oint Academic Comments on the South African Copyright Amendmer Bill, 2015

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ots of the provisions of other laws cited in this document can be found in *Masterlist: Limitations and Exceptions Provisions in National L*
ble at http://infojustice.org/flexible-use. We also make extensive reference to EIFL DRAFT LAW ON COPYRIGHT INCLUDING MODE
PTIONS AND LIMITATIONS FOR LIBRARIES AND THEIR USERS (2014), available at http://www.eifl.net/resources/eifl-draft-law-
ght-including-model-exceptions-and-limitations-libraries-and-their

f	Provision	Comments	Proposed Alternative
	To amend the Copyright Act 98 of 1978, so as to amend certain definitions; to allow for the reproduction of copyright work; to provide for the protection of copyright in craft work; to provide for the accreditation and registration of Collecting Societies; to provide for the procedure for settlement of royalties disputes; to allow fair use of copyright work; to provide for access to copyright works for a person with disabilities; to provide for the protection of ownership of orphan works by the state; to provide for the establishment of Intellectual Property Tribunal; to provide for the appointment of members of the Intellectual Property Tribunal; to provide for the powers and functions of the Intellectual Property Tribunal; to provide for protection of performers' moral and economic rights; to provide for the protection of rights of producers of phonograms; to provide for	Over the life of a piece of legislation such as this one, the Copyright Act is likely to face interpretation, both in the courts of South Africa and elsewhere, on many occasions. The bill may benefit from a preamble which would put forward a fuller set of values, principles and objectives that could aid interpretation of the Act. Such a preamble could guide and inform interpretation of the Act, as the provision in Art. 8, Sec. 8, cl. 8 of the U.S. Constitution has done successfully for decades. Another advantage of including a substantive preamble in this draft would be that it would help to encourage and focus public discussion of the merits of specific proposals as the legislative process continues. As indicated in the Proposed Alternative, the objective is to identify as comprehensively as possible the full range of objectives that any modern copyright law must	Purposes that a preamble might reflect include: To achieve an appropriate balan the rights of authors and those o the public as a means to promot and fulfil the Constitution and its and South Africa's international h rights, disability rights and intelle property protection treaty commi promote creativity, innovation an cultural arts, to expand opportun and use information to promote t development of all South African overcome vestiges of discriminat have disadvantaged the majority participation in and enjoyment of of cultural industries, to contribut and public discourse, to promote research and public archiving, to

prohibited conducts in respect technological protection measure; to provide for prohibited conduct in respect of copyright management information; provide for management of digital rights; to provide for the promotion of broadcasting of local content; to provide for certain new offences; and to provide for matters connected therewith.	serve, as well as considerations particular to South Africa. The most important attribute of a proper purpose is to express the balance of interests at the heart of copyright. A shorter statement could achieve that goal. See e.g. The Korean Law of 2009 ("Article 1 (Purpose): The purpose of this Act is to protect the rights of authors and the neighbouring rights and to promote fair use of works in order to contribute to the improvement and development of the culture and related industries."). Including preambles in South African legislation is still somewhat unusual but should seriously be considered in light of the aforementioned benefits. It is also noteworthy that the recently published *Protection, Promotion, Development and Management of Indigenous Knowledge Bill* also contained a preamble (see: http://www.gov.za/sites/www.gov.za/files/38574_gen243.pdf).	access for underserved populatic enable and take advantage of ne technologies, to safeguard perso works, and to ensure proper perf public administration.
Definitions	Throughout the Copyright Act, the terms "commercial" or "non-commercial" are being used; a definition of "commercial" should therefore be added to s1 of the Copyright Act. The suggested definition of "commercial" is appropriate for the modern era in which user generated content created with no intent for financial gain of the user has become incredibly common. It is similar to that of Singapore Copyright Act (Chapter 63), Division 5, S.136 (6B) ("a person does an act for the purpose of obtaining a commercial advantage if the act is done to obtain a direct advantage, benefit or financial gain for a business or trade carried on by him.").	"Commercial" means to obtain a economic advantage or financial connection with the user's busine

‘orphan works’ means works in which copyright still subsists but the right holder, both the creator of the work or the successor in title cannot be located;	Throughout the Bill, the term "creator" should be eliminated, and the words "author" or "rights holder” substituted. This is in keeping with conventional usage, and is designed to eliminate ambiguity. Here, “rights holder” is used because the key issue as far as orphan works are concerned is the inability of the would-be user to secure a licence. The new definition of orphan works proposed at right is adapted from Article 2 of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, 2012 O.J. (L 299) 5, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0028&from=EN (“A work ... shall be considered an orphan work if none of the rightholders in that work ... is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out …”).	‘orphan works’ means works in w copyright still subsists but none c holders in that work is identified c one or more of them is identified, located, despite a diligent search rights holders having been carrie
‘parallel importation of goods’, also known as “gray market goods” refers to genuine branded goods that are imported into a market and sold there without the consent of the owner in trademark;	This definition appears unnecessary given the need for a specific definition of a parallel importation right below. It also conflates the issues of copyright and trademark protection. It can be deleted and the specific right clarified as we suggest for proposed Section 12C below.	Delete (See new proposed Art 12
‘person with a disability’ means a person who is blind, has a visual impairment, a perceptual or reading disability which cannot be improved to give visual function substantially, equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person	Section 19D(5) of the Bill broadly authorizes accessible copies of any “work” (not just printed material) and defines disability broadly as “a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability” The EIFL Model Law Art. 17(5) contains a similar definition. The Section 19D definition is	“‘person with a disability’ means that requires an accessible forma access and use a work to substa same degree as a person withou disability.”

without an impairment or disability or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading regardless of any other disabilities;	consistent with definitions found elsewhere in South African law, including the Employment Equity Act 55 of 1998 ("people with disabilities means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment"). We recommend that the 19(D) definition replace that of "person with a disability" in the definition section of the proposed amendments. The latter definition is unduly limited to "a perceptual or reading disability" and is focused on books or reading material, rather than all works. The latter definition would not, for example, enable modifications to audio-visual works to assist the deaf or hard of hearing. See Denise Nicholson, Are the Deaf Getting Fair Deal https://www.westerncape.gov.za/text/2012/4/7_jf2012-copyright.pdf. For disability access clauses that apply regardless of the type of disability, see, e.g., Luxembourg, Law of 18 April 2004, Art. 10.11; Serbia, Law on Copyright and Related Rights, Art. 54 -- both of which are included in *Masterlist: Limitations and Exceptions Provisions in National Laws* available at http://infojustice.org/flexible-use	
'technological protection measure' means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is designed to prevent or restrict infringement of copyright work that is protected by a technological protection measure;	The last clause of the definition ("that is protected by a technological protection measure") makes the definition circular. The proposed alternative at right explicitly carves out of the definition common technologies used for non-infringing purposes, as does New Zealand, Copyright (New Technologies) Amendment Act 2008, Art. 226. (defining: "TPM or technological protection measure— (a) means any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the	'technological protection measur (a) means any process, treatmer mechanism, technology, device, component that in the normal co operation prevents or restricts in of a work; (b) for the avoidance of doubt, d include a process, treatment, me device, or system to the extent t controls any access to a work fo noninfringing purposes. For exa

	infringement of copyright in a TPM work; but (b) for the avoidance of doubt, does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for noninfringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a noninfringing copy of a work)”).	“technological protection measur include a process, treatment, me device, or system to the extent th controls geographic market segn preventing the playback in South noninfringing copy of a work.
‘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 Act as amended would allow circumvention by the rights holder or someone else to enable exercise of exceptions and limitations. Making this important user right effective requires the definition to permit the devices needed to circumvent TPMs to effectualize the right.	‘Technological protection measu circumvention device’ means a d primarily designed, produced or a purposes of enabling or facilitatir unlawful circumvention of a techr protection measure;
Works eligible for copyright (1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright- (a) literary works; (b) musical works; (c) artistic works; (d) cinematograph films; (e) sound recordings; (f) broadcasts; (g) programme-carrying signals; (h) published editions; (i) computer programs.	The clear international trend in copyright law is to move away from providing copyright protection for productions that do not reflect creative activity but merely represent the outcome of skill and effort. In some jurisdictions (like the United States) such non-original productions (which often take the form of databases and other compilations) are denied protection outright. In others, like the EU countries (including the UK), they receive lesser, non-copyright protection for a period of time. But nowhere does a modern copyright law embrace non-original productions as copyrightable. This, however, appears to be the tendency of recent jurisprudence in South Africa, as in Board of Healthcare Funders v Discovery Health Medical Scheme (Gauteng High Court 2010), relying in part on superseded UK precedents. There is strong reason to believe that this	Works eligible for copyright (1) Subject to the provisions of th following works, if they reflect ori authorship and are fixed in tangil shall be eligible for copyright- . . . Delete references to “broadcast” “programme carrying signals” in section.

	approach to the law of copyrightability is anticompetitive in effect, and could serve to stifle innovation in South Africa. Indeed, it could well be in constitutional tension with the principle of freedom of expression. In addition, copyright protection for databases (such as test results) may have a chilling effect on access to needed generic drugs. The suggested new language is not designed to resolve this question, which clearly belongs before the South African courts, but to provide them with a new opportunity to consider it afresh, relying on constitutional and jurisprudential first principles. Protection for "broadcasts" and "programme-carrying signals" belongs, if anywhere, in broadcasting legislation, rather than in copyright. No modern copyright law recognizes these as categories of copyrightable subject matter, though some national laws do provide limited protection under other rubrics.	
	The proposed provision describes a list of non-copyrightable information objects. It incorporates and expands upon a similar list located in Sec. 12(8) of the Act. Making provision for such a list provides an important protection for the public interest in having access to building blocks of knowledge that are too important to the nation as a whole to be reduced to the property of anyone. The list of non-protectable material here is based, in part, on Article 2 of the WIPO Copyright Treaty. Although South Africa is not a party to the WCT, the exclusions in Article 2 represent a common sense development of basic international copyright law principles. Another source is the EIFL Model Law Article 5. The exclusion in (2)(a) is modelled on the 1994	2A. Scope of copyright protectio (1) Copyright protection extends expressions and not to ideas, pro methods of operation or mathem concepts as such, nor, in the cas computer programs, to interface specifications (2)(a) Tables and compilations w reason of the selection or arrang their contents, constitute the auth intellectual creation shall be prot such by copyright. (b)The copyright protection of compilations shall not extend to t contents and shall be without pre any rights subsisting in those co themselves.

