copy levy.-CISAC, Dalro, RISA
- This defined term must undergo a legal assessment as a provision that supplements the copyright exceptions.-SAIPL
- Remove the definition and use of ‘lawfully acquired’ in the Bill, and remove reference to fair practice in Section 12B(1)(i)–Denise Nicholson, LIASA and CHELSA
- A work cannot be lawfully acquired if it is an infringing copy. To obviate this possibility, the qualification that the copy should not be an infringing copy should be added to the definition. Whether a gift of a copy of copyright work could constitute lawful acquisition. Anton Mostert
- The similar regulations was quashed by the UK Judicial review.-IFFRO
- Replace the phrase “lawfully acquired” with “lawfully accessed” in Section 12B(1)(i), leaving courts to define lawfully acquired.-Blind SA and Section 27
- Lawfully acquired and lawful copy. Whether they are supposed to have the same meaning. Lawfully acquired should be used consistently.-IFFRO, Anton Mostert
- This definition is flawed as it is limited in what lawful acquisition actually is. It is impossible to cover all forms of lawful acquisition in the definition, e.g. donations, inherited works, accessible formats not charged for, loans.-Shakira Maharaj

Lawfully acquired

- **Response by the dtic:** This was considered because of the concern about the abuse of personal copies at the expense of the copyright owner or author. The UK court set aside (dismissed) the regulations related to lawfully acquired personal copies. The private copying exception with the regulation that includes lawfully acquired, was introduced in the UK by the Copyright and Rights in Performance (Personal Copies for Private Use) Regulations. However, following a judicial review filed against the UK government, in 2015 the High Court dismissed the regulations introducing the exception.
- It is recommended that the definition of lawfully acquired be removed from the Bill. This is because of the unintended consequence and interpretation challenges and impact on sectors such as libraries. The courts can interpret lawfully acquired.
- The definition of lawfully acquired is also in some of the international law. It was important to subject this to public comment.
- As a mitigation, in the Bill there is a proposed subsection included to indicate that this would not affect other copies or copying in the Bill. So it was not the intention of the amendment to affect access to information provided in the Act for personal copies or the Bill. It read: “ (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.”
- The inclusion of lawfully acquired was not intended to conflict the principle of non-retrogression in law, in this amendment context, taking away the existing right to personal copies. The subsection b(1)(ii) was added to confirm this intention. This provision was added to ensure protection of the rights of authors and copyright owners while also considering the rights to access to information for the public.

Ephemeral exception: Subsection 12B(1)(c)

- **Rational of the amendment:**
- This exception is currently in section 12(5) of the Copyright Act.
- The Act is limited to musical or literary works.
- Ephemeral rights form part of exceptions and allow a broadcaster to have a copy of the work such as sound recordings for a limited period of six months without being allowed to distribute it to any person. During live events that are broadcast, the broadcaster may have the copy of the music played.
- It allows broadcasters the right to use sound recording in their reproductions without paying royalties.
- Ephemeral is temporary use, and according to the Act it is for 6 months.
- The Act also specifies how this reproduction can be stored.
- The Bill has subsection 12B(1)(c) that provides:
 - the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;
- The concern is that the six months is a long period and there are no payments of royalties for mechanical rights. The rights of rights holders in the sound recording industry are affected.
- The proposed amendments are from the Canadian copyright Act. They make allowance for 30 days instead of 6 months. The permission of owner is sought in various actions, there are payments of royalties for certain uses.

Advertised Ephemeral exception: Subsection 12B(1)(c)

Ephemeral recordings

30.8 (1) It is not an infringement of copyright for a [broadcaster] to fix or reproduce in accordance with this section 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, if the undertaking

- (a) is authorized to communicate the performer's performance, work or sound recording to the public by telecommunication;
- (b) makes the fixation or the reproduction itself, for its own broadcasts;
- (c) does not synchronize the fixation or reproduction with all or part of another recording, performer's performance or work; and
- (d) 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.

Record keeping

(2) The [broadcaster] must record the dates of the making and destruction of all fixations and reproductions and any other prescribed information about the fixation or reproduction, and keep the record current.

Right of access by copyright owners

(3) The [broadcaster] must make the record referred to in subsection (2) available to owners of copyright in the works, sound recordings or performer's performances, or their representatives, within twenty-four hours after receiving a request.

Destruction

(4) The [broadcaster] must destroy the fixation or reproduction within thirty days after making it, unless

- (a) the copyright owner authorizes its retention; or
- (b) it is deposited in an archive, in accordance with subsection (6).

Royalties

(5) Where the copyright owner authorizes the fixation or reproduction to be retained after the thirty days, the [broadcaster] must pay any applicable royalty.

Archive

(6) Where the [broadcaster] considers a fixation or reproduction to be of an exceptional documentary character, the undertaking may, with the consent of an official archive, deposit it in the official archive and must notify the copyright owner, within thirty days, of the deposit of the fixation or reproduction.

Application

(7) This section does not apply where a licence is available from a collective society to make the fixation or reproduction of the performer's performance, work or sound recording.

Ephemeral exception: Subsection 12B(1)(c)

- **Public Comments:**
- Section 12B(1)(b)(i) refers to a right that does not exist in relation to any works in the Act or the Bill – the right to communicate performances to the public by telecommunication. Telecommunication is distinct from broadcasting and the use of this word in the context of a broadcasters’ exception is undesirable. Further, to suggest that a broadcaster should be ‘authorised’ to exercise this right connotes the existence of a right that is distinct from broadcasting or publicly performing. –eMedia Investments, Multichoice, NAB
- The creation of a new collective management organisation to administer licensing this authorisation – an untenable position considering the different works in issue, and the very nature of the ephemeral right. To make the ephemeral right conditional on this authorisation defeats the very purpose of the exception in the first place; if a broadcaster could obtain such authorisation, the exception would not be required. The exception should exist without such a limitation in order to be of any value. -eMedia Investments
- Section 12B(1)(b)(iii) and (iv) are ostensibly repetitions of one another. Subsection (iii) refers to a right that does not exist in the Act or the Bill – the right to synchronize. the party wishes to ‘synchronise’ those works with a cinematograph film. Even though the word is common parlance in the industry worldwide, the Act does not refer to the word, nor is it defined. Rather, the right to synchronise is understood to be an amalgam of the reproduction right, and the adaptation right. The use of ‘synchronise’ in the draft is undesirable due to its ambiguity. Further, the limitations set out in (iii) and (iv) are inappropriately inserted as conditions that are required to be met in order to rely on the exception.-eMedia Investments
- Broadcasters can only rely on the exception in the new draft if they keep records of the works that are subject to the exception, keep such records up to date, make such records available on request within 24 hours, and secure consent of the owner of the works if they wish to store the reproduction. The administrative burden on broadcasters will be immense. eMedia Investments
- The amendments to the ephemeral right are not fit for purpose, and should not be adopted into the wording of the Bill. Rather, that the ephemeral right as contained in Section 12B(1)(c) of the un amended Bill should remain as is, subject to the following amendments: On this basis, submit that the obligation to delete the broadcast after six months should be deleted. –eMedia Investments

