



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**Copyright Amendment and Performers
Protection Amendment Bills**

**Presentation to the Portfolio Committee of Arts and
Culture
Cape Town
16 May 2017**

Presenters

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Purpose

The purpose is to update the PC of Arts and Culture on the processing of the Copyright Amendment Bill and the Performers Protection Amendment Bill of Trade and Industry

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Background

Background:

- Intellectual Property (IP) consists of Industrial Property: Patents, Designs and Trademarks and Copyright. Copyright is part of IP.
- In 2013 a Draft IP Policy was published.
- Copyright and related rights were consulted upon.
- Departments consulted: the Department of Environmental Affairs (Biological/Genetic resources-support), Department of Arts and Culture (Heritage and Cultural issues) – Support the IP Policy, Department of Telecommunications and Postal Services (ICT, Digital and Broadcasting), Department of Communications (Communications)- Support the IP Policy and hold the position in regards to the WIPO digital treaties that Broadcasters must only own the signal and not the content, Department of Health (access to public health and medicines)- Supports the IP Policy, Department of Science and Technology (Publicly funded research, Technology transfer)- Support the introduction of an SSE and encourage the use of a utility model for incremental innovation, Department of Sport and Recreation (mega sporting events), and the Department of Energy (IP and energy technologies)- Support the IP Policy and ask that the Patents Act, 1978 and the Nuclear Energy Act, 1999 be aligned for purposes of State security.
- Ministers consulted: International Relations and Cooperation, State Security, Justice and Constitutional Development, Sport and Recreation, Science and Technology, Finance, Cooperative Governance and Traditional Affairs, Communications, Police,

Background

Background:

- Basic Education, Agriculture Forestry and Fisheries, Arts and Culture, Water and Environmental Affairs, Health, Women Children and Persons with Disabilities, Higher Education and Training, the Presidency, Defence and Military Veterans, Economic Development, Home Affairs and Mineral Resources.
- International Organisations consulted: World Trade Organisation, World Intellectual Property Organisation, South Centre, Food and Agriculture Organisation, United Nations Conference on Trade and Development, Intellectual Property Office of the UK and World Health Organisation.
- National Stakeholders: Pharmaceuticals, Generics, Universities and Technikons, NGOs, Academics, Legal: Attorneys and consultants, Broadcasters, Collecting Societies, Authors, Publishers, Photographers, Producers, Actors, Musicians, Galleries, Art Institutions, Creative Industries and Anti Counterfeiting Agencies.
- Inputs from the above were analysed and produced policy direction. (Annexure A)
- Bills drafted accordingly.
- Cabinet approved for wider publication in June 2015, Bills published for wider consultations 27 July 2015. Consulted nationally and internationally, 122 written submissions received.

Background

Background:

- Copyright Review Commission (CRC) established and made recommendations of effective collective management system.
- Issue of local content was pronounced upon for public and private radio stations. The CRC Task Team did recommendations to the Inter Ministerial Committee (IMC).
- Cabinet Approved Bills for introduction into Parliament on the 8th of June 2016.
- The Copyright Amendment Bill is on the verge of introduction into Parliament whilst the Performers Protection Amendment Bill has already been introduced.
- Both the Bills are amending Copyright and Related rights and are therefore enriching previous amendments such as the Intellectual Property Laws Amendment Act 2013.
- In 2010 the **dti** commissioned a study through the World Intellectual Property Organisation (WIPO) to research the benefits coming from the copyright based industries in South Africa.
- In 2014 the **dti** commissioned a RIA to be conducted on the Draft National IP Policy 2013.
- In 2016 Socio Economic Impact Assessments (SEIAS) were completed on both Bills; the proposed legislative amendments will achieve the intended outcomes and offer authors and creators of copyright works the benefits due to them if education and awareness and the regulatory capacity of the CIPC are intensified.

Objectives of the Bills

- To develop a legal framework on Copyright and related rights that will promote accessibility to producers, users and consumers in a balanced manner; this includes flexibilities and advancements in the digital space that should empower all strata of the citizens of South Africa. (CRC Report, NDP and Draft IP Policy)
- To address the licensing of Copyright works/material in relation to commissioned work to facilitate commercial exploitation by any person so licensed.
- To ensure that IP legislation remains updated in view of the ever evolving digital space; that current legislation does not limit access to education; that access to information and resources are available for persons with disabilities and that artists and authors of works do not die as paupers due to ineffective protection.

Objectives of the Bills

- To provide exceptions and limitations in order for South Africa to address national needs, to encourage international organisations to take into consideration “new emerging issues” in the area of Copyright which enhances access to and use of copyright works.
- To enhance access to information for the enhancement of education and research and payment of royalties to alleviate the plight of the creative industry.
- The Appendix to the Berne Convention (incorporated into the TRIPS Agreement) allows developing countries to make use of compulsory licensing (use of protected works without authorisation but paying remuneration) in respect of the rights of translation and reproduction for educational purposes.