	EU Database Directive. The inclusion of (3) has several rationales. We expect that judicial interpretation of this proposed provision would further refine the question of limits on the protection of essential information. Many national copyright systems now recognize that particular ideas can be expressed intelligibly only in one or a limited number of ways, and therefore even the expression in these circumstances is unprotected, or extremely limited to prohibiting verbatim copying only. This is true in the United Kingdom, most Commonwealth countries and the United States (where this is known as the merger doctrine, because the expression is considered inextricably merged with the idea). The latter part of subsection (3), clarifying the exclusion of protection for information required by regulation, is important because it would cover disclosures in such areas as generic medicine package inserts, pesticide labels and the sort. If those statements were protected by copyright, the potential resulting risks to public health and safety would be considerable. There is at least one case in South Africa where this issue was engaged, with a holding of the court that a generic medicine could not copy information on a label required to be there by government regulation -- a result at odds with U.S. law on the subject. *Compare* Beecham Group plc and SmithKline Beecham Pharmaceuticals (Pty) Ltd v Biotech Laboratories (Pty) Ltd 2002 (holding that a generic company may not copy the safety label of a brand name drug), *with* SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharmaceuticals, Inc., 211 F.3d 21 (2nd Cir. 2000), available at	(3) Notwithstanding the provision 2, no protection shall extend to e inextricably merged with the idea the idea can be expressed intelli one or a limited number of ways, particular expression is directed regulation such that only one for expression will meet regulatory requirements, such as on a safet (4) Notwithstanding the provision 2, no protection shall subsist in o of a legislative, administrative or or in official translations of such t speeches of a political nature or delivered in the course of legal p or in news of the day that are me press information, provided that speeches referred to in this subs have the exclusive right of makin collection thereof.

	http://biotech.law.lsu.edu/cases/devices/smithkline_v_watson.htm (holding that label information required to meet regulatory requirements do not infringe copyright). Proposed subsection (4) is based on S. 12(8) of present South African Copyright Act. Structurally, it belongs here and should be deleted in sec. 12.	
Copyright by virtue of nationality, domicile or residence, and duration of copyright ... (1) Copyright shall be conferred by this section on every work, eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is at the time the work or a substantial part thereof is made, a qualified person, that is- … (c) in the case of copyright that vests in the state due to the fact that the owner cannot be located, is unknown or is dead, the term of such copyright shall be perpetual.	Vesting copyright in the state could implicate Berne Article 2(6): "Protection shall operate for the benefit of the author and his successors in title." Likewise, the provision of perpetual term for some copyrights runs counter to principles of international and domestic copyright that prescribed "limited" terms for copyrights. Limited terms serve the important public interest in the existence of a "public domain" of pre-existing works that are, by virtue of their age, open and available to use by all. If the intent here is to adopt a system of domaine public payant (DPP), or "paying public domain" such as exists in Algeria, Kenya, Rwanda, Senegal, Republic of the Congo, Côte d'Ivoire and Paraguay, further study may be in order to determine how the public interest will be served in such cases. See Carlos Mouchet, Problems of the "Domaine Publique Payante," 8 Colum.-VLA Art & L. 137 (1983-1984).	Delete Sec. 3(1)(c)
5 Copyright in relation to the state and certain international organizations (1) This Act shall bind the state. (2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or funded by or under the direction or control of the state or such international organizations as may	Section 5(2) denies the ability of all recipients of research grants to keep ownership of rights in their work, and subsections (3), (4) and (5) establish special terms and conditions of protection with respect to works of this kind. We are not aware of any modern copyright law that deals in this way with funded works as a category. Indeed, the typical default is that	Substitute for (2): (2) Unless altered by terms contr copyright for state funded works the author of the funded work an or international organization fund enjoy a royalty-free paid-in-full n licence to the full practice and us

be prescribed shall be owned by the state or such international organization. (3) Copyright conferred by this section on a literary or musical work or an artistic work, other than a photograph, shall subsist for fifty years from the end of the year in which the work is first published. (4) Copyright conferred by this section on a cinematograph film, photograph, sound recording, broadcast, programme-carrying signal, published edition or computer program shall be subject to the same term of copyright provided for in section 3 for a similar work. (5) Section 3 and 4 shall not confer copyright on works with reference to which this section applies. (6) Copyright which vests in the state shall for administrative purposes be deemed to vest in such officer in the public service as may be designated by the State President by proclamation in the Gazette.	copyright, which is an author's right, vests in the individual who received the funding (or other commission), while a funding contract or another mechanism assures the funder whatever use rights it may require in the resulting work. The substitute proposal at right provides for this traditional default. In the present context, a modification also would avoid difficult definitional questions about what constitutes a "funded" work (such as: Does this include professors' salaries? How are partially funded works treated? How are collaborations between funded authors and non-funded authors treated?). Under the proposal at right, the transaction should be set by contract, with the state able to negotiate for ownership if it has an interest in the individual case. In the usual case, it would not, and thus the government could save money (by not paying for all rights of the author), and authors could be made better off. The incentives here should be to make state funded work broadly available, including through "open" or "public" licences, such as Creative Commons licences. In its present form, subsection 5(2) also would have impractical unintended effects on assignments - barring further transfer of rights vesting in the state to third parties. It would also affect deposits of research and accompanying data/datasets in institutional repositories. Copyright ownership must remain with the author (or author's institution, depending on the IP policy of the institution) but not with the funders.	rights in the work for any purpose absence of contractual provision contrary, data and works funded or international organization shal released or licenced under a pub maximise public access to such Delete (3), (4), and (5)
Resale royalty right	The issue of whether to have a droit de suite (artist's' resale royalty) right is a complex one that merits a close, empirical study to determine whether South African artists would benefit from such a right, which artists would benefit, and	

	whether the high administrative costs of the necessary system justify passage of such a right. The emotional argument for a droit de suite is easy to grasp: visual artists, at least traditionally, have relied on sales of physical embodiments of their works to generate income. However, due to first sale laws, any resale of that embodiment is free of an obligation to pay the artist absent a contractual obligation. This has, in some famous (but perhaps also limited) cases, led to resales at prices far in excess of that made by the artist, and a consequent perception that artists are not properly sharing in the bounty that stems from their creativity. There are, however, arguments against such a right. A high resale price might be the result of a dealer's considerable efforts to increase the popularity of the artist. Another argument, made by artists themselves, is that the right only helps those who are already successful. Daniel Grant, ‘Droit de Suite’ Debate Heats Up, Art News (2012), available at http://www.artnews.com/2012/01/11/droit-de-suite-debate-heats-up/ (noting 2010 report on artists’ resale royalties by European Art Market Coalition finding 74 percent of all the royalties collected went to artists’ heirs, 20 percent went to the collecting agencies and six percent to living artists). However one comes out on these issues, there are important questions of scope and administration that should be addressed. These include which works will be included: all original "copies" of works sold in hard copy, such as musical and literary manuscripts; is it all visual works, including photographs, works of traditional	

