

Copyright Reform in South Africa – What is Delaying the Process?

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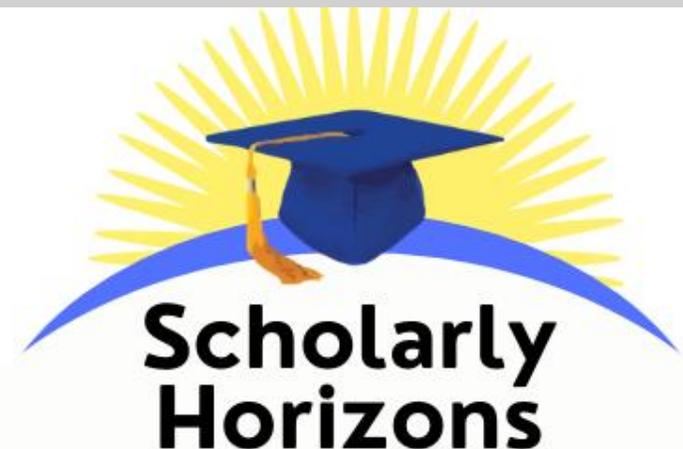
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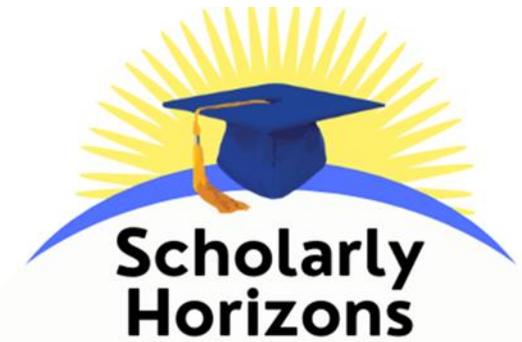
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ASAIB Conference Webinar

20 May 2021

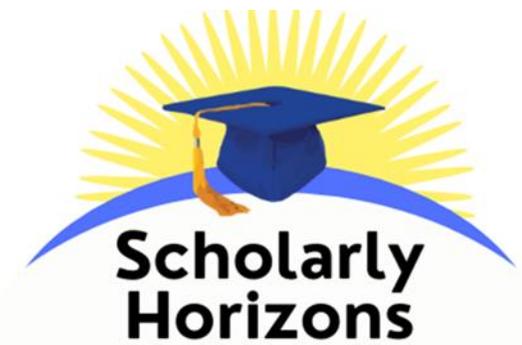


Current Copyright Act



- **Copyright Act No. 98 of 1978 (as amended) – outdated - does not address digital era**
- **Limited exceptions for education, research, libraries and archives (unchanged since 1978)**
- **No exceptions for people with disabilities - unconstitutional**
- **The higher education and library sectors have been calling for appropriate & balanced amendments since 1998!**
- **In a digital world, authors, creators, researchers and others need a rich, vibrant public domain & appropriate L & Es**

Current Copyright Exceptions



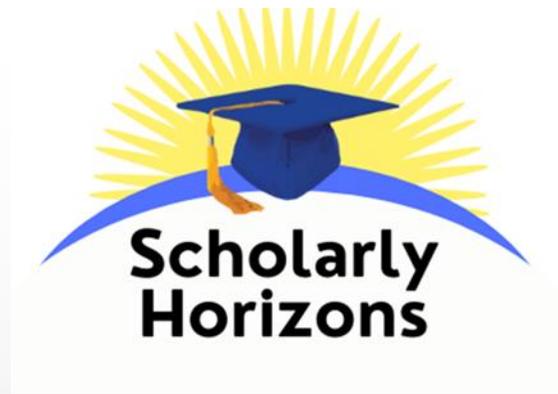
“Fair Dealing” (Sec. 12) – copying permitted only for these purposes, without permission -

- Research or private study
- Personal or private use
- Criticism or review
- Reporting current events (e.g. in newspapers or broadcasts)
- Quotation (with acknowledgement)
- By ‘way of illustration’ for teaching purposes
- Judicial proceedings and the report of those proceedings

No specific exceptions for Libraries & Archives in the Act itself, but Regulations (Sec. 13) have limited exceptions for libraries and archives, e.g. for copying mainly for preservation in the print environment and user requests, but obviously does not address digitisation, format-shifting, conversions, digital curation, etc.