Ephemeral exception: subsection 12B(1)(c)

- **Public comments:**
- Would also recommend that the exception be amended to include in subsection c that copies must not be used for transmission more than 3 times. RISA and IFPI
- Incorrect reference made in the published notice relating to the call for public comments. Is numbered 12B(1)(b) not subsection (c) in the additional documents with explanatory notes as in the published notice. Joint submission-IPO, IBFC, CPA, ASA
- Reference to cinematographic work is erroneous and should be replaced with audiovisual work given that all the reference in the Act will be replaced with audiovisual work. Joint submission-IPO, IBFC, CPA, ASA
- Several comments on the reference to performers and performance instead of copyright works. The section no longer clearly refers to copyright in a work. Section 12B(1)(c) refers to the fixation or reproduction by a broadcaster of "a performer's performance or work". To be removed. It should refer clearly to a copyright work.-Multichoice, EMedia, Anton Mostert, NAB, SAGA
- No mention is made of what happens once the licence expires. The words registered or accredited should have been added before the words collecting society.-Denise Nicholson
- Section 12B(1)(c) should be amended to remove the obligation to delete any broadcast that includes ephemeral works after six months.-eMedia Investments, Multichoice
- The term 'ephemeral 'rights' is not defined in the Bill and is incorrect. It should be 'ephemeral recordings' or 'ephemeral copies', not 'rights'.-Denise Nicholson
- In subparagraph (vi) the expression "which authorization may be subject to the payment of applicable royalties" (emphasis added) is used at the end of the paragraph. However, in the equivalent provision in the Canadian Copyright (s 30(8)(5)) the word "must" is instead used. It is recommended that the word "may" must be replaced with the word "must", in order to give assurance that rights-holders will in fact receive payment of royalties and that this will not be left to negotiations, where the broadcaster, being the party with stronger bargaining. -SAMRO

Ephemeral exception : subsection 12B(1)(c)

- **Public comments:** S.12B(1)(vii) refers to an 'official' archive, but this is not defined in the Bill. What does 'official' actually mean? Whose archive would it be? Who would be responsible for managing, updating and securing the archive on an ongoing basis? Would this include a broadcaster's archive or is there an intention to create an 'official' archive within government structures? A lawful and functioning archive should be allowed to collect, store and preserve these fixations or reproductions.

Also, what does 'exceptional documentary character' mean?-Ilse Assman, Denise Nicholson

- **Response by the dtic:**
- Stakeholders raised concerns with the unintended consequences of this provision as well as the legal and practical application of some of the text included in the provision.
- The amendment is adopted in Canada copyright law.
- Reference to the correct name to the ephemeral recording exception is noted.
- It is recommended that this amendment be removed from the Bill and the current amendment be retained.

12B(1)(f) – translations

- **Rational of the provision:** The translation exception is provided in the current Act.
- *Subsection 12B(1)(f) reads*, 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;
- It was recommended that the translation exception be amended in 12B(1)(f) to promote the Bill of Rights and reflect the full range of purposes for which a lawful translation may be made.
- It has been submitted that “the right to translate works may be necessary to promote various Constitutional rights, such as the right of South Africans “to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable, the right of everyone “to use the language and to participate in the cultural life of their choice, and the right of linguistic communities not to be denied the right, “to enjoy their culture” and “use their language.”
- It was recommended that language and culture be added to the purposes. This is section 30 of the Bill of rights.
- **Advertised amendment**

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

 - (i) done for non-commercial purposes;
 - (ii) used for personal, educational, teaching, judicial proceedings, research, for the furtherance of language and culture, or professional advice purposes only: Provided that such use shall be compatible with fair practice; or
 - (iii) communicated to the public for non-commercial purposes;

12B(1)(f): Translations

- **Public Comments:** The translation exception in section 12B(f) goes beyond what is reasonably required to ensure that works can be read in all of South Africa's official languages. It is extremely damaging to the South African publishing community (including non-profit and community publishers and authors) and is a breach of South Africa's international copyright obligations. –IFFRO
- propose that the drafting wording of section 12B(1)(f) be amended to read that "the translations of such work into any language provided that such translation is done for a non-commercial purposes, which is consistent with fair practice, and does not exceed the extent justified by the purpose". This would cater for the inclusion of any translation for non-commercial purposes, as long as it was consistent with fair practice and justifiable in the circumstances.-Google
- The exception for translations, section 12B(f) might result in discrimination against indigenous languages. –CISAC, Dalro
- The word 'or' has been omitted. Add 'or' after the semicolon.-Denise Nicholson
- The assumption that the requirements 'or' in 12B(f)(i) may be intended to be independent. They request that this be clarified and (iii) to be independent. They request that this be clarified and (iii) be deleted altogether. IFRO
- **Response by the dtic:**
- The amendment to be retained as advertised. The drafting suggestion recommended is already in the provision. Except the extent justified by the purpose wording.
- The 'or' is recommended to be removed. Each provision can be read independently.

Technological Protection Measure definition

- **Rational of the amendment:**

- The policy stance taken was to introduce TPMs but to also ensure a balance between protection of rights and access to works or performances as exceptions. Very restrictive TPMs may make it difficult to access works in the public interest and developmental purposes.
- The proposed recommendation will ensure adequate legal protection.
- There are concerns about unintended consequences about the amendment of this definition, including the deletion of paragraph (b) – the definition of TPM / TPMCD could result in actions, which should be allowed (exceptions), being prevented. It is recommended that this definition be advertised due to the removal of paragraph (b).

- **Technological protection measure’—**

(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work; and

(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;

- **The advertised amendment: 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;
- It has excluded the sub section (b).