	African art, clothes designs, works on glass, papier-mâché? Will the scope of the right be co-extensive with copyrightable visual works? What about limited editions? How limited must the edition be? Which artists, deceased ones, only living, only South African or all authors? Works that were created on or after the date of passage of the right, or all works regardless when created? If the latter, how does this impact on the expectations of those who purchased the copies before passage? Should there be a minimum sales price, or should the resale of a dollar item trigger the right? How long after the original purchase does a resale trigger the right? At any time, or only after a minimum period? Do private sales count, or just those by auction houses? What about dealers, or retailers? Will there be collecting societies? What will be transparency requirements for sellers and collecting societies; in other words, what right will artists have to examine the books and how will this right be enforced? Will sales of South African works abroad trigger the obligation, or only sales in South Africa? If sales within South Africa, how will royalties for non-South Africans be handled? See generally Clare McAndrew and Lorna Dallas-Conte, Implementing Droit de Suite (artists' resale right) in England, available at http://www.artscouncil.org.uk/media/uploads/documents/publications/325.pdf (study of the law in the UK and in six other countries). If, upon further study, South Africa were to determine that it did want to pursue such a right, it might be wise to consider a model that involves less bureaucratic oversight than the current Bill. Thus, for example the version of droit de suite now in place in the state of California, in the U.S., is largely self-administering. When the sale of a	

	work meets certain conditions outlined above, a seller must pay the artist 5% of the resale price. It is the seller's obligation to locate the artist within 90 days of the sale or make a payment to the California Arts Council.	
Duration of resale right (1) A creator of artistic work's resale right expires at the end of the period of fifty (50) years from the end of the calendar year in which such artist died. (2) In the case of - (a) an artistic work, the resale right of the work that is computer-generated expires, at the end of the period of fifty (50) years from the end of the calendar year in which the work was created;	If Artists' Resale Royalty provisions are retained in the final version of the Copyright Amendment Act, the provisions relating to "computer-generated" works probably should be reconsidered. Granting resale rights for all "computer-generated" images could lead to unforeseen consequences for the functioning of the internet and digital media.	Delete 7(C)(2)(a)
Royalties (1) (a) In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9 (c), (d) or (e) without payment of a royalty to the owner of the relevant copyright.	This section should exclude any requirement to pay royalties where limitations and exceptions provide for permission-free uses. The language should also track that in sections 9(c), (d) and (e) to which it refers, rather than introducing new terms (e.g. "to play").	Royalties (1) (a) In the absence of an agre contrary, unless otherwise autho no person may broadcast, transr communicate to the public, a sou recording as contemplated in sec (d) or (e), and not otherwise auth without payment of a royalty to th the relevant copyright.
General exceptions from protection of literary and musical works (1) Copyright shall not be infringed by any fair dealing with a literary or musical work- (a) for the purposes of research or private study by, or the personal or private use of, the person using the work; (b) for the purposes of criticism or review of that work or of another work; or (c) for the purpose of reporting current events-	The current structure of the Act and Bill mixes specific exceptions with flexible standards in 12 and 12A. We recommend that the new "fair use" clause in 12A(2) and (5) be merged with the fair dealing standard in 12(1) and that the specific exceptions within both articles be relocated, e.g. as a new 12A. We have made a suggested alternative to that effect in the right column. Either the term "fair dealing" or "fair use" or both may be used. The important point will be to make	12 Fair Dealings and Uses (1) In addition to uses specifically a fair dealing or use with respect performance for purposes such a following does not infringe copyri work: (a) research, personal study or th use of the person using the work (b) criticism or review of that wor another work; (c) reporting current events;

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<td>(i) in a newspaper, magazine or similar periodical; or
(ii) by means of broadcasting or in a cinematograph film;
Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.</td>
<td>the list of purposes open ended so that the factor analysis can apply to uses for purposes not specifically enumerated in the statute. This is one of the most important provisions in the Bill in that it provides an open and flexible exception that can be used to justify new uses or technologies over time that may not be envisioned in the Act at the time of its passing.

The Copyright Act of Singapore is an excellent example of a modern statute that has interpreted and applied “fair dealing” in this manner, by making the list of permissible purposes open. See Examples of Flexible Limitations and Exceptions from Existing and Proposed Laws http://infojustice.org/wp-content/uploads/2012/12/Appendix-II.pdf. See also the EIFL Model Law Art. 17(c); CCH Canadian Ltd v Law Society of Upper Canada [2004] 1 SCR 339,[1] 2004 SCC 13 (interpreting Canadian fair dealing law flexibly).

We note that factor (2)(c) at right considers whether a particular use is for a different purpose from the original -- a factor sometimes referred as “transformativeness.” This inclusion will insure consistency between the approach of South Africa and that of such countries as the U.S., Korea, Singapore, Israel and others. This approach to analysing flexible limitations and exceptions has assumed particular importance as digitization has created an important new issue for copyright law – the possibility of non-expressive use of expressive works. For example, when Internet search engines and plagiarism detection machines copy text, they do so to perform computational analysis and to generate metadata. These machines copy without communicating the underlying authors’</td>
<td>(d) research, scholarship, teachi
education;
(e) comment, illustration, parody,
caricature or pastiche,
(f) personal use, including to use
possessed work at a different tim
different device;
(g) preservation of and access to
collections of libraries, archives,
museums;
(h) expanding access for unders
populations;
(i) ensuring proper performance
administration.
(2) In determining whether an ac
relation to a work constitutes fair
fair use, all relevant factors shall
into account, including—
(a) the nature of the work in ques
(b) the amount and substantiality
of the work affected by the act in
the whole of the work;
(c) the purpose and character of
including whether such use serve
different from that of the work aff
whether it is of a commercial nat
non-profit research, library and/o
educational purposes; and
(d) the substitution effect of the a
potential market for the work affe
Provided that, to the extent reaso
practicable and appropriate, the
be mentioned, as well as the nar
author if it appears on the work.</td>
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	original expression. As such, their use has been recognized by several courts as transformative and as unlikely to substitute for the underlying author’s original expression. Where expressive substitution does cause harm to the market for an affected work (as where a novel is adapted as a movie without permission), the likelihood that the use would be considered fair dealing is reduced considerably by factor (d), considering any potential commercial harm from the use. Commerciality may be a factor in fair dealing analysis, but it should not be determinative. Newspapers, search engines, blogs, etc. may be for-profit commercial activities, but nonetheless eligible for fair use treatment. Not every effect on market value should be cognizable; only substitution effects should matter, as has been made clear in US case law. A critical review may do damage to the market for the original, but of course this doesn’t count against its fairness in considering quotations used in the review. Even a technological use, such as a search engine, might have a negative effect insofar as it helps would-be buyers locate superior alternatives to a given work. Only unfair competition in the sense of market substitution should count against fairness.	
12(2) The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings. (3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the	The specific exceptions currently included in 12(2)-(15) and 12A(3-4) and (6)-(8) should be relocated to a separate Section 12A defining specific uses that constitute fair dealings. Note that many of the purposes protected in these specific clauses are already included under the fair dealing/fair use provision above. Quotation, for example, is clearly covered in proposed section 12, but is also included here -- primarily to track the existing statute. An alternative may	Section 12A General exceptions copyright protection (1)The copyright in a work shall r infringed by any of the following: (a) Any quotation therefrom, inclu quotation from articles in newspa periodicals that are in the form of of any such work: Provided that t shall be compatible with fair prac the extent thereof shall not excee

form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(5) (a) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following 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.

(b) Any reproduction of a work made under paragraph (a) 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.

(6) (a) The copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be

be to eliminate any specific exception already clearly covered in the fair dealing/fair use purposes suggested at right.

Our proposal retaining all the current specific exceptions is included in the right column. Throughout, language limiting the exception to literary or musical works should be deleted and instead the provisions applied to all works.

We include here comments indicating the motivations for any changes in the current general exceptions in Sections 12 or 12A where we suggest them. Note that current S. 12(8) has been incorporated into a new S. 2B suggested above. We only include comments here on provisions that are not replicated from Bill's of Act's Sections 12 or 12A.
12A(1)(a) The quotation right currently in Section 12(3) is reproduced in subsection (a) at rights. The current quotation right is a broad and useful exception, arguably required by the Berne Convention. It is a traditional part of South African copyright law, and its omission or dilution here would disturb settled expectations. We do suggest amending the current attribution requirement in the Act to make it applicable "to the extent practicable." This is to accommodate for the fact that sometimes attribution is not possible or appropriate, as in the case of anonymous works.
12A(1)(b) We propose expanding the fair dealing exception for "illustration" beyond the limited confines of teaching. An exception of this kind is essential if the public discourse is to be carried on in South Africa without unreasonable interference from copyright law. Whether in the context of political discussion, or cultural commentary, or educational programming, the

reasonably justified by the purpo
to the extent practicable, the sou
mentioned, as well as the name
if it appears on the work.
(b) To the extent justified by the
way of illustration in any publicati
broadcast or sound or visual rec
teaching: Provided that such use
compatible with fair practice in th
thereof shall not exceed the exte
by the purpose and that, to the e
practicable, the source shall be r
as well as the name of
the author if it appears on the w
(c) By the reproduction of such w
broadcaster by means of its own
where such reproduction or any
is intended exclusively for lawful
of the broadcaster and is destroy
the expiration of a period of six m
immediately following the making
reproduction, or such longer peri
be agreed to by the owner of the
part of the copyright in the work.
reproduction of a work may, if it i
exceptional documentary nature,
preserved in the archives of the b
but shall, subject to the provision
not be used for broadcasting
or for any other purpose without
of the owner of the relevant part
copyright in the work.
(d) Reproducing in the press or b
broadcasting a lecture, address
work of a similar nature which is
delivered in public, if such repro
broadcast is for an informatory p
author of a lecture, address or ot
reproduced shall have the exclus

infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose. (b) The author of a lecture, address or other work referred to in paragraph (a) shall have the exclusive right of making a collection thereof. (7) The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned. . . . (13) An authorization to use a literary work as a basis for the making of a cinematograph film or as a contribution of a literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film. (14) The copyright in a literary or musical work shall not be infringed by translation of such work by a person or a public body giving or receiving instruction provided that- (a) such translation is not done for commercial purposes; (b) such translation may be used for private, educational, teaching, judicial proceedings, research and professional advice purposes only; or (c) such work is translated from or into any language and communicated to the public for non-commercial public information purposes. 12A(3) Notwithstanding any provision of this	ability to illustrate an argument with appropriate examples is close to the heart of free expression. Switzerland's law provides an example, providing an exception for the use of copyrighted material "if the quotation serves as an explanation, a reference or illustration." Federal Law on Copyright and Related Rights Act (copyright, LDA) of 9 October 1992 (as of 1992) – Ch. 5: Limitations on Copyright - Art. 25. (3)-(4) are replicated from current law. 12A(1)(d) The existing provision in 12(7) on -- restricted to print and "broadcast" -- is out of date in the age of blogs and web hosting. In the proposed subsection (d) at right, the exception has been separated out and made into a separate subsection on communication to the public for informatory purposes, as suggested in the EIFL Model Law, Art. 13. The expansion of the exception for informatory uses is appropriate to the present situation in South Africa, where the ability of the media to cover public events and public debates comprehensively is so critical to the democratic political process. 12A(1)(f) provides a translation right adapted from section 12A(8) of the Bill. For clarity, here and elsewhere, the term "personal" is used instead of "private." "Private" may suggest a non-governmental entity ("private company"). Read together with the definition of "commercial" provided in Sec. 1 of the Proposal, this exception is intended to make clear that an individual end-user using an online translation service, e.g. to translate an English webpage into Zulu, is defined as a personal use even though the platform is commercial (e.g. makes money through ads). The revision clarifies that the purposes stand alone, e.g. that giving "professional advice" does not have to be performed by an educational institution.	making a collection thereof. (e) Subject to the obligation to in source and the name of the auth practicable: (i) the reproduction by the press, broadcasting, transmission or oth communication to the public of a published in newspapers or peri current economic, political or reli and of broadcast works of the sa character in cases in which the r broadcasting or such communica is not expressly reserved; (ii) for the purpose of reporting c events, the reproduction and the broadcasting or communication t public of excerpts of a work see the course of such events, to the justified by the purpose; (iii) the reproduction in a newspa periodical, the broadcasting or communication to the public of a speech, a lecture, address, serm work of a similar nature delivered or a speech delivered during leg proceedings, to the extent justifie purpose of providing current info (f) Translation of such work by a public body giving or receiving in provided that- (i) such translation is not done fo commercial purposes; (ii) such translation may be used personal, educational, teaching, proceedings, research and profe advice purposes only; or (iii) such work is translated from language and communicated to t non-commercial public informatio

Act, the use of digitized copyright material published in the internet and other electronic media shall be restricted for educational purposes, unless covered by an explicit notice for request for licence to use the digitized material. (4) Fair use of copyright work shall allow for some limited and reasonable use of copyright work for purposes of cartoon, parody or pastiche work in songs, films, photographs, video clips, literature, electronic research reports or visual art for non-commercial use, without having to request a permission specified in the Schedule hereto. The use includes- (a) quoting the works of the copyright owner in a manner that is reasonable and fair; (b) making copies of eBooks or compact discs purchased by the user; or (c) transferring of purchased compact discs onto the user's MP3 format player. (6) The provision of subsection (1) and (2) shall apply to the use of copyrighted work not for commercial gain. (7) Notwithstanding any provision of this Act, parallel importation of trademarked goods is allowed in relation to- (a) goods that have been exhausted to be resold in the area from which the goods originate; and (b) the extent to which the owner of the trademarked goods can control the distribution of trademarked goods. (8) Encryption of computer-generated data is allowed to an extent that it is necessary to decrypt data in a protected state without resulting into incrimination.	12A(1)(i) provides a right to parody and similar uses based in part, on EIFL Model Law Art. 14. It is important to recognize that these activities may occur in commercial as well as non-commercial settings. Parodies are often commercial in nature, but are still subject to free expression rights. See Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994). Likewise, any effort to specify the media through which these uses will occur is likely to be underinclusive. The inclusion of tribute and homage is for the avoidance of doubt, to make clear that artistic references to pre-existing works in new ones will not always convey a negative assessment. The "few lines … few parts" restriction in the draft Act has been eliminated. It is potentially troublesome because it runs counter to the practice of effective parody and satire. There are many examples where the entire work had to be used in order to effectively engage in criticism, commentary, or education. At minimum, the entire work may need to be copied as an intermediate technical step. 12A(1)(j) is based on the Bill's Section 12A(4) private use right. But the Bill's language is not sufficiently tailored to include common modern uses such as cloud storage and time and format shifting. The substitute provision at right follows the recent UK legislation creating spaces for making personal copies, including format shifting. It is the most comprehensive modern private use right. Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014, available at http://www.legislation.gov.uk/ukdsi/2014/9780111116036/regulation/3.	(g) Use of a work in a bona fide demonstration of electronic equip client by a dealer in such equipm (h) Use of a work for the purpose proceedings or preparing a repor proceedings. (i) The reasonable use of a copy for purposes of cartoon, parody, pastiche, tribute or homage. (j) The making of a copy of a wor individual of— (i) the individual's own copy of th (ii) a personal copy of the work m individual, for the individual's personal use for ends which are not commerci Permitted personal uses include: back-up copy, time or format-shif the purposes of storage, includin electronic storage area accessed of the internet or similar means w accessible only by the individual person responsible for the storag (2) The provisions of subsection apply also with reference to the r use of an adaptation of a work ar the right to use the work either in language or in a different langua (3) An authorization to use a liter a basis for the making of a cinem film or as a contribution of a litera such making, shall, in the absenc agreement to the contrary, incluc to broadcast such film.

(15) The copyright in a literary or musical work shall not be infringed by communication from an educational establishment to persons affiliated as persons receiving instruction at or from such education establishment of reproductions and the translations permitted by this Act solely for private, educational and research purposes provided this is done through a secure network.	This proposed exception appears to overlap with and duplicate in different terms the educational exceptions proposed in Section 13B(2).	Delete 12(15)
(3) Notwithstanding any provision of this Act, the use of digitized copyright material published in the internet and other electronic media shall be restricted for educational purposes, unless covered by an explicit notice for request for licence to use the digitized material.	Proposed 12A(3) is not framed as an exception but rather a prohibition. But the prohibition is not necessary given the existing Copyright Act's protections, which apply to digital material. As written, it appears to grant less room for fair use of anything on the Internet than for offline material. If the intent is to actually provide more access to digital material in the classroom, the provision could be re-worded and combined with what we propose as a new 12A(2) above.	Delete
(6) The provision of subsection (1) and (2) shall apply to the use of copyrighted work not for commercial gain.	The intent of (6) is unclear. Given the proposed restructuring of 12 and 12A, this limitation now seems unnecessary. Whether the work is for commercial or non-commercial purposes will be considered in the fourth factor of the new fair dealing test.	Delete
(7) Notwithstanding any provision of this Act, parallel importation of trademarked goods is allowed in relation to- (a) goods that have been exhausted to be resold in the area from which the goods originate; and (b) the extent to which the owner of the trademarked goods can control the distribution of trademarked goods.	There is a need, and we understand an intent, to clarify the application of the Copyright Act, as well as the Trademark Act, to parallel imported goods. It may be appropriate to provide this right in a separate Section, as we propose at right. Even if copyright is not a barrier to parallel import, trademark could still be used to prevent import of copyright goods - there are South African cases in which this has happened. Sec. 12(8) of the EIFL Model Law deals with this	12C Parallel Importation Notwithstanding any provisions o the Trademark Act 194 of 1993 a Counterfeit Goods Act 37 of 199 sale or other transfer of ownersh Africa or abroad shall exhaust th distribution and importation natio internationally in respect of the tr original or copy.

	issue. The best and simplest modern parallel importation clause lies in the recent amendment of its law by Chile. See Chile Law No. 17.336 on Intellectual Property http://www.wipo.int/wipolex/en/text.jsp?file_id=270205 Article 18 ("the first sale or other transfer of ownership in Chile or abroad shall exhaust the right of distribution nationally and internationally in respect of the transferred original or copy").	
(8) Encryption of computer-generated data is allowed to an extent that it is necessary to decrypt data in a protected state without resulting into incrimination.	This provision appears redundant with the law enforcement exception to the TPMs provision below. It can be deleted here.	Delete
Temporary reproduction (1) Anyone is permitted to make temporary copies of a work which are transient or incidental and which are an integral and essential part of a technical process provided that the sole purpose of such copies is to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work which have no independent economic significance.	This is an important exception that should be retained. It should be revised slightly to take into account the mobile environment, where some changes are made to take into account the smaller screen. There being no (2), subsection (1) may be eliminated. For recent modern examples of transient copy exceptions, see New Zealand Copyright Act 1994 (amended 2011) Section 43A; Switzerland, Federal Law on Copyright and Related Rights (2008), Ch. 5, Art 24; Poland Act 2/4/94 Art 75(1); Denmark Copyright Act of 2010; Australia Copyright Act of 1968 (Amended 2012), Sections 43A and 43B, all included in the Masterlist: Limitations and Exceptions Provisions in National Laws, available at http://infojustice.org/flexible-use	13A. Temporary reproductions a adaptation. Anyone is permitted transient or incidental copies of a including reformatting, when an i essential part of a technical proc provided that the purpose of sucl adaptations is (i) to enable a tran a work in a network between thir an intermediary or a lawful use o to adapt the work to allow use or technological devices, such as m devices, provided there is no ind economic significance to these a
Reproduction for educational and activities (1) For the purpose of educational activities copies may be made of works, recordings of works, broadcast in radio and television provided the copying is for fair use	(1) The scope of this provision has been broadened slightly in our proposal at right to include the full range of activities, both teaching and scholarship, that typically occur in and around academic institutions.	13B. Use for educational and ac activities. (1)For the purpose of educationa academic activities copies may b works, recordings of works, broa

