

September 16, 2015

Meshendri Padayachy
Department of Trade and Industry
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South Africa

By email: Mpadayachy@thedti.gov.za

Dear Ms Padayachy,

COPYRIGHT AMENDMENT BILL –WIKIMEDIA ZA SUBMISSIONS

We welcome the opportunity to submit this recommendation to amend Section 15 of the Copy Right Act of 1978 to the Department of Trade and Industry on behalf of Wikimedia South Africa.

1. General Submissions and Recommendations:

Amend Section 15 to allow for Freedom of Panorama in South Africa whilst rationalising and simplifying it. Section 15 of the current legislation currently does not allow for Freedom of Panorama in South Africa thereby leading to a situation which we believe negatively impacts the public interest. Wikimedia South Africa proposes this amendment to the act as well as sets out why we believe this amendment is important. It also contains examples on why how the act currently limits Freedom of Panorama.

2. Specific Proposals:

Section of 1978 Act	Provision	Comments	Proposed Alternative (where applicable)
15	<p>Special exceptions from protection of artistic works</p> <p>(1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.</p>	<p>The incidental use exception in 15(1) is unduly restricted. It fails, for example, to authorize the incidental capture of audio-visual works (a television or radio in the background), photographs, or performances (e.g. a street band) of the kind commonly captured in cinematographic film. The exception also leaves out key works that commonly incidentally capture background material, such as photographs, paintings, etc.</p> <p>This recommendation is based on the one drawn up by the Joint Academic Comments on the South African Copyright Amendment Bill, 2015 which Wikimedia South Africa supports.</p>	<p>Special exceptions for incidental copying and with relation to works in public spaces.</p> <p>(1) The copyright in a work shall not be infringed by its inclusion in another work if such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work.</p>

15s	<p>(3) The copyright in an artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such work is permanently situated in a street, square or a similar public place.</p>	<p>The right of panorama in 15(3) is unduly limited. It should be expanded to include photographs and other images (such as paintings) as well as interior public spaces. This will promote a progressive Freedom of Panorama exemption. There are also a number of other issues expanded upon in the Additional Context and motivations sections that include:</p> <ol style="list-style-type: none"> 1. Undue limitations that negatively impact the public's ability to commemorate recent history such as the struggle against apartheid. 2. Possible loophole in exclusions with regards to taking stills from film that undermines the legitimacy of the existing act by appearing arbitrary. <p>This recommendation is based on the one drawn up by the Joint Academic Comments on the South African Copyright Amendment Bill, 2015 which Wikimedia South Africa supports.</p>	<p>(2) It shall be permissible to reproduce, distribute and make available to the 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 and interior public spaces thereof.</p>
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15	(4) The provisions of section 12 (1), (2), (4), (5), (9), (10), (12) and, (13), (14) and (15) shall mutatis mutandis, in so far as they can be applied, apply with reference to artistic works.	<p>The statute is difficult to understand and would greatly benefit in terms of public accessibility and understanding by its removal. Otherwise, by default, they apply to all works and performances.</p> <p>This recommendation is based on the one drawn up by the Joint Academic Comments on the South African Copyright Amendment Bill, 2015 which Wikimedia South Africa supports.</p>	Delete
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3. Additional Context and Motivations

We emphasise that amending the Copyright Act in its current outdated form is a necessary and welcomed endeavour and acknowledge our thanks to the Department for driving for a reformed Copyright Act that accounts in particular for a digital economy and digital public services, in particular voluntary ones, such as Wikipedia the online free encyclopaedia.

3.1 Examples on how the current act negatively impacts Freedom of Panorama

Since 2012 Wikimedia South Africa has held an annual photographic and media contest focused on monuments for use on Wikipedia thereby providing a free public service. As part of the competition members of the public are invited to photograph monuments and public spaces that are important to their community and the country as a whole so they can be donated to the global public by being uploaded on Wikimedia Commons.

Wikimedia Commons is a central repository for all the different language Wikipedias around the world (such as Afrikaans language Wikipedia) and a number of other free to use volunteer driven Wikis such as Wiki Voyage (for travelers and tourists) or Wiki News or Wiki Books or Wiki University (for free university educational material).

Because of the current wording of the Copy Right Act of 1978 and the vaguely worded exemptions –as set out in section 15- outlining what will not infringe the copyrights of an artist or owner of a work of art the a number of images cannot be submitted to Wikimedia Commons and so are not admissible to the Wiki Loves Monuments competition in South Africa.

