



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

PRESENTATION ON COPYRIGHT: PC ON TRADE AND INDUSTRY

PROVISIONS IN THE COPYRIGHT AMENDMENT BILL

31 MAY 2018

Presenters

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Purpose of the Presentation

To present the Bill Clause by Clause to the Portfolio Committee on Trade and Industry.



PREAMBLE

The preamble will change depending on the provisions of the Bill which will be retained or removed.

DEFINITION CLAUSE

- The definitions in clause 1 will be retained.
- This includes among others the definition of **accessible format copy** which defines an alternative form which gives a person with disability access to the work as a person without disability ,
- the definition of **audiovisual work** which is defined as the embodiment of moving images whether or accompanied by sound or by representation which can be perceived, reproduced or communicated through a device and include a cinematographic film. This expression also substitute the use of the phrase cinematographic film with audiovisual work and the phrase film with work in the entire Bill and Act,
- Definition of **Orphan work** may have to be removed if we retain fair dealing.
- Orphan work is work in which copyright subsists and the owner of right can not be identified or can be identified but can not be located.

Clause 2
 insertion
 of section
 2A dealing
 with
 Scope of
 copyright
 protection

There are certain activities that are not protected by Copyright because of their nature. For example, one cannot take a publicly produced or known concept and claim it as a copyright.

There is an international trend to move away from promoting copyright protection that do not reflect creative activity but merely the outcome of a skill and efforts.-US, EU, UK. Creative effort: illustration, description and explanation.

Copyright does not protect ideas, procedure, methods of compilation, mathematical concepts, interface specifications (computer programs-e.g documents that capture an idea of a software, possible actions that can be taken).

Some are developed and published by the Service Availability Forum (SA Forum) and made freely available. Interface specification example is manuals in boxes of say DVD players.

Protection does not subsist to official texts of legislative, administrative or legal nature or speeches of a political nature or speeches delivered in the course of legal proceedings or in news of the day that are mere items of press information.

the dti agrees with the DAC on the copyright protection.

Clause 3:
 Amendme
 nt to
 Section 5
 Work
 funded by
 the State

The Clause confers copyright on the work eligible for copyright which is funded by or under the direction or control of the state or international or local organizations. It addresses public funding for e.g research and development using funds allocated by government or government agencies.

This is problematic because government funds many things and they cannot be perceived as copyright, e.g **the dti** incentives.

It was proposed that the words funded be removed in this clause.

the dti agrees with the DAC on removing the words 'funded by'.

<p>Clause 4: Amendment to section 6 Communicating of literal and musical work to the public</p>	<p>Copyright in literal or musical work vest an exclusive right to or authorize the doing of among other things: communicating the work by wire or wireless means to the public so that work may be access at the time chosen by that person.</p>	
<p>Clause 5: insertion of section 6A Royalties regarding literal or musical work.</p>	<p>Policy issue: The authors have been deprived of the right to their royalties. This provision aims to ensure royalties are paid for creative work. In the music industry, provision was made, however not specific and it was abused.</p> <p>Allows the author who transfers copyright in literal or musical work to have a right to claim half of the royalty payable to that other person for the use of the copyright work.</p> <p>the contract to be the first option.</p> <p>the dti agrees with the DAC that unfair contracts must be addressed.</p>	<p>Clause 5, 7 and 9, cannot legislate for 50/50 split in all categories as they operate differently in practice. Contract will be respected, but as a policy position we propose minimum standard contract template for all categories. In the legislation there should be a provision that enables the Minister to prescribe minimum requirements of the agreement but the specifications will be dealt with in Regulations.</p>

Proposed

“6A 1(a) In the absence of an agreement to the contrary, no person may reproduce, broadcast, cause the publishing of the work or perform the work in the public as contemplated in section 6 (a)(b)(c) and d without payment of royalty to the owner of the relevant copyright.

The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the composer, the publisher and the owner of the copyright, or between their representative collecting societies.

(c) In the absence of an agreement contemplated in paragraph (b), the composer, the publisher or the user the royalty may refer the matter to the Copyright Tribunal in terms of this Act”.

E.G of minimum contract requirements

- Dispute resolution
- Term of contract
- Exit clauses for artists
- Sharing splits
- Rights of parties

Clause 6 amendment
section 7
Communicating
artistic work to the
public.

Policy: this clause is to ensure creative work is available in any format, anywhere at any time. The Bill is from 1978, much has occurred in Copyright over time, the Act not in line with technological developments. Copyright in artistic work vest an exclusive right to or authorize the doing of among other things: communicating the work by wire or wireless means to the public so that work may be access at the time chosen by that person.