Discussion

Issues to be introduced into the Copyright Amendment Bill	What the Bill provides
WIPO Copyright treaty (WCT)	WCT is under the Berne Convention and the Bill deals with the protection of works and rights of authors in the digital environment.
Films, TV and Radio Shows, Photographs	The commercial re-use of works such as the rebroadcasting of films in the area of copyright without any compensation to the author is unfair. (Value Chain) ISBN for books
Introduction of a Private Copy Levy	Ensures that performers, songwriters, music publishers and makers of sound recordings receive compensation for copies of their work that are made by individuals for private use.

Discussion

Issues to be introduced	What the Copyright Amendment Bill provides
Collection of Royalties/ Royalty Management	<p>There shall be one Collecting Society per copyright set of rights with regard to all music rights such as performance, needletime and mechanical...”</p> <p>“In cases where there is no Collecting Society, contractual arrangements between copyright owners and creator shall be prescribed by the Minister.”</p> <p>Conditions in the licence (CRC)</p>

Discussion

Issues to be introduced	What the Bill provides
Reciprocity on Needle Time	A Collecting Society may enter into an agreement with any foreign society or organisation administering rights corresponding to rights under this Act, to entrust to such foreign society or organisation the administration in any foreign country of rights administered by the said Collecting Society in the Republic: Provided that no such Collecting Society or organisation shall permit any discrimination with regard to the terms of licence or the distribution of royalties collected.

Discussion

Issues to be introduced	What the Bill provides
Collecting Societies to collect only for their registered members	Collecting societies practice of distributing unallocated revenues is unacceptable
Exceptions and Limitations	principal Act makes provision for exceptions and limitations for libraries, museums, galleries and people with disabilities.
Marrakesh Treaty	makes provision for making accessible formats of a work to accommodate persons with print disabilities, the blind and visually impaired. However the African position and the Bill are for all disabilities not just the blind.

Discussion

Issues to be introduced	What the Bill provides
Minimum Contractual terms	This is so as to safeguard the rights of contracting parties. the dti must develop a standardised template of terms and conditions for contracts for the creative industry, for example between performers and recording companies. Recommendation: Contracts for the whole creative industry and the vulnerable.
All collecting societies must be regulated by the Companies and Intellectual Property Commission (CIPC)	There shall be one Collecting Society...to be registered and regulated by the Commission (CIPC)." IP tribunal access and speedy resolutions... companies law model

Discussion

Issues to be introduced	What the Bill provides
Resale of Original Work of Art	<p>The Artist's Resale Right means that an artist could be entitled to a royalty when their work is resold (threshold amount can be identified UK), with the involvement of an auction house, gallery or dealer. Supported by the DAC and DST.</p> <p>Sliding Scale, Fixed Rate, collecting society</p>
Local Content	<p>Quotas for radio stations. 80% public 60% commercial/private Linked to matter of performers protection.</p>



Discussion

Issues to be introduced	What the Bill provides
Orphan Works Exceptions and Limitations	Ownership of any copyright whose owner cannot be located, is unknown, or is deceased shall vest in a trust or Guardian Fund: Provided that if the owner of such copyright is located at anytime, ownership of such copyright shall revert to such owner.

Discussion

Issues to be introduced	What the Bill provides
Fair Use of Copyright Work	<p>Allows for the reproduction of copyright material for certain uses or purposes without obtaining permission and without paying a fee and without paying a royalty. Limited circumstances have been provided for.</p> <p>Furthermore, this section stipulates the factors that need to be considered in determining whether the use of a copyright amounts to fair use.</p> <p>Temporary copying exception introduced as well.</p> <p>Fair use Model such as the United States (US), jurisprudence developed, the US cannot challenge the law. SA courts can develop their own jurisprudence like in Company Law-no codification of law.</p>

Discussion

Issues to be introduced into the Performers Protection Amendment Bill	What the Bill provides
Beijing Treaty on Audio Visual Performances	Grants performers four kinds of economic rights for their performances fixed in audio visual fixations (1) reproduction(direct or indirect reproduction in any manner or form)(2) distribution (making available to the public the original and copies through sale or transfer of ownership); (3) rental (commercial rental to public of original and copies) (f) making available (the right to authorise the making available to the public by wire or wireless means etc) Giving performers in Audio Visual Performances moral rights.