Monuments or public works of art that were build longer than the life the author/artist/architect plus 50 years are fine as any claim on copyright or rights related to taking any renderings of it have long expired. This means that any monument build during South Africa's colonial period such as Rhodes Memorial (build in 1902) are perfectly admissible (see figure 2).

However recently built or installed works of public art such as monuments which are still covered by the life of the author plus 50 years requirement and for which no exclusion is made due the public nature of the artwork are not covered even though the general public seems to be in complete ignorance of this and it is – we argue- against the public interest to limit Freedom of Panorama in this case. So a photograph of a monument built recently to commemorate the struggle against apartheid would not be admissible to Wikimedia Commons and so could not be submitted to Wiki Loves Monuments. Such as the photograph of the monument at the Nelson Mandela capture site in Howick (see figure 1).



Figure 1: This photograph of the Nelson Mandela Capture site monument near Howick in Kwazulu Natal is not admissible to Wiki Loves Monuments because the current wording of the act does not allow for recently build public works of art. Copyright of the photographer of this image is also not an issue as the photographer has released his image under a creative commons licence.



Figure 2: This photograph of Rhodes Memorial (with the copyright of the photograph released under a Creative Commons licence) in Cape Town (built in 1902) is admissible to Wiki Loves Monuments as any copy right or rights on distribution by the 'artist' or 'owner of the art' has expired.



Figure 3: This photograph of the Cape Town Stadium is not allowed on Wikimedia Commons because of the current act.

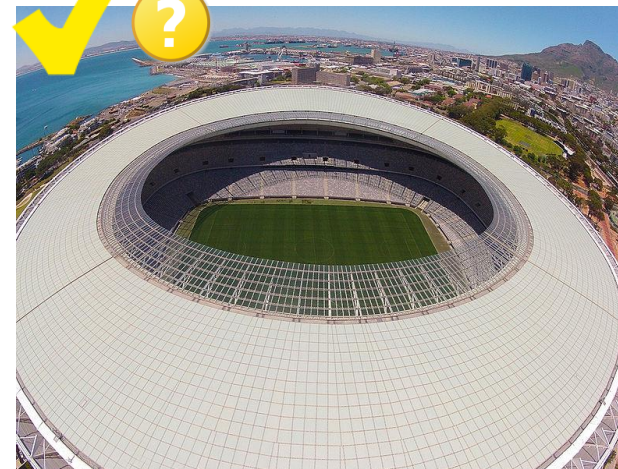


Figure 4: This photograph of the Cape Town Stadium is arguably allowed on Wikimedia Commons because it is a still from video footage.

Why fair use will not help in this case

Because all submitted media must be submitted to Wikimedia Commons, the central repository, for efficient and easy use and indexing (being able to find the media is very important as it allows other people find content and know of its existence) fair use rights would not help as fair use could only be argued for when the media is actually used on Wikipedia. However if it is just being stored on a central repository waiting to be used fair use cannot effectively be argued for. In order to best protect the rights of copy right holders around the world Wikipedia has taken a policy decision to take the strictest possible interpretation of copy right law. This example could also extend to the sharing of photographs for non-commercial purposes on social media sites such as Facebook and Instagram where the sites at as both a repository and distribution service. However Wikimedia South Africa would like to voice its support for a broadening of fair use rights in any new act.