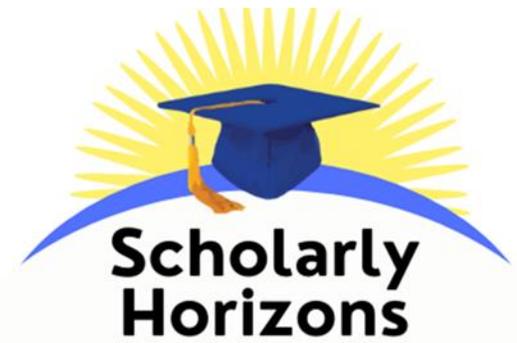
A librarian/archivist may make a single copy for students/lecturers at their request.

How Much May You Copy?



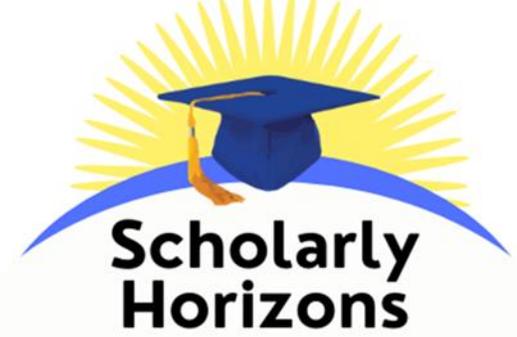
- **'Fair Dealing' – not defined in the law.**
- **Generally accepted usage:**
 - **10% or 1 chapter of a book**
 - **1 article from a journal issue**
 - **A full case study or law report (not only 10% of it)**
- **Sources must be acknowledged - even if works are free, Open Access, unpublished, or the copyright term has expired**

Current Copyright Law - a Barrier



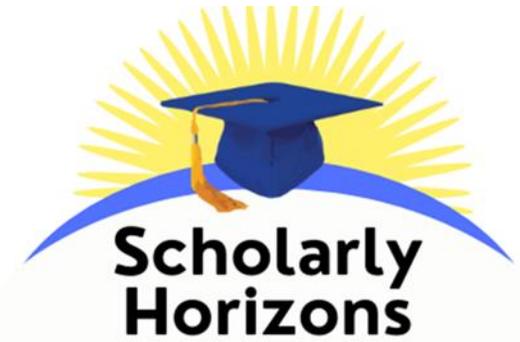
- **Current copyright law affects access to information and educational and other material**
- **Severely hampers library and archival services**
- **Has no provisions for museums or galleries**
- **Does not allow for digital curation**
- **Restricts or prevents sharing of information, e.g. with disadvantaged and rural communities**
- **Prevents use of full films and music for educational purposes**
- **Prevents works being used in exhibitions and commemorations of historical events**
- **Lack of access to information affects socio-economic development and prevents citizens from becoming active contributors to our economy.**
- **Copyright exceptions can be overridden by contract law**

Preserving our Cultural Heritage



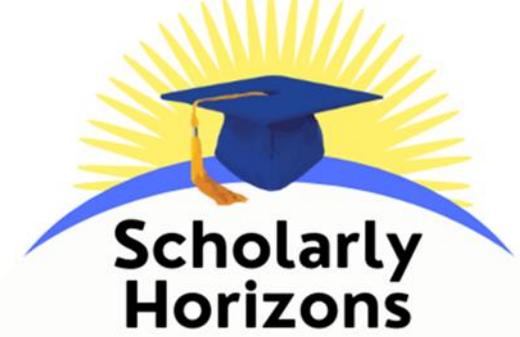
- **No exceptions for digitisation, format shifting, conversion from old to new technologies**
- **Libraries, especially legal deposit libraries and archives need adequate copyright exceptions**
- **Legal Deposit Act No. 54 of 1997 – <https://www.gov.za/documents/legal-deposit-act>**
- **New Copyright Amendment Bill will enable libraries to engage in preservation and digital curation on an ongoing basis, format-shifting, conversion from old to new technologies, replacement of lost or damaged works, etc.**