Technological Protection Measure

- **Public Comments:**
- The definition as proposed in the Bill remains problematic because it refers to technologies that prevent or restrict infringement, as opposed to technologies designed to have that effect or control access to copies of works. This could facilitate abuses.-IPA
- The amendments not sufficient to provide adequate legal protection. Some stakeholders welcomed the amendment of the definition of TPM but highlighted it is weakened by insufficient amendments in section 28P, 28O and section 28S. –PASA, Capasso, submission-IPO, IBFC, CPA, ASA
- Note with alarm that the Copyright Amendment Bill's TPM provisions have moved closer to the US regime defined in Sec 1201 of the 1998 Digital Millennium Copyright Act (hereafter "DMCA 1201"). It's impossible to overstate the extent to which DMCA 1201's defects have made it a locus of real mischief in the US, and how these defects are apt to impose even higher cost on South Africans. This allows the manufacturer to exercise tremendous control over devices long after they have been sold.-Dr Doctorow
- International experts advised not to adopt US DMCA.-Ilse Assman
- A TPM regime that does not tie a prohibition on circumvention to copyright infringement is a death sentence for Made-in-South-Africa technological innovation. The Proposed Amendments Make the Copyright Amendment Bill worse.-Dr Doctorow
- With regard to the new proposed amendments relating to TPMs, recommend that there be adequate exceptions and flexibilities included for people with disabilities to use or circumvent TPMs lawfully for the purpose of accessing materials, e.g. using devices to make a digital book accessible, or to convert a section of a PDF work into an accessible format for fair use purposes, or to enable text-to-speech software to work, or for a library to circumvent a TPM in order to browse through an electronic database when considering subscribing to it, to check if it is compatible for people with disabilities. Shakila Maharaj
- The proposed deletion of the second half of the definition of a technological protection measure limits freedom of expression because it makes technologies used for expression presumptively illegal.-Right2Know
- It is really an overextension to criminalise TPMs, given the support to free media and the free flow of information.Right2Know
- It is submitted that the CAB does not make this distinction between TPM that may be circumvented and TPM that may not be circumvented.-NAB
- Confirmation that definition of TPM excludes (b). SAIPL
- A comment was made that the (b) in the definition of TPMs should be excluded as it is already addressed in another law.-Multichoice

Technological Protection Measure definition

- **Public comments:** It is proposed to expand the definition of technological measure to include a device or service that has a mostly non-commercial use, such as enabling access by disabled persons or non-profit education that can also be used to circumvent technological protection measures.-Joint Academic Opinion
- **Response by the dtic:** It is clarified that the definition exclude (b).
- The SA copyright law has been challenged for weak enforcement related to IP piracy. It is recommended that TPM definition as amended and the changes be retained as this strengthens the Bill. The deletion of subsection (b) is supported.
- Indications are that countries are moving towards stronger TPMs to ensure intellectual property protection and adequate legal protection in line with international treaties.
- Although there are other laws that may address IP enforcement and protection. It is important that the Copyright Act also addresses this aspect.
- It is recommended that the definition as amended must be retained as the Bill must offer protection to copyright owners and authors.
- There are other provisions that supports the exceptions and access to the exceptions by the public.

Technological Protection Measure Circumvention Device Definition

- **Rational for the amendment:** It was submitted that the definition of ‘technological protection measure circumvention device’ is insufficient and must align with WCT, WPPT and the Beijing Treaty.
- It is recommended that the definition of “technological protection measure circumvention device” in draft section 1(i) be amended also to include services and devices that: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent TPMs.
- This would ensure that the definition is adequately scoped to encompass all TPM circumvention devices and services, which would also be consistent with Article 6(2) of the EU Copyright Directive, for example, and would therefore be compatible with WPPT and the WCT.
- The proposed language is consistent with Article 6(2) of the EU Copyright Directive.

Definition in the current Bill: technological protection measure circumvention device means a device primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure.

The advertised definition: “‘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”.

Technological Protection Measure Circumvention Device Definition

- **Public comments:** It is also proposed to prohibit a device or service advertised as circumventing technical protection measures in the definition. Do not expand the definition of ‘technological protection measure circumvention device or service’. Do not expand the definition of ‘technological protection measure circumvention device’ to include proposed (b) and (c).-Right2Know
- Amendment of the definition of TPM circumvention device to include ‘performed’.-RISA
- **Response by the dtic:**
- The advertised changes to the TPMs circumvention devices strengthen the Bills and should be retained. The changes to the Technological Protection Measure circumvention device definition to be retained. This is similar to the EU Directive and other international copyright laws. This will not be unique to South Africa.
- Although the public commented of possible unintended consequences, a weaker TPM regime will impact the status of the copyright legislation in South Africa and negatively in international IP law enforcement for the country.

Clause 29: Section 28O, Section 28P, Section 28S

Rational: The amendment in 28O, 28P and 28S to clause 27 are consequential to the amendments to section 27 providing for offences

“28O. (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, 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, that the service will or is likely to be used by another person to infringe copyright in a technologically protected work.

(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”.]

“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)**], 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).

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, 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, that the copyright management information has been removed or modified without the authority of the performer or copyright owner.”.

