

## South African Copyright Law and Humanities Research

17 September 2020

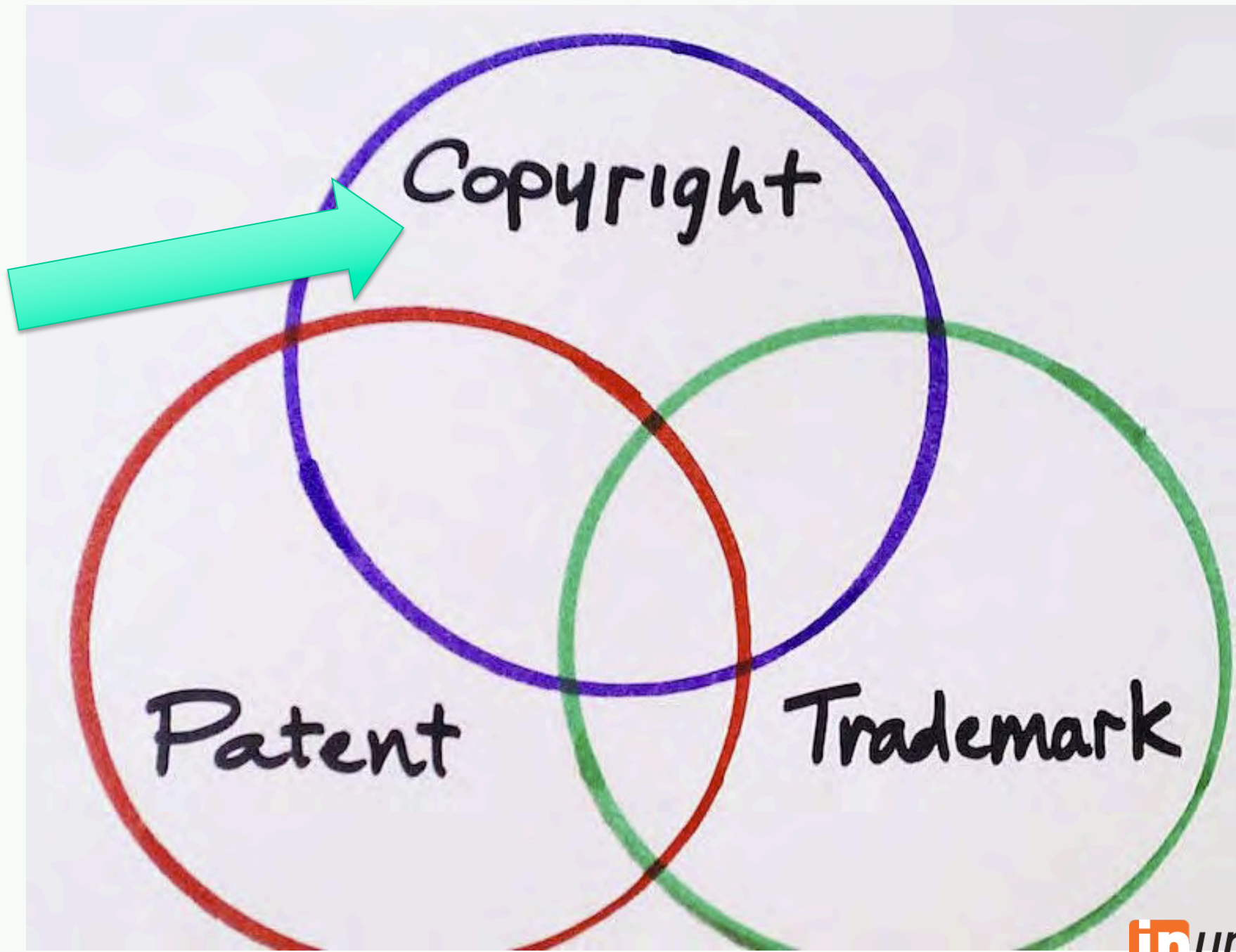
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<some general copyright remarks>



The way copyright laws around the world operate is that the moment creative works are created, creators get a time-limited **monopoly** that allows them to decide if and how others can use this work.





The scope of © protection in a certain country is determined by that country's domestic copyright laws; i.o.w. **there is no such thing as an "international copyright"**.

This said, domestic copyright laws have been harmonised through **international copyright treaties/instruments** such as the Berne Convention and the TRIPS Agreement.



**COPYRIGHT ACT  
NO. 98 OF 1978**

[View Regulation]  
[ASSENTED TO 20 JUNE, 1978]  
[DATE OF COMMENCEMENT: 1 JANUARY, 1979]







Why is digital so different as far a © is concerned?

- ✓ unlimited number of copies
- ✓ virtually instantaneously
- ✓ no loss of quality
- ✓ easy to modify
- ✓ easy to distribute
- ✓ distribution of copies around the world in seconds
- ✓ new search and linking capabilities
- ✓ Sometimes no human author
- ✓ "multimedia" works
- ✓ ...