Clause 7 insertion of
section 7A Royalties
regarding artistic
works

Policy: When compared with other copyright works, one cannot reproduce a painting for example. Revenue stream is from sales. The intention of the provision is to provide for royalties in artistic works.

Artist Resale Right (ARR):

The history of the incorporation of ARR in the UK is especially relevant to South Africa because its copyright law is essentially British.

With regard to the rate, in the UK the royalty depends on the resale price and it is worked out according to a sliding scale from 4% to 0.25% with a threshold of €1,000 and up to qualify for a royalty. Australia, California in the USA and Senegal have a fixed rate of 5%. Countries have the policy space to decide on whether to opt for a fixed or sliding scale and both are acceptable to this right.

Proposal for CAB: fixed rate which must be determined by the two Ministers jointly. The proposal by the DAC to set the rates upfront is noted.

With regard to pays the royalty, in the UK the ARR Regulations 2006 state that principally the art market professional and the seller of the artwork are “jointly and severally liable” for the payment of the royalty.

With regard to collection of the ARR, the UK has made Collective Management of ARR compulsory, therefore no direct payments may be made directly to the author of the work.

Proposal for CAB: That royalty should be administered through Collective Management. The dti agrees with the DAC.

The Collecting Societies collecting on ARR have the responsibility to facilitate the disclosure of information regarding payment.

With regard to works covered by the ARR, the Senegalese Copyright Act provides that ARR does not apply to architectural works or works of applied art.

It must be noted that there is no international treaty on ARR.

DAC: Senegalese model, rates set upfront by the statute. Liability for payment of the royalties should be well stipulated, whether it is by the seller or the buyer. And who will be subjected to collect the royalties.

Delete the insertion of 7A:

Artistic work cannot be reproduced, the nature of the work for artistic work is different from the other works. The royalty for artistic work is created by the resale of the work as contemplated by the insertion of section 7B.



Insertion of section 7B resale royalty right regarding artistic works

It proposes that royalties in artistic works on commercial resale to be payable at the rate prescribed by Minister.

Artists of visual art can sell their work, at a fairly low price, over time the art sold appreciates. For the artist to receive a royalty, everytime the art is resold.

Will not apply to architectural and engineering drawings, circuit layouts, commercial logos and icons for applications. Other jurisdictions have specific legislation on Artist resale rights.

It sets out grounds of an author who shall be entitled to such resale royalty: he must be a South African citizen when resale is concluded even at time of death if author is deceased, validity of the resale of royalty right has not expired.

The non citizens must be catered for.

The principal Act provides for a South African citizen, or is domiciled or resident in the Republic.

Insertion of section 7C Proof of author

In South Africa, there is no system to register copyright work and the basis of copyright is originality and that it is in written format.

A person if deemed to be author where a mark or name purporting to identify as author of an artist appear on such work.

DAC: Concern of reciprocity. 7B (a) requires resale royalties be given to South African citizens or residents-this may undermine the principle of reciprocity.

A system in which SA would determine the number of permits it grants to nationals of another country on the basis of how many permits that country grants South Africa, for example. The World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights allows for reciprocity of intellectual property protection if similar rights are offered in the country of origin. This means that foreign resale royalty right schemes can only be accessed by a country if its domestic law permits it, and only if it has a similar scheme open to nationals of the country from which the right is being claimed.

Insertion of section 7D resale of royalty right

An visual artist-sells an art piece and sells it at a very low price, over time it appreciates. The artist should be able to receive royalty each time the art piece is resold.

The clause proposes that the resale of royalty right of an author of an artistic work expires at the end of 50 years calculated from the end of the calendar year in which the author died, for more than one author when the last known author dies.

This provision will ensure that the family of the artists receive their royalties long after they have died.

This is in line with the UK, France, Morocco system on artist resale.

Other countries have specific laws to address artist resale rights such as the UK.

Where author is unknown at the end of the period of 50 years calculated from the end of the calendar year in which the work was first made available to the public.

Agree with DAC. it should be visual artists catered for.

Insertion of section 7E transmission of resale royalty right

The section provides that a resale royalty right may not be alienated save for transmission on death of holder through testamentary disposition (a will) or operation of law.

The institutions in **the dti** legislation, the community Trusts to be removed. The DST institutions will be utilised.

