

## **COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 – Comparisons of**

- **the text of the B-Bill adopted by Parliament in May 2019 and referred back to the National Assembly by the President in June 2020**
- **proposals by the Portfolio Committee for Trade Industry & Competition in December 2021 for the public participation process ending January 2022**
- **the text of the D-Bill approved by the Portfolio Committee in June 2022 for adoption by the National Assembly**

**Academic and Non-Fiction Authors' Association of South Africa (ANFASA)**

**Publishers Association of South Africa (PASA)**

**Dramatic Artistic and Literary Rights Organisation (Pty) Ltd (DALRO)**

**June 2022**

*“... the Bill was placed before an advisory committee, but reappeared substantively unchanged.”*

the Hon. JA Esterhuizen MP (IFP) in the National Assembly on the adoption of the Copyright Amendment Bill, B-13 of 2017, on 5 December 2018 (*Hansard*)

## **Executive summary**

This research examines the history of changes to the Copyright Amendment Bill, B13 of 2017, passed by Parliament in March 2019 (the “2019 B-Bill”) from when it was referred back to the National Assembly by the President in June 2020, through public consultations in mid-2021 and, in respect of certain proposals for changes made in December 2021 (the “2021 Proposals”), up to early 2022, resulting in the so-called D-Bill (the “2022 D-Bill”) that is to be put to the National Assembly for adoption after its 2022 winter-recess.

The findings show that only 48 substantive changes were made to eighteen new sections in the 2019 B-Bill that were under consideration after the President’s referral-back, to arrive at the 2022 D-Bill. Only 10 of these changes related to the copyright exceptions in six new sections containing 3 000 words of text, and 5 to the new provisions for the protection of technological protection measures.

The findings also show that most of the substantive changes proposed in the 2021 Proposals in relation to the copyright exceptions and the technological protection measures were retracted.

The conclusion is that, notwithstanding the President’s referral-back for concerns about the constitutionality and treaty compliance of, amongst others, its copyright exceptions, the 2022 D-Bill preserves the copyright exceptions and, to a lesser extent, the provisions for technological protection measures of the 2019 B-Bill, while accepting most changes in the 2021 Proposals for all the other provisions.

Of the specific copyright exceptions explicitly mentioned as being of concern in the President’s referral-back, only 6 substantive changes that did not limit rights of copyright and moral rights were made to the 2019 B-Bill. Two other substantive changes further limited rights of copyright and authors’ moral rights.

There were no changes to three topics in the 2019 B-Bill that are obvious mistakes in conceptualisation and drafting, namely the 25-year term limit on the assignment of copyright in literary and musical works, the provisions for the royalty resale right, and the statutory licences for reproduction and translation, despite even the Minister having raised the errors in the last two topics.

This outcome echoes the experience with the 2019 B-Bill . In the words of the Honourable JA Esterhuizen MP quoted on the title page, said upon the National Assembly’s passing it in 2018, the Bill introduced in 2017 was substantively unchanged despite the advice of experts in copyright law, to which he could have added reference to the numerous criticisms from stakeholders representing professions and businesses that are dependent on copyright.

*A glossary of terms used in this document appears on p. 14.*

## **Introduction:**

This analysis traces the changes made to the Copyright Amendment Bill, B13 of 2017, adopted by Parliament in March 2019 (the “B-Bill”)<sup>1</sup>, from when it was referred back to the National Assembly by the President for his concerns about the constitutionality of certain of its provisions and their compliance with international treaties relating to copyright in June 2020, through proposals made for the Portfolio Committee for Trade, Industry and Competition, ostensibly to address the President’s concerns, in December 2021 (the “2021 Proposals”)<sup>2</sup>, to the D-Bill that was approved by the Portfolio Committee on 8 June 2022<sup>3</sup> and that, at the time of writing, is expected to be put before the National Assembly for adoption after its 2022 winter recess, at the end of August or in September 2022.

The analysis is based on a side-by-side comparison of the three versions of the text, marking up the texts of each of the 2019 B-Bill and the 2021 Proposals in comparing them with the 2022 D-Bill.

Changes that do not arise from the President’s explicit concerns are specifically mentioned.

Inasmuch as the President’s referral-back may have required legal opinion on constitutionality and treaty-compliance, the Portfolio Committee and the DTIC did not obtain any independent legal opinion from experts in copyright law or constitutional law. Views on these points only came from stakeholder submissions. The absence of prior impact assessment was confirmed by other research carried out by ANFASA, DALRO and PASA.<sup>4</sup>

In addition, neither the 2021 Proposals nor the 2022 D-Bill dealt with controversial provisions of the Bill that are obvious errors and in respect of which changes were recommended by the Minister of Trade Industry and Competition and other stakeholders. This research also identifies these provisions.

The findings of this research confirm the perception that the B-Bill’s provisions relating to copyright exceptions and, to a slightly lesser extent, those relating to technological protection measures, remain substantially the same in the D-Bill, although the D-Bill does make substantial changes in respect of other provisions.

These findings are significant, since the President’s concerns specifically raised the absence of sufficient consultation on the copyright exceptions ‘fair use’ clause, the constitutionality of the copyright exceptions, and the Bill’s compliance with international treaties, of which the legal protection of technological protection measures for copyright works is a key feature.

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<sup>1</sup> At: [https://www.gov.za/sites/default/files/gcis\\_document/201811/copyright-amendment-bill-b13b-2017.pdf](https://www.gov.za/sites/default/files/gcis_document/201811/copyright-amendment-bill-b13b-2017.pdf).

<sup>2</sup> Document issued by the Portfolio Committee entitled “ALL PROPOSED AMENDMENTS” on 8 December 2021.

<sup>3</sup> [https://static.pmg.org.za/1/220608B13D-CopyRight-2017\\_Final.pdf](https://static.pmg.org.za/1/220608B13D-CopyRight-2017_Final.pdf)

<sup>4</sup> “COPYRIGHT AMENDMENT BILL NO. B13 OF 2017 – Research demonstrating the absence of proper impact assessment for the Copyright Amendment Bil”, May 2022, at: [https://publishsa.co.za/wp-content/uploads/2022/06/ANFASA\\_DALRO\\_PASA-research-report-May2022.pdf](https://publishsa.co.za/wp-content/uploads/2022/06/ANFASA_DALRO_PASA-research-report-May2022.pdf).

## Historical background

In June 2020, President Ramaphosa referred the B-Bill back to the National Assembly for concerns about the constitutionality and treaty compliance of certain of its provisions. The reasons for the referral-back are repeated in the next section.

After initially hearing presentations defending the B-Bill's provisions in August 2020 and May 2021, the National Assembly's Portfolio Committee for Trade Industry and Competition agreed on 12 May 2021 to remove three provisions of the B-Bill that had the effect of retrospectively financially encumbering copyright owners' rights, and then held a public consultation in mid-2021, comprised of an opportunity for the public to make written submissions between 4 June and 16 July 2021 (extended from 9 July) and oral submissions on 11 and 12 August 2021. The Portfolio Committee received presentations on this public consultation by the Minister for Trade Industry and Competition, the Parliamentary Legal Adviser and the Department of Trade Industry and Competition DTIC during November 2021, leading to an approval by the National Assembly, sitting in a plenary session, to effect certain out-of-scope changes on 1 December 2021<sup>5</sup> and a public consultation on specific proposals for changes to the Bill called on 3 December 2021.<sup>6</sup> After the deadline for public comments, extended by one week to 28 January 2022, the Parliamentary Legal Adviser and the DTIC gave their feedback on the public comments to the Portfolio Committee during May 2022. This in turn led to the issue of a draft D-Bill on 8 June 2022 with a report by the Portfolio Committee to the National Assembly dated 10 June 2022 with the recommendation to adopt the D-Bill, containing the changes that had been agreed to by the majority of the Portfolio Committee. The National Assembly in plenary session is set to vote on the adoption of the report and on passing the D-Bill after its 2022 mid-year winter recess.

The feedback of the Parliamentary Legal Adviser and the DTIC in May 2022 retracted many of the proposals made in December 2021, notably those relating to the Bill's many copyright exceptions and the provisions for the protection of technological protection measures. As a result, many of the provisions in the D-Bill ended up being substantially the same as the corresponding provisions in the B-Bill.

An early indication that this might happen was a letter from the Minister relayed to the Portfolio Committee at its meeting on 2 March 2022, referring to "concerns raised by the stakeholders in this round of public comments", the need to address "technical matters raised" and "unintended consequences to institutions such as libraries, the education sector and the broadcasting industry."

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<sup>5</sup> Hansard, at <https://www.parliament.gov.za/storage/app/media/Docs/hansard/d3820b7e-7eff-4107-be7f-5fcfa73a6306.pdf> from p.120 onwards.

<sup>6</sup> About a week later, on 8 December 2021, following an intervention by one of the Portfolio Committee members, these proposals were placed in the context by the public release of a document called "ALL PROPOSED AMENDMENTS" (see footnote 3), which set out the changes put up for consultation in the context of the totality of the full provisions in which they appeared, as well as changes that the Portfolio Committee had already agreed to in May 2021 and that were not the subject of the public consultation.

## The reasons stated by the President for his referral of the Bill back to the National Assembly

The relevant parts of the President's reasons for his referral-back in June 2020 reads as follows:

...

5 In considering the numerous and varied submissions made and the process followed in Parliament to pass the Bills, I have a number of reservations as to the Constitutionality of the Bills. These reservations lead me to conclude that, in its present form, the Bill may not pass constitutional muster and may therefore be vulnerable to constitutional challenge. I set out below those constitutional matters that require reconsideration so that these important statutes achieve their intended purpose without the risk of being set aside by the courts.

...

### **Retrospective and arbitrary deprivations of property**

11 I also have reservations that Sections 6A(7), 7A(7) and 8A(5) of the Copyright Bill may constitute retrospective and arbitrary deprivations of property. These provisions mean that going forward, copyright owners will be entitled to a lesser share of the fruits of their property than was previously the case. The impact of these provisions reaches far beyond the authors it seeks to protect - those that live in poverty as a result of not having been fairly protected in the past. The retrospective provisions deprive copyright owners of property without sufficient reason and will therefore result in substantial and arbitrary deprivation of property. In addition, the uncertainty created by its unlimited retrospective operation, how assignment by multiple authors would work or what would happen if the owner of the copyright is a non-profit organisation aggravates the situation. The sections which raise this concern are likely not to survive constitutional challenge.

### **Fair Use**

12 Following public hearings in August 2017, substantial amendments were effected to various sections of the Bill, including section 12A which deals with the fair use of a work or performance of a work. The relevant provisions as amended were not put out for public comment before the final version of the Bill was published. The changes made to this particular section of the Bill were material to the scheme as a whole and the failure to consult, in the face of such materiality of the amendments, could render the provisions constitutionally invalid.

### **Impermissible delegation of legislative power to the Minister**

13 Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) confer substantial discretionary powers on the Minister and this may well constitute an impermissible delegation of legislative authority, and as such would be constitutionally invalid if the Bill is assented to in its current form.

14 Section 6A(7)(b) permits the Minister to make key decisions regarding the deprivation of property (copyright) from those to whom it was assigned in the past. This also has the effect that there is no participation process to which litigation is generally subjected. In this regard, I have reservations that the Bill fails to provide for the oversight role by the NCOP. The contention is that the decision making process in the Bill is in fact within the domain of the National Assembly and is therefore an impermissible delegation.

### **The Copyright exceptions**

15 The Copyright Bill introduces copyright exceptions in the new sections 12A to 12D, 19B, and 19C. From my reading of the various submissions and advice, a number of issues arise from these provisions which may constitute reasonable grounds for constitutional challenges for the following reasons:

15.1. Sections 12 and 19 include exceptions and limitations that seek to align the Bill with the Marrakesh Treaty. However, sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C 93) (*sic*), 19C(4), 19(c)(5)(b) (*sic*) and 19(9) (*sic*) may constitute arbitrary deprivation of property.

Section 12A and 12D may further run the risk of violating the right to freedom of trade, occupation and profession;

15.2. It is also clear that these sections may be in conflict with the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty both of which have been signed by South Africa, although they are yet to be acceded to. If these exceptions and limitations run the risk of constitutional challenges, they require reconsideration by the National Assembly.

15.1 There is also a contention that the Copyright Bill breaches the Three-Step Test, first established under Article 9(2) of the Berne Convention to which South Africa is bound in terms of section 231 (5) of the Constitution, The Three-Step Test is also referred to extensively in the Marrakesh Treaty. The Test is that an exception or limitation:

20.1. shall cover only certain special cases;

20.2. shall not conflict with the normal exploitation of the work; and

20.3. shall not unreasonably prejudice the legitimate interests of the rightsholder.

### **International Treaty Implications**

16 The Bill seeks to align national legislation with international treaties which have been reviewed and are in the process of being acceded to by South Africa, including the World Intellectual Property Organization ("WIPO") digital treaties, namely, the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are blind, visually impaired or otherwise print disabled.

...

21 I have reservations about whether the Bills comply with the above Treaties and am therefore referring the Bills back to Parliament in order that it may consider the Bills against South Africa's International Law obligations.

...

### **Referral**

22 I have considered both the Bills, all submissions received and the process followed by Parliament in passing the Bills. Having done so, I have reservations about the constitutionality of the Bills for the following reasons:

...

22.2 The retrospective application of the proposed new sections 6A, 7A and BA of the Copyright Bill to copyright assigned before the new sections come into operation

may indeed be unconstitutional on the ground that it constitutes an arbitrary deprivation of property under section 25 of the Constitution.

22.3 The new exceptions introduced by sections 12A, 12B, 12C, 12D and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law.

23 For the reasons set out above, and in terms of section 79(1) of the Constitution, I hereby express my reservations about the constitutionality of the Bills. I request the National Assembly to consider these Bills afresh so that their objectives can be realized speedily and without the risk of any constitutional challenge.

...