Framework of Amendment Bill



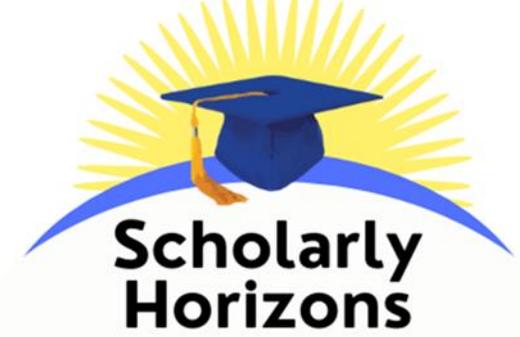
- Bill was informed by DTI-commissioned research through the University of Pretoria, the Farlam Review Commission and the WIPO Study on *“The Economic Contribution of Copyright-Based Industries in South Africa”*, as well as the Draft IP Policy, and a Regulatory Impact Assessment (2013/4)
- Treaty Proposals at WIPO SCCR (by the Africa Group, and International Federation of Library Associations & Institutions (IFLA) and its Alliance Partners)
- EIFL Model Copyright Law (an expansion of the WIPO model law for developing countries).
- Research findings of the African Copyright & Access to Knowledge Project (2007-2011)
- The Report on the South African Open Copyright Review (2008)
- Our Constitution, the National Development Plan & Sustainable Development Goals
- 2015 Cape Town Declaration

Copyright Amendment Bill (CAB Fair Use



- The Bill introduces Fair use, based on the US copyright law. It is NOT carte blanche for piracy or infringement. It has 4 factors/criteria that apply and address -
 - ever-changing technologies and unforeseen uses in the future, as technology evolves;
 - transformative uses, text and data mining; new innovations, 3D creations, AI, robotics, etc.
- A Copyright Tribunal will address many of the issues to avoid matters going to court.
- Suggestions of inconsistency with international law completely ignore the evidence from the US and 9 other countries that currently benefit from fair use.
- It has not destroyed authors or creative industries.
- Libraries and archives promote copyright compliance, and will engage in educational activities to assist users in understanding and applying fair use.

L & E's for Libraries & Archives



The Bill provides some practical **limitations and exceptions** to enable Libraries and Archives to carry out their full statutory mandates, without having to clear copyright and pay high fees for everything related to the digital environment.

See: General exceptions regarding protection of copyright work for libraries, archives, museums and galleries (19C.(1)A) -

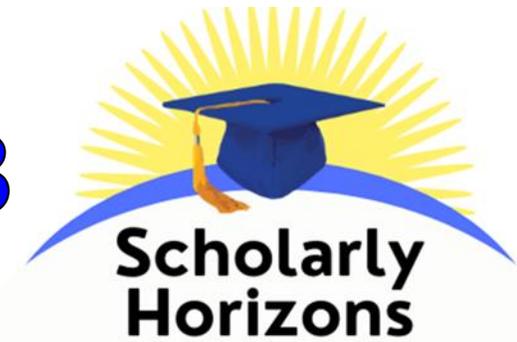
https://libguides.wits.ac.za/ld.php?content_id=49099809

Education & Other Exceptions

- The Bill has helpful exceptions for research and education, including extracts of works in course-packs
- Translations for teaching purposes
- Use material for quotation, comments, satire, parody, caricature, cartoon, tribute homage, illustration and pastiche
- It has provisions, albeit cumbersome, to address orphan works.
- Allows parallel importation of more reasonably-priced material
- Enables material to be converted into accessible formats for people with disabilities
- Does not allow a contract to override lawful copyright exceptions, so should protect authors and creators in future
- Fair use and exceptions will enable Open access, Open educational resources and Open licensing, etc.