## CHAPTER 1 COPYRIGHT IN ORIGINAL WORKS (ss 2-22)

### 2 Works eligible for copyright

(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright-

- (a) literary works;
- (b) musical works;
- (c) artistic works;
- (d) cinematograph films;

[Para. (d) substituted by s. 2 (a) of Act 125 of 1992.]

- (e) sound recordings;
- (f) broadcasts;
- (g) programme -carrying signals;
- (h) published editions;

[Para. (h) added by s. 2 of Act 52 of 1984.]

- (i) computer programs.



## Exclusive rights ("*use*"), e.g.

1. reproduce
2. make adaptations
3. broadcast
4. **distribute**
5. perform
6. display in public
7. cause a work to be transmitted in a diffusion service

# Basic requirements for © protection



1. Originality
2. Material form
3. (Qualified Person)

*No registration necessary*  
*The idea itself is NOT protected*



Default & automatic **All Rights Reserved** situation

→ permission is thus required for most uses, regardless of whether or not it is easy to locate / contact the © owner.

# Ownership



**Author** = (first) owner

but in **employer-employee relationships (incl. at universities)** the **employer** usually owns the copyright according to our © law

and contracts (eg funding or publishing contracts) often also affects © ownership...





# Duration of copyright protection in SA

- ✓ depending on the nature of work

- ✓ rule of thumb for **literary works, musical and artistic works** (other than photos): end of the year in which the author dies + 50 years

# Copyright infringement



## CHAPTER 2 INFRINGEMENTS OF COPYRIGHT AND REMEDIES

### 23. Infringement.

- (1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorize.



Assignment  
transfer of rights

Licensing  
permission to make  
use of copyrighted  
material

<humanities research-related questions concerning

**(1) the use of third-party material**

(2) (ownership) rights in the digitisation projects

# Use of third party material

- - Material in the “public domain”
- permission (licence) from the rights owner, incl. open licences such as Creative Commons
- Relying on copyright exceptions & limitations

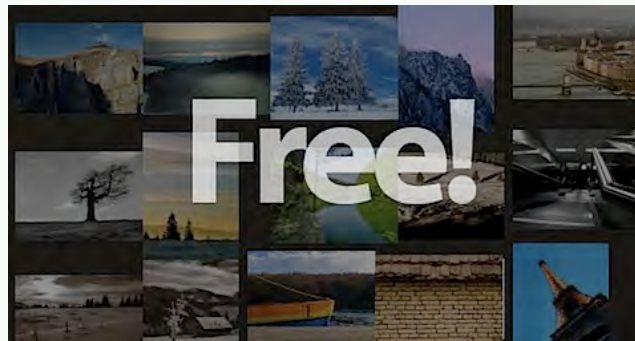


# The public domain

Public domain works are those **works whose use is not (or no longer) restricted by copyright**; they can freely be used, without permission –

but *moral* rights may still apply & what is in the public domain in SA may not be in the public domain elsewhere ((P) if accessible over the Internet)

- Copyright term is expired
- Works that are not copyright protected (in SA eg official texts of a legislative, administrative or legal nature)



# Use of third party material

- - Material in the “public domain”
- **permission** (licence) from the rights owner, incl. open licences such as Creative Commons
- Relying on copyright exceptions & limitations

Obviously, you may use third party material if you have permission from the rights owner(s) / CMO to do so.

- Case-to-case
- Blanket licence
- Open licence such as CC (upfront permission)