### **Research methodology:**

The provisions that are analysed are grouped as follows:

- COPYRIGHT EXCEPTIONS (new sections 2A(1), 12A, 12B, 12C, 12D, 19B, 19C and related definitions, to which are added 2A(1) and 39B because they are supplementary to and support the exceptions)<sup>7</sup>
- COPYRIGHT EXCEPTIONS FOR PERSONS WITH DISABILITIES (new section 19D, with related definitions)
- TECHNOLOGICAL PROTECTION MEASURES (new sections 28O and 28P, with related definitions)
- COPYRIGHT MANAGEMENT INFORMATION (new section 28S)
- PUBLISHED EDITIONS (amendment to section 11A)
- COMPUTER PROGRAMMES (amendment to section 11B)
- RETROSPECTIVE AND UNWAIVABLE STATUTORY ROYALTY RIGHTS (deletions from new sections 6A, 7A and 8A)
- REGULATIONS (amendments to section 39)
- BROADCASTS (new definition)
- OFFENCES AND PENALTIES (amendment to section 39)
- 25-YEAR LIMIT ON ASSIGNMENTS OF COPYRIGHT IN LITERARY AND MUSICAL WORKS (amendment to section 22(3), misdescribed as a “right of reversion”)
- RESALE ROYALTY RIGHT (new sections 7B to 7F)
- STATUTORY LICENCES FOR REPRODUCTION AND TRANSLATION (amendment to section 22(3) and new Schedule 2)

The first part of this research is a comparison of the three texts of the 2019 B-Bill, the 2021 Proposals and the 2022 D-Bill. The qualitative evaluation of this part of the analysis is identifying changes that are substantive, as described in the next paragraph, and identifying

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<sup>7</sup> The tabulation of changes in respect of the copyright exceptions excludes the copyright exceptions for persons with disabilities in new Section 19D and its related definitions, because different considerations apply to these provisions, notably compatibility with the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*. They are dealt with in the next group.

which of the substantive changes are for the insertion or removal of whole numbered clauses, namely numbered sections, sub-sections, paragraphs, sub-paragraphs and definitions.

The analysis distinguishes between substantive changes on the one hand and non-substantive changes (e.g. corrections, adoption of gender-neutral text, rephrasing of text retaining substantively the same meaning, changes in numbering) on the other.

A similar analysis is made of substantive changes in relation to numbered clauses (i.e. numbered sub-sections, paragraphs and sub-paragraphs) deleted from the 2019 B-Bill or added to its text, and of those that were proposed in the 2021 Proposals and adopted. Since most of the substantive changes involved only a few words, the measurement per numbered clauses presents a more realistic understanding of the substance of the changes.

The findings determine the adoption rate and rejection rate of the 2021 Proposals. The factors used in the calculations are as follows:

- The number of substantive changes proposed is identified in each section (i.e. excluding non-substantive changes) = *SC*.
- The number of substantive changes adopted in each section were identified = *AC*.
- The number of substantive changes rejected in each section were identified = *RC*.
- The number of additions to text in the 2022 D-Bill not reflected in the 2021 Proposals in each section were identified = *RT*.
- The totals as relate to the Bill as a whole is calculated by adding the numbers of substantive changes proposed, adopted and rejected per section.
- Changes to numbered clauses proposed and adopted are *SCC* and *ACC* respectively.

The rates of adoption and rejection of substantive proposals in the 2021 Proposals were calculated as follows:

- **Rate of adoption of substantive changes:**  $AC/SC$  expressed as a percentage.
- **Rate of rejection of substantive changes:**  $RC+RT/SC+RT$  expressed as a percentage.
- **Rate of adoption of substantive changes in relation to numbered clauses to be deleted or added:**  $ACC/SCC$  expressed as a percentage.

(Due to the method of calculating the rate of rejection, the sum of the percentages of rate of adoption and rate of rejection is not 100%.)

The findings also compare the substantive changes to the copyright exceptions that did not broaden the exceptions of limit authors' moral rights with the copyright exceptions that the President explicitly mentioned in his referral-back.

The second part of this research identifies obvious errors in the 2019 B-Bill in respect of which changes were recommended by the Minister of Trade Industry and Competition and other stakeholders, and which were not dealt with in the 2021 Proposals or the 2022 D-Bill.

**Key:**

The key to the tables comparing the three texts appearing in the annexure to this document are set out below.

- Provisions raised in the President’s referral-back and other proposals for change in December 2021:

<i>Description of provision or set of provisions</i>		
D-Bill (June 2022)	Proposals for amendments (December 2021 – January 2022)	B-Bill (March 2019, referred back by the President in June 2022)
<i>Text</i>	<i>Text with mark-up</i>	<i>Text with mark-up</i>
<i>Notes</i>		

To indicate changes compared with the C-Bill, changed text is highlighted in the earlier texts:

- Non-substantive changes (see under “Research methodology” below) are highlighted in yellow and are not counted for the purpose of the findings of this research.
- In respect of substantive changes:
  - Where text in the B-Bill or the December 2021 Proposals was respectively deleted or not appear in the D-Bill, that text is highlighted in red.
  - If text was inserted, the space where the text was inserted is indicated by highlight in blue in the earlier text, -----.

In the text of the December 2021 Proposals, text that was adopted in the D-Bill is highlighted in grey, and text in the 2019 Bill removed in the D-Bill in line with the December 2021 Proposals is indicated by :::::

- Provisions proposed to be changed by the DTIC and stakeholders in June – July 2021 with no changes proposed by the Portfolio Committee in December 2021:

<i>Description of provision or set of provisions</i>
C-Bill (June 2022), where the provisions are the same as that of the B-Bill (March 2019, referred back by the President in June 2022)
<i>Text or heading</i>
<i>Notes</i>

The analysis of the changes that were made appears under “Notes” in respect of each group of provisions.

The analysis ends with a table listing total numbers of changes, substantive changes adopted and rejected and substantive changes in relation to adding or deleting numbered clauses adopted and rejected, per group of provisions, for the 2021 Proposals compared to the 2022 D-Bill.

All references to section numbers are to those in the D-Bill, unless otherwise stated.

## **Findings:**

The statistical findings are made in respect of the provisions raised in the President's referral-back and other proposals for change in December 2021. In addition, the research references three provisions amounting to material mistakes in the Bill that the DTIC and stakeholders proposed to have changed in June – July 2021, but where no changes appeared in the Portfolio Committee's 2021 Proposals.

### ***Provisions raised in the President's referral-back and other proposals for change in December 2021***

The analysis of the changes made from **the 2019 B-Bill to the 2022 D-Bill** show a total of 48 changes that were made, of which 37 were substantive changes and 16 substantive changes were in relation to numbered clauses to be deleted or added.

In the **2021 Proposals**, a total of 78 changes were proposed, of which 62 were substantive changes. 37 of the proposals for substantive changes were adopted and 25 rejected, and 9 new textual changes appeared in the 2022 D-Bill. As part of these changes, there were 29 proposals for substantive changes to numbered clauses, of which 16 were adopted and 13 rejected.

In respect of the total number of changes following from the 2021 Proposals, the following adoption and rejection rates are determined:

#### ***Total changes***

- *Rate of adoption of substantive changes:  $37 / 62 = 59,7\%$ .*
- *Rate of rejection of substantive changes:  $25+9 / 62+9 = 47,9\%$ .*
- *Rate of adoption of substantive changes in relation to numbered clauses to be deleted or added:  $16 / 29 = 55,2\%$ .*

Whereas the above analysis is purely quantitative and not qualitative, it is relevant when comparing it to the ratio of substantive changes to all changes in the text for copyright exceptions<sup>8</sup> and for the subtotal of changes for the copyright exceptions and technological protection measures, where the adoption rates were much lower and the rejection rates much higher.

The adoption rate for the copyright exceptions *includes* one substantive change that *expands an exception*<sup>9</sup> and one substantive change that *limits authors rights*.<sup>10</sup>

#### ***Changes in relation to copyright exceptions***

- *Rate of adoption of substantive changes:  $10 / 24 = 41,7\%$ .*
- *Rate of rejection of substantive changes:  $14+5 / 24+5 = 65,5\%$ .*
- *Rate of adoption of substantive changes in relation to numbered clauses to be deleted or added:  $1 / 11 = 9\%$ .*

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<sup>8</sup> Excluding the copyright exceptions for persons with disabilities for the reasons given in footnote 7.

<sup>9</sup> Change to new section 12B(1)(e)(ii).

<sup>10</sup> Change to new section 12D(8)(a).

**Changes in relation to copyright exceptions and technological protection measures**

- Rate of adoption of substantive changes:  $16 / 35 = 45.7\%$ .
- Rate of rejection of substantive changes:  $19+5 / 35+5 = 60\%$ .
- Rate of adoption of substantive changes in relation to numbered clauses to be deleted or added:  $2 / 14 = 14.3\%$ .

A scan or scroll-down of the highlighted changes in the 2019 B-Bill in respect of the text of the copyright exceptions in the annexure indicates that the bulk of the text of these exceptions remained preserved with no changes at all. This is borne out by the research, that shows that only 15 sets of changes were made, of which 10 were substantive, this in text containing about 3 000 words. Of the 10 substantive changes that were made, one broadened the copyright exception concerned and another one further limited authors’ moral rights. Only 1 substantive change was a change in relation to a numbered clause.

Many of the 2021 Proposals originated from stakeholder comments in the public consultation of June – July 2021, tying in with the President’s reservations about the copyright exceptions. However, the highlighted changes in the 2021 Proposals and the 2019 B-Bill indicate that most of the proposals for change of the copyright exceptions and the legal protection for technological protection measures were retracted. Comparing the changes proposed and the changes adopted in tabular form, the following results appear:

	<i>Changes in relation to copyright exceptions (excl. for disabilities)<sup>11</sup></i>	<i>Changes in relation to copyright exceptions<sup>11</sup> and technological protection measures</i>	<i>Changes excl. copyright exceptions<sup>11</sup> and technological protection measures</i>
<i>Rate of adoption of substantive changes:</i>	<b>41,7%</b>	<b>45,7%</b>	<b>66,7%</b>
<i>Rate of adoption of substantive changes in relation to numbered clauses to be deleted or added:</i>	<b>9%</b>	<b>14,3%</b>	<b>93,3%</b>
<i>Rate of rejection of substantive changes:</i>	<b>65,5%</b>	<b>60%</b>	<b>32,3%</b>

The table shows that the majority of proposals for changes to the copyright exceptions and technological protection measures were rejected, in contrast with the proposals for other provisions, most of which were adopted. The count of changes other than for copyright exceptions and technological protection measures indicate an adoption rate for substantive changes of 2/3 and an adoption rate of changes in respect of numbered clauses of 93,3%, that stand in sharp contrast to the adoption rates for copyright exceptions and technological protection measures.

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<sup>11</sup> See footnote 7.

The outcome in respect of the specific copyright exceptions explicitly raised by the President was that, although the 2021 Proposals only had 13 substantive changes that did not limit rights of copyright and moral rights (in respect of three full sections covering nineteen subsections/paragraphs), only 6 such substantive changes were made to the 2019 B-Bill:

<i>Section (numbered as per the B-Bill)</i>	<i>Substantive changes in 2021 Proposals that do not limit rights of copyright and authors' moral rights:</i>	<i>Substantive changes in D-Bill that do not limit rights of copyright and authors' moral rights, compared to B-Bill:</i>
<i>Note: All clause references in this paragraph are to the 2019 B-Bill, as per the President's referral-back.</i>		
12A	5 substantive changes incl. 4 numbered clauses	1 substantive change 0 numbered clauses. <sup>12</sup>
12B(1)(a)(i)	1 substantive change 0 numbered clauses	1 substantive change 0 numbered clauses
12B(1)(c) (12B(1)(b) in the D-Bill)	1 substantive change incl. 1 numbered clause	0
12B(1)(e)(i)	1 substantive change incl. 1 numbered clause (deletion)	1 substantive change incl. 1 numbered clause (deletion) <sup>13</sup>
12B(1)(f) (12B(1)(e) in the D-Bill)	1 substantive change <sup>14</sup> 0 numbered clauses	1 substantive change <sup>14</sup> 0 numbered clauses
12D	3 substantive changes incl. 1 numbered clause	2 substantive change <sup>15</sup> 0 numbered clauses
19C(3)	0	0
19C(4)	1 substantive change 0 numbered changes	0
19C(5)(b)	0	0
19C(9)	0	0

***Provisions proposed to be changed by the DTIC and stakeholders in June – July 2021 with no changes proposed by the Portfolio Committee in December 2021***

The Portfolio Committee did not deal with three topics in the B-Bill that are obviously errors in its conceptualisation and drafting.

The first, repeatedly raised by stakeholders, is the 25-year term limit on the assignment of copyright in literary and musical works in section 22(3), that is misdescribed in the B-Bill's memorandum of objects as a "reversion of rights", and that does not follow the recommendations of the Copyright Review Commission.<sup>16</sup>

<sup>12</sup> Despite the President's explicit citation of the 'fair use' clause, new section 12A, in his referral-back, the sweeping substantive changes in the 2019 Proposals were all retracted, and the resulting provision in 2022 D-Bill remains substantially identical to the 2019 B-Bill. The only substantive change is a slight change to the proviso in 12A(c) that preserves authors' moral rights.

<sup>13</sup> The reason given, namely to avoid duplication, was incorrect. Section 12A does not contain that clause's application of that exception to "cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved." The quoted text in deleted section 12B(1)(e)(i) of the 2019 B-Bill is in direct conflict with Article 5(2) of the Berne Convention.

<sup>14</sup> A second substantive change to section 12B(e)(ii) in the 2021 Proposals adopted in the D-Bill expands the exception. See footnote 9.

<sup>15</sup> A third substantive change to section 12D(8)(a) limits authors' moral rights. See footnote 10.

<sup>16</sup> Copyright Review Commission Report, 2011, para 10.12.10 on p.81.