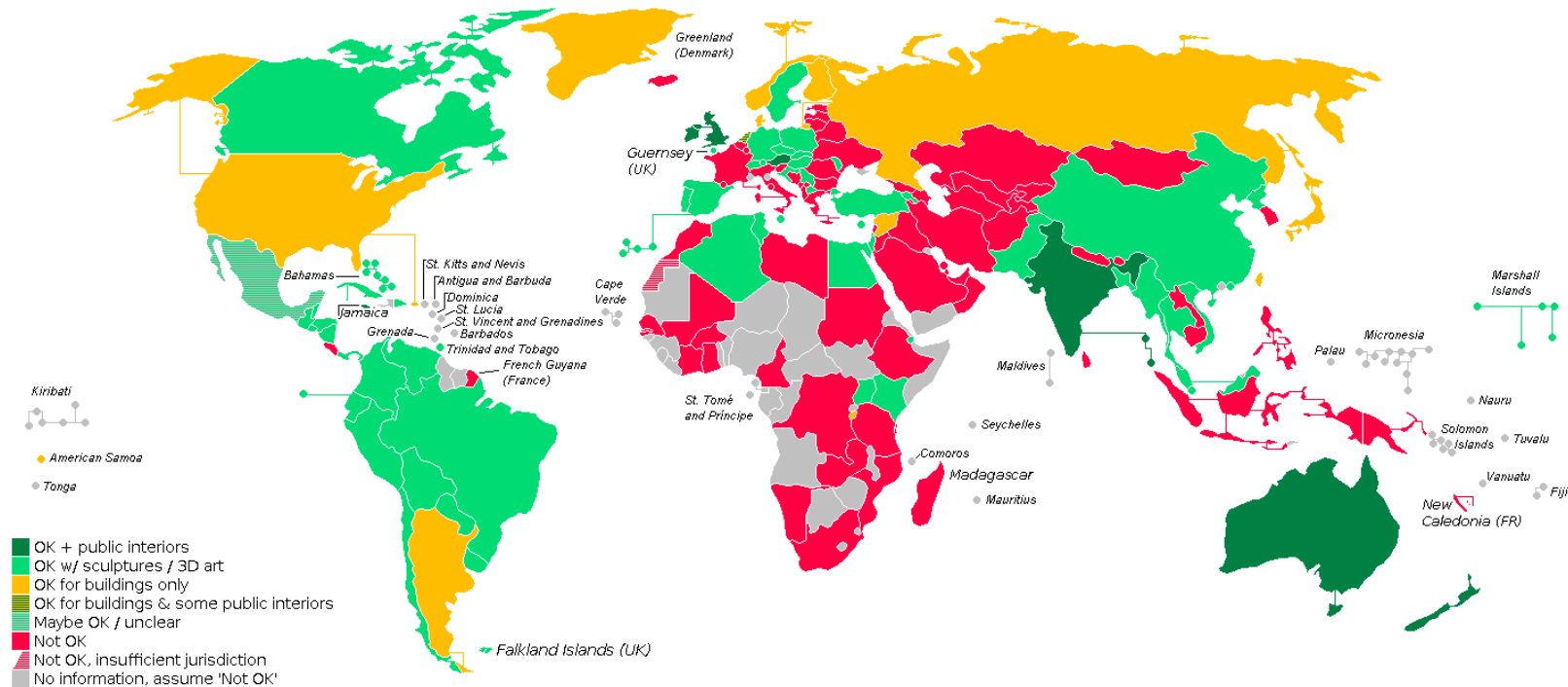
Possible loophole in existing Act

A possible loophole in the current wording arises because of the exclusion of “cinematograph film or a television broadcast” in the subsection 3 of Section 15. It means that although we cannot upload photographs the act could reasonably be interpreted to allow for people to film public works of art, then take stills from that film, and submit them to Commons instead (see figure 4). This creates a perverse outcome whereby one cannot photograph a recently built public artwork or building of –for example- the Cape Town Stadium (see figure 3) but they can film that building, then take a still from the film, and release that instead (see figure 4). It would be more straightforward and simpler to just allow for a broad allowance of photographs in subsection 3 of section 15 as mentioned in the recommendation above.

3.2 Freedom of Panorama

“Freedom of panorama (FOP) is a provision in the copyright laws of various jurisdictions that permits taking photographs and video footage and creating other images (such as paintings) of buildings and sometimes sculptures and other art works which are permanently located in a public place, without infringing on any copyright that may otherwise subsist in such works, and to publishing such images. Panorama freedom statutes or case law limit the right of the copyright owner to take action for breach of copyright against the creators and distributors of such images. It is an exception to the normal rule that the copyright owner has the exclusive right to authorize the creation and distribution of derivative works. The phrase is derived from the German term Panoramafreiheit ("panorama freedom").” – Wikipedia (accessed on the 14 September 2015)

Over 76 countries allow for Freedom of Panorama in varying degrees with only 58 countries not allowing for it. South Africa is currently one of the countries -due to the ambiguity of the wording of Section 15 of the Copy Right Act of 1978- that does not currently allow for Freedom of Panorama.



Seven countries (India, New Zealand, Australia, Switzerland, United Kingdom, Netherlands, and Ireland) allow for full freedom of panorama including public interiors. The trend internationally is for the allowance of ever greater Freedom of Panorama. The map above illustrates the countries that allow for Freedom of Panorama in some form (in green and yellow) and countries that do not allow for Freedom of Panorama (in Red) in the year 2014. For more information [see the page](#) on Wikimedia Commons about Freedom of Panorama around the world.