Clause 29: Section 28O, Section 28P, Section 28S

- **Public comments:** Still concerned about the definition of TPMs in the Bill- support section 28O as it will assist broadcasters to deal with broadcast signal piracy. However, section 28O(3) of the Copyright Bill uses the standard of "with the specific intention of inciting" that other person to unlawfully circumvent a technological protection measure. This is a high and subjective standard and will be difficult to prove. Have serious concerns that the protection of TPMs provided under section 28O will be undermined by the broad exceptions permitted for circumvention of TPMs in section 28P of the Copyright Bill.-MultiChoice
- They submit that s 28P and the proposed addition to s 27(5B) 'subject to s 28P' are such appropriate measures. The proposed amendment should be interpreted as follows: that the use of a circumvention device in furtherance of any of the exceptions in the CAB including and, for the purposes of the rights of people with disabilities, s 19D and the other associated provisions facilitating accessible format shifting, must not be considered an infringement of copyright.-Blind SA and Section 27, S Maharaj
- It is proposed to replace the phrase "has reason to believe", which requires intention, with the phrase "should reasonably have known", which imposes criminal liability based on negligence, in s280(1) and s280(2)(b). The result would be to criminalise many more actions than the current wording. Using negligence as grounds for criminal liability will make it much more dangerous for people who want to engage in a lawful use, and must circumvent a digital lock to do so negligence.-Joint Academic Opinion
- Section 28P(2) of the Bill introduces an exemption for a person who intends on circumventing a TPM to perform a 'permitted act'. Have serious reservations about this proposal, as a copyright owner may withhold or deny permission on the basis that a dispute exists as to whether the intended user's conduct would amount to a 'permitted act' in the first place.-Future Managers
- With respect to the exemption proposed in Sections 28S(a) and (c) they submit that it is inappropriate for a 'performer' to authorize the removal or modification of copyright management information from a copyright work. Joint submission-IPO, IBFC, CPA, ASA
- Section 28P should allow the circumvention of a technological protection measure only for the purposes of the following situation: after the person, who seeks to use a technological protection measure circumvention device, has requested the copyright owner to allow access to the copyright work for purposes of the relevant exception; and, the copyright owner has failed — within a reasonable time — to provide the necessary access to the copyright work (in whole or in part) so as to reasonably satisfy the purpose for which access to the copyright work is sought.-Anton Mostert
- Section 28P(2)(a) also requires the person wishing to circumvent a TPM to perform a permitted act to apply to the copyright owner for assistance. It is submitted that where there has been a refusal or lack of response by the copyright owner, the matter should rather first be considered by the Tribunal to determine if the request is permitted and reasonable. (Apply to the PPAB as well)-MultiChoice, Joint submission-IPO, IBFC, CPA, ASA

Section 28O, Section 28P, Section 28S

- **Response by the dtic:**
- ‘Reasonably have known’ as an objective measure was intended to strengthen the provisions.
- However the original wording can be retained. It is recommended that the wording in the original Bill be retained for sections 28O and 28S (where reasons to believe/ have known were amended).
- Some of the comments made by the public were outside the advertised clauses (e.g recommendation of a Tribunal).
- The removal of performer from section 28S(a) and (c) was not advertised. The removal of performer is supported if it is not a substantive change to the Bill. This will ensure focus on the copyright owner.

Amendments to section 11 (11A, 11B)

- **Rationale:** The CAB introduces the new exclusive rights of ‘communication to the public’, ‘making available’ and ‘distribution’ to literary, musical and artistic works and cinematograph films and sound recordings in Sections 6, 7, 8 and 9, there has not been corresponding amendments extending these rights to published editions in Section 11A or to computer programmes in Section 11B. It was submitted that the failure to extend these rights to computer programmes means that the relative requirements of WCT are not met.
- **Advertised amendment:**
 - **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:
 - (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;

Amendments to section 11 (11A, 11B)

- **Public comments:** The conceptual confusion concerning the right of communication to the public, the making available right, right to broadcast and to emit a programme-carrying signal.-Anton Mostert
- The amendment to exclude “by wire” is incongruent with other drafting proposed in the amendment document – most notably, in the amendments to Sections 11A and 11B, which include the right to communicate the works mentioned in those sections “to the public by wire or wireless means”.-eMedia Investments, Denise Nicholson
- Supports the Proposed Amendments to section 11A. As long as the amendments do not dilute the benefits of free and unfettered access to information.-Google
- 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.-WCG
- Original is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic. In relation to paragraph (d), it is not clear how, factually, an “original” published edition could be distributed (as there should presumably only be one such item). “Distribution” suggests that there needs to be multiple copies of something. It should immediately be noted that “original” is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic.-Anton Mostert
- Accordingly, paragraph (d) should only deal with publishing the work to the public, as with, for example, literary works. In any event, distribution of an unauthorised copy — namely, an infringing copy — currently already constitutes secondary infringement.-Anton Mostert
- 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”.-WCG

Amendments to section 11 (11A, 11B)

• Response by the dtic

- The right of communicating to the public and the making available to the public are digital rights provided by the international Treaties. The rights relates to communicating the work and making it available to the public by wire or wireless means.
- Articles 10 and 11 of the Berne Convention makes a distinction between 'broadcasting' and 'communication to the public by wire'. These are two different rights that can be licensed separately, often to different rights holders.
- Article 11 of the Berne Convention provides that authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.
- Communication to the public in the Wipo Copyright Treaty (WCT) provides the exclusive right of authorizing any communication to the public of works, by wire or wireless means, including the making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them.
- The WCT makes a distinction between broadcast and communicating to the public. Communicating to the public provided for in Article 8 of the WCT when taken into account, has the result of (interactive) “making available to the public”.
- Currently these rights are in clause 4, 6, 8, 10 and new clause proposing section 11A and 11B of the CAB.
- Communicating to the public is related to offering a work or object of related rights to the public by any means, such as by distribution of copies, public display, public performance, public recitation, broadcasting, other communication to the public – or by (interactive) making available to the public.
- A programme carrying signal is a copyright work. A broadcast or a programme-carrying signal shall not be eligible for copyright until, in the case of a broadcast, it has been broadcast and, in the case of a programme carrying signal, it has been transmitted by a satellite. Copyright in programme carrying signals vest the exclusive right to undertake, or to authorize, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.
- Original or copy are the phrases used in copyright and have a meaning. In this case, original is descriptive of the nature of the work. It does not require clarity or to be removed. There are other similar provisions in the Bill. It is also in line with the Treaty language.
- There is a view, that even if wire is removed, communicating to the public by wire can take place through the digital rights and not impact on the other sections as listed by the comment. These are interrelated rights but the manner they are recommended in the Bill is not entirely incorrect.
- The diffusion services or service is not advertised in these amendments. However, a correction is supported to remove the ‘s’ in services to read as ‘service’.

Sanctions: Section 27A

- **Rational for the provision:** The CAB is already noted for not introducing the legal tools that rights-holders need to enforce the new digital rights (the new exclusive rights of ‘communication to the public’ and ‘making available’), not even by extending the existing criminal sanctions in Section 27(1) of the Act for deliberate infringement for commercial purposes to these new rights.
- **The advertised amendment:** Section 27 of the principal Act is hereby amended—
 - **New (5A) in respect of digital rights**

“(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.

Technological Protection Measures sanctions: 5B and 5C

- **Rational for the amendment:** Because we are referring to this wording in section 27, which provides for offences, it is recommended that a more objective test is used than “has reason to believe”, which is very subjective and may cause difficulty in proving the offense or the defense. This is done in S28O and 28S. The sections related to sanctions for TPMs were amended in section 27 (5B) and 5C
- **Advertised clauses: Subsection (5B) and (5C)**

(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 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 ~~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 other

(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.

