



**the dti**

---

Department:  
Trade and Industry  
**REPUBLIC OF SOUTH AFRICA**

Responses by the dti to stakeholder submissions on the Copyright  
Amendment Bill 2017

**Presentation to the Portfolio Committee on  
Trade and Industry**

**18 August 2017**

## Presenters

**Mr Lionel October: Director-General, the dti**

**Mr MacDonald Netshitenzhe: Acting Deputy-Director General,  
Consumer and Corporate Regulation Division (CCRD)**

**Ms Meshendri Padayachy: Deputy Director: Intellectual Property  
Law and Policy, CCRD**

**Ms Zandile Nkonyane: Chief Director: Monitoring, Evaluation  
and Socio Economic Impact Assessment.**

**Mr Nkosinathi Mkhonza: Intellectual Property Law and Policy,  
CCRD**

**Ms Dineo Masha: Socio Economic Impact Assessment, CCRD**

## Purpose

The purpose of this presentation is to provide inputs and responses to the Portfolio Committee on Trade and Industry on the submissions on Copyright Amendment Bill, 2017

## Background

### Background:

- Intellectual Property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. IP is divided into two categories, namely:
  - ✓ **Industrial Property:** includes inventions (patents), trademarks, industrial designs, and geographic indications of source, AND
  - ✓ **Copyright and Related Rights:** includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.
- In 2013 a Draft IP Policy was published and 118 written submissions were received.
- Copyright Amendment Bill (Copyright and Performers Protection Amendment Bill) were consulted upon and 122 written submissions were received.
- Presidential Task Team (led by DM Manamela at the Presidency) and the Presidency (Budget Speech 2016/2017) want these Bills to be concluded.

## Background

### Background:

- Copyright Review Commission (CRC) established and made recommendations of effective collective management system:
- ✓ South Africa should amend its Copyright Act by adopting inter alia the right to communicate literary and musical works to the public and the right to make available copies of sound recordings;
- ✓ The copyright law should be amended to allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant collecting society (SAMPRA, NORM or SAMRO);
- ✓ Legislation be amended to allow for one collecting society per set of rights with regard to all rights governed by the Copyright Act of 1978 (performance, needle time and mechanical rights).
- ✓ The law should be amended to allow for all music-rights collecting societies (SAMRO, NORM and SAMPRA) to fall within the ambit of the regulations issued under the Act;

## Background

### Background:

- ✓ The legislation to be amended as follows: retention of music usage information to be compulsory for essential music users;
- ✓ The Copyright Act must be amended to allow rights holders (as well as users) to engage the Copyright Tribunal in disputes about the appropriate tariffs to be applied;
- ✓ The Acts should be amended to provide that needle time be divided equally between the owner(s) of the copyright in the sound recordings and the owner(s) of the neighbouring right to needle time
- ✓ The Copyright Act must be amended to include a section modeled on that the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence;
- ✓ The definitions of local music contained in the EC Act should be enlarged;
- ✓ The Copyright Act should be amended to adopt the right 'to communicate the work to the public' and the 'making available' right as two new exclusive rights of copyright owners;

## Background

### Background:

- Through the public participation process the **dti** began to unpack the issues facing the audio visual performers in South Africa:
  - ✓ Repeat Fees;
  - ✓ Commercial Exploitation Contracts and
  - ✓ The accession to the Beijing Treaty on Audio Visual Performances.
- The Bill is amending Copyright and Related rights and is 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) was completed on the Bill; 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.

## Problem Statement

- The sector is currently not organised for bargaining purposes.
- Lack of formalisation of the creative industry which exposes it to abuse.
- Piracy / Counterfeiting is rife and enforcement agencies not coordinated.
- Unfair Contracts resulting in the perpetual signing away of their economic rights and the lack of updated industry contracts for freelance performers.
- Non - Payment of Royalties in the form of Repeat Fees and Commercial Exploitation for Actors.
- Non – Recognition of the Moral and Economic Rights of performers.
- Non – Ratification of Treaties that make provision for the recognition of the Moral and Economic Rights.
- Non – payment of Needletime royalty.
- Reciprocity regarding payment of royalties from other jurisdictions.
- Disputes not resolved speedily.
- The digital environment is not catered for in the principal Act.(Non ratification of digital Treaties)

## Treaties Informing the Bills

- **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; and
- **The Beijing Treaty for Audio Visual Performances (BTAP)** administered by WIPO, South Africa is not a member.

