

Submission to Testify or submit a written testimony to the Parliamentary Committee on the Copyright and Performers' Protection Amendment Bills.

By Douglas Scott (President, Wikimedia South Africa)

Common terms

Freedom of Panorama..... FoP

Statement of Interest

This submission is being made by the non-profit [Wikimedia South Africa](http://www.wikimedia.org.za), to whom Freedom of Panorama (FoP) and related copyright issues are deeply important. FoP allows Wikipedia editors to effectively illustrate articles on the free online encyclopedia in over 280 languages on a wide range of topics.

Wikipedia is the 5th most visited website in the world, and the largest encyclopedia in history. It is created and maintained by volunteer editors from all over the world. Due to the way the Copyright Act is currently worded, it would prevent the use of a wide range of valuable images collected by volunteers to illustrate Wikipedia articles on a large number South African related topics.

We make this submission to request that the current South African law be amended to protect the right of FoP, namely the right to represent public works of art and architecture in other derivative works, such as in photographs or video. This could be achieved through either a specific exception or through an open list (i.e. open to purpose) fair use right in Sec. 12 of the Act.

Protecting FoP in the new bill would help to create a copyright framework that would maximise the public good from Copyright, without unduly eroding the rights of copyright owners.

Wikimedia ZA would like the opportunity to present the case for inclusion of Freedom of Panorama to the Parliamentary committee in addition to submitting this written comment on the bill.

Why FoP should be included into the new bill.

As the draft bill before Parliament currently stands, the citizens of South Africa do not have any legal protection or right to share photographs and other representations of copyrighted objects in public spaces, from artworks to building designs.

Examples

According to the language of the draft bill, people in situations such as the following are not protected:

- A photographer who captures an image of the publicly displayed bust of Nelson Mandela in the courtyard of Parliament in Cape Town and shares that photograph over social media like Facebook.
- A painter who earns a living by painting pictures that include the façades of buildings.
- A tourist whose vacation video of the V&A Waterfront includes a scene that focuses on the statues of Nobel Prize winning historic figures and wishes to share that video on YouTube.
- An architect who wishes to make a three dimensional rendering of the Orlando Stadium so she can 3D print a miniature for display at an exhibition of South African architecture.

It is unreasonable to require such individuals to seek permission from the copyright holders in common situations such as these, involving activities in which the public commonly engages without any damaging effect on existing copyright holders. A Freedom of Panorama clause will provide citizens with clear, predictable protection in such cases. For some of these examples, a fair use justification might be available under new Sec. 12 of the Copyright Act, as provided in Bill 12-2017, but it would be difficult for even well-informed users to know in advance whether their use would constitute “commentary” or “illustration” — the only two categories in the Bill’s current closed list of uses which are eligible for fair use treatment. This state of the law will discourage citizens who are aware of it from openly celebrating the full extent of our national heritage for fear of copyright violation.

In this way the current act and bill can be said to stifle innovation and cultural progress, the protection of which is the very purpose of copyright laws.

A specific example | Wikipedia

Although the new Bill does allow for fair use of otherwise copyrighted material if it is used for “illustration,” and favors such uses when made by non-profit educational purposes [Sections 12(1)(a)(v) and 12(1)(b)(iii)(bb)], this exception is not sufficient to cover the needs of the Wikipedia community in South Africa. This is because of how Wikipedia stores multimedia content for use on Wikipedia and how it is licensed for re-use.

Multimedia content that would be covered in South Africa by the Copyright Act, such as photographs, audio files, and video, is used to illustrate any of the over 280 language versions of

Wikimedia South Africa
www.wikimedia.org.za
Phone: +27 (0)79 515 8727

Postnet Suite # 146, Private Bag X 9190, Cape Town, 8000



Wikipedia. To avoid duplication, such content is centrally stored on a sister site known as Wikimedia Commons. Wikimedia Commons acts as a central repository for creative commons licensed content. Contributors provide images under a free license which expressly allows free re-use in educational, private and commercial applications when they upload their content to Wikimedia Commons. This allows their content to be used not only on Wikipedia, the free encyclopedia, but also in books, scientific articles, television programming and other media. But because the act of uploading material to Wikipedia is not, in itself, an exercise in “illustration” (or, for that matter, “commentary,” another category mentioned in the Bill), South Africans would be prohibited from contributing images depicting local things and places to Wikipedia Commons.