Technological Protection Measures sanctions: 5B and 5C

- The Proposed Amendments to section 27(5B)- As such, a person is more likely to be found guilty of an offence. The amended wording is far-reaching and unreasonable as it expects someone to know at the time that the device or service is likely to be used to infringe copyright, without a warning to cease any offending activities.-Google
- In sub-section (5C)(b), the offence for exploiting works where management information attached to those works has been modified or removed, must, like sub-section (5A), only constitute an offence where the infringing party knows that it is infringing copyright. In this regard, broadcasters often receive content from third parties and may not have direct knowledge about whether they are infringing copyright or not. To the extent that sub-section (5C)(b) imposes strict liability, this must be addressed.-eMedia Investments
- Propose the previous proposed wording be used, namely such person knows or has reason to believe. This test is perhaps more onerous and the past tense of the proposed amendment implies retrospective application.-Google
- The conceptual confusion concerning the right of communication to the public, and the making available right. The same concern also affects sections 27(4), which deals with broadcasts, and 27(5), which deals with programme-carrying signals. – Anton Mostert
- The Proposed Amendments to section 27(5B)-a person is more likely to be found guilty of an offence. The amended wording is far-reaching and unreasonable as it expects someone to know at the time that the device or service is likely to be used to infringe copyright, without a warning to cease any offending activities.-Google
- However, the new section 27(5B)(a)(i) should be amended to make clear that the offering and other dealing with circumvention devices are already infringing acts, without the need to show that the illegal device is subsequently used to infringe copyright. The current wording sets the bar for infringement so high such that it makes the whole provision ineffective.-RISA&IFPI
- 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—
- (eA) communicates the work...; and (eB) makes the work available..., which they know to be infringing copyright in the work,...”. 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).-WCG
- Section 27(5C)-First, the language in sections 27(5C)(a) and (b) needs to be fixed to agree with the singular subject. For example, it should be say “removes or modifies”, and “makes, imports, sells, lets” etc. The section does not refer to the making available right, which is particularly relevant in the digital environment. The section contains no knowledge (or constructive knowledge) requirement, which may make this provision potentially liable to a constitutional challenge, as it results in criminal liability.-Anton Mostert

Sanctions: Section 27(5A)

- **Public comments:**
- The proposed exemption with respect to the criminalization of infringing acts performed in respect of the new digital rights of ‘making available’ and ‘communication to the public’ to exclude acts not committed for commercial purposes is arbitrary and unjustifiable. None of the other acts of copyright infringement that are described and criminalized in Section 27 are subjected to the same limitation. To resolve this issue, submit that the phrase ‘and for commercial purposes’ be deleted from the proposed new subsection (5A) of section 27- This is extremely problematic as infringement of copyright should not be dependent on whether or not a use is for commercial purposes. -SAMRO, FIAPF
- The new provisions for offences in relation to digital rights should be made by way of an amendment to Section 27(5) of the Act, and the existing terminology “for the purposes of trade” should be used, together with the element of “knowing to be infringement copies”, to define the offence. Section 27(5A) must then be withdrawn-SAIPPL
- The verbs in 5C (a) and (b) should be in the singular form.-Future Managers, PASA
- The concerns relating to section 27(6) bear repeating. The fines imposed on juristic persons in this, and other paragraphs, are draconian and are minimum penalties. While strong copyright protection is to be welcomed, a balance needs to be maintained.-Anton Mostert
- **Response by the dtic to 5A, 5B and 5C:** It is recommended that the wording be retained and for commercial purposes be removed in section 27(5A).
- It is recommended that the verbs in 5C to be considered.
- The recommendation to amend section 27(5) is not clear and substantiated and may require further assessment. Subsection 5 focuses on the programme carrying signals. It is recommended that section 5A be retained.

Section 12A: deletion of duplications (examples of fair use)

Rational to the amendment:

The exceptions in 12B-D need not be repeated in 12A.

•Exceptions that overlap with recommendations for amendments:

- Research, private study, personal use: The whole of S12A(a)(i) to be deleted (Covered in 12B(1)(i) and 12B(2) iro personal use, and 12D iro research and private study).
- Scholarship, teaching and education: The whole of S12A(a)(iv) to be deleted (Covered in 12D)
- Libraries, archives and museums: The whole of S12A(a)(vi) to be deleted (Covered in S19C)
- 12B(1)(b) to be moved to 12D (education specific)
- 12B(1)(e)(i) to be deleted – sufficiently provided for in 12A
- Consequential amendments (Where 12A's wording should be included in 12B or D, or 19C as it is not 100% covered there).
- Add the aspect of using at a different time or on a different device to 12B(1)(i) and 12D(1) as this is now deleted from 12A

Advertised clause

- **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: (the text bolded is now removed)
 - [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];**
 - criticism or review of that work or of another work;
 - reporting current events;
 - [(iv) scholarship, teaching and education];**
 - comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
 - [(vi) preservation of and access to the collections of libraries, archives and museums];** and
 - ensuring proper performance of public administration.

Section 12A: deletion of duplications (examples of fair use)

- **Public Comments:** Add after research including computational analysis.-Joint Academic Opinion, Sean Flynn, Denise Nicholson
- Despite the claim that the deletions proposed in Section 12A are not substantive, there is a concern that the loss of references to research, scholarship and preservation risk having a substantive effect on the way in which the law is applied. Leaving these references in (sub-sections 12A(a)(i), (iv) and (vi)) provides a useful signal to librarians, courts and users about what the law allows.-AFLIA, Wikimedia, Shakila Maharaj, Recreate SA, Dr Thomas Dr Thomas Hoeren, Blind SA and Section 27, Recreate Action
- There is no case for specifying illustration as a fair use purpose. This would put work of authors of artistic work who license their work precisely for illustration at risk.-SAIPL
- Recommends that the word 'use' of copyright works in Section 12A should include 'reproduction' of such works.-SADTU
- The words 'computational analysis' should be added into subsection (i), alternatively, an explicit separate exception for this should be included in Section 12D, as this is crucial to digital research. –Denise Nicholson, SADTU, Joint Academic Opinion
- Some emphasised research, scholarship, personal uses and educational ones will be detrimental. Emphasis was on research. –Sean WCG, Google
- **The dtic response:**
- It is recommended to retain all the uses, i.e personal copies, teaching, scholarship, education and research and library uses. A few countries was benchmarked and they have fewer or similar examples to South Africa.
- The suggestion to include computational analysis on the examples of uses is noted. The 'such as' in section 12A widens the scope. If additional specific new examples of fair use are added, for fairness, may require an open consideration for other examples not included in the Bill.