The other two topics that have their source in the principal international treaty on copyright, the Berne Convention, despite the observation of the Minister of Trade Industry and Competition that the provisions had to be rewritten.<sup>17</sup> These were the provisions for the royalty resale right (that is known in other countries as the “artists resale right”) in new sections 7B to 7F, and the statutory licences for reproduction and translation in section 22(3) and Schedule 2.

A cold reading of the extracts of those provisions in this report show that they simply do not make sense when read with the relative recommendations of the Copyright Review Commission and the provisions of the Berne Convention respectively, as well as with the rest of the D-Bill.

## **Conclusions**

These findings clearly indicate an intention on the part of the drivers of the Bill in the Portfolio Committee to preserve the copyright exceptions as well as the exceptions to the provisions for technological protection measures, while making concessions on all the other provisions.

The Parliamentary Legal Adviser and the representative of the Department of Trade Industry and Competition led the Portfolio Committee through a process where the work would supposedly be confined to the President’s reservations, yet failed to deal with some provisions that clearly had constitutional and treaty implications, all as revealed by this research.

This result echoes the experience in the previous Portfolio Committee in response to submissions and recommendations for changes to the copyright exceptions in the original Bill, introduced in 2017, that led to the 2019 B-Bill. The Honourable JA Esterhuizen MP commented in the National Assembly that “... the Bill was placed before an advisory committee, but reappeared substantively unchanged.”<sup>18</sup> This was also noted by André Myburgh, one of the Panel of Experts engaged by the previous Portfolio Committee in 2018, when he said “Despite the public consultation, despite the concerns about their expropriative nature and the evidence of damage these exceptions will cause, and despite a substantial rewrite by Parliament of other provisions of the Bill, the text ... shows that there were very few substantive changes to the exceptions; indeed, Parliament added a new one.”<sup>19</sup>

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<sup>17</sup> Minister’s presentation to the Committee dated 9 November 2021, pp. 42-43.

<sup>18</sup> Said in the National Assembly on the adoption of the Copyright Amendment Bill, B-13 of 2017, on 5 December 2018 (*Hansard*).

<sup>19</sup> “On A Knife’s Edge: South Africa’s copyright law”, event hosted by intellectual property law attorneys Adams & Adams in Johannesburg on 2 August 2019.

## GLOSSARY

2019 B-Bill (or “B-Bill”):	the Copyright Amendment Bill, B13 of 2017, at <a href="https://www.gov.za/sites/default/files/gcis_document/201811/copyright-amendment-bill-b13b-2017.pdf">https://www.gov.za/sites/default/files/gcis_document/201811/copyright-amendment-bill-b13b-2017.pdf</a> , adopted by Parliament in March 2019
2021 Proposals:	proposals made for the Portfolio Committee for Trade, Industry and Competition, ostensibly to address the concerns about constitutionality and treaty compliance in the President’s referral-back, contained in a document issued by the Portfolio Committee entitled “ALL PROPOSED AMENDMENTS” on 8 December 2021
2022 D-Bill:	D-Bill that was approved by the Portfolio Committee on 8 June 2022 at <a href="https://static.pmg.org.za/1/220608B13D-CopyRight-2017_Final.pdf">https://static.pmg.org.za/1/220608B13D-CopyRight-2017_Final.pdf</a> that is expected to be put before the National Assembly for adoption after its 2022 winter recess
changes in relation to numbered clauses:	substantive changes that are the deletion or addition of numbered sub-sections, paragraphs and sub-paragraphs, as further explained under the heading “Research Methodology, all of which changes which are identified in the respective texts of the 2019 B-Bill and of the 2021 Proposals in the annexure to this document entitled “Provisions raised in the President’s referral-back and other proposals for change in December 2021”, and listed per grouping of provisions
DTIC:	Department of Trade Industry and Competition
Minister:	The Minister for Trade Industry and Competition
Portfolio Committee:	Portfolio Committee for Trade Industry and Competition of the National Assembly of the Parliament of South Africa
President’s referral-back (or “referral-back”):	the President’s referral of the B-Bill back to the National Assembly in terms of section 79(1) of the Constitution of the Republic of South Africa, 1996, for concerns about its constitutionality and compliance with international treaties, in June 2020
Previous Portfolio Committee:	the Portfolio Committee for Trade & Industry in the 5 <sup>th</sup> Parliament (to 2019)
substantive changes:	changes to text that are not corrections, adoption of gender-neutral text, rephrasing of text retaining substantively the same meaning, changes in numbering, that were: <ul style="list-style-type: none"> <li>• made to the 2019 B-Bill, OR</li> <li>• proposed in the 2021 Proposals</li> </ul> as further explained under the heading “Research Methodology, all of which changes which are identified in the respective texts of the 2019 B-Bill and of the 2021 Proposals in the annexure to this document entitled “Provisions raised in the President’s referral-back and other proposals for change in December 2021”, and listed per grouping of provisions

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:**

**COPYRIGHT EXCEPTIONS**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Scope of copyright protection</b></p> <p><b>2A.</b> (1) Copyright protection subsists in expressions and not— ... (b) in the case of computer programs, in interface specifications.</p>	<p>[no change proposed]</p>	<p><b>Scope of copyright protection</b></p> <p><b>2A.</b> (1) Copyright protection subsists in expressions and not— ... (b) in the case of computer programs, in interface specifications.</p>
<p><b>General exceptions from copyright protection</b></p> <p><b>12A.</b> (a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:</p> <ul style="list-style-type: none"> <li>(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;</li> <li>(ii) criticism or review of that work or of another work;</li> <li>(iii) reporting current events;</li> <li>(iv) scholarship, teaching and education;</li> <li>(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;</li> <li>(vi) preservation of and access to the collections of libraries, archives and museums; and</li> <li>(vii) ensuring proper performance of public administration.</li> </ul> <p>(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—</p> <ul style="list-style-type: none"> <li>(i) the nature of the work in question;</li> <li>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;</li> <li>(iii) the purpose and character of the use, including whether—</li> </ul> <ul style="list-style-type: none"> <li>(aa) such use serves a purpose different from that of the work affected; and</li> <li>(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and</li> </ul>	<p><b>General exceptions from copyright protection</b></p> <p><b>12A.</b> (a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:</p> <ul style="list-style-type: none"> <li>(i) [redacted]</li> <li>(ii) criticism or review of that work or of another work;</li> <li>(iii) reporting current events;</li> <li>(iv) [redacted]</li> <li>(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;</li> <li>(vi) [redacted]</li> <li>and</li> <li>(vii) ensuring proper performance of public administration.</li> </ul> <p>(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—</p> <ul style="list-style-type: none"> <li>(i) the nature of the work in question;</li> <li>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;</li> <li>(iii) the purpose and character of the use, including whether—</li> </ul> <ul style="list-style-type: none"> <li>(aa) such use serves a purpose different from that of the work affected; and</li> <li>(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and</li> </ul>	<p><b>General exceptions from copyright protection</b></p> <p><b>12A.</b> (a) In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:</p> <ul style="list-style-type: none"> <li>(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;</li> <li>(ii) criticism or review of that work or of another work;</li> <li>(iii) reporting current events;</li> <li>(iv) scholarship, teaching and education;</li> <li>(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;</li> <li>(vi) preservation of and access to the collections of libraries, archives and museums; and</li> <li>(vii) ensuring proper performance of public administration.</li> </ul> <p>(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—</p> <ul style="list-style-type: none"> <li>(i) the nature of the work in question;</li> <li>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;</li> <li>(iii) the purpose and character of the use, including whether—</li> </ul> <ul style="list-style-type: none"> <li>(aa) such use serves a purpose different from that of the work affected; and</li> <li>(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and</li> </ul>

<p>(iv) the substitution effect of the act upon the potential market for the work in question.</p> <p>(c) For the purposes of paragraphs (a) and (b) the source, as well as the name of the author shall be mentioned, if it appears on the work.</p>	<p>(iv) the substitution effect of the act upon the potential market for the work in question.</p> <p>(c) For the purposes of paragraphs (a) and (b) the source, as well as the name of the author shall be mentioned, if it appears on the work.</p> <p>(d) The exceptions authorized by this Act in sections 12B, 12C, 12D, 19B and 19C, in respect of a work or the performance of that work, are subject to the principle of fair use, determined by the factors contemplated in paragraph (b).</p>	<p>(iv) the substitution effect of the act upon the potential market for the work in question.</p> <p>(c) For the purposes of paragraphs (a) and (b) the source ----- and the name of the author shall be mentioned -----.</p>
<p><b>Specific exceptions from copyright protection applicable to all works</b></p> <p><b>12B.</b> (1) Copyright in a work shall not be infringed by any of the following acts:</p> <p>(a) Any quotation: Provided that—</p> <p>(i) the extent thereof shall not exceed the extent reasonably justified by the purpose, and it shall be compatible with fair practice; and</p> <p>(ii) the source and the name of the author, if it appears on the work, shall be mentioned in the quotation;</p> <p>(b) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject</p>	<p><b>Specific exceptions from copyright protection applicable to all works</b></p> <p><b>12B.</b> (1) Copyright in a work shall not be infringed by any of the following acts:</p> <p>(a) Any quotation: Provided that—</p> <p>(i) the extent thereof shall ----- be compatible with fair practice; and</p> <p>(ii) :::: the source and the name of the author, if it appears on :::: the work, shall be mentioned in the quotation;</p> <p>:::: [moved to section 12D(9)]</p> <p>(b) ----- fixation or reproduction by a broadcaster of a performer's performance or work, other than a cinematographic work, that is performed live, or a sound recording that is performed at the same time as the performer's performance or work: Provided that the broadcaster—</p> <p>(i) is authorized to communicate the performer's performance, work or sound recording to the public by telecommunication;</p>	<p><b>Specific exceptions from copyright protection applicable to all works</b></p> <p><b>12B.</b> (1) Copyright in a work shall not be infringed by any of the following acts:</p> <p>(a) Any quotation: Provided that—</p> <p>(i) the extent thereof shall not exceed the extent reasonably justified by the purpose -----; and</p> <p>(ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;</p> <p>(b) any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the act of teaching or in the illustration in question;</p> <p>(c) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the</p>

<p>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;</p>	<p>(ii) makes the fixation or the reproduction itself, for its own broadcasts;</p> <p>(iii) does not synchronize the fixation or reproduction with all or part of another recording, or other performer's performance or work;</p> <p>(iv) does not cause the fixation or reproduction to be used in an advertisement intended to sell or promote, as the case may be, a product, service, cause or institution;</p> <p>(v) records the dates of the making and destruction of all fixations and reproductions and any other prescribed information about the fixation or reproduction: Provided that the broadcaster shall keep the record current and shall make the record available to owners of copyright in the works, sound recordings or performer's performances, or their representatives, within twenty-four hours after receiving such a request;</p> <p>(vi) destroys the fixation or reproduction within thirty days after making it, unless the fixation or reproduction is deposited in an archive in accordance with subparagraph (vii), or where the copyright owner authorizes the retention thereof, which authorization may be subject to the payment of applicable royalties; and</p> <p>(vii) is authorized to, with the consent of an official archive, deposit the fixation or reproduction in that official archive where the broadcaster considers that fixation or reproduction to be of an exceptional documentary character: Provided that the broadcaster shall, within thirty days of such deposit, notify the copyright owner thereof;</p>	<p>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;</p>
<p>(c) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the source and the name of the author should be indicated, if it appears on the work, and that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;</p> <p>(d) subject to the obligation to indicate the source and the name of the author, if it appears on the work—</p>	<p>(c) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the source and the name of the author should be indicated, if it appears on the work, and that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;</p> <p>(d) subject to the obligation to indicate the source and the name of the author, if it appears on the work—</p>	<p>(d) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the source and the name of the author should be indicated ----- and that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;</p> <p>(e) subject to the obligation to indicate the source and the name of the author ----- in so far as it is practicable—</p>