<p>Clause 8 amendment to section 8: Nature of copyright in audiovisual works</p>	<p>The provision substitutes the use of the phrase film with work in this section.</p> <p>It also allows for copyright in audiovisual film to vest exclusive right and authorize communicating the work by wire or wireless means to the public. To align with the performers protection amendment Bill as it affects the actors and treaties such as Wipo Copyright Treaty.</p>	
<p>Clause 9 of section 8A Royalties regarding audiovisual works</p>	<p>This provision is to empower authors in audio visual works to receive royalties. The intention is not to transfer.</p> <p>Has implications for the Performers Protection Bill.</p> <p>Allows the author who transfers copyright in audiovisual work to have a right to claim half of the royalty payable to that other person for the use of the copyright work.</p>	<p>Clause 5, 7 and 9 – cannot legislate for 50/50 split in all categories as they operate differently in practice. Contract will be respected, but as a policy position we propose minimum standard contract template for all categories. In the legislation there should be a provision that enables the Minister to prescribe minimum requirements of the agreement but the specifications will be dealt with in Regulations.</p> <p>the dti agrees with the DAC regarding the split of 50% amongst authors, performers and producers, the right to receive royalty and the contract.</p>



**Clause 9
insertion of
section 8A
Royalties
regarding
audiovisual
works**

This provision is to empower authors in audio visual works to receive royalties. The intention is not to transfer.

Has implications for the Performers Protection Bill.

Allows the author who transfers copyright in audiovisual work to have a right to claim half of the royalty payable to that other person for the use of the copyright work.

“8A 1(a) In the absence of an agreement to the contrary, no person may reproduce, broadcast the work, cause the film, in so far as it consist of images, to be seen in public or in so far at it consist of sound, to be heard in public, cause the transmission of the film as contemplated in section 8(1)(a), (b),(c) and (d), without payment of a royalty to the owner of the relevant copyright.

(b)The amount of any royalty contemplated in paragraph (a) shall be determined by an agreement between the user of the audio visual work, the performer and the owner of the copyright, or between their representative collecting societies.

(c) In the absence of an agreement contemplated in paragraph (b), the owner of the copyright or the collecting society receives payment of a royalty shall ensure that such royalty is shared equally between the copyright owner and any performer whose performance is featured on the audio visual works in question and would have been entitled to receive a royalty in that regard as contemplated in section 5 of the Performers’ Protection Act”.

**Clause 10
amendment
to section 9
Communicating to the public**

This provision is to enable sound recording to be available on wire and wireless format at any place and time to the public.
Copyright in sound recording vests an exclusive right to, among other things communicating the sound recording by wire or wireless means to the public.
This clause may have implications for the Wipo Copyright Treaty

**Clause 11
insertion of
section 9A
Royalties regarding sound recording**

Provide certainty on sound recordings. Also to provide for the royalties.
The section prohibits a person from transmitting sound recording, broadcast sound recording or communicate sound recording to the public without payment of royalty to the owner of copyright.
The person who intends to so transmit, broadcast or communicate must submit a prescribe notice to the performer, copyright owner or collecting society of intention to either broadcast, transmit or communicate the sound recording.
The notice must indicate date of performance and terms and conditions of the payment of royalties.

Music log sheets are kept mainly by broadcasters, and that general music users tend not to retain any log sheets. Collecting societies are, therefore, not able to accurately distribute royalties based on music usage. In cases where there are no log sheets, collecting societies use the available usage information as a mechanism for distributing unlogged royalties. Furthermore, some of the submissions to the CRC requested an amendment to the legislation to force every music user to retain cue sheets in order to eliminate the above-mentioned problem.



To agree the performer or collecting society signs the notice with proposal.

Where the person fails to submit the notice to the owner, performer or collecting society, he will notify them, pay the generally applicable licence fees as published by the owner or collecting society and pay the royalties calculated from date of first use regardless of whether the date was prior to coming into operation of this Act.

Proposed clause: Any person intending to perform any act contemplated in section 9 (c), (d) and (e) (which is broadcasting, transmission or communicating to the public), must at any time when performing, register the act in a log sheet and submit a report to the performer, copyright owner, collecting society as the case may be in the prescribed manner, keep record of information in respect of the use of sound recording and furnish it to the performer, copyright owner or collecting society to enable the collecting society to comply with its obligations under the Copyright Act, 1978, Performers Protection Act, 1967).

Clause 11

DAC raised a concern about who constitutes a user. This could be defined.

The indigenous Community or National Trust to be removed.

Parties may refer disputes in this regard to the Tribunal for adjudication.

The Tribunal may order that payment of royalties be made into a trust account of an attorney pending finalization of terms and royalty payable.

The provision further proposes that the performers share of the royalty will represent an equitable remuneration as determined by the agreement between the performer and the owner of the copyright or the collecting society.



Clause 11 continues

Clause 11

With regard to notice/proper record keeping – user must register act/use in a log sheet and submit a report to the performer, copyright owner or collecting society as the case may be, keep record of information in respect of the use in question of sound recording and furnish it to the performer, copyright owner or collecting society as the case may be to enable the collecting society to comply with its obligation under the Copyright Act, 1978, Performers' Protection Act, 1967). Refer to Regulation 7 (3) of 2006.