Fair practice

- **Rational for the amendment:** Aligning words – removing “extent justified by the purpose” and replacing it with “fair practice” throughout the CAB.

- **The advertised provisions: 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 practice; and

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

(i) done for non-commercial purposes;

(ii) used for personal, educational, teaching, judicial proceedings, research, for the furtherance of language and culture, or professional advice purposes only: Provided that such use shall be compatible with fair practice; or

- (i) 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.”.

- **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, 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;

8) (a) The source of the work reproduced and the name of the author, if it appears on the work, 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 practice;”.

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.”.

(9) 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.”.

Fair practice

- **Public comments:** Submit that the Committee retain the reference to ‘fair practice’ under s 12D(8)(b) and delete ss 12D(1)(c)-(d).-Blind SA and Section 27
- If the Committee is keen to retain s 12A(d), they submit that it must be interpreted in a manner that does not limit the scope of ‘fair practice’ in s 12D(1) and gives effect to the right to education.-Blind SA and Section 27
- A few were not in favour of fair practice.-Recreate
- Adding a fair practice requirement in 12D(1) is duplicative since it is applied in subsection 12D(8)(a).-Joint Academic Opinion
- A clear definition of “fair practice” is missing in the CAB. However, according to Article 10 of the Berne Convention, which South Africa has ratified, a quotation of a copyright work must be “compatible with fair practice”. In this respect, the amendment aligns South African copyright law with international law.-Hoeran, Recreate
- **The dtic response:**
- There was a number of stakeholders who recommended fair practice in the Bill. Fair practice does not have to be defined as it is a language and standard in copyright law and internationally recognized, included in the Berne Convention (Article 10 for quotations and illustrations for teaching). It is also in the principal Act.
- Recommended to remove fair practice in 12D(1) as it is addressed in section 12D(8).

Layering of restrictions: Section 12A-12D: Section 12A(d)

- **Rational for the provision:** Section 12A has fair use criteria (four factors), but this does not apply to the parallel set of specific exceptions (sections 12 B – D). This creates uncertainty and thus 12B-D do not comply with the Three Step Test.
- Propose that a paragraph be added to section 12A (the fair use clause) that makes the factors in 12A(d) applicable to all specific exceptions, or just to specific exceptions, e.g. 12A to 12D.
- **Advertised amendment:** Proposed wording:
- “(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).”.

Layering of restrictions: Section 12A-12D: Section 12A(d)

- **Public comments:**

- Section 12A(d) appears to require that the four-factor fair use test be applied in addition to the carefully drafted internal limitations that exist in Sections 12B, 12C, 12D, 19B and 19C. This could cause great confusion by the courts.-Joint Academic Opinion
- Some stakeholders support this section.-Dalro, PASA, IPA, FIAPF
- Note that the proposed addition of section 12A(d) appears duplicative and potentially harmful. The section could be read to require that the four factor fair use test be applied by courts in addition to the internal limitations already contained in each specific exception.-Global Expert Network on Copyright User Rights, Creative Commons SA, Sean Flynn, Denise Nicholson, Recreate
- section 12A(d) – extension of fair use principles to other exceptions: are of the view that making the fair use provisions apply to other exceptions, as proposed here, is plainly wrong. Each exception must stand on its own legs.-SAMRO (plainly wrong, each expert to stand on its own), Anthony Mostert, Shakila Maharaj (grossly unfair)
- This new paragraph is material in nature and should have been advertised.-Recreate
- Attention be given to assess each individual; exception in section 12B, 12C, 12D, 19B, 19C and amends where appropriate. Few proposed each exception has to be addressed separately.-Joint Academic Opinion, SAMRO
- The argument is made that introducing the four-factor test to all exceptions will bring about certainty. However, experience from the United States shows that the application of the four-factor test does not result in certainty, much less in an outcome that can be predicted by either party to a ‘fair use’ dispute.-SAIPL
- This will bring vagueness copyright law. Joint submission-IPO, IBFC, CPA, ASA
- Section 12A(d) – This subsection should be deleted. Sections 12B, 12C, 12D, 19B AND 19C – Layered conditions. The 4 fair use factors apply solely to Section 12A(a), and that only if there is a need for condition(s) over and above the limitations already attached to specific exceptions in Sections 12B, 12C, 12D, 19B AND 19C, then ‘fair practice’ should be applied.-SADTU, Recreate SA, Creative Commons, Sean Flynn, Right2Know, SAIPL
- Proposed that this replace section 12A(d), drafting suggestion. ‘Nothing in section 12B, 12C, 12D, 19B and 19C, in any way affects application of the fair use principle determined by the factors contemplated in paragraph (b’).-Joint Academic Opinion

• **The dtic response:** It is recommended that the fair use factors assessment be excluded from section 12B, 12C, 12D, and 19C and to be

Clause 13, section 12A(c), 12B, 12D, 19D (Name of author)

- **Rational of amendments:** Related to moral rights in respect of exceptions – amendments were recommended throughout the Bill to use the wording of Section 12(4) of the Act. The wording of the Act provides “that the source shall be mentioned, as well as the name of the author if it appears on the work”; and Remove “As far as is practicable”.
- **Advertised provisions:** 12A(c): “(c) For the purposes of paragraphs (a) and (b) the source, **[and] as well as** the name of the author shall be mentioned, if it appears on the work.”
- 12B(1) “Copyright in a work shall not be infringed by any of the following acts:
 - (a)(ii) Any quotation: Provided 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 quotation;”
 - (b) (moved to 12D): “**(b) (9) 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 **[not exceed the extent justified by the purpose]** be compatible with fair practice: 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;
 - (e)(current events): “(e) subject to the obligation to indicate the source and the name of the author [in so far as it is practicable], if it appears on the work—”
- 12D (Educational and academic activities)
 - “(8) (a) The source of the work reproduced and the name of the author, if it appears on the work, shall be indicated [**as far as is practicable**] on all copies contemplated in subsections (1) to (6).”.
- 19D (Persons with 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 [**in so far as it is practicable**]....”