As the bill is currently written, when a person creates a picture which includes a public artwork, they do not have the right to distribute it without getting permission from the copyright holder of that public artwork. This means that although they might own their own photograph and can donate it, but without a relevant copyright exception, they can not upload it Wikimedia Commons for use on Wikipedia (or any other purpose) without permission from the owner of the artwork, building design, signage, or other copyrighted material depicted in it.

Getting that permission is often impossible. Often the owner of the public artwork is unknown so permission can not be obtained. Other times it is unclear. In other cases getting permission is just very difficult, for example from a municipality whose representatives, like most members of society, are unaware of this licensing therefore ignore permission requests.

This has created a distortion of depictions of South African cultural heritage on Wikipedia, as only photographs of public art and buildings that are older than fifty years from the death of the author (or, in some cases, from the publication of the work) can be uploaded. Where there are several authors, copyright extends until 50 years after the death of the longest lived of them. **This means that Wikipedia articles with depictions of colonial monuments are well represented while more recent monuments, such as monuments commemorating or celebrating the struggle against apartheid, are not and cannot be featured on Wikipedia.** The current Bill fails conspicuously redress this problem through a relevant exception.



This photograph (above) of the memorial statue of Nelson Mandela at the Union Buildings in Pretoria has had the statue censored out. Only in this way could it be used on Wikipedia as the current bill makes no provision for Freedom of Panorama. The Union Buildings themselves can be used as they are older than fifty years after the life of the author.

Wikimedia South Africa
www.wikimedia.org.za
Phone: +27 (0)79 515 8727

Postnet Suite # 146, Private Bag X 9190, Cape Town, 8000





This photograph (above) of Rhodes Memorial in Cape Town is currently used on Wikipedia as the building is older than than fifty years after the life of the author. Therefore no permission is required to use it and there is no need to argue fair use.

Freedom of Panorama is a global norm

Freedom of Panorama is increasingly becoming a global norm with more and more countries across the world incorporating it into their copyright laws so as to further the interests and expand the rights of the general public. One of the countries with the best Freedom of Panorama rights is the United Kingdom, on whose regulations the South African Copyright Act is based. This illustrates that FoP is compatible with local law.

See [section 62 of the UK Copyright, Designs and Patents Act 1988](#) where it is stated that:

(1) This section applies to—

- (a) buildings, and*
- (b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.*

(2) The copyright in such a work is not infringed by—

- (a) making a graphic work representing it,*
- (b) making a photograph or film of it, or*
- (c) making a broadcast of a visual image of it.*

Wikimedia South Africa
www.wikimedia.org.za
Phone: +27 (0)79 515 8727

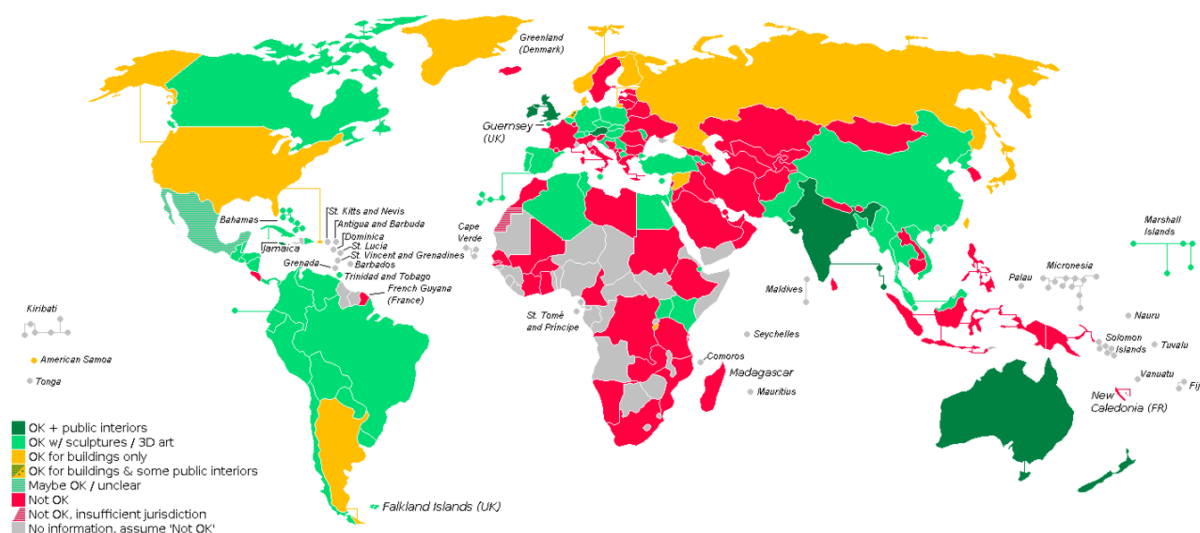
Postnet Suite # 146, Private Bag X 9190, Cape Town, 8000