Importance of Freedom of Panorama

Arguably the most significant reason why Freedom of Panorama is important is because without it the Act effectively brings millions of South Africans into conflict with copyright law as it creates needless and onerous administrative hurdles that the average person is ignorant of whenever they take photographs for non-commercial purposes to share with friends and family, increasingly over a modern social media platform such as Facebook or Instagram. For example, if a person goes to the Nelson Mandela Capture Site memorial on vacation and takes a photograph of the location to share with friends and family on Facebook or other type of internet based social media it they currently need to 1) be aware that they need to check its copyright/release status, 2) to find out if that work of public art (or building) is still protected by copyright, 3) if it is then they would need to find out who is the copyright holder, 4) seek permission from the copyright holder to share the photograph. They need to meet these requirements before they can share this photograph over a digital platform all of which is currently done every day by a great many other wise law abiding people at the touch of one or two buttons.

Problems with each of these steps:

1. Very few people are aware of Section 15 of the Act or aware of its implication in the way they share their photographs and other media over a network like the internet. As such it is highly unlikely that an average person would know they need to think about securing permission from the owner of a public work of art. This extends to larger organizations such as municipalities, companies, and government officials.
2. It is exceedingly difficult to find out if a public site is copyrighted. They could investigate its historical status to see if the copyright has expired by determining its age but they might not be available. If the owner of the artwork (in this case most likely the local municipality) wants to grant permission there is no central database they can put that on for people to look it up on and even if such a database existed we believe it would still be unreasonable to expect both parties to register and look up details on it every time they wished to take a photograph.
3. If a person was aware of its copyright status they would need to know who owned the item. This would take some time and investigation and might not produce any results. In our experience a great many of these public works of art or owned by local municipalities that are themselves unaware of this requirement of the act and simply assume that people are allowed to photograph and share those photographs as they wish as this is regarded as the most reasonable state of affairs.
4. If a person has managed to find out who the copyright holder is to gain permission from to distribute their photograph and are able to ask for it they will have to wait some time (days or weeks) before getting a response. If the local municipality owns the copyright then they will have to go through numerous time consuming bureaucratic hurdles to seek that permission. Most of the time the municipality or government office will be unaware of this requirement and simply assumes that people are allowed to photograph and share those photographs of public spaces as they see fit so they do not have any systems to deal with such requests which further hinders the process of gaining permission.

Restrictions on Freedom of Panorama also greatly complicates the business of journalists, professional photographers, whose activities are commercial, but who have for decades been able to rely upon the public space as a resource that can be used freely by anybody without having to negotiate a licence first. If one goal of copyright law is to stimulate the creation of new art and information, restricting Freedom of Panorama would clearly be counter-productive. In contrast to some artists relying on the public space to create their works, the main source of income for architects certainly isn't the sale of illustrations of the finished building. It's easy to see that the overall effect of a restriction of Freedom of Panorama for creators would be negative.

Finally, a non-commercial restriction is problematic for the use in projects that rely on freely licensed works. As mentioned before Wikipedia does not accept any pictures with restrictions that contradict the Open Knowledge Definition and this includes non-commercial clauses, even though the Wikimedia Foundation that runs Wikipedia is itself not aimed at making a profit. This effectively prevents all pictures of public buildings and permanent artworks depicting a work whose author has not been dead for over 50 years in South Africa are not usable on Wikipedia. This reduces the overall quality of articles on South African topics on Wikipedia thereby negatively impacting the free sharing of knowledge. It also limits people's understanding and appreciation of South Africa if places and concepts encapsulated in public works of art cannot be used to illustrate them.

The ability to freely share information of all kinds, from text to images, is core to Wikimedia's mission of making all knowledge available to everyone. The availability of knowledge of all kinds to all is, we feel, strongly in the interests of the general public. Having Freedom of Panorama in a country helps facilitate and abridge the communication and accessibility of knowledge to the general public.

Further to our submissions above, we would be very pleased to provide any further information that you may require to support the finalisation of the Bill and welcome engagement with the Department to this end.

Yours faithfully,

A handwritten signature in black ink that reads "D Scott". The signature is fluid and cursive, with the first letter 'D' being particularly large and stylized.

Douglas Scott

President

Wikimedia South Africa



Wikimedia South Africa is a Wikimedia chapter for the Republic of South Africa. It is incorporated as a Section 21 non-profit-making organisation under South African law. It was founded locally on 25 February 2012 after being approved as a chapter by the Wikimedia Foundation (the organization that runs Wikipedia) on 26 March 2011 as an independent volunteer driven entity to help represent the South Africa wiki contributing community. This includes projects such as Wikipedia, Wikimedia Commons, Wiki Source, Wiki News, Wiki Voyage, and other Open Content wikis.