# Number of CC licensed works

# 1.4 BILLION

## CREATIVE COMMONS LICENSED WORKS





OPEN EDUCATIONAL RESOURCES

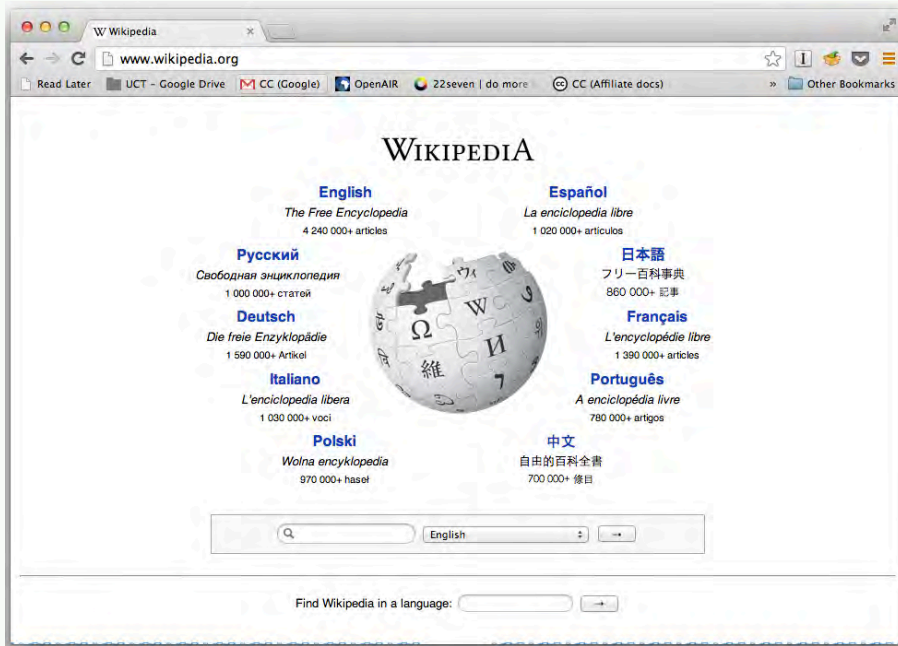


FORD FOUNDATION

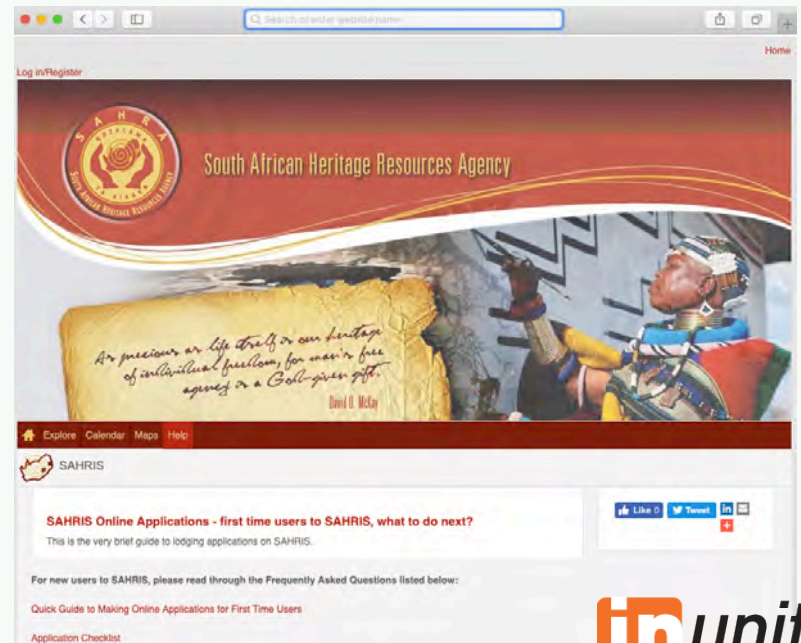
BILL & MELINDA  
GATES *foundation*







## Examples for heritage curation



# Use of third party material

- - Material in the “public domain”
- permission (licence) from the rights owner, incl. open licences such as Creative Commons
- Relying on copyright exceptions & limitations

# Copyright exceptions and limitations

Copyright e&l **curtail the exclusive rights** assigned by copyright law to the copyright holder. They do this **to promote the public interest** and to respect users' legitimate interests in using copyright protected material in certain circumstances **without the permission of the rights holder.**

## Relevant examples

- ✓ **Fair dealing** (for limited purposes: study, research, private use)
- ✓ Exceptions for **educational purposes**
- ✓ Exceptions for **libraries and archives**
- ✓ **Quotations**
- ✓ Etc.




But:

Often, the scope of **(educational) exceptions** and exceptions for **libraries and archives** is unclear, particular in the **digital environment.**"



# The Copyright Amendment Bill, 2017

<b>Bill Title</b>	Copyright Amendment	
<b>Bill Number</b>	B13B-2017	
<b>Last Updated Date:</b>	2020-07-20	
<b>Notes:</b>	2020-06-29	Bill returned to the National Assembly for consideration of the President's Reservations.
	2019-03-29	Parliamentary process complete. Bill to be submitted to the President for assent. <a href="#">Show more comments</a>
<b>Originator</b>	Minister of Trade and Industry	
<b>First Version Published:</b>	2017-05-16	
<b>First Referred To:</b>	Portfolio Committee on Trade & Industry (NA)	
<b>Tag:</b>	75 	
<b>Long title:</b>	To amend the Copyright Act, 1978, so as to define certain words and expressions; to allow for the reproduction of copyright work; to provide for the protection of copyright in artistic work; to ... <a href="#">Show more</a>	

## Bill Tracker





In SA, we do currently NOT have a general provision (like the US FAIR USE provision) that generally allows the permission-free use of copyrighted materials if certain requirements are met (incl. that the market of the original work is not adversely impacted)!!