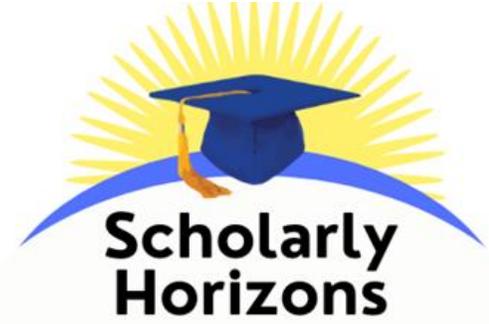
See relevant exceptions - https://libguides.wits.ac.za/ld.php?content_id=48931487

Some Examples of L & E's in CAB



- **Students may include extracts/images from library collections in online thesis/dissertations**
- **Librarians can assist authors to deposit in OA repositories.**
- **Libraries/archives may permit users to view or listen to a whole work for educational and non-commercial purposes.**
- **Libraries/archives may use copyrighted works for non-profit exhibitions & special events.**
- **May convert a work into an accessible format for a person with disabilities**
- **They may lend, borrow, make copies for interlibrary loans, make temporary and replacement copies**
- **They may digitise, format-shift as technologies change, preserve, archive, and convert to accessible formats for people with disabilities.**
- **Educators can use material for teaching material and to create Open Educational Resources, etc.**
- **Using fair use, researchers will be able to do text and data mining, which will be very helpful in pandemic**

Process of the Copyright Bill



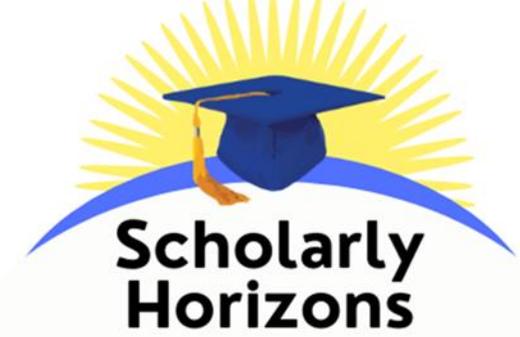
- **Genesis of the Bill in 2009 -**

https://libguides.wits.ac.za/Copyright_and_Related_Issues/Bill_Genesis_Process

- **Bill published for public comment in July 2015**
- **2 small copyright working groups appointed by Parliamentary Committee to help redraft and revise Bill a number of times**
- **Final 2017 version approved by Parliament on 28 March 2019.**
- **President failed to act in terms of Section 79(1) of Constitution**
- **Opinion on constitutionality – see:**

https://libguides.wits.ac.za/Copyright_and_Related_Issues/Opinion

Benefits of Copyright Bill for SA



- The Bill updates our 43 year old copyright law - it is progressive & forward-looking
- Empowers libraries and archives, and adds exceptions for museums and galleries
- It improves access to knowledge, and accessibility for people with disabilities
- Bill aligns SA's law with other progressive copyright regimes & international treaties
- Introduces limitations and exceptions that many developed countries already enjoy
- Goes a long way to redressing omissions, restrictions and imbalances in current law
- Enhances creativity & innovation, and empowers authors & creators in the digital world.
- Regulates collecting societies so authors and creators get a fair share of royalties
- Linked to Performers' Protection Bill, it enables performers to earn royalties
- Strongly supported by many international, regional & local organisations & institutions.
- It updates and 'future-proofs' our copyright law for the 21st century and 4IR.

Why a Parliamentary Review?

- No action by President for 15 months – much lobbying from opponents of the Bill
- Many organisations, like ICA, IFLA, EIFL, etc., wrote to the President in support of Bill – others strongly opposed the Bill
- Blind SA action against President in ConCourt
- USTR – Economic threats to AGOA and other trade agreements - Called for submissions on this matter and had public hearings in US in January 2020
- European Commission – wrote to President based on consultations with rightsholders, collection management organisations, etc. No consultation with representative bodies for education, libraries and archives, or for people with disabilities.