and has received permission and instructions not exceeding the extent justified by the purpose. (2) 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 the 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 instructions at or from the the educational establishment making such copies. (3) Persons receiving instruction may incorporate portions of works in printed or electronic form in assignments and portfolios, theses and in dissertations for personal use and library deposit. (4) 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 subsection (1) to (3). (5) The permission under subsection (1) shall not extend to reproductions for commercial purposes and shall include the reproduction of whole textbooks where the textbook is either out of print, the owner of the right cannot be found, authorized copies of the same edition of the textbook are not for sale in the country or cannot be obtained at a price	The Bill's provision appears similar to EIFL Model Law Art 11(1), but adds it the qualifiers that the use must be "for fair use" (requiring application of the factor analysis) and "has received permission and instructions." The former requirement appears unnecessary since the provision includes the most important qualification -- not exceeding the extent of the purpose. The latter requirement (permission) makes the exception essentially useless. It is not a free use if one must first seek permission. (2) It is believed that the additions to this provision will enable teaching without significantly affecting the legitimate market interests of publishers. The proposed balance is an appropriate one in light of South Africa's paramount interest in delivering high quality education at reasonable cost to the greatest possible number of its citizens. (3) has been slightly revised (as (3a)) to take account of an important new phenomenon, the open "institutional repositories" of faculty and student work that are being established by institutions of higher education. So-called "IR's" represent an excellent opportunity for the important work of South African students and scholars to become better known in the general community of learning. The provisions of 3(b) deal with a related topic -- the making available of publicly funded research by way of public licences (sometimes referred to as an "open" licence, e.g. a Creative Commons-By licence) and repositories (i.e those that not only permit the public to read their contents but also allow for its general use for various	radio and television provided the does not exceed the extent justifi purpose. (2) Educational establishments m incorporate the copies made und subsection (1) in printed and elec course packs, study packs, resou and in any other material to be u course of instruction or in virtual environments, managed learning environments, virtual research er and library environments hosted network and accessible only by t giving and receiving instructions the the educational establishmer such copies, provided that such environments shall not include al substantially all of a book or jour unless a licence to do so is not a from the publisher or its represer reasonable terms and conditions (3a) Persons receiving instructio incorporate portions of works in p electronic form in assignments a portfolios, theses and in disserta personal use and library deposit, institutional repositories. (3b) The author of a scientific or contribution which is the result of activity publicly-funded by at leas percent and which has appeared collection, has the right, even aft the publisher or editor an exclusi use, to make the contribution ava public under a public licence and means of an open access institut repository in the final accepted m version (peer-reviewed postprint, in the case of a contribution publ

	purposes, including republication). The suggested provisions at right are adapted from Art. 38 (4) of German Copyright Act, as last amended by Article 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714), available at http://www.gesetze-im-internet.de/englisch_urhg/	collection that is issued periodic once per year, agreements may delay in the exercise of this auth up to 12 months from the date of periodical publication. When the work is made available of the first publication shall be pr acknowledged. Third parties, suc librarians, may carry out these ac behalf of the author. Any deviati agreement to the detriment of the shall be ineffective, except as pro herein.
Inter-library document supply (1) Libraries may supply to each other whether by post, fax or secure electronic transmission, provided that the electronic file is deleted immediately after printing a paper copy of an electronic copy of a work. (2) A paper copy may be supplied by the receiving library to a user of such library.	The Bill's Section 13(C) includes an apparent ban on providing an electronic copy of the work to the patron - by requiring "printing a paper copy of an electronic copy of a work." This falls short of conventional ILL practice in US and other countries where a digital copy is commonly sent by the requesting library to the patron. Because this provision relates to libraries, it should be relocated -- we propose to S. 19C(14).	(Relocated and amended at 19C
Special exceptions from protection of artistic works (1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.	The incidental use exception in 15(1) is unduly restricted. It fails, for example, to authorize the incidental capture of audiovisual works (a television or radio in the background), photographs, or performances (e.g. a street band) of the kind commonly captured in cinematographic film. The exception also leaves out key works that commonly incidentally capture background material, such as photographs and paintings.	Special exceptions for incidental with relation to works in public sp (1) The copyright in a work shall infringed by its inclusion in anoth such inclusion is merely by way o background, or incidental, to the matters represented in the new w

(3) The copyright in an artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such work is permanently situated in a street, square or a similar public place.	The right of panorama in 15(3) is unduly limited. It should be expanded to include photographs and other images (such as paintings). The 2001 EU Directive on Copyright (Art. 3), for example, broadly applies to any "work" included in "any material" -- permitting "incidental inclusion of a work or other subject-matter in other material. The language proposed for 2 is adapted from the German Copyright Act Art 59	(2) It shall be permissible to repr distribute and make available to works located permanently in pu and ways or public open spaces. of buildings, this authorisation sh extend to the façades thereof.
(4) The provisions of section 12 (1), (2), (4), (5), (9), (10), (12) and, (13), (14) and (15) shall mutatis mutandis, in so far as they can be applied, apply with reference to artistic works.	We have added proposed language in sections 12 and 12A that makes them applicable to all works. If accepted, this and other applications of those sections mutatis mutandis are not necessary.	Delete
(1) The provisions of section 12 (1) (b) and (c), (2), (3), (4), (12) and, (13), (14) and (15) shall mutatis mutandis apply with reference to cinematograph films.	We have added proposed language in sections 12 and 12A that makes them applicable to all works. If accepted, this and other applications of those sections mutatis mutandis are not necessary.	Delete
17 General exceptions regarding protection of sound recordings The provisions of section 12 (1) (b) and (c), (2), (3), (4), (5), (12) and , (13), (14) and (15) shall mutatis mutandis apply with reference to sound recordings.	We have added proposed language in sections 12 and 12A that makes them applicable to all works. If accepted, this and other applications of those sections mutatis mutandis are not necessary.	Delete
General exceptions regarding protection of broadcasts The provisions of section 12 (1) to (5) inclusive, (12) and, (13), (14) and (15) shall	We have added proposed language in sections 12 and 12A that makes them applicable to all works. If accepted, this and other applications of those sections mutatis mutandis are not	

mutatis mutandis apply with reference to broadcasts.	necessary.	
19A General exceptions regarding protection of published editions The provisions of sections 12 (1), (2), (4), (5), (8), (12) and, (13), (14) and (15) shall mutatis mutandis apply with reference to published editions.	We have added proposed language in sections 12 and 12A that makes them applicable to all works. If accepted, this and other applications of those sections mutatis mutandis are not necessary.	
19B Special exceptions regarding protection of computer programs (1) Subject to the provisions of section 23 (2) (d), the provisions of section 12 (1) (b) and (c), (2), (3), (4), (5), (12) and, (13), (14) and (15) shall mutatis mutandis apply, in so far as they can be applied, with reference to computer programs. (2) The copyright in a computer program shall not be infringed by a person who is in lawful possession of that computer program, or an authorized copy thereof, if (a) he makes copies thereof to the extent reasonably necessary for back up purposes; (b) a copy so made is intended exclusively for personal or private purposes; and (c) such copy is destroyed when the possession of the computer program in question, or authorized copy thereof, ceases to be lawful. (3) The copyright in a computer program shall not be infringed by a person who is in lawful possession of that computer program, or an authorized copy thereof, if- (a) he makes copies thereof to the extent reasonably necessary for back-up purposes;	The existing computer program exceptions should be expanded to permit reverse engineering for purposes of interoperability, as in the EU Software Directive. For additional clarity, we propose the language from the EU Software Directive at right. Because we propose above to make the limitations and exceptions in 12 and 12A applicable to all works, including computer programs, subsection 19B(1) is unnecessary. The computer program exception in 19B currently is subject to the fair dealing provision in 12, and the specific exceptions in 12A. If the proposed personal copying exception in 12A is accepted, 19B(2) would no longer be required.	19B Special exceptions regardir of computer programs, in additio limitations and exceptions in this may apply. (1) The person having a right to u of a computer program shall be e without the authorisation of the ri to observe, study or test the func the program in order to determin and principles which underlie any the program if he does so while p any of the acts of loading, displa running, transmitting or storing th which he is entitled to do. (2) The authorisation of the rights shall not be required where repro the code and translation of its for indispensable to obtain the inform necessary to achieve the interop an independently created compu with other programs, provided th following conditions are met: (a) those acts are performed by t or by another person having a rig copy of a program, or on their be person authorised to do so; (b) the information necessary to interoperability has not previousl