## Treaties Informing the Bills

- **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, South Africa is not a member;
- **Marrakesh Treaty** (South Africa not a member): to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, South Africa is not a member; and
- **Berne Convention** (South Africa is a member): deals with the protection of literary and artistic works.

## Proposed Amendments

<b>Matters raised by Stakeholders:</b>	<b>Responses by the dti:</b>
Accession to International Treaties	the <b>dti</b> has considered all the applicable international treaties in the domain of Copyright. One of the purposes of the CAB is to update the legislation to take into consideration the digital issues, therefore the WIPO digital treaties will be ratified. The all important Marrakech Treaty will also be ratified to allow for access to works for people with disabilities as per the broader definition of person with a disability in the CAB and with the cross border provisions. The CAB introduces provisions in the Bill which will allow for implementation of these critical treaties.

## Proposed Amendments

<b>Matters raised by Stakeholders:</b>	<b>Responses by the dti:</b>
<p>Copyright in relation to the State and certain International Organisations, Clause 3 of the Bill (State funded)</p> <p>Amendment of section 5 of Act 98 of 1978</p> <p>Page 4 of the Bill</p> <p>Page 13 of the Act</p>	<p>The CAB will be reconciled with the provisions of the IPR Act.</p>

## Proposed Amendments

Matters raised by Stakeholders:	Responses by the dti:
<p><b>User Rights-Clauses 7,8 and 9 of the Bill</b> Insertion of section 9A of Act 98 of 1978 <b>Pages 6-7 of the Bill</b> Page 15 of the Act</p>	<p>the <b>dti</b> agrees that definitions of certain words such as “user”, “creator” and “author” need to be defined correctly and be used within the context, e.g. “user” should be the one who pays a royalty to the “creator”/”author”/”producer” and holders of Intellectual Property (IP). Where the “user” produced a new work altogether from the original work owned by the IP owner/author, the “user” may become the IP owner of the new product.</p>
<p><b>Commissioned Works-Clause 20 of the Bill</b> Amendment of section 21 of Act 98 of 1978 <b>Page 15 of the Bill</b> Page 23 of the Act</p>	<p>the <b>dti</b> proposes a principled position in commissioned work. Stakeholders must be treated equally. If judgement is supporting that the one who pays owns the copyright, changes in the law should be changed with or without a contract. This should be done consistently. Parliament can change commissioned work to belong to photographers.</p>



## Proposed Amendments

### Matters raised by Stakeholders:

#### Commissioned Works-Clause 20 of the Bill

Amendment of section 21 of Act 98 of 1978

Page 15 of the Bill

Page 23 of the Act

### Responses by the dti:

the dti respects the Berne Convention in relation to commissioned work. However contractual arrangements should be the first option. Court Judgment attached.

## Proposed Amendments

### Matters raised by Stakeholders:

#### Assignment-Clause 21 of the Bill

Amendment of section 22 of Act 98 of 1978

Page 16 of the Bill

Page 24 of the Act

### Responses by the dti:

The CRC believes that the Copyright Act must be amended to provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights. Such an amendment will help relieve the plight of composers whose works still earn large sums of money, which are going to the assignees of the composers' rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken.

The reversion clause is supported only in the royalty payments/music rights as per the CRC report: this is so even if it is out-dated; it assists the creator to an option to renegotiate new favourable clauses.

**Proposed  
 Amendments**

<b>Matters raised by Stakeholders:</b>	<b>Responses by the dti:</b>
<p><b>General Exceptions from Copyright protection(Fair Use/Fair Dealing)- Clause 11 of the Bill</b></p> <p>Insertion of section 12A into Act 98 of 1978  <b>Page 9 of the Bill</b>            Page 17 of the Act</p>	<p>The fair use provision provides for an open list of issues that should be dealt with. The proponent of fair use also indicates that certain jurisdictions that use the fair dealing doctrine are either broadening the scope of fair dealing or are migrating from fair dealing to fair use. There is also empirical evidence that countries who adopted the fair use system are rich in innovation.</p> <p>There seems to be many supporters of the fair use system (32) than the fair dealing system (18).</p> <p>Fair use is a technology neutral open system. the <b>dti</b> agrees and supports the issue of an open fair use/fair dealing even if it may be a hybrid. Four factors should be tailor made in order to determine whether a work is fair not. The 5<sup>th</sup> criteria has been rejected by Singapore as it closes the fair use/dealing system. The test for fairness in both fair use and fair dealing rights is whether the use substitutes for the work in the market.</p>