Proposed Amendments Performers
Rights

**Issues to be introduced into the
Performers Protection Amendment
Bill**

Beijing Treaty on Audio Visual Performances

What the Bill provides

The main difference between the BTAP and the 1961 Rome Convention is that, whilst the latter only awarded performers the right to oppose certain uses of their performances, the former grants them a comprehensive list of exclusive rights, including the right of making available on demand, which has become essential in light of the latest technological developments and the digital distribution of creative works. The BTAP also awards audiovisual performers moral rights, which were not included in the Rome Convention. By far the most striking difference however is the fact that, the BTAP specifically protects audiovisual fixations, whilst the Rome Convention did not.



Discussion

Issues to be introduced into the Performers Protection Amendment Bill	What the Bill provides
WIPO Performances and Phonograms Treaty(WPPT)	Both the performer and producer of a phonogram shall enjoy the right to a single equitable remuneration in terms of the Bill. Provides economic and moral rights for performers of phonograms.

Legislation

Legislation of other Departments that may be impacted on:

- IP including Copyright is transversal i.e. ICT, business, creative industries, trade and science.
- The following legislation may be effected by the Amendment Bills:
 - **The National Development Plan** as all legislation is required to be aligned to the NDP;
 - **Legal Deposit Act 54 of 1997** - Legal Deposit Act, 1997 requires publishers to provide five copies of every book published, if the print run consists of 100 or more copies;
 - **South African Library for the Blind Act 91 of 1998** - provides for the functions of the Library, which aims, inter alia, to build up the appropriate collections of South African and other documents for the use of blind and print-handicapped readers. The Act provides that the fees or royalties paid to the Library of the Blind constitute, among others, one of the sources of the Library funds (Section 13(d)).
 - **National Archives and Records Service of South Africa Act 43 of 1996** - To provide for a National Archive; the proper management and care of the records of governmental bodies; and the preservation and use of a national archival heritage; and to provide for matters connected therewith.

Legislation

- **Revised White Paper (White Paper) on Arts, Culture and Heritage (ACH)** - conveys government's current vision for ACH and the Cultural and Creative Industries.
- **Electronic Communications Act (DOC)** - It applies to any form of communication by e-mail, the Internet, SMS etc except for possibly voice communications between 2 people. The ECT Act is also "an enabling" piece of legislation in that it provides functional equivalents for paper-based concepts (including writing, original and signature)

International Treaties

International Treaties affecting Copyright and Performers Protection:

- **Trade Related Aspects of Intellectual Property (TRIPS Agreement)** administered by the World Trade Organisation, South Africa is a member;
- **WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), South Africa is not a member;
- **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations** administered by WIPO, International Labour Organisation (ILO) and United Nations Educational Scientific and Cultural Organisation (UNESCO), South Africa is not a member;
- **The Beijing Treaty for Audio Visual Performances (BTAP)** administered by WIPO, South Africa is not a member;
- **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs;
- **Marrakesh Treaty** (South Africa not a member): to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled and
- **Berne Convention** (South Africa is a member): deals with the protection of literary and artistic works.

Recommendations

- PC should take note that the Bills do not intend to repeal any law relating to copyright and related rights.
- PC should confer with PC of Communications regarding the issue of (music) local content: 80% (public) / 60% (private).
- PC should foster coordination of enforcement agencies to deal with piracy and counterfeiting.
- PC must take note of the Economic Study of the Contribution of Copyright based Industries, Regulatory Impact Assessment (RIA) and Socio Economic Impact Assessment (SEIAS Report).

CONCLUSION

- Performers are often in a very weak bargaining position and forced to transfer all their economic rights to producers in perpetuity for little more than a symbolic payment.
- Gives the creator of the work a bundle of exclusive rights to control the economic use of his/her work.
- Copyright and related rights can generate an income. (Copies or a license)
- **Moral rights** are essentially meant to help performers uphold their reputation. Typically, they include the right of paternity (i.e. the right to be named as the performer of one's performance) and the right of integrity (i.e. the right to oppose any alteration of the performance that may be prejudicial to the reputation of the performer).
- As they are closely linked to the performers' personality, they belong to the performer independently of his or her economic rights, and even after the transfer of those rights, and are protected at least just as long.
- Most of the **economic rights** granted by the BTAP are exclusive rights. Broadly speaking, these give performers maximum leverage, enabling them to authorise use against the promise of a fair payment, e.g. a residual or a royalty payment.

CONCLUSION

- There are Intellectual Property Rights in terms of the TRIPS Agreement-Articles 6,7,8 should be applied in a balanced manner for the benefit of both producers, users and consumers.
- It will be wrong to allow one stakeholder to usurp all the benefits at the expense of other stakeholders.
- The Bills really want to balance the equation in the area of copyright and related rights.
- IP is cross cutting music, ICT, arts, trade etc. and therefore a coordinated approach is required.
- Joint Briefing on the Bills should be had with the Portfolio Committees of Trade and Industry, Arts and Culture and Communication to ensure that each Department is aligned in terms of their mandate to protect IP and ensure that legislation is coordinated.



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Thank You