<p>(i) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or</p> <p>(ii) for purposes of providing current information, the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by such purpose;</p> <p>(e) the translation of such work by a person giving or receiving instruction: Provided that such translation is—</p> <p>(i) done for non-commercial purposes;</p> <p>(ii) used for personal, educational, teaching, judicial proceedings, research, the furtherance of language and culture, or professional advice purposes only: Provided that such use shall be compatible with fair practice; and</p> <p>(iii) communicated to the public for non-commercial purposes;</p> <p>(f) the use of such work in a <i>bona fide</i> demonstration of electronic equipment to a client by a dealer in such equipment;</p> <p>(g) the use of such work is for the purposes of judicial proceedings or preparing a report of judicial proceedings; or</p> <p>(h) the making of a personal copy of such work by a natural person for their personal use and made for ends which are not</p>	<p>.....</p> <p>(i) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, which reporting, reproduction, broadcasting or communication shall be compatible with fair practice; or</p> <p>(ii) for purposes of providing current information, the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, which reproduction, broadcasting or communication shall be compatible with fair practice;</p> <p>(f) the translation of such work by a person giving or receiving instruction: Provided that such translation is—</p> <p>(i) done for non-commercial purposes;</p> <p>(ii) used for personal, educational, teaching, judicial proceedings, research, for the furtherance of language and culture, or professional advice purposes only: Provided that such use shall be compatible with fair practice; or</p> <p>(iii) communicated to the public for non-commercial purposes;</p> <p>(g) the use of such work in a <i>bona fide</i> demonstration of electronic equipment to a client by a dealer in such equipment;</p> <p>(h) the use of such work is for the purposes of judicial proceedings or preparing a report of judicial proceedings; or</p> <p>(i) the making of a personal copy of such work by a natural person for their personal use, including the use of a lawful copy of the work at a different time or with a different device</p>	<p>(i) the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;</p> <p>(ii) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or</p> <p>(iii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;</p> <p>(f) the translation of such work by a person giving or receiving instruction: Provided that —</p> <p>(i) such translation is not done for commercial purposes;</p> <p>(ii) such translation is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes only: Provided that such use shall not exceed the extent justified by the purpose; or</p> <p>(iii) such work is translated and communicated to the public for non-commercial purposes;</p> <p>(g) the use of such work in a <i>bona fide</i> demonstration of electronic equipment to a client by a dealer in such equipment;</p> <p>(h) the use of such work is for the purposes of judicial proceedings or preparing a report of judicial proceedings; or</p> <p>(i) the making of a personal copy of such work by an individual for the individual's personal use and made for ends</p>
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<p>commercial: Provided that such use shall be compatible with fair practice.</p> <p>(2) For the purposes of subsection (1)(h), permitted personal uses include—  (a) the making of a back-up copy;  (b) time or format-shifting; or  (c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.</p> <p>(3) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.</p> <p>(4) An authorization to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.</p> <p>(5) The provisions of subsection (1)(c) and (d) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.</p> <p>(6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale</p>	<p>owned by that natural person, and made for ends which are not commercial: Provided that the work was lawfully acquired and that such personal use shall be compatible with fair practice.</p> <p>(2) Subsection (1)(b) does not apply where a licence is available from a collecting society to make the fixation or reproduction of the performer's performance, work or sound recording.</p> <p>(3) (a) For the purposes of subsection (1)(i) permitted personal use include—  (i) the making of a back-up copy;  (ii) time or format-shifting; or  (iii) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.  (b) The factors associated with making a personal copy, set out in subsection (1)(i), do not apply to a copy made in terms of another exception provided for in this Act.</p> <p>(4) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.</p> <p>(5) An authorization to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.</p> <p>(6) The provisions of subsection (1)(d) and (e) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.</p> <p>(7) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale</p>	<p>which are not commercial: Provided that such use shall not exceed the extent justified by the purpose.</p> <p>(2) For the purposes of subsection (1)(i), permitted personal uses include—  (a) the making of a back-up copy;  (b) time or format-shifting; or  (c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.</p> <p>(3) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.</p> <p>(4) An authorization to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.</p> <p>(5) The provisions of subsection (1)(d) and (e) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.</p> <p>(6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale</p>
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<p>of or other assignment of ownership of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy.</p>	<p>of or other assignment of ownership of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy.</p>	<p>of or other assignment of ownership of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy.</p>
<p><b>Temporary reproduction and adaptation</b></p> <p><b>12C.</b> Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—</p> <p>(a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or</p> <p>(b) to adapt the work to allow use on different technological devices, such as mobile devices,</p> <p>as long as there is no commercial significance to these acts.</p>	<p><b>Temporary reproduction and adaptation</b></p> <p><b>12C. (1)</b> Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—</p> <p>(a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or</p> <p>(b) to adapt the work to allow use on different technological devices, such as mobile devices,</p> <p>as long as there is no commercial significance to these acts.</p> <p><b>(2)</b> Transient or incidental copies or adaptations of a work contemplated in subsection (1), may—</p> <p>(a) only be made in the cases stipulated in subsection (1);</p> <p>(b) not conflict with the normal exploitation of the copyright work; and</p> <p>(c) not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.</p>	<p><b>Temporary reproduction and adaptation</b></p> <p><b>12C.</b> Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—</p> <p>(a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or</p> <p>(b) to adapt the work to allow use on different technological devices, such as mobile devices, - - - - as long as there is no independent, economic significance to these acts.</p>
<p><b>Reproduction for educational and academic activities</b></p> <p><b>12D.</b> (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities.</p>	<p><b>Reproduction for educational and academic activities</b></p> <p><b>12D.</b> (1) Subject to subsection (3), a person may make - - - - a reproduction of a work, including the use of a lawful copy of the work at a different time or with a different device owned by that person, or may broadcast it, for the purposes of educational and academic activities: Provided that—</p> <p>(a) the extent of the reproduction or the portion of the broadcast shall be compatible with fair practice;</p> <p>(b) a reproduction may only be made in the cases stipulated in this section;</p> <p>(c) the reproduction does not conflict with the normal exploitation of the copyright work; and</p>	<p><b>Reproduction for educational and academic activities</b></p> <p><b>12D.</b> (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose.</p>

<p>(2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.</p> <p>(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.</p> <p>(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—  <i>(a)</i> where the textbook is out of print;  <i>(b)</i> where the owner of the right cannot be found; or  <i>(c)</i> where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.</p> <p>(5) The right to make copies shall not extend to reproductions for commercial purposes.</p> <p>(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.</p> <p>(7) <i>(a)</i> The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a</p>	<p><i>(d)</i> the reproduction does not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.</p> <p>(2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.</p> <p>(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.</p> <p>(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—  <i>(a)</i> where the textbook is out of print;  <i>(b)</i> where the owner of the right cannot be found; or  <i>(c)</i> where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.</p> <p>(5) The right to make copies shall not extend to reproductions for commercial purposes.</p> <p>(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.</p> <p>(7) <i>(a)</i> The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a</p>	<p>(2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.</p> <p>(3) Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.</p> <p>(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—  <i>(a)</i> where the textbook is out of print;  <i>(b)</i> where the owner of the right cannot be found; or  <i>(c)</i> where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.</p> <p>(5) The right to make copies shall not extend to reproductions for commercial purposes.</p> <p>(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.</p> <p>(7) <i>(a)</i> The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a</p>
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<p>collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.</p> <p>(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.</p> <p>(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.</p> <p>(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.</p> <p>(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.</p> <p>(8) (a) The source of the work reproduced and the name of the author, if it appears on the work, shall as far as is practicable, be indicated on all copies contemplated in subsections (1) to (6).</p> <p>(b) The use of the work as contemplated in subsections (1) to (6) shall not exceed the extent justified by the purpose and shall be compatible with fair practice.</p> <p>(9) Copyright in a work shall not be infringed by any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose, and shall be compatible with fair practice: Provided further that the source as well as the name of the author, if it appears on the work, shall be mentioned in the act of teaching or in the illustration in question.</p>	<p>collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.</p> <p>(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.</p> <p>(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.</p> <p>(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.</p> <p>(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.</p> <p>(8) (a) The source of the work reproduced and the name of the author, if it appears on the work, shall ----- be indicated on all copies contemplated in subsections (1) to (6).</p> <p>(b) The use of the work as contemplated in subsections (1) to (6) shall ----- be compatible with fair practice.</p> <p>(9) Copyright in a work shall not be infringed by any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall ----- be compatible with fair practice: Provided further that the source and the name of the author, if it appears on the work, shall be mentioned in the act of teaching or in the illustration in question.</p>	<p>collection, has the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.</p> <p>(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.</p> <p>(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.</p> <p>(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.</p> <p>(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.</p> <p>(8) The source of the work reproduced and the name of the author ----- shall be indicated as far as is practicable on all copies contemplated in subsections (1) to (6).</p> <p>-----</p> <p>----- [Formerly in section 12B(1)(b).]</p>
<p><b>General exceptions regarding protection of computer programs</b></p> <p><b>19B.</b> (1) A person having a right to use a copy of a computer program may, without the authorization of the copyright owner, observe, study or test the functioning of the program</p>	<p><b>General exceptions regarding protection of computer programs</b></p> <p>[no change proposed]</p>	<p><b>General exceptions regarding protection of computer programs</b></p> <p><b>19B.</b> (1) A person having a right to use a copy of a computer program may, without the authorization of the copyright owner, observe, study or test the functioning of the program</p>

<p>in order to determine the ideas and principles, which underlie any element of the program if that person does so while performing any of the acts of loading, displaying, executing, transmitting or storing the program, which they are is entitled to perform.</p> <p>(2) The authorization of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:</p> <p>(a) The acts referred to in subsection (1) are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorized to do so;</p> <p>(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in paragraph (a); and</p> <p>(c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.</p> <p>(3) The information obtained through the application of the provisions of subsection (2) may not be—</p> <p>(a) used for goals other than those to achieve the interoperability of the independently created computer program;</p> <p>(b) given to others except when necessary for the interoperability of the independently created computer program;</p> <p>(c) used for the development, production or marketing of a computer program substantially similar in its expression to the program contemplated in subsection (1); or</p> <p>(d) used for any other act which infringes copyright.</p> <p>(4) For the purposes of this section, ‘interoperability’ means the ability to exchange information and to use the information which has been exchanged.</p>		<p>in order to determine the ideas and principles, which underlie any element of the program if that person does so while performing any of the acts of loading, displaying, executing, transmitting or storing the program, which he or she is entitled to perform.</p> <p>(2) The authorization of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:</p> <p>(a) The acts referred to in subsection (1) are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorized to do so;</p> <p>(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in paragraph (a); and</p> <p>(c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.</p> <p>(3) The information obtained through the application of the provisions of subsection (2) may not be—</p> <p>(a) used for goals other than those to achieve the interoperability of the independently created computer program;</p> <p>(b) given to others except when necessary for the interoperability of the independently created computer program;</p> <p>(c) used for the development, production or marketing of a computer program substantially similar in its expression to the program contemplated in subsection (1); or</p> <p>(d) used for any other act which infringes copyright.</p> <p>(4) For the purposes of this section, ‘interoperability’ means the ability to exchange information and to use the information which has been exchanged.</p>
<p><b>General exceptions regarding protection of copyright work for libraries, archives, museums and galleries</b></p> <p><b>19C.</b> (1) A library, archive, museum or gallery may, without the authorization of the copyright owner, use a copyright work to</p>	<p><b>General exceptions regarding protection of copyright work for libraries, archives, museums and galleries</b></p> <p><b>19C.</b> (1) A library, archive, museum or gallery may, without the authorization of the copyright owner, use a copyright work to</p>	<p><b>General exceptions regarding protection of copyright work for libraries, archives, museums and galleries</b></p> <p><b>19C.</b> (1) A library, archive, museum or gallery may, without the authorization of the copyright owner, use a copyright work to</p>

<p>the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work is not used for commercial purposes.</p> <p>(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.</p> <p>(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.</p> <p>(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work for commercial purposes.</p> <p>(5) A library, archive, museum or gallery may make a copy of —</p> <p>(a) any work in its collection for the purposes of back-up and preservation; and</p> <p>(b) a publicly accessible website for the purposes of preservation.</p> <p>(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery.</p> <p>(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from aging or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.</p> <p>(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act, 1997 (Act No. 54 of 1997).</p>	<p>the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work is not used for commercial purposes.</p> <p>(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.</p> <p>(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.</p> <p>(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work - - - -.</p> <p>(5) A library, archive, museum or gallery may make a copy of —</p> <p>(a) any work in its collection for the purposes of back-up and preservation; and</p> <p>(b) a publicly accessible website for the purposes of preservation.</p> <p>(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery.</p> <p>(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from aging or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.</p> <p>(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act, 1997 (Act No. 54 of 1997).</p>	<p>the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work is not used for commercial purposes.</p> <p>(2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.</p> <p>(3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has lawful access, to a user or to another library, archive, museum or gallery.</p> <p>(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work for commercial purposes.</p> <p>(5) A library, archive, museum or gallery may make a copy of —</p> <p>(a) any work in its collection for the purposes of back-up and preservation; 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<p>(9) A library, archive, museum or gallery may make a copy of a copyright work for its own collection when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot, after reasonable endeavour, be obtained or where the work is not available by general trade or from the publisher.</p> <p>(10) Notwithstanding any other section, a library, archive, museum or gallery may buy, import or otherwise acquire any copyright work that is legally available in any country.</p> <p>(11) A library, archive, museum or gallery may reproduce for preservation purposes, in any format, any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for scholarship, research or any other legal use.</p> <p>(12) (a) A library, archive, museum or gallery may make a copy of any copyright work and make it available to another library, archive, museum or gallery or for a public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.</p> <p>(b) A library, archive, museum or gallery contemplated in paragraph (a) may also, for the purposes of that paragraph—</p> <p>(i) take and show a photograph of such work or show video footage of such work;</p> <p>(ii) create other images such as paintings of buildings; or</p> <p>(iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place.</p> <p>(13) (a) Subject to paragraph (b), a library, archive, museum or gallery may supply to any other library, archive, museum or gallery a copy of a copyright work in its collection, whether by post, fax or secure digital transmission.</p> <p>(b) The receiving library, archive, museum or gallery must delete any digital file received from the other library, archive, museum or gallery immediately after supplying the person who has requested it with a digital or paper copy of the work.</p> <p>(14) An officer or employee of a library, archive, museum or gallery acting within the scope of their duties shall be</p>	<p>(9) A library, archive, museum or gallery may make a copy of a copyright work for its own collection when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot, after reasonable endeavour, be obtained or where the work is not available by general trade or from the publisher.</p> <p>(10) Notwithstanding any other section, a library, archive, museum or gallery may buy, import or otherwise acquire any copyright work that is legally available in any country.</p> <p>(11) A library, archive, museum or gallery may reproduce for preservation purposes, in any format, any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for scholarship, research or any other legal use.</p> <p>(12) (a) A library, archive, museum or gallery may make a copy of any copyright work and make it available to another library, archive, museum or gallery or for a public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.</p> <p>(b) A library, archive, museum or gallery contemplated in paragraph (a) may also, for the purposes of that paragraph—</p> <p>(i) take and show a photograph of such work or show video footage of such work;</p> <p>(ii) create other images such as paintings of buildings; 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<p>protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—</p> <p>(a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or</p> <p>(b) the copyright work, or material protected by related rights is in the public domain or licensed to the public under an open licence.</p> <p>(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in section 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.</p>	<p>protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—</p> <p>(a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or</p> <p>(b) the copyright work, or material protected by related rights is in the public domain or licensed to the public under an open licence.</p> <p>(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in section 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.</p>	<p>protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—</p> <p>(a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or</p> <p>(b) the copyright work, or material protected by related rights is in the public domain or licensed to the public under an open licence.</p> <p>(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in section 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy.</p>
<p><b>Unenforceable contractual term</b></p> <p><b>39B.</b> (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.</p>	<p><b>Unenforceable contractual term</b></p> <p><i>[no change proposed]</i></p>	<p><b>Unenforceable contractual term</b></p> <p><b>39B.</b> (1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.</p>
<p><i>[No provision]</i></p>	<p><b>Section 1</b></p> <p><b>'lawfully acquired'</b> means a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift and does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy;</p>	<p><i>[No provision]</i></p>
<p>The copyright exceptions were one of the primary reasons for the President’s referral-back of the Bill. He specifically asked that “If these exceptions and limitations run the risk of constitutional challenges, they require reconsideration by the National Assembly.” The Portfolio Committee did not undertake a comprehensive legal assessment of the copyright exceptions.</p>		

The President identified the copyright exceptions as those in new sections 12A, 128, 12C, 12D and 19B and 19C. This table expands on that list by adding an exclusion from copyright protection that appears in new section 2A and the contract override clause in section 39B that supports all of the exceptions.