(b) a copy so made is intended exclusively for personal or private purposes; and (c) such copy is destroyed when the possession of the computer program in question, or authorized copy thereof, ceases to be lawful.		readily available to the persons r point (a); and (c) those acts are confined to the original program which are neces order to achieve interoperability. (d) The provisions of paragraph i permit the information obtained t application: (i) to be used for goals other than the interoperability of the indeper created computer program; (ii) to others, except when necessary f interoperability of the independer computer program; or (iii) to be u development, production or mark computer program substantially s expression, or for any other act w infringes copyright. For purposes of this section, inte can be defined as the ability to e information and mutually to use t information which has been exch
General exceptions regarding protection of copyright work for libraries, archives, museums and galleries	We recommend that the current language in 19C be replaced with the language at right, which derives from EIFL Model Law Art 12. Comments on some specific issues with the currently proposed 19C are noted below. To begin, the list of beneficiary institutions has been broadened here, to reflect the fact that in South Africa, "memory institutions" with various designations serve overlapping functions in preserving and making available important information objects. It is important to point out that these specific exceptions do not exclude the application of fair dealing in library settings, since it may be	Libraries, archives, museums ar (1) Libraries, archives, museums galleries may, without the author the copyright owner, use a work appropriate to their activities in a with subsections (2) – (13), provi not done for commercial purpose (2) Such institutions may lend co works incorporated in tangible m user, or to another institution. (3) Such institutions may provide access to copyright works in digi intangible media, to which it has access, to a user, or to another li (4) Such institutions may for edu research purposes, permit a user

	necessary as a basis for making a variety of uses that are not specifically mentioned here (e.g. making digitized records publicly available). Because many cultural institutions now engage with materials using a full range of technologies, including digital ones, an effective set of exceptions for cultural institutions must recognize that a range of rights reserved to copyright owners may be implicated. For the avoidance of doubt, this provision is made co-extensive with the itemization of copyright owners rights in 8(c). This is the intent of the use of the inclusive term “use” in 19C(1). With respect to format shifting, discussed in (8), the goal should be to make it possible for a library that holds a collection in an out of date format (e.g. VHS, Microfiche, etc) to shift the format of the entire collection easily. Although, Because format shifting is a form of preservation, it is implicated in other subsections of 9C as well. The proposed new language is included for the avoidance of doubt. The second sentence in (13) also is included for the avoidance of doubt. The inclusion of a revised “panorama right,’ as suggested in relation to S. 15, below, would obviate the need for this provision.	view a whole film, or listen to a fu or other sound recording or musi its premises, or in an institutional or lecture theatre, or by means o computer network, without permi rights-owners, but may not permi make copies or recordings of the (5) Such institutions may make c works in their collection for the pu back-up and preservation. Such may also make copies of publicly websites for the purposes of pres (6) If a work or a copy of such wo an institution’s collection, is incor an institution may make or procu the missing parts from another in (7) Such institutions may, withou consent of rights owners, engage shifting or conversion of works fr and/or obsolete technologies to n technologies in order to preserve for perpetuity, and to make the n copies accessible consistent wit section. (8) This Law does not prevent th copies in accordance with the pro the Act on legal deposit of publis (9) Such institutions may make c works when the permission of the other owner of copyright cannot a reasonable endeavour be obtain the work is not available by gene from the publisher. (10) Notwithstanding any other s institutions shall be permitted to l or otherwise acquire copyright w legally available in any country. (11) Such institutions may reproc make available, as appropriate, i

		for preservation, research or othe any copyright work which has be or withdrawn from public access, has previously been communicat public or made available to the p author or other rightsholder. (12) Such institutions are permitt copies of works, and make them for institutional or public exhibitio profit nature, for the purposes of commemorating historical or cult or for educational and/or researc They may also, where necessary purposes, show or take photogra video footage, and/or create othe such as paintings of buildings or artworks on public buildings, suc and graffiti, memorial sites, sculp other artworks which are perman located in a public place, for the mentioned purposes. (13) Libraries may supply to each copies of works in their collection by post, fax or secure electronic transmission, provided that any e received is deleted immediately b receiving institution after supplyin who has requested it with an elec paper copy of a work. (14) An institutional officer or em acting within the scope of his or h shall be protected from claims fo from criminal liability, and from co infringement, when the action is good faith: — In the belief, and where there reasonable grounds for believing work is being used as permitted scope of an exception in this Act

		that is not restricted by copyright — in the belief, and where there reasonable grounds for believing work, or material protected by rel is in the public domain or licence public/under a public licence Librarians and archivists shall be from liability for the actions of the (15) Nothing in the section shall rights that libraries, archives, mu galleries otherwise enjoy pursuan provisions of this Act, including S and 12A. Provided that, in exercising rights this section or elsewhere in the A institutions shall take reasonable assure that any digital copies sup them are accompanied by inform concerning the appropriate use o copies.
General exceptions regarding protection of copyright work for a person with disability] . . . (5) For the purposes of this section, a person with a disability means a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability.	This definition should replace that included in the definitions section, S. 1, as discussed above. In that case, it can be deleted here. Otherwise, no changes are suggested in this section. Its inclusion represents a remarkable accomplishment, since by means of it, South Africa assumes an international leadership role in the harmonization of copyright and disability rights.	Delete
Moral rights (1) Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject	Moral rights are an important aspect of any modern copyright law, and recognition of certain moral rights is mandated by Art. 6bis of the Berne Convention. However, it is widely recognized that the reputational security that moral rights provide to individual creators is in potential tension with the public interest in	Moral rights (1) Notwithstanding the transfer o copyright in a work, the author sh right to claim authorship of the w to the provisions of this Act, and any distortion, mutilation or other

to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorizes the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work. (2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2, and for the purposes of the provisions of the said Chapter the author shall be deemed to be the owner of the copyright in question.	promoting new innovation and creativity. The proposed new moral right provision in the right column seeks to balance these interests, by -- expanding the subject-matter coverage of moral rights to all copyrighted works; -- broadening slightly the "necessity" limitation in the last sentence of 20(1); -- clarifying the reference to ownership in 20(2); -- imposing a limitation on duration (consistent the Berne Convention) in 20(3); -- assuring in 20(2) and 20(4) that only the actual author or authors of a work may exercise moral rights with respect to it; -- providing authors with the ability to effectively waive their moral rights in connection with projects in which they wish to participate (based closely on EIFL Model Law Art 7(3); and -- clarifying the applicability of general limitations and exceptions to copyright where moral rights are concerned. The last of these provisions is designed to assure that the balance struck between private ownership and public access through the Act is applicable here as well. Without such a provision, moral rights could be exercised to bar the use of works (or as the basis for payment demands) even where (for example) a general provisions of Sections 12 and 12A applied. Without the waiver language indicated in the far column, below, this would be a highly problematic provision for some creative industries, including filmmakers.	modification of the work where su or would be prejudicial to the hor reputation of the author: Provide author who authorizes the use of a sound recording or cinematogr an author of a computer program associated with a computer prog prevent or object to modifications necessary on technical grounds purpose of commercial exploitati work. (2) Any infringement of the provis section shall be treated as an inf of copyright under Chapter 2, ex purposes of the provisions of the Chapter the author shall be deen the right to complain of any infrin rather than the owner of the cop question. (3) The duration of moral rights i work subsist only for the life of its author, if any; in the case of work by more than one author, moral r endure for the life of the longest them. (4) Moral rights are non-transfera (5) Where applicable, limitations exceptions provided in this Act, i specifically those specified in Se and 12A, shall apply mutatis mar moral rights. (6) The author may waive any of rights mentioned in subsection (1 that such a waiver is in writing ar specifies the right or rights waive circumstances in which the waive

(3) Notwithstanding the transfer of the copyright work in a television, film, radio, photography or crafts work to the owner, the creator of the copyright work has the moral right to – (a) be attributed as the creator; (b) not to be falsely attributed; and (c) not to have their work treated in a derogatory manner.	This provision is unnecessary in light of the expansion of the coverage of moral rights to all works in the suggested revision of the basic provision.	delete
(4) Notwithstanding the transfer of the copyright work in a television, film, radio, photography or crafts work to the owner, the creator of the copyright work or the performer has, exclusive of contractual arrangements, the moral right to receive royalty payments – (a) when repeats of the film, television, radio, photography or art work is used as prescribed by the Minister."	This section is defining economic rights, not moral rights, even though such an obligation may be rooted in moral considerations. These rights, if retained, should therefore be dealt with outside of s20. Moreover the economic rights in question are not copyrights but so-called "neighbouring rights." For this reason, these provisions appear better suited to being incorporated into SA's Performers Protection Act. This said, any general notion that contributors enjoy a continued, non-contractual right to receive royalties/residuals will seriously limit the usefulness of fair use for filmmakers. Even if the language is limited to TV rerun, its implications could be undesirable. In general, so-called "residual payments" are provided for in individual or group contracts, rather than in national law.	Delete (and perhaps consider inc SA' Performers Protection Act.)
Protection of performers' moral and economic rights	If this protection were to be dealt with in the Copyright Act and not in the Performers Protection Act (which appears to be better suited), then the content of this provision needs to be better integrated into the Act by adhering to the Act's internal structure. More specifically, the scope of, performer rights protection needs to be addressed in the nature of rights part (ss7-11B) of the Act, transfer in the transfer section (s22), and made subject to all exceptions, especially	Delete