For further information:

- See: https://libguides.wits.ac.za/Copyright_and_Related_Issues/tradeissues
- Article: <https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101>

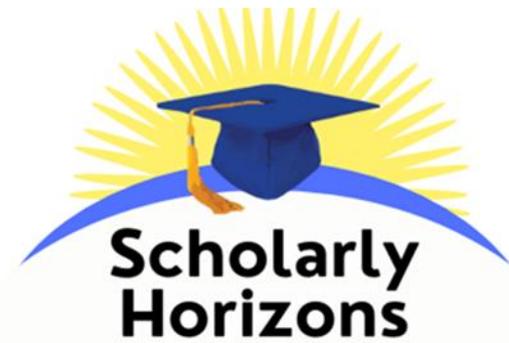
Bill Referred Back to Parliament

- President sends Bill back to Parliament for review on 16 June 2020 – see his letter to Speaker of Parliament at: https://libguides.wits.ac.za/ld.php?content_id=57799959
- Raises possible ‘constitutionality’ issues (included all exceptions for libraries & archives, museums and galleries, education, research, etc., but not those for disabilities)
- Nearly a year passed without action in Parliament – strong lobbying from opponents of Bill
- 7 April 2021 - Blind SA, with legal assistance from Section 27, served papers on President, Parliament and relevant Govt officials to High Court, Johannesburg, on grounds that current copyright law is unconstitutional – in process

Academic Opinions on CAB

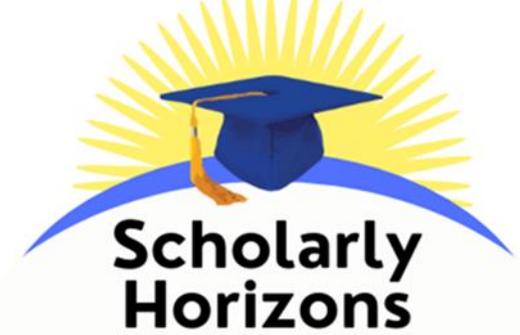
- Academic research by IP academics -
https://libguides.wits.ac.za/ld.php?content_id=61553209
- Research by Ms Nombuso Shange, Legal Advisor at Mandela University -
https://libguides.wits.ac.za/ld.php?content_id=61553214

Recent Parliamentary Meetings



- After lapse of 9 months, Parliament finally met on 5 and 11 May to discuss way forward
- Political parties had to submit final comments by 10 May on issues raised by the President
- Listen to discussions by Parliamentary Legal Advisor about tagging and fair use, etc. at:
- 11 May 2021 – all parties agreed Bill should go back for re-tagging, have more public consultations on fair use, and address the clauses dealing with retrospective royalties (dealing with shares in royalties on literary, musical, visual artistic and audio-visual works) so that they only apply to for prospective operation only.
- Section 75 Bill is a national function and does not go to the Provinces for voting.
- Section 76 Bill needs to go to the Provinces for deliberation and voting
- Joint Tagging Mechanism responsible for deciding whether Bill gets re-tagged or not
- Could result in another long delay!

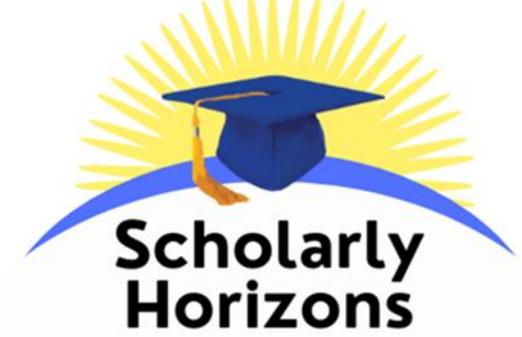
CAB Stalled Again



- **14 May 2021 - PC on Trade and Industry met to take a formal decision on the President's reservations on the Bill**
- **Based on its agreement on 11 May, 2021, the Committee unanimously approved a recommendation that the National Assembly should rescind its decision of December 2018 to pass the Copyright Amendment Bill and the Performer's Protection Amendment Bill.**
- **Recommended: Bills be submitted to the Joint Tagging Mechanism for re-consideration of the Section 75 tagging and that the Portfolio Committee on Trade and Industry should be instructed to correct the procedural and substantive concerns, incorporating in its work the proceedings and all the previous work of the committee up to the second reading of the Bill. More public consultations on fair use.**