The President explicitly named new sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C(3), 19C(4), 19C(5)(b) and 19C(9) of the 2019 B-Bill as provisions that may constitute arbitrary deprivation of property, in conflict with the Constitution's property clause. In the 2022 D-Bill:

- There are no substantial changes to 12A.
- A substantive change was made to 12B(1)(a)(i).
- No change was made to 12B(1)(c).
- 12B(1)(e)(i) was deleted (see below).
- The exception in 12B(1)(f) (12B(1)(e) in the D-Bill) was broadened, and subject to one other substantive change to a part of a clause, the remaining changes were not substantive.
- There was only three substantive changes to 12D, one of one limited authors' moral rights.
- No changes were made to 19C(3), 19C(4), 19C(5)(b) and 19C(9).

*Note:* All clause references in this paragraph are to the 2019 B-Bill, as per the President's referral-back.

#### **Comparison 2022 D-Bill to 2019 B-Bill:**

A total of **15 sets of changes** were made to the 2019 B-Bill: 12A(c); 12B(1)(a)(i); 12B(1)(a)(ii); 12B(1)(b) of the 2019 B-Bill and 12D9; 12B(1)(d); 12B(1)(e)(i) of the 2019 B-Bill; 12B(1)(d)(ii) (part); 12B(1)(e)(ii) (parts, in 2 sets of changes); 12B(1)(h) (parts, in 2 sets of changes); 12C; 12D(1); 12D(8)(a) (part); 12D(8)(b).

**10 of the 15 changes were substantive changes:** 12A(c); 12B(1)(a)(i); 12B(1)(a)(ii); 12B(1)(d); 12B(1)(e)(i) of the 2019 B-Bill; 12B(1)(e)(ii) (parts); 12B(1)(h) (parts); 12D(1); 12D(8)(a) (part); 12D(8)(b). One of these substantive changes, 12B(1)(e)(ii), broadened the exception concerned.

**Only 1 of the 10 sets of substantive changes affected a numbered clause:** the deletion of 12B(1)(e)(i) of the B-Bill. The reason given, namely to avoid duplication,<sup>20</sup> was incorrect. Section 12A does not contain that clause's application of that exception to "cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved." The quoted text is directly in conflict with Article 5(2) of the Berne Convention.

**Only 1 of the 5 sets of non-substantive changes related to a numbered clause:** moving 12B(1)(b) of the 2019 B-Bill to 12D(9).

#### **Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **29 changes:** deletion 12A(a)(i); deletion 12A(a)(iv); deletion 12A(a)(vi); 12A(c); 12A(d); 12B(1)(a)(i) (part); 12B(1)(a)(ii) (part); 12B(1)(b) of the 2019 B-Bill and 12D(9); 12B(1)(b); 12B(1)(c); 12B(1)(d); 12B(1)(e)(i) of the 2019 B-Bill; 12B(1)(d)(i); 12B(1)(d)(ii) (parts, in two sets of changes); 12B(1)(e)(ii) (parts, in two sets of

<sup>20</sup> Portfolio Committee document "ALL PROPOSED AMENDMENTS" issued on 8 December 2021, footnote 11 ("This amendment is to avoid duplication – it is already covered in section 12A.")

changes); 12B(1)(h) (parts, in three sets of changes); 12B(2) of the 2021 Proposals; 12B(3)(b) of the 2021 Proposals; 12C; 12C(2) of the 2021 Proposals; 12D(1) proviso of the 2021 Proposals; 12D(8)(a) to limit authors' moral rights; 12D(8)(b); 19C(4); definition "lawfully acquired" of the 2021 Proposals.

**24 of the 29 changes were substantive changes:** deletion 12A(a)(i); deletion 12A(a)(iv); deletion 12A(a)(vi); 12A(c); 12A(d); 12B(1)(a)(i) (part); 12B(1)(a)(ii) (part); 12B(1)(b); 12B(1)(c); 12B(1)(d); 12B(1)(e)(i) of the 2019 B-Bill; 12B(1)(d)(i); 12B(1)(d)(ii) (part); 12B(1)(e)(ii) (part); 12B(1)(h) (parts, in two sets of changes); 12B(2) of the 2021 Proposals; 12B(3)(b) of the 2021 Proposals; 12C(2) of the 2021 Proposals; 12D(1) proviso of the 2021 Proposals; 12D(8)(a); 12D(8)(b); deletion part 19C(4); definition "lawfully acquired" of the 2021 Proposals.

**11 of the 24 substantive changes were for the insertion or deletion of a numbered clause** (ie section, sub-section, paragraph or sub-paragraph).

**10 of the 24 substantive changes were adopted** in the 2022 D-Bill: 12A(c); 12B(1)(a)(i); 12B(1)(c); 12B(1)(d); 12B(1)(e)(ii) (part); 12B(1)(h) (parts, in two sets of changes); 12D(8)(a); 12D(8)(b).

2 of the 10 substantive changes adopted further limited copyright and authors rights: 12B(1)(e)(ii) broadened the exception concerned; 12D(8)(a) added a limitation to authors' moral rights.

**Only 1 of the 10 substantive changes adopted related to a numbered clause:** the deletion of 12B(1)(e)(i) of the 2019 B-Bill. The reason given, namely to avoid duplication,<sup>21</sup> was incorrect. Section 12A does not contain that clause's application of that exception to "cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved." The quoted text is directly in conflict with Article 5(2) of the Berne Convention.

**14 of the 24 substantive changes were rejected** for the 2022 D-Bill: deletion 12A(a)(i); deletion 12A(a)(iv); deletion 12A(a)(vi); 12A(d); 12B(1)(b); 12B(1)(d)(i); 12B(1)(d)(ii) (part); 12B(1)(h) (part); 12B(2) of the 2021 Proposals; 12B(3)(b) of the 2021 Proposals; 12C(2) of the 2021 Proposals; 12D(1) proviso of the 2021 Proposals; deletion part 19C(4); definition "lawfully acquired" of the 2021 Proposals.

**10 of the 14 rejections of substantive changes were in respect of numbered clauses:** deletion 12A(a)(i); deletion 12A(a)(iv); deletion 12A(a)(vi); 12A(d); 12B(1)(b); 12B(2) of the 2021 Proposals; 12B(3)(b) of the 2021 Proposals; 12C(2) of the 2021 Proposals; 12D(1) proviso of the 2021 Proposals; deletion part 19C(4); definition "lawfully acquired" of the 2021 Proposals.

**5 substantive changes were made to the 2022 D-Bill that were not included in the 2021 Proposals:** 12B(1)(a)(i); 12B(1)(e)(ii); 12D(8)(a); 12D(8)(b) (part); 12D(9) (part).

**Only 1 of the 5 non-substantive changes related to a numbered clause:** moving 12B(1)(b) of the 2019 B-Bill to 12D(9) of the 2022 D-Bill.

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<sup>21</sup> Portfolio Committee document "ALL PROPOSED AMENDMENTS" issued on 8 December 2021, footnote 11 ("This amendment is to avoid duplication – it is already covered in section 12A.")

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:  
COPYRIGHT EXCEPTIONS FOR PERSONS WITH DISABILITIES**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Section 1</b></p> <p>‘accessible format copy’ means a copy of a work in an alternative manner or form, which gives a person with a disability access to the work, including to permit the person to have access as feasibly and comfortably as a person without a disability;</p>	<p><b>Section 1</b></p> <p>‘accessible format copy’ means a copy of a work in an alternative manner or form, which gives a person with a disability access to the work, including to permit the person to have access as feasibly and comfortably as a person without a disability;</p>	<p><b>Section 1</b></p> <p>‘accessible format copy’ means a copy of a work in an alternative manner or form, which gives a person with a disability access to the work --- and which permits such person to have access as feasibly and comfortably as a person without a disability;</p>
<p><b>Section 1</b></p> <p>‘authorized entity’ means— (a) an entity that is authorized or recognised by the government to provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis; or (b) a government institution or non-profit organization that provides education, instructional training, adaptive reading or information access to persons with a disability as one of its primary activities or institutional obligations;</p>	<p><b>Section 1</b></p> <p>‘authorized entity’ means— (a) an entity that is authorized or recognised by the government to provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis; or (b) a government institution or non-profit organization that provides education, instructional training, adaptive reading or information access to persons with a disability as one of its primary activities or institutional obligations;</p>	<p><b>Section 1</b></p> <p>--- [no provision]</p>
<p><b>General exceptions regarding protection of copyright work for persons with disability</b></p> <p><b>19D.</b> (1) Any person as may be prescribed and who serves persons with disabilities, including an authorized entity, may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met: (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;</p>	<p><b>General exceptions regarding protection of copyright work for persons with disability</b></p> <p><b>19D.</b> (1) Any person --- that serves persons with disabilities, including an authorized entity, may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met: (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;</p>	<p><b>General exceptions regarding protection of copyright work for persons with disability</b></p> <p><b>19D.</b> (1) Any person as may be prescribed and --- that serves persons with disabilities --- may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met: (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;</p>

<p>(b) in converting the copyright work to an accessible format copy, the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible in that alternative format and of the accessibility needs of the persons with a disability; and</p> <p>(c) the activity under this subsection must be undertaken on a non-profit basis.</p> <p>(2) (a) A person to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorization of the owner of the copyright work, reproduce the work, where that person is a person—</p> <p>(i) with a disability, for their personal use; or</p> <p>(ii) who serves persons with disabilities, including an authorized entity, for personal use by a person with a disability.</p> <p>(b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.</p> <p>(3) (a) A person with a disability or a person who serves persons with disabilities, including an authorized entity, may, without the authorization of the copyright owner export to, or import from, another country any legal copy of an accessible format copy of a work referred to in subsection (1), for distribution, or to make it available to persons with a disability, as long as such activity is undertaken on a non-profit basis by that person.</p> <p>(b) A person contemplated in paragraph (a) may not export or import an accessible format copy where such person knows, or has reason to know, that the accessible format copy will be used for purposes other than to aid persons with a disability.</p> <p>(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author, if it appears on the work, on any accessible format copy.</p>	<p>(b) in converting the copyright work to an accessible format copy, the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible in that alternative format and of the accessibility needs of the persons with a disability; and</p> <p>(c) the activity under this subsection must be undertaken on a non-profit basis.</p> <p>(2) (a) A person to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorization of the owner of the copyright work, reproduce the work, where that person is—</p> <p>(i) a person with a disability, for their personal use; or</p> <p>(ii) a person that serves persons with disabilities, including an authorized entity, for personal use by a person with a disability.</p> <p>(b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.</p> <p>(3) (a) A person with a disability or a person that serves persons with disabilities, including an authorized entity, may, without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), for distribution or to make it available to persons with a disability, as long as such activity is undertaken on a non-profit basis by that person.</p> <p>(b) A person contemplated in paragraph (a) may only so export or import where such person knows, or has reasonable grounds to believe that the accessible format copy, will only be used to aid persons with a disability.</p> <p>(4) The exception created by this section is subject to—</p> <p>(a) the obligation of indicating the source and the name of the author, if it appears on the work, on any accessible format copy; and</p> <p>(b) use of the accessible format copy exclusively by a person with a disability.</p>	<p>(b) the copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and</p> <p>(c) the activity under this subsection must be undertaken on a non-profit basis.</p> <p>(2) (a) A person with a disability, or a person that serves persons with disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorization of the owner of the copyright work, reproduce the work for personal use.</p> <p>(b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.</p> <p>(3) A person with a disability or a person that serves persons with disabilities may, without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.</p> <p>(4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.</p>
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**Comparison 2022 D-Bill to 2019 B-Bill:**

A total of **6 sets of changes** were made to the 2019 B-Bill: 19D(1); 19D(1)(b); 19D(2)(a); 19D(3)(a); 19D(3)(b); 19D(4).

**5 of the 6 changes were substantive changes:** 19D(1); 19D(2)(a); 19D(3)(a); 19D(3)(b); 19D(4).

**1 of the 5 sets of substantive changes affected a numbered clause:** 19D(3)(b).

**0 of the 1 set of non-substantive changes related to a numbered clause.**

**Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **11 changes:** definition “accessible format copy”; definition “authorized entity”; 19D(1); 19D(1) (part); 19D(1)(b); 19D(2)(e); 19D(3)(a); 19D(3)(b) (parts in two sets of changes); 19D(4)(b) of the 2021 Proposals; 19D(4).

**8 of the 11 changes were substantive changes:** 19D(1); 19D(1) (part); 19D(2)(e); 19D(3)(a); 19D(3)(b) (parts in two sets of changes); 19D(4)(b) of the 2021 Proposals; 19D(4).

**2 of the 8 substantive changes were for the insertion or deletion of a numbered clause** (ie section, sub-section, paragraph or sub-paragraph).