Clause 13, section 12A(c), 12B, 12D, 19D (Name of author)

- **Public comments:** The qualification of authors' moral rights in Section 12B(1)(a)(ii) and 12B(1)(c) and 12B(1)(d) for the source and the name of the author to only be mentioned in instances 'where it appears on the work' amounts to an unjustifiable limitation and therefore expropriation of authors' moral right to be recognized as the author of their works.-Joint submission
- The phrase 'to the extent that it is practicable' has been deleted in section 12B (1) (a) (ii). This is problematic and the phrase should be restored. If you have 50 images on screen in a collage at one time, then it would not be practicable to have on screen at the same time a credit to the author. The claim made to justify the deletion is to make it more closely aligned to treaty language. -Recreate
- Authors' names do not always appear 'on a work'. The proposed wording is undesirable, problematic, and should be reconsidered. It conflicts with Section 12A(c) of the Bill which confirms that 'the source and the name of the author shall be mentioned' (our emphasis), and there is no clear justification for this proposed deviation in the relevant provisions.-Joint submission
- Section 12A(c)-It does not make any sense to require that the source and the name of the author be mentioned in respect of all the permitted uses pursuant to paragraph (a), and such obligation in respect of paragraph (b) is sheer non-sense.-Joint submission
- **The dtic response:**
- The concern about the potential conflict is possible between 12A(c) and the new amendment. Section 12A (c) says for the purposes of (a) and (b) the source and the name of the author shall be mentioned. It is recommended the words if it appears on the work can be added to section 12A(c) to align with the amendment.
- The name of the author is provided for in various provisions in the Bill and should be mentioned in the work except in those instances it is not on the work and is unknown.
- In the previous call for comments the public challenged 'as far as practicable'. The name can be mentioned where it appears and where it is possible.

Adding the three step test: 12C and 12D

- **Rational of the three step test in 12C and 12D:** It was submitted that the three step test must apply to 12C and 12D(1) based on the previous stakeholder comments.
- The three step test as provided for in article 9 of the Berne Convention is premised on ensuring that the legitimate interests of authors are not prejudiced.
- The three step test is designed to attain a balancing act on the legitimate rights of authors and the society at large.
- The three-step test as contained in international instruments such as the Berne Convention and the TRIPS Agreement sets limits for domestic copyright exceptions and limitations, thereby creating an international standard against which national copyright exceptions and limitations are to be judged. More specifically, the test stipulates that national exceptions and limitations must:
 - **be confined to certain special cases;**
 - **not conflict with the normal exploitation of the copyright work; and**
 - **not unreasonably prejudice the legitimate interests of the rights holder / author**
- **For section 12C** (Temporary reproduction and adaptation)-The public recommended the change.
- This subsection is similar to the EU Directive. The EU Directive provides:
 - Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral part of a technical process and the purpose of those copies or adaptations. **“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.**

Adding three step test: 12C and 12D

- **The advertised 12C.** As long as there is no commercial 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.

Adding three step test: 12C and 12D

- **For section 12D(1):**
- It was submitted that subsection 12D(1) is very badly worded and contains mixed, and incorrect use of terminology, which makes its interpretation uncertain and difficult. It ought to read along the following lines:
 - “...a person may make a reproduction of a work, or may broadcast it, for the purposes of educational and academic activities; provided that the extent of the reproduction or of the portion broadcast does not exceed the bounds of what can reasonably be justified, having regard to the legitimate interests of the copyright owner.”
- 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 the copying does not exceed the extent justified by the purpose.
- Subsection(3) provides that 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.
- It was recommended for section 12D(1) which affects other subsections in section 12D, that the three step test applies to it.
- **New advertised amendment: 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, 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;
 - (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.

Adding three step test: 12C and 12D

- **Public comments:**
- The deviation from the wording of the three step test as it appears in the Berne Convention would introduce unnecessary vagueness as it would exclude so-called ‘non-consumptive uses’ from its scope of application. The three step test phrases must be used verbatim and not altered, (referring to the additional words ‘flowing from their copyright in that work’.- PASA, Joint submission: the Independent Producers Organization (IPO)
- The test typically applies to the way in which governments themselves make laws, rather than in the way they are interpreted. The three step test can be in the preamble of the Bill. IFLA
- Insufficient application of the 3-step test provision. The three step test is not covering all the exceptions. It should apply to all the exceptions. The exceptions must be assessed in specific term against the three step test.-Dalro, PASA, IPA
- Some stakeholders welcomed the insertion of the 3 step test in the advertised provisions. – IPA, FIAPF
- Delete the three steps test since Parliament has already agreed.-LIASA and CHELSA

Adding three step test: 12C and 12D

- **Public comments:**
- The three step test with other tests (e.g fair practice) is duplicative. Joint Academic Opinion
- The proposed addition of the three-step test makes section 12D impracticable. Submit that the three-step test (ss 12D(1)(c)-(d)) is an inappropriate standard for educational exceptions.-Blind SA and Section 27
- Some stakeholders were in support of section 12C. –Google
- Section 12C does not need the three step test, it is unnecessary. –EIFL, Joint Academic Opinion, SAIPL
- In 12D(1)(b) (a reproduction may only be made in the cases stipulated in this section) has the same meaning as ‘certain special cases’. The term ‘certain special cases’ warrants some investigation. Section 12D(1)(b) must be withdrawn. Have not been assessed as special cases.-PASA, SAIPL, Future Managers (‘listing them as special cases in the legislation does not make them special cases’)
- In section 12D, sub-sections (2), (3) and (4) should be removed and replaced by a provision subjecting these uses to licensing. IPA
- Drafting suggestion for section 12D(3): “Educational institutions shall not incorporate extracts as envisaged under Section 12D(1) or the whole or substantially the whole of a book or journal issue, or a recording of a work, as envisaged under 12D(4), unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.”
(clarified new text in bold)-PASA