	fair dealing/fair use (12 and 12A).	
Transfer of rights Where a performer has consented to fixation of his or her performance in an audio-visual fixation, the exclusive rights of authorization granted to a performer in terms of section 3, subsections (4) paragraphs (c), (d), (e), (f) and (g) which shall be owned or exercised by or transferred to the producer of such audio-visual fixation, subject to a prescribed written contractual agreement which shall give the performer the right to receive royalties for any use of the performance.	This provision on the transfer of performers' rights belongs more properly in the Performers' Protection Act. The statutory cross references in the proposal appear to be to that statute. The idea of providing a standard agreement, perhaps including some non-negotiable terms, seems like a good one. However, we note that some performers may affirmatively wish to contribute their work to a project, and the law should find a way to assure to this is a possibility. Protective legislation should not significantly restrict the ability of performers to deal in their own best interest.	Delete
Prohibited conduct in respect technological protection measure (1) The prohibited conduct in respect of the technological protection measure, the use of a technological protection measure circumvention device and the exceptions related to technological protection measure, contemplated in sections 280 and 28P of the Copyright Act, 1978 (Act 98 of 1978), shall mutatis mutandis apply in respect of performances fixed or fixed in audio-visual fixations.	Again, this is properly dealt with not in the Copyright Act but in the Performers' Protection Act.	Delete
Digital rights management (1) The library or archive must communicate the conditions for using a digital copy with authenticated users or persons with legitimate right to use the digital	The digital rights management provisions appear overly burdensome and unnecessary. For example, informing each user "of the extent of fair use" is a very difficult task.The extent of fair use (or fair dealing as the case may be) is a fact	Delete and add after 19C(16) of t above: Provided that, in exercising rights this section or elsewhere in the A

material, including – (a) advising the authenticated person that the digital copy is lawfully obtained; (b) ensuring that each user is informed in writing about the limitations and extent of fair use of the digital material in terms of this Act; (c) ensuring that the digital copy is communicated to the user in a form that cannot be altered or modified; (d) verifying that the number of digital copies used are not more than the number of the users; (e) giving a written notice that sets out the terms of the use of the digital copy to the authenticated user; and (f) as soon as is reasonably practicable, destroying any additional copy made in the process of making the digital copy.	intensive inquiry that will defy the ability of each library to counsel its patrons. (1)(c) appears an impossible requirement. There are no known forms in which a digital work "cannot be altered or modified." Even if there were, using such formats would disable users from making legal reproductions, such as to quote the work in another medium. The requirement in (1)(d) to verify the number of copies of a work used appears another nearly impossible task. We recommend the substitute language included in the proviso at the end of proposed Section 19C above.	institutions shall take reasonable assure that any digital copies su them are accompanied by inform concerning the appropriate use c copies
Ownership of copyright (1) … (c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.	This provision makes commissioners of certain works the automatic owner of that work, even where all the creative choices are performed by the author rather than the commissioning party. The origin of the norm appears to be of Dutch extraction. See http://hocker.nl/uploads/files/publication_documents/2543/A_Century_of_Dutch_Copyright_Law.pdf The practical results have been that films, photographs and other works in South Africa have been reported to be locked away in the archives of commissioning entities with the result that enjoyment by the public, as well as benefits to the authors, is curtailed. The proposal provided here represents one way	Ownership of copyright (1) … (c) Where a person commi taking of a photograph, the painti drawing of a portrait, the making gravure, the making of a cinemat or the making of a sound recordi or agrees to pay for it in money c worth, and the work is made in p that commission, the ownership copyright subsisting in the work a the commissioning person and th authors who execute the commis be governed by contract; provide absence of an effective, signed a ownership shall vest in the autho

	of implementing this approach.	and the commissioning party sha irrevocable non-exclusive licence copyright rights as may subsist ir
(3) Ownership of any copyright whose owner cannot be located, is unknown or is deceased shall vest in the state: Provided that if the owner of such copyright is located at anytime, ownership of such copyright shall be conferred back to such owner.	As noted above, we advise deleting the new language on orphan works and instead relying on specific exceptions for libraries and archives and the flexible fair dealing or fair use provision.	Delete.
Assignment and licences in respect of copyright	The proposed additions are designed to accommodate the growing phenomenon of voluntary public or “open” licensing, by means of which a copyright owner gives a general authorization to members of the public to deal in various ways with material in which that owner has claimed or could claim copyright Examples include FLOSS software licences, and Creative Commons licences. Included within the array of public licences are those that release all rights in the work in questions, causing it to enter for all purposes into the public domain.	Add at the end of Section 22: (9) Public licences shall be in wri or licences may preclude a perso previously failed to comply with tl licence for that work from using t (10) Dedication of a work to the p domain shall be in writing and cle the work. The effect of dedicatior public domain shall be to termina copyright and moral rights in the by the person dedicating the wor term of copyright in the work had
(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law: Provided that, copyright owned by, vesting on, or under the custody of the state may not be assigned.	The proposed prohibition on the state assigning copyright may severely impede the states' ability to use its resources efficiently, economically and effectively as required by section 195 of South Africa's Constitution. Moreover, it will be a significant burden on the state to administer a growing portfolio of low-value copyrights. It is therefore proposed to delete the prohibition on the state assigning copyright.	1) Subject to the provisions of thi copyright shall be transmissible a property by assignment, testame disposition or operation of law.
(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the	While, this assignment clause does not directly affect public and open licences it does affect contributor agreements that include assignment, used by many FLOSS actors including the Free	(3) No assignment of copyright a exclusive licence to do an act wh subject to copyright shall have ef it is in writing and signed, includi

assignor, the licenser or, in the case of an exclusive sublicense, the exclusive sublicenser, as stipulated in the Schedule hereto or as the case may be: Provided that such assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment	Software Foundation. Problematically, this language requires hardcopy signatures. Digital signatures should be permitted in addition.	electronic form, by or on behalf c assignor, the licensor or, in the c exclusive sub-licence, the exclus licensor, as stipulated in the Sch or as the case may be: Provided assignment of copyright shall be period of 25 years from the date agreement of such assignment.
(4) A non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.	This should be amended so that revocation applies only to oral and inferred non exclusive licences- written non exclusive licences should be for the period set out in the written licence. Otherwise CC licences are threatened. Creative Commons South Africa considers CC licences to be contracts and perpetual because that is the period set out in the contract. The same problem occurs for FOSS licences, on which a huge portion of the technology industry depends. It might be simplest to explicitly introduce a category of "public licence" which then avoids the necessity of dealing with the contract issue more broadly. The term "granted by contract" is unclear, but may refer to written grants. If so, the adjacent language might be preferable.	Provided that such a licence grar writing or its electronic equivalen be revoked, either by the person granted the licence or his succes except as the contract may provi further contract, or by operation c
(8) Where the doing of anything is authorized by the grantee of a licence or a person deriving title from the grantee, and it is within the terms, including any implied terms, of the licence for him to authorize it, it shall for the purpose of this Act be deemed to be done with the licence of the grantor and of every person, if any, upon whom the licence is binding.	The proposed revision suggests a simpler way of saying that sublicenses are permitted to act without the consent of the original licensor, while eliminating the troublesome notion that one can "derive title" from a licensee.	Unless otherwise prohibited from licensee may grant a sub-license licences for the doing of acts tha the terms of the licence, includin term, without the consent of the c licensor.

Assignment and licences in respect of orphan works	A fuller study of the question of how to deal with orphan works may be appropriate. Some priority issues, such as how to authorize libraries to use and copy orphan works, are addressed through tailored exceptions (as suggested above in S. 19C). Other urgent uses of orphan works could be enabled through enactment of the flexible fair dealing (or fair use) clause we suggest above. The issue of orphan works deserves further study to determine: -- the real extent of the problem; -- the different interests implicated; -- the cost/benefit relationship between the expense involved in implementing a remedial scheme and that actual earnings that doing so would enable. We note that vesting all ownership rights in the government may be problematic, including under the terms of the Berne Convention and TRIPS Agreement. Requiring extensive individualized searches is likely to cause many problems in execution, especially for digital uses. A simpler formulation such as that in the laws of Brunei Darussalam (order under section 83(3), 1999, Art. 61, and Jamaica (Copyright Act of 1993, Art. 71), could be considered, i.e.: “Copyright in a literary, dramatic, musical or artistic work is not infringed by an act done at a time when, or under arrangements made at a time when — it was not possible by reasonable inquiry to ascertain the identity of the author; and it was reasonable to assume — that copyright had expired; or that the author had died fifty years or more before the beginning of the year in which the act was done or the arrangements	Delete 22A

	were made." Meanwhile, fair dealing as proposed in 12, above, can provide a general rubric under which practices with regard to orphan works can be developed. Regulations could be later defined (and more easily changed) to deal with specific uses as they arise.	
Infringement … (2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work- (a) imports an article into the Republic for a purpose other than for his private and domestic use;	23(2)(a) is contrary to the intent to permit parallel importation of works from abroad.	Delete 23(2)(a)
(4) Any person who – (a) tampers with information managing copyright, as contemplated in subsection 20A(16) of the Act, shall be guilty of an offence; (b) omits to pay the author or creator of the copyright work a royalty fee as and when the copyright work is used as contemplated in subsection 9(4) of the Act, is guilty of an offence; (c) omits to pay the creator of craft work a royalty fee as and when the craft work is sold at a higher price or is re-sold to a second and third seller, as contemplated in section 9(5) of the Act, is guilty of an offence;	Sec 23 deals with civil offences. Therefore, the provisions in (4) are civil infractions rather than criminal offenses (which are addressed in s27 of the Act) and the wording "shall be guilty of an offence" must be avoided as such wording wrongly implies criminal liability. Criminal liability in the context of copyright law must be reserved to grave misdoings, e.g. infringement on a commercial scale.	(4) Copyright shall be infringed b person who – (a) tampers with information mar copyright, as contemplated in sul 20A(16) of the Act. (b) omits to pay the author or cre copyright work a royalty fee as a copyright work is used as conten subsection 9(4) of the Act; (c) omits to pay the creator of cra royalty fee as and when the craft at a higher price or is re-sold to a and third seller, as contemplated 9(5) of the Act; *{subject to the comments regard* *and (h) below, the remaining sub* *s23(4) should be drafted in a sim*