**5 of the 7 substantive changes were adopted** in the 2022 D-Bill: 19D(1); 19D(2)(e); 19D(3)(a); 19D(3)(b); 19D(4).

**Only 1 of the 5 substantive changes adopted related to a numbered clause:** 19D(3)(b).

**3 of the 7 substantive changes were rejected** for the 2022 D-Bill: 19D(1) (part); 19D(3)(b) (part); 19D(4)(b) of the 2021 Proposals.

**Only 1 of the 3 rejections of substantive changes were in respect of numbered clauses:** 19D(4)(b) of the 2021 Proposals.

**Only 1 substantive change was made to the 2022 D-Bill that was not included in the 2021 Proposals:** 19D(3)(b) (part)

**0 of the 3 non-substantive changes related to a numbered clause.**

Provisions raised in the President’s referral-back and other proposals for change in December 2021: TECHNOLOGICAL PROTECTION MEASURES		
D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Section 1</b></p> <p>‘technologically protected work’ means a work that is protected by a technological protection measure;</p>	<p><b>Section 1</b></p> <p>[no change proposed]</p>	<p><b>Section 1</b></p> <p>‘technologically protected work’ means a work that is protected by a technological protection measure;</p>
<p><b>Section 1</b></p> <p>‘technological protection measure’— (a) means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work; and</p> <p>(b) does not include a process, treatment, mechanism, technology, device, product, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;</p>	<p><b>Section 1</b></p> <p>‘technological protection measure’ means any process, treatment, mechanism, technology, device, product, system or component that in the normal course of its operation is designed to prevent or restrict the infringement of copyright in a work;</p> <p>[(b) proposed to be removed]</p>	<p><b>Section 1</b></p> <p>‘technological protection measure’— (a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work; and</p> <p>(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes;</p>
<p><b>Section 1</b></p> <p>‘technological protection measure circumvention device or service’ means a device or service primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure;</p>	<p><b>Section 1</b></p> <p>‘technological protection measure circumvention device or service’ means a device or service— (a) primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure; (b) promoted, advertised or marketed for the purpose of circumvention of a technological protection measure; or (c) with a limited commercially significant purpose or use other than to circumvent a technological protection measure;</p>	<p><b>Section 1</b></p> <p>‘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;</p>
<p><b>Prohibited conduct in respect of technological protection measures</b></p> <p><b>280.</b> (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a</p>	<p><b>Prohibited conduct in respect of technological protection measures</b></p> <p><b>280.</b> (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a</p>	<p><b>Prohibited conduct in respect of technological protection measures</b></p> <p><b>280.</b> (1) No person may make, import, sell, distribute, let for hire, offer or expose for sale, hire or advertise for sale a</p>

<p>technological protection measure circumvention device or service if such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technologically protected work.</p> <p>(2) No person may provide a service to any other person if— (a) such other person intends to use the service to circumvent an effective technological protection measure; or (b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright in a technologically protected work.</p> <p>(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.</p> <p>(4) No person may, during the subsistence of copyright in a work and without a licence of the owner of the copyright in such work, circumvent an effective technological protection measure applied by the owner of the copyright to such work.</p> <p>(5) A technological protection measure shall be deemed to be effective if the use of the work is controlled by the exclusive licensee or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.</p>	<p>technological protection measure circumvention device or service if such a person knows, or <b>----</b> <b>should reasonably have known</b>, that it will or is likely to be used to infringe copyright in a technologically protected work.</p> <p>(2) No person may provide a service to any other person if— (a) such other person intends to use the service to circumvent an effective technological protection measure; or (b) such person knows, or <b>----</b> <b>should reasonably have known</b>, that the service will or is likely to be used by another person to infringe copyright in a technologically protected work.</p> <p>(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.</p> <p>(4) No person may, during the subsistence of copyright in a work and without a licence of the owner of the copyright in such work, circumvent an effective technological protection measure applied by the owner of the copyright to such work.</p> <p>(5) A technological protection measure shall be deemed to be effective if the use of the work is controlled by the exclusive licensee or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.</p> <p><b>::::</b></p>	<p>technological protection measure circumvention device <b>----</b> if such a person knows or has reason to believe that it will or is likely to be used to infringe copyright in a technologically protected work.</p> <p>(2) No person may provide a service to any other person if— (a) such other person intends to use the service to circumvent an effective technological protection measure; or (b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright in a technologically protected work.</p> <p>(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.</p> <p>(4) No person may, during the subsistence of copyright in a work and without a licence of the owner of the copyright in such work, circumvent an effective technological protection measure applied by the owner of the copyright to such work.</p> <p>(5) A technological protection measure shall be deemed to be effective if the use of the work is controlled by the exclusive licensee or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.</p> <p><b>(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).</b></p>
<p><b>Exceptions in respect of technological protection measures</b></p> <p><b>28P.</b> (1) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device or service to perform any of the following:</p>	<p><b>Exceptions in respect of technological protection measures</b></p> <p><b>28P.</b> (1) <b>::::</b> Nothing in this Act shall prevent any person from using a technological protection measure circumvention device <b>or service</b> to perform any of the following:</p>	<p><b>Exceptions in respect of technological protection measures</b></p> <p><b>28P.</b> (1) <b>For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002),</b> nothing in this Act shall prevent any person from using a technological protection measure circumvention device <b>----</b> to perform any of the following:</p>

<p>(a) An act permitted in terms of any exception provided for in, or prescribed under, this Act; or</p> <p>(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).</p> <p>(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—</p> <p>(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or</p> <p>(b) if the copyright owner has refused such person’s request or has failed to respond to it within a reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.</p> <p>(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—</p> <p>(a) other person, including their name, address and all other relevant information necessary to identify them; and</p> <p>(b) purpose for which the services of such other person has been engaged.</p>	<p>(a) An act permitted in terms of any exception provided for in, or prescribed under, this Act; or</p> <p>(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).</p> <p>(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—</p> <p>(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or</p> <p>(b) if the copyright owner has refused such person’s request or has failed to respond to it within ---- reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.</p> <p>(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—</p> <p>(a) other person, including ---- his or her name, address and all other relevant information necessary to identify ---- him or her; and</p> <p>(b) purpose for which the services of such other person has been engaged.</p>	<p>(a) An act permitted in terms of any exception provided for in ---- this Act; or</p> <p>(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).</p> <p>(2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—</p> <p>(a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or</p> <p>(b) if the copyright owner has refused such person’s request or has failed to respond to it within ---- reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.</p> <p>(3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—</p> <p>(a) other person, including ---- his or her name, address and all other relevant information necessary to identify ---- him or her; and</p> <p>(b) purpose for which the services of such other person has been engaged.</p>
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**Comparison 2022 D-Bill to 2019 B-Bill:**

A total of **8 sets of changes** were made to the 2019 B-Bill: definition “technological protection measure”; defined term “technological protection measure circumvention device or service”; 28O(1); deletion 28O(6) of the 2019 B-Bill; 28P(1)(a); 28P(1); 28P(2)(b); 28P(3)(a).

**6 of the 8 changes were substantive changes:** definition “technological protection measure”; defined term “technological protection measure circumvention device or service”; 28O(1); deletion 28O(6) of the 2019 B-Bill; 28P(1)(a); 28P(1).

**1 of the 5 sets of substantive changes affected a numbered clause:** deletion of 28O(6) of the 2019 B-Bill.

**Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **13 changes:** definition “technological protection measure” (parts in two changes); definition “technological protection measure” para (b); defined term “technological protection measure circumvention device or service”; defined term “technological protection measure circumvention device or service” paras (b) and (c); 28O(1) (parts in two changes); 28O(2)(b); deletion 28O(6) of the 2019 B-Bill; 28P(1)(a); 28P(1), 28P(2)(b); 28P(3)(a).

**11 of the 13 changes were substantive changes:** definition “technological protection measure” (parts in two changes); definition “technological protection measure” para (b); defined term “technological protection measure circumvention device or service”; defined term “technological protection measure circumvention device or service” paras (b) and (c); 28O(1) (parts in two changes); 28O(2)(b); deletion 28O(6) of the 2019 B-Bill; 28P(1)(a); 28P(1).

**3 of the 11 substantive changes were for the insertion or deletion of a numbered clause** (ie section, sub-section, paragraph or sub-paragraph).

**6 of the 11 substantive changes were adopted** in the 2022 D-Bill: definition “technological protection measure” (part); defined term “technological protection measure circumvention device or service”; 28O(1) (part); deletion 28O(6) of the 2019 B-Bill; 28P(1)(a); 28P(1).

**1 of the 6 substantive changes adopted related to a numbered clause:** deletion 28O(6) of the 2019 B-Bill.

**5 of the 11 substantive changes were rejected** for the 2022 D-Bill: definition “technological protection measure” (part); definition “technological protection measure” para (b); defined term “technological protection measure circumvention device or service” paras (b) and (c); 28O(1) (part); 28O(2)(b).

**2 of the 5 rejections of substantive changes were in respect of numbered clauses:** definition “technological protection measure” para (b); defined term “technological protection measure circumvention device or service” paras (b) and (c).

**0 substantive changes were made to the 2022 D-Bill that were not included in the 2021 Proposals.**

**0 of the 2 non-substantive changes related to a numbered clause.**

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:**

**COPYRIGHT MANAGEMENT INFORMATION**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Exceptions in respect of copyright management information</b></p> <p><b>28S.</b> The prohibition in section 28R does not apply if a person—  <i>(a)</i> is authorized by the performer or copyright owner to remove or modify the copyright management information;  <i>(b)</i> does not know and has no reason to believe that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work; or  <i>(c)</i> does not know or has no reason to believe that the copyright management information has been removed or modified without the authority of the performer or copyright owner.</p>	<p><b>Exceptions in respect of copyright management information</b></p> <p><b>28S.</b> The prohibition in section 28R does not apply if a person—  <i>(a)</i> is authorized by the performer or copyright owner to remove or modify the copyright management information;  <i>(b)</i> does not know - - - , or could reasonably not have known, that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work; or  <i>(c)</i> does not know, or - - - could reasonably not have known, that the copyright management information has been removed or modified without the authority of the performer or copyright owner.</p>	<p><b>Exceptions in respect of copyright management information</b></p> <p><b>28S.</b> The prohibition in section 28R does not apply if a person—  <i>(a)</i> is authorized by the performer or copyright owner to remove or modify the copyright management information;  <i>(b)</i> does not know and has no reason to believe that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright in the work; or  <i>(c)</i> does not know or has no reason to believe that the copyright management information has been removed or modified without the authority of the performer or copyright owner.</p>

**Comparison 2022 D-Bill to 2019 B-Bill:**

No change.

**Comparison 2022 D-Bill to 2021 Proposals:**

1 set of changes was proposed in the 2021 Proposals: 28S(b) and (c).

1 set of the 1 set of changes in the 2021 Proposals was rejected: 28S(b) and (c).

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:**

**PUBLISHED EDITIONS**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Substitution of section 11A of Act 98 of 1978, as inserted by section 8 of Act 52 of 1984</b></p> <p><b>11A.</b> Copyright in a published edition vests the exclusive right to make or to authorize the doing of any of the following acts in the Republic:</p> <p>...</p> <p><i>(b)</i> communicating the work to the public by wire or wireless means;</p> <p><i>(c)</i> making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person; and</p> <p><i>(d)</i> distributing the original or a copy of the work to the public.</p>	<p><b>Substitution of section 11A of Act 98 of 1978, as inserted by section 8 of Act 52 of 1984</b></p> <p><b>11A.</b> Copyright in a published edition vests the exclusive right to make or to authorize the doing of any of the following acts in the Republic:</p> <p>...</p> <p><i>(b)</i> communicating the work to the public by wire or wireless means;</p> <p><i>(c)</i> making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person; and</p> <p><i>(d)</i> distributing the original or a copy of the work to the public.</p>	<p>----- [no provision]</p>

**Comparison 2022 D-Bill to 2019 B-Bill:**

**3 changes** were made to the 2019 B-Bill: 11A(b), (c) and (d)  
**All 3 changes were substantive changes.**  
**All 3 substantive changes affected numbered clauses:** 11A(b), (c) and (d).

**Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **3 changes:** 11A(b), (c) and (d).  
**All 3 changes were substantive changes.**  
**All 3 of the substantive changes were adopted** in the 2022 D-Bill.  
**All 3 substantive changes adopted related to a numbered clause:** 11A(b), (c) and (d).  
**0 of the 3 substantive changes were rejected** for the 2022 D-Bill.  
**0 substantive changes were made to the 2022 D-Bill that were not included in the 2021 Proposals.**

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:  
COMPUTER PROGRAMMES**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Amendment of section 11B of Act 98 of 1978, as substituted by section 53 of Act 38 of 1997</b></p> <p><b>11B.</b> ... (dA) communicating the work to the public by wire or wireless means; (dB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person; (dC) distributing the original or a copy of the work to the public;</p>	<p><b>Amendment of section 11B of Act 98 of 1978, as substituted by section 53 of Act 38 of 1997</b></p> <p><b>11B.</b> ... (dA) communicating the work to the public by wire or wireless means; (dB) making the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person; (dC) distributing the original or a copy of the work to the public;</p>	<p>----- [no provision]</p>

**Comparison 2022 D-Bill to 2019 B-Bill:**

**3 changes** were made to the 2019 B-Bill: 11B(dA), (dB) and (dC).  
**All 3 changes were substantive changes.**  
**All 3 substantive changes affected numbered clauses:** 11B(dA), (dB) and (dC).

**Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **3 changes:** 11B(dA), (dB) and (dC).  
**All 3 changes were substantive changes:**  
**All 3 substantive changes were adopted** in the 2022 D-Bill:  
**All 3 substantive changes adopted related to numbered clauses:** 11B(dA), (dB) and (dC).  
**0 of the 3 substantive changes were rejected** for the 2022 D-Bill.  
**0 substantive changes were made to the 2022 D-Bill that were not included in the 2021 Proposals.**

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:  
RETROSPECTIVE AND UNWAIVABLE STATUTORY ROYALTY RIGHTS**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p>Share in royalties regarding literary or musical works</p> <p><b>6A....</b> [No subsection (7).]</p>	<p>Share in royalties regarding literary or musical works</p> <p>[Section 6A (Retrospective clause and re delegations to Minister) 1. On page 5, from line 50, to omit subsection (7)(a) and (b)(i) and (ii). 2. On page 6, from line 1, to omit subsection (7)(b)(iii) and (c).]</p>	<p>Share in royalties regarding literary or musical works</p> <p><b>6A. ...</b> (7) (a) This section applies to a literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that literary or musical work— (i) falls within the application of this Act; and (ii) is still exploited for profit. (b) The Minister must— (i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a); (ii) conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and (iii) table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39. (c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2017.</p>
<p>Share in royalties regarding visual artistic works</p> <p><b>7A....</b> [No subsection (7).]</p>	<p>Share in royalties regarding visual artistic works</p> <p>[Section 7A (Retrospective clause and re delegations to Minister) 1. On page 7, from line 8, to omit subsection (7)(a), (b) and (c).]</p>	<p>Share in royalties regarding visual artistic works</p> <p><b>7A. ...</b> (7) (a) This section applies to a visual artistic work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that visual artistic work— (i) falls within the application of this Act; and (ii) is still exploited for profit.</p>

		<p>(b) The Minister must—</p> <p>(i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);</p> <p>(ii) conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and</p> <p>(iii) table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.</p> <p>(c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2017.</p>
<p><b>Share in royalties regarding audiovisual works</b></p> <p><b>8A...</b>  [No subsection (5). Former subsections (6) and (7) renumbered (5) and (6)]</p>	<p><b>Share in royalties regarding audiovisual works</b></p> <p>[Section 8A.  <i>(Retrospective clause and re delegations to Minister)</i></p> <p>1. On page 9, from line 48, to omit subsection (5)(a) and (b).</p> <p>2. On page 10, from line 1, to omit the continuation of subsection (5)(b)(iii) and subsection (5)(c).]</p>	<p><b>Share in royalties regarding audiovisual works</b></p> <p><b>8A. ...</b></p> <p>(5) (a) This section applies to an audiovisual work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that audiovisual work—</p> <p>(i) falls within the application of this Act; and</p> <p>(ii) is still exploited for profit.</p> <p>(b) The Minister must—</p> <p>(i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);</p> <p>(ii) conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and</p> <p>(iii) table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.</p> <p>(c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2017.</p>

**Comparison 2022 D-Bill to 2019 B-Bill:**

A total of **3 sets of changes** were made to the 2019 B-Bill: deletion of sections 6A(7), 7A(7) and 8A(5) of the 2019 B-Bill.

**All 3 changes were substantive changes.**

**All 3 substantive changes affected numbered clauses:** deletion of sections 6A(7), 7A(7) and 8A(5) of the 2019 B-Bill.

**Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **3 changes:** deletion of sections 6A(7), 7A(7) and 8A(5) of the 2019 B-Bill.

**All 3 changes were substantive changes.**

**All 3 substantive changes were adopted** in the 2022 D-Bill.

**All 3 substantive changes adopted related to numbered clauses:** deletion of sections 6A(7), 7A(7) and 8A(5) of the 2019 B-Bill.

**0 of the 3 substantive changes were rejected** for the 2022 D-Bill.

**0 substantive changes were made to the 2022 D-Bill that were not included in the 2021 Proposals.**

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:**

**BROADCASTS**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Section1</b></p> <p><b>‘broadcast’</b> means—</p> <p>(a) transmission, partially or wholly, by wire or wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;</p> <p>(b) transmission, partially or wholly, by satellite; or</p> <p>(c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;</p>	<p><b>Section 1</b></p> <p><b>‘broadcast’</b> means—</p> <p>(a) transmission, partially or wholly, by <b>---</b> wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;</p> <p>(b) transmission, partially or wholly, by satellite; or</p> <p>(c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;</p>	<p><b>---</b> [no provision]</p>

**Comparison 2022 D-Bill to 2019 B-Bill:**

**1 set of changes** was made to the 2019 B-Bill: definition “broadcast”.

**The 1 change was a substantive change.**

**The 1 set of substantive changes affected a numbered clause:** definition “broadcast”.

**Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **1 set of changes:** definition “broadcast”.

**The 1 change was a substantive change.**

**The 1 set of substantive changes was adopted** in the 2022 D-Bill.

**The 1 set of substantive changes adopted related to a numbered clause:** definition “broadcast”.

**0 of the 1 substantive changes were rejected** for the 2022 D-Bill.

**1 substantive change was made to the 2022 D-Bill that was not included in the 2021 Proposals:** definition “broadcast” para (a).

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:**

**OFFENCES AND PENALTIES**

<b>D-Bill (June 2022)</b>	<b>Proposals for amendments (December 2021)</b>	<b>B-Bill (March 2019, referred back by the President in June 2022)</b>
<p><b>Amendment of section 27 of Act 98 of 1978, as amended by section 11 of Act 52 of 1984, section 3 of Act 61 of 1989 and section 24 of Act 125 of 1992</b></p> <p>Section 27 of the principal Act is hereby amended—  <i>(a)</i> by the insertion of the following subsections:                      “(5A) Any person who at a time when copyright subsists in a work, without the necessary authority—</p> <p><i>(a)</i> communicates the work to the public by wire or wireless means; or  <i>(b)</i> makes the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person, which they</p>	<p><b>Amendment of section 27 of Act 98 of 1978, as amended by section 11 of Act 52 of 1984, section 3 of Act 61 of 1989 and section 24 of Act 125 of 1992</b></p> <p>Section 27 of the principal Act is hereby amended—  <i>(a)</i> by the insertion of the following subsections:                      “(5A) Any person who at a time when copyright subsists in a work, without the <b>---</b> authority <b>of the owner of the copyright and for commercial purposes</b>—</p> <p><i>(a)</i> communicates the work to the public by wire or wireless means; and  <i>(b)</i> makes the work available to the public by wire or wireless means, so that any member of the public may access the work from a place and at a time chosen by that person, which they</p>	<p><b>Amendment of section 27 of Act 98 of 1978, as amended by section 11 of Act 52 of 1984, section 3 of Act 61 of 1989 and section 24 of Act 125 of 1992</b></p> <p>Section 27 of the principal Act is hereby amended—  <i>(a)</i> by the insertion of the following subsection <b>---</b>:</p> <p><b>---</b></p>

<p>know to be infringing copyright in the work, shall be guilty of an offence.</p> <p>(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—</p> <p>(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if such person—</p> <p>(i) knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure;</p> <p>(ii) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure; or</p> <p>(iii) knows that the service contemplated in subparagraph (ii) will, or is likely to be used by another person to, infringe copyright in a work protected by an effective technological protection measure;</p> <p>(b) publishes information enabling or assisting any other person to circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic; or</p> <p>(c) circumvents such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence.</p> <p>(5C) Subject to section 28S, any person who—</p> <p>(a) in respect of any copy of a work, removes or modifies any copyright management information; or</p> <p>(b) makes, imports, sells, lets for hire, offers or exposes for sale, advertises for sale or hire, or communicates to the public a work or a copy of a work, if the copyright management information in respect of that work or copy of that work, has been removed or modified without the authority of the copyright owner,</p>	<p>know to be infringing copyright in the work, shall be guilty of an offence.</p> <p>(5B) Subject to section 28P, any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—</p> <p>(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service if --- —</p> <p>(i) such person knows, or should reasonably have known, that that device or service will or is likely to be used to infringe copyright in a work protected by an effective technological protection measure;</p> <p>(ii) such person provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure; or</p> <p>(iii) such person knows, or should reasonably have known, that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by an effective technological protection measure;</p> <p>(b) publishes information enabling or assisting any other person to circumvent an effective technological protection measure with the intention of inciting that other person to unlawfully circumvent an effective technological protection measure in the Republic; or</p> <p>(c) circumvents such an effective technological protection measure when they are not authorized to do so, shall be guilty of an offence.</p> <p>:::;</p> <p>(5C) Subject to section 28S, any person who—</p> <p>(a) in respect of any copy of a work, remove or modify any copyright management information; or</p> <p>(b) make, import, sell, let for hire, offer or expose for sale, advertise for sale or hire or communicate to the public a work or a copy of a work, if the copyright management information in respect of that work or copy of that work, has been removed or modified without the authority of the copyright owner,</p>	<p>“(5A) --- Any person who, at the time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—</p> <p>(a) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device if --- —</p> <p>(i) such person knows, or has reason to believe, that that device will or is likely to be used to infringe copyright in a work protected by a technological protection measure;</p> <p>(ii) such person provides a service to another person to enable or assist such other person to circumvent a technological protection measure; or</p> <p>(iii) such person knows or has reason to believe that the service contemplated in subparagraph (ii) will or is likely to be used by another person to infringe copyright in a work protected by --- a technological protection measure;</p> <p>(b) publishes information enabling or assisting any other person to circumvent --- a technological protection measure with the intention of inciting that other person to unlawfully circumvent --- a technological protection measure in the Republic; or</p> <p>(c) circumvents such technological protection measure when he or she is not authorized to do so, shall be guilty of an offence and shall upon conviction be liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment. ---”;</p>
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<p>which they know to be infringing copyright in the work, shall be guilty of an offence.”</p> <p><i>(b)</i> by the substitution for subsection (6) of the following subsection: “(6) A person convicted of an offence under this section shall be liable— <i>(a)</i> in the case of a first conviction, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates or <i>(b)</i> in any case other than that contemplated in paragraph <i>(a)</i>, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.”; and</p> <p><i>(c)</i> by the addition after subsection (8) of the following subsection: “(9) <i>(a)</i> For the purpose of subsection (6), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences, as the case may be, were committed and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, in respect of all uses to which this Act applies. <i>(b)</i> If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsection (6), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”</p>	<p>--- shall be guilty of an offence.</p> <p><i>(b)</i> by the substitution for subsection (6) of the following subsection: “(6) A person convicted of an offence under this section shall be liable— <i>(a)</i> in the case of a first conviction, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates; or <i>(b)</i> in any case other than that contemplated in paragraph <i>(a)</i>, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.”; and</p> <p><i>(c)</i> by the addition after subsection (8) of the following subsection: “(9) <i>(a)</i> For the purpose of subsection (6), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences, as the case may be, were committed and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, in respect of all uses to which this Act applies. <i>(b)</i> If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsection (6), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”</p>	<p><i>(b)</i> by the substitution for subsection (6) of the following subsection: “(6) A person convicted of an offence under this section shall be liable— <i>(a)</i> in the case of a first conviction, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates or <i>(b)</i> in any case other than that contemplated in paragraph <i>(a)</i>, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.”; and</p> <p><i>(c)</i> by the addition after subsection (8) of the following subsection: “(9) <i>(a)</i> For the purpose of subsection (6), the annual turnover of convicted person that is not a natural person at the time the fine is assessed, is the total income of that person during the financial year during which the offence or the majority of offences, as the case may be, were committed and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, as the case may be, in respect of all uses to which this Act applies. <i>(b)</i> If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the minimum sentence prescribed in subsection (6), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”</p>
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**Comparison 2022 D-Bill to 2019 B-Bill:**

A total of **6 sets of changes** were made to the 2019 B-Bill: 27(5A); 27(5B) (parts in two sets); 27(5B)(a)(i)(ii)(iii); 27(5B)(a)(i)(ii)(iii)(b)(c); 27(5C).

**5 of the 6 changes were substantive changes:** 27(5A); 27(5B) (parts in two sets); 27(5B)(a)(i)(ii)(iii)(b)(c); 27(5C).

**2 of the 5 sets of substantive changes affected numbered clauses:** 27(5A); 27(5C).

**0 of the 1 set of non-substantive changes relate to a numbered clause.**

**Comparison 2022 D-Bill to 2021 Proposals:**

The 2021 Proposals proposed **8 changes:** 27(5A); 27(5A) (part); 27(5B) (parts in two sets); 27(5B)(a)(i)(ii)(iii); 27(5B)(a)(iii); 27(5B)(a)(i)(ii)(iii)(b)(c); 27(5C).

**7 of the 8 changes were substantive changes:** 27(5A); 27(5A) (part); 27(5B) (parts in two sets); 27(5B)(a)(iii); 27(5B)(a)(i)(ii)(iii)(b)(c); 27(5C).

**5 of the 7 substantive changes were adopted** in the 2022 D-Bill: 27(5A); 27(5B) (parts in two sets); 27(5B)(a)(i)(ii)(iii)(b)(c); 27(5C).

**2 of the 5 substantive changes adopted related to numbered clauses:** 27(5A); 27(5C).

**2 of the 7 substantive changes were rejected** for the 2022 D-Bill: 27(5A) (part); 27(5B)(a)(i)(ii)(iii).

**0 of the 2 rejections of substantive changes were in respect of numbered clauses.**

**2 substantive changes were made to the 2022 D-Bill that were not included in the 2021 Proposals:** 27(5A) (part); 27(5C).