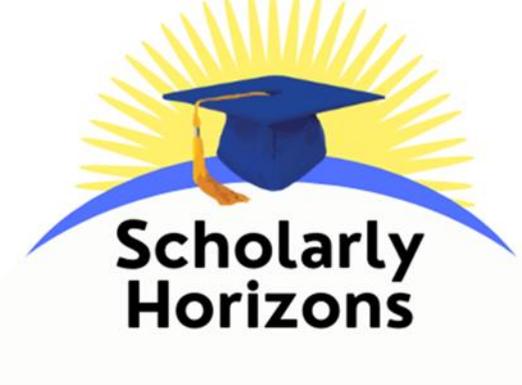
Video recording of meeting - <https://drive.google.com/file/d/1Sy8s8Z6ZMG1aQkzAfbZEZCJiOQifImD1/view>

Next Steps?



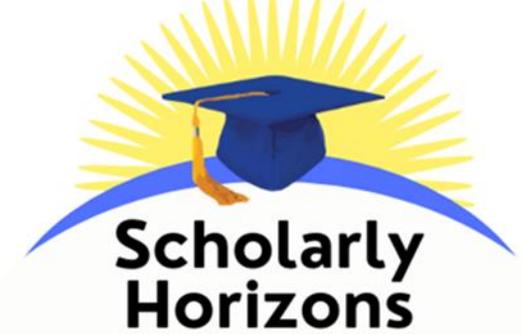
- **Bill will be returned to the Parliamentary Joint Tagging Mechanism to consider re-tagging of Bill to Section 76 Bill**
- **Some redrafting will have to be done**
- **If Section 76 Bill is approved, it will have to go to the Provinces for deliberation and voting**
- **More public consultations on fair use provisions**
- **Removal of retrospectivity clauses – only prospective royalties**
- **The above process could take a year or more**
- **Once Bill has finally been passed, Draft Regulations will be published for public comment**
- **Long delay ahead!**

Useful Resources on the Bill



- Latest version of the Bill - https://libguides.wits.ac.za/ld.php?content_id=47021252
- Copyright resourced on the SA Copyright reforms (2009 on wards)
<https://scholarlyhorizons.co.za/resources/copyright/>
- Genesis and Process of the Bill -
https://libguides.wits.ac.za/Copyright_and_Related_Issues/Bill_Genesis_Process
- Questions and answers on the Bill – see:
https://libguides.wits.ac.za/Copyright_and_Related_Issues/FAQs_CAB
- Fair use/fair dealing – definitions, benefits, best practice guidelines, different countries that have fair use or are considering fair use, etc. -
https://libguides.wits.ac.za/copyright_and_related_issues/fairuse_fairdealing

Conclusion



- **Bill long overdue - process from its genesis to date – 11 years!**
- **A Bill that would resolve many of the problems for research & the library and educational sectors has been delayed yet again**
- **Continues the ‘book famine’ for people with disabilities - delays ratification of Marrakesh Treaty**
- **Delays better provisions and royalty benefits for authors and creators – and long-overdue royalty rights for performers**
- **Delays Phase 2 amendments of 11 pieces of legislation relating to libraries, archives and cultural heritage under Third Cultural Amendment Bill 2008 (DSAC)**
- **Digitisation & preservation projects will continue to be restricted or stalled - Our cultural heritage is at risk**
- **Educational and library sectors need to get more involved – lobby for speedy solution**
- **Will have to continue working under restrictive current copyright law until Bill is finally passed**

Thank You

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My Copyright & A2K Issues Archives – (2009 – Dec 2020)

<https://africanlii.org/content/copyright-and-a2k-issues>