(4) … (d) unreasonably refuses to grant permission for the use of copyright work for educational, judicial proceedings and the reproduction in copies of the copyrighted work, translation of copyrighted work in a usable language or format shifting, is guilty of an offence;	It appears that most uses in these categories would be covered by exceptions under the Act, and therefore would not require licensing. For the avoidance of doubt, however, we propose including a provision relating to the misuse of copyright, and indicating that, when proven, it represents either of both (1) a defence to a claim of infringement, and (2) an independent basis asserting a civil offense against the copyright owner.	(4)(d) Misuse of copyright and te protection measures constitute b defences to any claim of copyrigl and independent causes of actio be pursued either as counterclai action for infringement or indepe
(4) … (h) engages in a conduct that is prohibited in respect of technological protection measures stipulated in this Act, is guilty of an offence actionable in terms of the Act; (i) contravenes the provision in relation to prohibition of conduct in respect of copyright management information, commits a copyright infringement that is actionable in terms of the Act; or.	The Electronic Communications and Transactions Act already prohibits circumvention. Additional prohibitions are not needed in this Act. We note however, that following the modernization of the Copyright Act, revisions to the ECTA will be required, since its provisions fail to explicitly authorize circumvention for exceptional uses. To the extent possible, this legislative proposal anticipates these revisions.	
(5A) (1) Any person who at the time when the copyright subsists in a work or technological protection measure work –(a) make, import, sell, distribute, let for hire, offer or expose for sale or hire or advertise for sale or hire, a technological protection measure and circumvention device if – (i) such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technological protection measure work; (ii) such person intends to provide a service to another person to	The Bill's provisions do not take account of the fact that some circumvention is lawful, in that it has been authorized either by the copyright owner or by this copyright law itself. The proposed revisions do so. The categorical ban on publication in the Bill could be a specific threat to computer security researchers and journalists, raising issue under the Bill of Rights Art. (16. (1) Everyone has the right to freedom of expression, which includes—(b) freedom to receive or impart information or ideas; . . . (d) academic freedom and freedom of scientific research.").	(5A) (1) Any person who at the ti copyright subsists in a work that by an effective technological prot measure applied by the owner of a) makes, imports, sells, distribut hire, offers or exposes for sale or hire or advertise for sale or hire, technological protection measure circumvention device if (i) such a person knows or has re believe that it will or is likely to be infringe copyright in a technologi protected work; (ii) such person intends to provid to another person to enable or as

enable or assist such person to circumvent an effective technological protection measure; or (iii) such person knows or has reason to believe that the service … (b) publish information enabling or assisting another person to circumvent an effective technological protection measure if such a person knows or has reason to believe that, such information will or is likely to be used to infringe copyright in a technological protection measure work; or (c) knowingly or having reasonable grounds to know, circumvent an effective technological protection measure applied by the owner of copyright to such work shall be guilty of an offence ...		person to circumvent an effective technological protection measure authorization; or (iii) such person knows or has re believe that the service will or is used by another person to infring in a technological protection mea . . . (b) publishes information enablin assisting another person to circu effective technological protection with the specific intention of inciti person to unlawfully circumvent a technological protection measure Republic (c) knowingly or having reasonab to know, circumvents such a tech protection measure, when not au do so, shall be guilty of an offen
Offenses by companies	Liability of office bearers may better be left to company legislation. Shifting of the onus of proof in this section could raise constitutional concerns with respect to Bill of Rights (35(3) Every accused person has a right to a fair trial, which includes the right . . . (h) to be presumed innocent, to remain silent, and not to testify during the proceedings")	Delete
(1) Where any offence under this Act has been committed by a juristic person, every person who at the time the offence was committed was a director, in charge of or was responsible for the conduct of the business of such juristic person shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing	This provision includes a very far-reaching liability standard, appearing to impute criminal liability based on a negligence standard. This could raise constitutional concerns and in any case is not good policy. Businesses should generally be held liable for the costs of infringements where they occur, but not made criminally culpable for every act of an agent not foreseen. Under this standard, for example,	Delete

contained in this section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.	every film production company would become criminally liable for the infringing acts of their writers and directors, which can include a failure to pay royalties where required.	
(3) Upon conviction, such juristic person or any person convicted in terms of this section shall be liable to a fine or imprisonment or to both fine and imprisonment as contemplated in section 27(6).	The officers of a juristic person can be imprisoned because of the words "any person convicted in terms of the section" so the addition of the words "such jurisdiction" person appears to intend that a juristic person itself should be imprisoned.	Delete
Provision for restricting importation of copies (1) The owner of the copyright in any published work may give notice in writing to the Commissioner for Customs and Excise (in this section referred to as the 'Commissioner')- (a) that he is the owner of the copyright in the work; and (b) that he requests the Commissioner to treat as prohibited goods, during a period specified in the notice, copies of the work to which this section applies: Provided that the period specified in a notice under this subsection shall not extend beyond the end of the period for which the copyright is to subsist: Provided further that the Commissioner shall not be bound to act in terms of any such notice unless the owner of the copyright furnishes him with security in such form and for such amount as he may require to secure the fulfilment of any liability and the payment of any expense which he may incur by reason of the detention by him of any copy of the work to which the notice relates or as a result of anything done by him in relation to a copy so detained. (2) This	This provision allows a South African rights holder to block otherwise lawful parallel importation. The revisions suggested are designed to avoid such a conflict. Their effect would be to bar the importation of copies that infringed copyright where and when they were made, but to permit so-called “grey market” copies to enter without restriction. This provision would yield significant benefits for South African consumers, both with respect to copyrighted materials (books, films, etc.) but also with respect to goods (soap, cosmetics, etc.) that have copyrighted labels or packaging.	(2) This section shall apply to an work in question made outside th the making of which constituted a infringement of copyright in the c which the article was made. …... (5) This section shall mutatis mu with reference to an exclusive lic has the right to import into the Re work published elsewhere which infringing copy of the work in the which it was made.

section shall apply to any copy of the work in question made outside the Republic which if it had been made in the Republic would be an infringing copy of the work.		
Prohibited conduct in respect to technological protection measure (3) No person may publish information enabling or assisting another person to circumvent an effective technological protection measure if such a person knows or has reason to believe that, such information will or is likely to be used to infringe copyright in a technological protection measure work.	This particular prohibition goes too far in impinging on constitutional rights (see the discussion of S. 27, above). It would prohibit publication of general scientific information, raising Constitutional concerns. It also fails to allow to the communication of information in fields such as security research, which can be used to defeat (as well as, perhaps, to enable) circumvention. In the event that deleting the section is not affected, it should be amended to state: (3) No person may publish information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting another person to unlawfully circumvent a technological protection measure in the Republic	Delete.
Exceptions in respect of technological protection measure		
(1) Notwithstanding the provisions of section 28A 27, 28O, nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform - (a) a permitted act or an act that falls within the general public interest exceptions in sections,12, 13, 14, 15, 16, 17, 18, 19, 19A, 19B,19C,19D of this Act;	Prohibitions on circumvention and the provisions of circumvention tools should apply only when there is a nexus to infringement.	'For the purposes of this Act and 86 of the Electronic Communicat Transactions Act No. 25 of 2002, this Act shall prevent any person a technological protection measu circumvention device to perform- (a) A permitted act that falls withi exceptions in this Act. (b) The sale, offer to sell, procure

		use, design, adaptation for use, c or possession of any device or da including a computer program or component, which is designed pr overcome security measures for protection of data, in order to ena performance of any act permitted this section is not unlawful.
Qualifications for appointment … (2) A person may not be appointed or continue to be a member of the Tribunal, if that person - (a) is an office-bearer of any political party, movement or organisation;	This requirement to not be the member of any “organization,” even those not having conflicts of interest with the Tribunal's works (e.g. neighbourhood associations) seems excessive.	Delete 29C(2)(a)
Unenforceable Contractual Term (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 will be unenforceable.”.	The first part of 39A is very positive, ensuring that contractual terms cannot negate the user rights in the act -- thereby disrupting the policy balance at the heart of copyright. The last clause, forbidding the renouncement of rights, needs to assure that it does not interfere with the effectiveness of public and open licences (CC, FLOSS, etc.). It is not likely the intent of the lawmaker to constrict open licences here but instead to protect less powerful rights holders when contracting with more powerful entities. Additional statutory language is required to not inadvertently restrict voluntary open and public licensing which has become a crucial engine for innovation and creativity around the world (with more than a billion copyrighted works now accessible globally under a CC licence alone).	Add: (2) This section does not prohibit otherwise interfere with public an licences to do any act which is s copyright or moral rights, nor with agreements, terms of service lice the voluntary dedication of a wor public domain.

n	Application for licence (1) Any person may, apply to the Intellectual Property Tribunal for a licence to make a translation of the work into any of the languages including, Northern Sotho, Zulu, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa, Afrikaans or Ndebele, the translation in printed or analogous forms of reproduction (hereinafter referred to as “the licence”).	The suggested revision is designed to mitigate doubt about the languages covered and the audiences for such translations.	Application for licence (1) Any person may, apply to t Intellectual Property Tribunal for make a translation of the work, ir analogous forms of reproduction language that is an official langua South Africa, or a foreign languag regularly used in the Republic, fo readers located in the Republic.