**0 of the 1 non-substantive change relate to a numbered clause.**

**Provisions raised in the President’s referral-back and other proposals for change in December 2021:**

**REGULATIONS**

D-Bill (June 2022)	Proposals for amendments (December 2021)	B-Bill (March 2019, referred back by the President in June 2022)
<p><b>Amendment of section 39 of Act 98 of 1978, as amended by section 4 of Act 9 of 2002 and section 5 of Act 28 of 2013</b></p> <p>Section 39 of the principal Act is hereby amended—  <i>(a)</i> by the deletion of the word “and” at the end of paragraph (cD);</p> <p><i>(b)</i> by the insertion of the following paragraphs after paragraph (cE):                      “(cF) prescribing rules regulating the processes and proceedings of the Tribunal;                      (cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;                      (cH) prescribing permitted acts for circumvention of technological protection measures contemplated in section 28P after due consideration of the following factors:                      (i) The availability for use of works protected by copyright;                      (ii) the availability for use of works for non-profit archival and educational purposes;                      (iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or                      (iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;                      (cl) prescribing royalty rates or tariffs for various forms of use;                      (cJ) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;                      (cK) prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a collecting society; and”;</p>	<p><b>Amendment of section 39 of Act 98 of 1978, as amended by section 4 of Act 9 of 2002 and section 5 of Act 28 of 2013</b></p> <p>Section 39 of the principal Act is hereby amended—  <i>(a)</i> by the deletion of the word “and” at the end of paragraph (cD);</p> <p><i>(b)</i> by the insertion of the following paragraphs after paragraph (cE):                      “(cF) prescribing rules regulating the processes and proceedings of the Tribunal;                      (cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;                      (cH) prescribing permitted acts for circumvention of technological protection measures contemplated in section 28P after due consideration of the following factors:                      (i) The availability for use of works protected by copyright;                      (ii) the availability for use of works for non-profit archival and educational purposes;                      (iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or                      (iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;                      (cl) prescribing royalty rates or tariffs for various forms of use;                      (cJ) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;                      (cK) prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a collecting society; and”;</p>	<p><b>Amendment of section 39 of Act 98 of 1978, as amended by section 4 of Act 9 of 2002 and section 5 of Act 28 of 2013</b></p> <p>Section 39 of the principal Act is hereby amended—  <i>(a)</i> by the deletion of the word “and” at the end of paragraph (cD);</p> <p><i>(b)</i> by the insertion of the following paragraphs after paragraph (cE):                      “(cF) prescribing rules regulating the processes and proceedings of the Tribunal;                      (cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;                      (cH) prescribing permitted acts for circumvention of technological protection measures contemplated in <b>Section - - - - 28B</b> after due consideration of the following factors:                      (i) The availability for use of works protected by copyright;                      (ii) the availability for use of works for non-profit archival and educational purposes;                      (iii) the impact of the prohibition on the circumvention of technological protection measures applied to works or protected by copyright on criticism, comment, news reporting, teaching, scholarship or research; or                      (iv) the effect of the circumvention of technological protection measures on the market for or value of works protected by copyright;                      (cl) prescribing royalty rates or tariffs for various forms of use;                      (cJ) prescribing the percentage and period within which distribution of royalties must be made by collecting societies;                      (cK) prescribing the terms and manner relating to the management of unclaimed royalties, code of conduct and any other matter relating to the reporting, operations, activities and better collection processes of royalties by a collecting society; and”;</p>

<p>(c) by the addition of the following subsections, the existing section becoming subsection (1):  “(2) The Minister must make regulations providing for processes and formalities related to the authorization, or recognition, by the government of entities that provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis.  (3) Before making any regulations in terms of subsection (1) or (2), the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”</p>	<p>-----  (2) The Minister must make regulations providing for processes and formalities related to the authorization, or recognition, by the government of entities that provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis.  (3) Before making any regulations in terms of subsection (1) or (2), the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”</p>	<p>(c) by the addition of the following subsection, the existing section becoming subsection (1):  “-----  (2) Before making any regulations in terms of subsection (1) -----, the Minister must publish the proposed regulations for public comment for a period of not less than 30 days.”</p>
<p><b><u>Comparison 2022 D-Bill to 2019 B-Bill:</u></b></p> <p>A total of <b>3 sets of changes</b> were made to the 2019 B-Bill: 39(cH); 39(2); 39(3).</p> <p><b>Only 1 of the 3 changes were substantive changes:</b> 39(2).</p> <p><b>The 1 substantive change affected a numbered clause:</b> 39(2).</p> <p><b>0 of the 2 sets of non-substantive changes related to a numbered clause:</b></p> <p><b><u>Comparison 2022 D-Bill to 2021 Proposals:</u></b></p> <p>The 2021 Proposals proposed <b>3 changes:</b> 39(cH); 39(2); 39(3).</p> <p><b>1 of the 3 changes were substantive changes:</b> 39(2).</p> <p><b>The 1 substantive change was adopted</b> in the 2022 D-Bill.</p> <p><b>The 1 substantive change adopted related to a numbered clause:</b> 39(2).</p> <p><b>0 of the 1 substantive changes were rejected</b> for the 2022 D-Bill.</p>		

Table listing total numbers of changes, substantive changes adopted and rejected and substantive changes in relation to adding or deleting numbered clauses adopted and rejected, per group of provisions, for 2021 Proposals compared to 2022 D-Bill:

<b>2021 Proposals cf. 2022 D-Bill</b>	<b>Copyright exceptions (excl. for disabilities)</b>	<b>Technological protection measures</b>	<b>Disabilities</b>	<b>Copyright management information</b>	<b>Published editions</b>	<b>Computer programmes</b>	<b>Statutory royalty rights</b>	<b>Broadcasts</b>	<b>Offences</b>	<b>Regulations</b>	<b>TOTALS</b>
Changes proposed	29	13	11	1	3	3	3	1	8	3	78
Substantive changes proposed	24	11	8	1	3	3	3	1	7	1	62
Substantive changes i.r.t. numbered clauses proposed	11	3	2	0	3	3	3	1	2	1	29
Substantive changes adopted	10	6	5	0	3	3	3	1	2	1	37
Substantive changes i.r.t. numbered clauses adopted	1	1	1	0	3	3	3	1	2	1	16
Substantive changes rejected	14	5	3	1	0	0	0	0	2	0	25
+	+	+	+	+	+	+	+	+	+	+	+
New text in 2022 D-Bill	5	0	1	0	0	0	0	1	2	0	9
Substantive changes i.r.t. numbered clauses rejected	10	2	1	0	0	0	0	0	0	0	13

**Provisions proposed to be changed by the DTIC and stakeholders in June – July 2021 with no changes proposed by the Portfolio Committee in December 2021**

**25-YEAR LIMIT ON ASSIGNMENTS OF COPYRIGHT IN LITERARY AND MUSICAL WORKS (misdescribed as a right of reversion)**

**D-Bill (June 2022), where the provisions are the same as that of the B-Bill (March 2019, referred back by the President in June 2022)**

**Amendment of section 22 of Act 98 of 1978**

Section 22 of the principal Act is hereby amended—

(a) by the substitution for subsections (3) ... of the following subsections, respectively:

“(3) ... Provided that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.”

The Copyright Review Commission report of 2011 proposed “To provide the artists or their heirs with the opportunities to reduce the level of losses that arise as a result of the disparate circumstances referred to above, the CRC recommends an amendment to the legislation to allow for automatic reversions of assigned rights after 25 years (from the date of assignment). The recommendation is based upon the relevant provision in the US Copyright Act. But the period proposed is 25 years and not 35 years, in view of the fact that the period of copyright protection in the US is much longer than in South Africa.”<sup>22</sup>

The memorandum of objects accompanying the Bill refers to the abovementioned limitation of validity of an assignment of certain rights of copyright to 25 as a right of reversion. In fact, it is not. The amendment to Section 22(3) of the Act bears no resemblance to the relevant provision in the US Copyright Act recommended in the report. It is also not limited to musical works, as recommended in the report.

As was raised by numerous stakeholders and noted by the Previous Portfolio Committee’s Panel of Experts<sup>23</sup>, this amendment to Section 22(3) is no more than a serious mistake.

<sup>22</sup> Copyright Review Commission Report, 2011, para 10.12.10 on p.81.

<sup>23</sup> [https://legalbrief.co.za/media/filestore/2018/10/andre\\_myburgh.pdf](https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf) at p.86 (commenting on an earlier draft of this provision).

**Provisions proposed to be changed by the DTIC and stakeholders in June – July 2021 with no changes proposed by the Portfolio Committee in December 2021**

**RESALE ROYALTY RIGHT**

**D-Bill (June 2022), where the provisions are the same as that of the B-Bill (March 2019, referred back by the President in June 2022)**

**Section 1**

‘visual artistic work’ means an artistic work as contemplated in paragraph (a) of the definition of ‘artistic work’

**Resale royalty right regarding visual artistic works**

**7B.** (1) The author of a visual artistic work in which copyright subsists or their heirs, as may be applicable, must be paid royalties on the commercial resale within the art market of that work.

(2) (a) Royalties in respect of visual artistic works shall be payable at the rate prescribed by the Minister, after consultation with the Minister responsible for arts and culture.

(b) The Minister must, before prescribing the rate referred to in paragraph (a), publish the rate proposed in the Gazette and call for written comments by any interested party to be provided within 30 days after publication.

(c) The Minister may from time to time in the manner contemplated in paragraph (b), amend the prescribed rate contemplated in paragraph (a).

(3) The seller and the art market professional concerned are jointly and severally liable to pay the royalties contemplated in subsection (1) to the author or their heirs, as may be applicable.

(4) The author of a visual artistic work or their heirs, as may be applicable, shall be entitled to receive a resale royalty if—

(a) at the time when the resale is concluded—

(i) the author is a South African citizen or is domiciled or resident in the Republic or is a citizen of, or domiciled in, a designated country specified by the Minister in accordance with section 37; and

(ii) the term of validity of the resale royalty right has not expired;

(b) in the case of a deceased author, the deceased was at the time of death a South African citizen or was domiciled or resident in the Republic or was a citizen of, or domiciled in, a country specified by the Minister in accordance with section 37;

(c) the resale or any part of the transaction takes place in the Republic or in any country specified by the Minister in accordance with section 37; and

(d) the resale of the work is recognisable after the commencement of section 7 of the Copyright Amendment Act, 2017.

**Proof of author**

**7C.** (1) Where a mark or name purporting to identify a person as the author of a visual artistic work appears on such work, that person is, in the absence of evidence to the contrary, presumed to be the author of such work.

(2) If a visual artistic work—

(a) is a work of more than one author, the presumption in subsection (1) applies to each co-author of such visual artistic work; or

(b) includes indigenous cultural expressions or knowledge, the relevant indigenous community is entitled to an equitable share in the resale royalty payable.

**Duration of resale royalty right**

**7D.** (1) The resale royalty right of an author of a visual artistic work or their heirs, as may be applicable, expires at the end of the period of 50 years calculated from the end of the calendar year—

(a) in which the author concerned died; or

(b) in the case of more than one author, in which the last of the known authors died.

(2) In the case of a visual artistic work created by an unknown author—

- (a) the resale royalty right in that work expires at the end of the period of 50 years calculated from the end of the calendar year in which the work was first made available to the public; or  
(b) where the identity of the author becomes known at a later stage, the resale royalty right of that author expires in accordance with the period contemplated in subsection (1).

**Transmission of resale royalty right**

- 7E.** (1) A resale royalty right may not be alienated, save for transmission on the death of the holder of the right by testamentary disposition, or by operation of law.  
(2) In the case of a bequest of a visual artistic work by an author who did not assign copyright in that work in their lifetime, the bequest must be read as including the resale royalty right.  
(3) If resale royalties are recovered by a collecting society or an indigenous community after the death of a holder of a resale royalty right, those resale royalties must be treated as part of the estate of the deceased holder.  
(4) A resale royalty right may not be assigned or waived and any assignment or waiver of a resale royalty right is unenforceable.

**Application of resale royalty right**

- 7F.** (1) Sections 7B, 7C, 7D and 7E apply to a visual artistic work that was made before the commencement date of the Copyright Amendment Act, 2017, if that visual artistic work falls within the application of this Act.  
(2) The resale royalty right only applies to a commercial resale made after the commencement date of the Copyright Amendment Act, 2017.”

Article 14<sup>ter</sup> of the Berne Convention allows a member state to introduce legislation granting the inalienable right to an artist to an interest in any sale of a hard copy of his or her work. This right, commonly known as the “artists’ resale right”, is not a right of copyright, but another right that is dependent on the existence of a right of copyright. Sections 7B to 7F incorrectly couches this right as a right of copyright.

The Minister for Trade Industry and Competition proposed to the Portfolio Committee that the resale royalty right provisions in Sections 7B to 7F be recast and placed in a new chapter of the Act.<sup>24</sup>

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<sup>24</sup> Minister’s presentation to the Portfolio Committee dated 9 November 2021, p. 42.

**Provisions proposed to be changed by the DTIC and stakeholders in June – July 2021 with no changes proposed by the Portfolio Committee in December 2021**

**STATUTORY LICENCES FOR REPRODUCTION AND TRANSLATION**

**D-Bill (June 2022), where the provisions are the same as that of the B-Bill (March 2019, referred back by the President in June 2022)**

**Amendment of section 22 of Act 98 of 1978**

Section 22 of the principal Act is hereby amended—

(b) by the substitution for subsections (3) ... of the following subsections, respectively:

“(3) ... no exclusive licence to do an act which is subject to copyright in such work shall have effect unless it is in writing and signed by or on behalf of ... the licensor or, in the case of an exclusive sub-licence, the exclusive sub-licensor, as stipulated in Schedule 2...”

**Insertion of Schedule 2 in Act 98 of 1978**

The following Schedule is hereby added to the principal Act, the existing Schedule becoming Schedule 1:

**“Schedule 2**

**(Section 22(3))**

**Part A**

**Translation Licences ...**

**Part B**

**Reproduction Licences ...”**

Schedule 2 of the Bill sets out compulsory licences for translation and reprints and has its origin in the Appendix to the Berne Convention. The Appendix contains special rules available only to developing countries. However, Schedule 2 departs in material respects from the text of the Appendix and is therefore not compliant with the Berne Convention. Also, Schedule 2 is not introduced into the law under existing or new provisions relating to statutory licences, but by amending Section 22(3) of the Act (which deals with the formalities of assignments and exclusive licences).

The Minister for Trade Industry and Competition proposed to the Portfolio Committee that Schedule 2 of the Bill and the corresponding amendment to Section 22(3) of the Act require “a total redraft”.<sup>25</sup>

<sup>25</sup> Minister’s presentation to the Portfolio Committee dated 9 November 2021, p.43.