Adding three step test: 12C and 12D

- **Public comments:** Delete the three step test in 12C and 12D. Concerns stated about the introduction of the Fair Use regime and the three-step test in sections 12C (2) (a), (b) and (c); and 12D(1) (b) (c) and (d), followed by 12D(2).-Joint Academic Opinion, LIASA and CHELSA, WCG, SADTU
- Exclude 12D(1)(b), (c), exclude course packs, as they are a violation of three step test.-ANFASA
- Each exception has its own control limitations and adding the three step test is not recommended. Sean Flynn, Denise Nicholson
- New section 12C(2) – subjecting the temporary reproduction and adaptation exception to the three-step test- the section did not subject the exception to the three-step test, as done under the EU Directive (art. (5) of the Directive).-SAMRO
- Section 12C and 12C(2) to be deleted as these uses are not temporary reproductions.-IFFRO
- In 12D(1), change “reproduction” to “use”, and add after “activities”: “including in the cases stipulated in this section.”-Joint Academic Opinion
- Use of works to include reproduction of such works section 12D(3)-consider deleting.
- **Response by the dtic:** It is recommended that the three step test be removed in the Bill in 12C and 12D.
- The three step test as a principle and guideline does not have to be incorporated in the Bill as per best practices of its application. Although it can add an additional measure of assessment, there may be unintended consequences with the other assessments measures added. Furthermore, the application of the test may be necessitated in the other exceptions.
- Section 12C provides for temporary reproductions as per global best practices. Some stakeholders submitted section 12C is not temporary reproductions.
- While the point about the three step test not applied in laws and serve as a guiding principles is noted, the EU has made reference to it in one of its Directives. (Directive 2001/29/EC). “Article 5 of the Directive: The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder”.
- The removal of ‘flowing from the copyright in that work’ from section 12C and 12D was to be considered if the three step test was to be retained in the Bill. It therefore falls away. This was to address the public comments, however, Treaties do not have to be adopted verbatim in terms of word by word.

Section 19C (4)

- **Rational of the provision:** Concern is the duplication exception may not be allowed for commercial purposes as that is covered by subsection (1). If the whole phrase is removed, a copy for non commercial purposes may be allowed if this is done under Section 12D(1) for example. If retained “but may not permit a user to make a copy or recording of the work”, this would be a prohibition in respect of both commercial and non commercial purposes and changes the content. It needed inputs from the public if to retain this phrase.
- 19C: Subsection (4) ends with “, but may not permit a user to make a copy or recording of the work for commercial purposes.
- As subsection (1) is applicable to all subsections in 19C, this sentence was viewed as duplication.
- **Current text in the Bill: 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.
- (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.** **(Already included in the Bill)**
- **The advertised clause: 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.
- (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 purpose.

Section 19C (4)

- **Public comments:** Stakeholders are of the view this will have an impact on access to copies in libraries, the education sector, market interests and interests of intermediaries. -Blind SA and Section 27
- Section 19C(4)- 6-This gives a totally different meaning to this section. This stops a personal or private copy from being made at all, which is unfair and impractical, especially for people with disabilities, who would in all instances, need to download or make a copy of the work for purposes of having it converted into an accessible format. This section needs to be corrected to allow personal or private copying for educational and research purposes at least.-Shakila Maharaj
- In the previous version of the Bill, this subsection did not permit the making of copies or recordings ‘for commercial purposes’, but now the words ‘for commercial purposes’ are to be deleted (without public having the opportunity to comment on this) and an additional phrase added, stating ‘may not permit a user to make a copy or recording of the work’. This totally changes the meaning and context of this Section. It prohibits any copy being made at all, which is unfair, impractical and arguably unconstitutional, especially in the COVID-19 pandemic.-SADTU
- The proposed change to Section 19C(4) would remove the words “for commercial purposes” because the 19C(1) already prohibits uses under the section for commercial purposes so it is duplicative. However the effect is to create an unanticipated prohibition on copying in a subsection not intended to deal with copying. Section 19C permits a library or archive to permit a user to view or listen to an audiovisual work. It originally prohibited making a copy for commercial purposes. Merely removing the words ‘for commercial purposes’ leaves the words ‘but may not permit a user to make a copy or recording of the work’. Joint Academic Opinion
- Delete the phrase ‘but may not permit a user to make a copy or recording of the work’ from section 19C.-Right2Know, WCG (remove the addition to sub section 4)
- This provision, prior to the latest amendment, did not involve any activity restricted by copyright, and, consequently, no exception was required. The present amendment, while providing some clarity, does not add anything in substance, and the provision should be deleted. If anything, it simply introduces a potential conflict with the possible fair-dealing exceptions.-Anton Mostert
- Section 19C(4) prohibits reproduction, creating a serious problem for access to knowledge, especially in the pandemic where remote teaching has fully or partially replaced the physical lecture room.-Creative Commons
- Opposes the addition of the clause “but may not permit a user to make a copy or recording of the work” at the end of section 19C(4). This proposed new clause would prohibit the GLAM or a user from making a copy or recording of the work. However, there are many circumstances in which a user should be permitted to make a copy of a portion of an audiovisual work or sound recording. For example, a student should be allowed to use her mobile phone to copy an excerpt of the work for a school assignment. –Electronic Information for Libraries(EIFL)
- **Response by the dtic:** It is recommended that the provision be retained as is. The subsection formed part of the President’s specific reservations. When reading 19C(1) together with (4) there is indeed a duplication of “for commercial purposes’.
- The highlighted text is already in the Bill and not an addition. It was highlighted as challenging because it seemed to restrict copying for commercial and non-commercial purposes but already a reservation was raised because of its potential implications/unintended consequences. Whether the commercial purposes is removed or retained, the principle remains, it should not be copies for commercial purposes. It should be highlighted that some stakeholders viewed this subsection as not protecting any right and that it can be abused as persons going to the cinema, so it may have other implications.

Other Issues Raised

- Standard SA/UK English be used instead of US English. Creative Commons, Dennis Nicholson, SADTU
- Reference to 'government' Where the word 'government' is used in proposed amendments, SADTU recommends using the words 'relevant government department' or 'relevant government entity responsible for".-SADTU, Denise Nicholson
- The Bill should have allowed for more issues to be addressed more than those referred back.-SAFREA
- Inaccessible advert calling for public comments. The advert in the media calling for comments on a broader set of amendments than anticipated was made public on 6 December 2021, with deadline of 21 January 2022, yet it was totally inaccessible to people with disabilities. Not aware of any new notice to date to alert the public (including disabled people) of an extension of the deadline to 28 January 2022. This is yet another example where people with disabilities' rights are being infringed.-Shakila Maharaj
- The need for an impact assessment.-SAIPL, Brian Wafawarowa, IFFRO (personal use exception and levy), Dalro
- Some amendments are beyond the President's reservations.-Denise Nicholson, NCLIS
- It is imperative that all these new amendments are coupled with a very robust and clear statutory damages framework. In terms of the current legislation, rightsholders are afforded three remedies namely; interdict, delivery-up and damages.-Capasso
- **The dtic response**
- The above were noted.

Thank You