

Exceptions and Limitations in the Copyright Amendment Bill 2017 that affect libraries, archives, museums, galleries, as well as education, research activities and persons with disabilities

The [Copyright Amendment Bill 2017](#), include the following limitations and exceptions for libraries, archives, museums, galleries, as well as to education and research activities and persons with disabilities. Many of these provisions were adopted from the [eIFL Model Copyright Law](#). If approved by Parliament, they will provide much broader flexibilities to access to information. Many of the provisions for libraries and related sectors will enable them to carry out their statutory mandates to provide access and preserve information for perpetuity. The current copyright law is totally outdated and inadequate, and does not address the digital world. As expected and unfortunately, there has been a lot of opposition by rightsowners to these exceptions, particularly to the fair use provisions, those for education and research, and unenforceable contractual term, so it is difficult to gauge what will be in the final Bill that will be enacted in due course.

Introduction of Fair Use

Section 12 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work:

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

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

- (i) the nature of the work in question;
- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
- (iii) the purpose and character of the use, including whether—
 - (aa) such use serves a purpose different from that of the work affected; and
 - (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
- (iv) the substitution effect of the act upon the potential market for the work in question.

(c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.

General exceptions from copyright protection

12A. (1) Copyright in a work shall not be infringed by any of the following acts:

(a) Any quotation, including a quotation from articles in a newspaper or periodical, that is in the form of a summary of that work: Provided that the quotation shall be compatible with fair use in that the extent thereof shall not exceed the extent reasonably justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;

(b) teaching or any illustration in a publication, broadcast, sound or visual record: Provided that such use shall be compatible with fair practice in that the extent thereof shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;

(c) 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;

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

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

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

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

(iii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a political speech, lecture, address, sermon or other work of a similar nature delivered in public, or a speech delivered during legal proceedings, to the extent justified by the purpose of providing current information;

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

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

(ii) such translation is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes

only; or

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

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

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

(i) the reasonable use of such work for the purposes of cartoon, parody, satire, pastiche, tribute or homage; and

(j) the making of a copy of such work by an individual of—

(i) the individual's own copy of the work; or

(ii) a personal copy of the work made by the individual for the individual's personal use and made for ends which are not commercial.

(2) For the purposes of subsection (1)(j), permitted personal uses include—

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

(b) time or format-shifting; or

(c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage area accessed by means of the internet or similar means which is accessible only by the individual and the person responsible for the storage area.

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

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

Temporary reproduction and adaptation

13A. (1) Any person may make transient or incidental copies of a work, including reformatting an integral and essential part of a technical process, if the purpose of those copies or adaptations is—

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

(b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.

Reproduction for educational and academic activities

13B. (1) Any person may make copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose.

(2) (a) Educational establishments may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual

research environments and library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.

(b) Establishments referred to in paragraph (a) shall not include all or substantially all of a book or journal issue, unless a licence to do so is not available from the author or collecting society, or representative if it is an indigenous community, on reasonable terms and conditions.

(3) Any person receiving instruction may incorporate portions of works in printed or electronic form in assignments and portfolios, thesis and dissertations for personal use and library deposit, including institutional repositories.

(4) (a) The author of a scientific or other contribution, which is the result of a research activity publicly-funded by at least 50 per cent and which has appeared in a collection, has the right, even after granting the publisher or editor an exclusive right of use, to make the contribution available to the public under a public licence or by means of an open access institutional repository in the final accepted manuscript version peer-reviewed post print.

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

(c) When the work is made available to the public, the place of the first publication must be properly acknowledged.

(d) Third parties, such as librarians, may carry out these activities on behalf of the author.

(e) Any agreement to the detriment of the author shall be void, except as provided for in this section.

(5) The source of the work reproduced and the name of the author shall be indicated as far as is practicable on all copies made under subsections (1) to (4).

(6) The permission under subsection (1) shall not extend to reproductions for commercial purposes but the permission shall include the reproduction of a whole textbook—

(a) where the textbook is out of print;

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

(c) where authorised copies of the same edition of the text book are not for sale in the country or cannot be obtained at a price reasonably related to that normally charged in the country for comparable works.”

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

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

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

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

(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole film or audiovisual fixation, 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 film or fixation 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 rights owners, but may not permit a user to make a copy or recording of the work for commercial purposes.

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

- (a) a copy of any work in its collection for the purposes of back-up and preservation; and
- (b) copies of publicly accessible websites for the purposes of preservation.

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

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

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

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

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

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

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

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

- (i) take and show a photograph of such work or show video footage of such work;
- (ii) create other images such as paintings of buildings; or
- (iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place.

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

(b) The receiving library must delete any electronic file received from the other library immediately after supplying the patron who has requested it with an electronic or paper copy of the work.

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

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

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

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

General exceptions regarding protection of copyright work for persons with disability

19D. (1) Any person may, without the authorisation of the author, 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 electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:

(a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;

(b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and

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

(2) (a) A person with a disability to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the author of the copyright work, reproduce the work for personal use.

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

(3) A person with a disability or an organisation that serves persons with disabilities may, without the authorisation of the author, export to or import from another country any copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person or organisation.

(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.

Unenforceable contractual term

39B. (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.

(2) This section does not prohibit or otherwise interfere with public and open licences to do any act which is subject to copyright or moral rights, settlement agreements, terms of service licences and the voluntary dedication of a work to the public domain.