## Proposed Amendments

### Matters raised by Stakeholders:

General Exceptions from  
Copyright protection(Fair  
Use/Fair Dealing)- Clause 12 of  
the Bill

Insertion of section 12A into Act 98 of 1978

Page 9 of the Bill

Page 17 of the Act

### Responses by the dti:

For example soundtracks are a core market use of music and the tracks/songs must be licensed in fair use and non fair use countries. The use cannot be fair where making copies of a book or a song instead of buying it causes market harm to the rights holder.

## Proposed Amendments

Matters raised by Stakeholders:	Responses by the dti:
<p>Socio Economic Impact Assessment</p>	<p>An independent assessment was undertaken in 2014 after the Draft IP Policy was published for public comments in September 2013. The assessment was focused on a selection of policy proposals in the Draft IP Policy, identifying the critical policy themes as representative of the core policy objectives and significant change in the IP regulatory landscape. One of the critical policy themes the RIA assessed was the amendment of various legislation to implement the contents of international treaties; in the domains of Copyright, Designs and Trade Marks. Further to this, the assessment was meant to identify important proposals missing from the Draft IP Policy; the assessment was to assist the policy developer and decision makers to help improve the Draft IP Policy, some of these proposals were the adoption of fair use/fair dealing provisions and the Artist Resale Royalty.</p>

## Proposed Amendments

<b>Matters raised by Stakeholders:</b>	<b>Responses by the dti:</b>
Socio Economic Impact Assessment	The CAB SEIAS Report was certified on 29 May 2017 by the Department of Monitoring and Evaluation (DPME). This was after it was published by the PC for public comments on the 7 May 2017. Hence, the PC has made it available on request. The SEIAS does meet the guidelines of the DPME.



## Proposed Amendments

<b>Matters raised by Stakeholders:</b>	<b>Responses by the dti:</b>
Consultation with stakeholders	A wide variety of stakeholders and associations have been consulted in various platforms . A detailed list is attached with the schedule document page 4-6.

## Proposed Amendments

### Matters raised by Stakeholders:

Exceptions and Limitations for libraries, archives and museums and for persons with disabilities.

Insertion of section 19C and 19D into Act 98 of 1978

Page 13 of the Bill

Page 22 of the Act

### Responses by the dti:

The Berne Convention which deals with the protection of certain works provides authors of those works with exclusive rights to authorise certain uses regarding their work. The Berne Convention also subjects these exclusive rights to certain limitations and exceptions in Articles *2bis*, *10*, *10bis* and *13*. The limitations and exceptions in the Berne Convention are entrenched by Article 13 of the TRIPS Agreement which provides that members to the Agreement are required to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

## Proposed Amendments

<b>Matters raised by Stakeholders:</b>	<b>Responses by the dti:</b>
Copyright Amendment Bill will affect Foreign Direct Investment	IP is not the only determinant factor of foreign direct investment (FDI). There are other factors which influence the inflow of FDI such as local advantage, market size, transportation costs, distance, local demand and labour costs. Therefore the argument that limitations and exceptions would result in lower FDI does not hold.

## RECOMMENDATIONS

- The impact of the copyright based industries can be strengthened and their contribution increased by updated legislation, the structure of the economy and incentives provided for the development and growth of the industry e.g. films.
- PC should take note that the Bill does not intend to repeal any law relating to copyright and related rights. Coordinated approach by Government.
- PC should enact the Bill as it confers rights to the vulnerable.
- PC should consider ratification of all treaties/conventions related to the Bill.
- PC should legislate in the area of Copyright; that collecting societies must be statutorily regulated.
- PC should confer with PC of Communications and Arts and Culture regarding the issue of (music) local content: 80% (public) / 60% (private)-CRC recommendation.
- PC should impose time lines for e.g.: regulations/databases to be finalised.
- PC should foster coordination of enforcement agencies to deal with piracy and counterfeiting.
- Recommendation by WIPO: Statistics SA and the Reserve Bank should separate the statistics related to the copyright based industries and publish them regularly. This will assist with information gathering and measuring the growth and impact of the copyright based industries in South Africa as information is limited.
- PC must take note of the Socio Economic Impact Assessment (SEIAS Report).



the dti

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA



Thank You