(3) Nor is the copyright infringed by the issue to the public of copies, or the communication to the public, of anything whose making was, by virtue of this section, not an infringement of the copyright.

See also [Sculpture and Works of Artistic Craftmanship on Public Display](#), United Kingdom Design and Artists Copyright Society factsheet.

Below is a map of countries that have **strong Freedom of Panorama rights in dark green**, most notably India, United Kingdom, and Australia; countries that have generally adequate, Freedom of Panorama in light green; and Countries with **weak or absent** Freedom of Panorama rights in yellow and red respectively.



The Failure of the 2017 Bill to Protect Freedom of Panorama

Neither the current Act nor the 2017 Bill protects FoP.

Article 15(1) of the current Act provides a very limited exception for the incidental inclusion of an “artistic” work in a narrow range of other kinds of works (specifically, a cinematograph film or a television broadcast or transmission in a diffusion service). This exception falls short of the needs of Wikipedia and many other users. Firstly, it only applies to the depiction of artistic works, rather than to all works in public spaces, and it only applies to uses in a limited range of other works: it does not, for example, include photography, the main means of representing public works on Wikipedia. A better incidental use exception would apply to the use of any work, in any other type of work. The 2001 EU Directive on Copyright (Art. 3), for example, permits “incidental inclusion of a work or other subject-matter in other material.”

Secondly, the exception is only applicable to “incidental use,” and therefore does not appear to apply where the depiction of the work is the main subject of another work (as would be the case in many Wikipedia entries)

The 2017 Bill does not include a clear FoP right. Importantly, the fair use provision in Section 12 is subject to a closed list, meaning the purpose for the use of another work must be included in the list in order for the fairness criteria for the use to be applicable. As noted above, “illustration” and “commentary” are included in the closed list, but there it is difficult or impossible to predict how these undefined categories would apply. It seems unlikely, however, that they would be applied (for example) to an individual’s posting of personal photos or videos on a social media platform, or to a website organized to display photos of recently constructed buildings designed by South African architects.

Nor does it protect a street artist who might subsist on painting and selling street scenes that might include building facades or public artworks. And, as already explained, it fails to justify the worthwhile non-commercial practices of the Wikipedia community.

Options for Protecting Freedom of Panorama

Wikimedia ZA and our supporters are calling for Freedom of Panorama to be included into the new version of the South African Copyright Act. We strongly feel it is in the public interest and that it in no way hinders the rights of copyright holders.

The inclusion of the following, or something similar, into the language of Sec. 12A as proposed in the new Bill would be sufficient:

"Copyrights shall not be infringed by the reproduction, distribution, or by making available to the public of still or moving images including representations of public works located permanently in public roads and ways or public spaces. In the case of buildings, this authorisation shall only extend to the façades, external structures, and interior public spaces thereof."

We also advocate for the fair use right in Section 12 to be subject to an open list, e.g. through inclusion of the words “such as” before the current closed list of purposes. This would enable the clause to be adaptable to future uses in the digital environment that Wikipedia ZA and other South Africans may seek to use.

For additional information and examples please see the page on Wikimedia Commons that Wikimedia ZA created on “The importance of Freedom of Panorama for Wikipedia. For South Africa” at https://commons.wikimedia.org/wiki/Freedom_of_Panorama_ZA

Wikimedia South Africa
www.wikimedia.org.za
Phone: +27 (0)79 515 8727

Postnet Suite # 146, Private Bag X 9190, Cape Town, 8000