# Exceptions and limitations

## “General exceptions from copyright protection



**12A. (a)** In addition to uses specifically authorized, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

- (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;
- (ii) criticism or review of that work or of another work;
- (iii) reporting current events;
- (iv) scholarship, teaching and education;
- (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
- (vi) preservation of and access to the collections of libraries, archives and museums; and
- (vii) ensuring proper performance of public administration.

**(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—

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

**(c)** For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.

## Specific exceptions from copyright protection applicable to all works

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

- (a) Any quotation: Provided that—
  - (i) the extent thereof shall not exceed the extent reasonably justified by the purpose; and
  - (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;
- (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;
- (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



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

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

(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.

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(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.

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(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.

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

(a) any work in its collection for the purposes of back-up and preservation: and

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<humanities research-related questions concerning

(1) the use of third-party material

(2) (ownership) rights in the digitisation projects

We experience problems around the free, public presentation of materials – like the writings of 19<sup>th</sup> century black authors – now held in commercial databases ... the core problem is really about the renewal or invention of expired copyright in new digital forms.

Boils down to the question: What rights do entities really have if they digitise (public domain) materials, e.g. do they own © in the digital copies? (*Not clear; grey area!*)

*No doubt, “digitisers” often claim some form of copyright in the digital copies but I am not so sure the law actually supports them in this.*

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*Was a new (derivative) **original** work created in the digitising process?*

*In SA we have a low standard for originality (by still following the “sweat of the brow” doctrine which considers effort and labour invested as sufficient for originality). If our courts were to confirm this approach then a new original work would arguably be created through digitising, however*

- *very few countries still follow the sweat of the brow approach and recent SA case law also seems to suggest some deviation from it (Moneyweb vs Media24)*
- *& if so, scans would only be protected – similar to the protection of photographs – if a creative spark (US) / intellectual creation (Europe) is involved in the digitising process, rather than “just” effort.*

We experience problems around the free, public presentation of materials – like the writings of 19<sup>th</sup> century black authors – now held in commercial databases ... the core problem is really about the renewal or invention of expired copyright in new digital forms.

This said:

*A compilation of works could, in SA, be protected separately as a “published edition”*

*And: © possible for layout etc aspects of the work (but not the work itself).*



We experience problems around the free, public presentation of materials – like the writings of 19<sup>th</sup> century black authors – now held in commercial databases ... the core problem is really about the renewal or invention of expired copyright in new digital forms.

Thus:

*Rather than relying on copyright here, it seems preferably for those who digitise / "own" commercial databases to rely on contractual (TOS) / drm measures to control access and allow monetisation –*

*but among other things, this comes at the expense of effectively locking up public domain works; usually without due regard to uses that are legally permitted under © law.*

Thank you!

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## “Licences in respect of orphan works

**22A.** (1) A person who wishes to obtain a licence to do an act which is subject to copyright in respect of an orphan work must make an application to the Commission in the prescribed manner.

(2) Before making an application in terms of subsection (1), the applicant must publish his or her intention to make such application by notice in the *Gazette* in English and one other official language, as well as in two daily newspapers having general circulation throughout the Republic in any official language.

(3) An application in terms of subsection (1) must be made in such form as may be prescribed and must be accompanied by copies of the published advertisement contemplated in subsection (2) and such fee as may be prescribed.

(4) When the Commission receives an application in terms of subsection (1), the Commission may, after holding such inquiry as may be prescribed, grant to the applicant a licence to perform any act which is subject to copyright, subject to subsections (5) and (6) and the payment of a royalty.

(5) A licence issued in terms of subsection (4) is non-exclusive and is subject to such terms and conditions as the Commission may determine.

(6) The Commission may not issue the licence in terms of subsection (4) unless the Commission is satisfied that the applicant has undertaken the following steps in locating the copyright owner:

- (a) Conducted a search of the database of the register of copyright maintained by the Commission that is available to the public through either the internet or any other means relevant to identifying and locating a registered copyright owner;
- (b) conducted a search of reasonably available sources of copyright ownership and ownership information and where appropriate, licensor information;
- (c) conducted a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert assistance;
- (d) conducted a search using any other database available to the public, including any database that is available to the public through the internet; and
- (e) undertaken actions that are reasonable and appropriate in terms of the facts relevant to the search, including—
  - (i) actions based on facts known at the start of the search and facts uncovered during the search;
  - (ii) actions directed by the Commission; and
  - (iii) the review of any records not available to the public through the internet that are known to be useful in identifying and locating the copyright owner.

# Orphan works, s22A

# Parallel importation, s28

- Now allowed, it seems.

# Exceptions and limitations

## Reproduction for educational and academic activities

**12D.** (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying does not exceed the extent justified by the purpose.

(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.

(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.

(4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—

- (a) where the textbook is out of print;
- (b) where the owner of the right cannot be found; or
- (c) where 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.

(5) The right to make copies shall not extend to reproductions for commercial purposes.

(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.

(7) (a) 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 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.