Clause 11

Furthermore, with regard to terms and conditions of payment of royalty, it will be the responsibility of Collecting Societies. In addition, the Regulations require that the agreement itself should contain the terms and conditions prescribing payment. Those who do not belong to a collecting society, it is their responsibility to have agreements with users of their work which is cumbersome hence collective management is encouraged.

- Fair dealing: operates by exempting the use of copyright works for certain statutorily-defined purposes and only relates to particular types of works. Fair dealing is a closed list of specific exceptions. There is no statutory definition of what dealing is fair.
- Despite the existence of exceptions for purposes of illustration for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter.
- Fair Use: is a doctrine under copyright law that permits certain uses of a work without the copyright holder's permission. Fair use exceptions include but not limited to criticism, parody, comment, news reporting, teaching, scholarship, or research. It allows users to make use of copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder.

Hybrid Model

- Singapore: Singapore's fair dealing is modeled on the US Fair Use provisions (S35 (2)). The US provisions of Fair Use are open.
- Open: refers to the fact that the exception is flexible and that the exception can apply potentially to any purpose and this model is followed in the US, Israel, Malaysia and other countries.
- Closed: refers to list systems like SA current fair dealing and can only be closed to the purpose listed in the clause.
- It may be argued as it was by some stakeholders during public hearings that it does not matter what you call the clause but rather how far you open up the exception. The Singapore model may be described as such Singapore remained with the exception being called Fair Dealing but opened up the exception by drafting it on the US Fair Use provision and adding the words 'such as'-This involves a mixture of the general, fair use style factors for lawful use, combined with more specific fair dealing style requirements in certain cases. As both fair use and fair dealing this would require balancing the rigidity and certainty of one with the flexibility and uncertainty of the other. 18

- The provision in the CAB is drafted in a similar style to the Singapore model however the words ‘such as’ were left out thus closing the exception rather than allowing for an open exception.
- Ultimately Singapore shaped its fair dealing provision on prevailing local circumstances, the legislative objective was to create an environment conducive to the development of creative works, and also facilitating greater investment, research and development in Copyright Industries. (Dan Tan, Singapore Academy Law Journal, (2016) 28 SAclJ).
- In 2006 Singapore amendment authorized fair dealing for any purpose thus doing away with lists of purposes.
- The Preamble of the WIPO Copyright Treaty affirms the “need to maintain a balance between the rights of authors and the large public interest, particularly education, research and access to information as reflected in the Berne Convention”. This could be used to direct interpretation towards an open construction of the listed exceptions, and to address this newly enshrined balance with a ‘fair use’ concept which takes into account the rights of authors and the rights of access to information.

Clause 12 substitute section 11 Nature of copyright in programme-carrying signal

A signal embodying a program which is released and passes through a satellite. Copyright in programme carrying signal vests exclusive right to undertake or to authorize the, among other things, the communication of the work by wire or wireless means to the public.
This clause has implications for Treaties such as the Performances and Phonograms Treaty.

Clause 13 repeals section 12

Section 12 provides for Fair Dealing
Fair dealing currently sets out categories of acceptable uses.
It provides that copyright is not infringed by fair dealing in literary work or musical work: for purposes of research or private study by person using the work or for personal or private use or for purposes of criticism or review of the work or for reporting current events in a newspaper, magazine or by means of broadcasting or in cinematograph film
This provision requires for the name of the author to be mentioned as well as the source.

**the dti position and the DAC are similar. DAC points out challenges with fair use, the dti recognised the issues with fair use. Fair use not considered by the dti. It opts for fair dealing with flexibility.
The concern of the DAC concerning the personal use/private use of copyright is noted by the dti. Exploitation not desirable.
Private copy levy the dti has no policy position on it. It can be included if Parliament proposes it.**



**Clause 14 insertion of section 12A, 12B, 12C and 12D
General exceptions from
copyright protection**

Section 12A deals with uses specifically authorized fair use in respect of work or performance of work not infringing copyright for purposes of research for private or personal use; for criticism or review; for reporting current events; scholarship, teaching and education; for comment, illustration, parody, satire, caricature or pastiche; preservation and access to the collection of libraries, archives and museums and expanding access to undeserved populations.

Test to Determine Fair use

Nature of the work

Amount and substantiality of the part of the work affected in relation to the whole of the work

Purpose and character of the use (whether it is of commercial nature and what purpose it serves)



Clause 14
insertion of
section 12A,
12B, 12C
and 12D
General
exceptions
from
copyright
protection

Section 12B copyright is not infringed in the following acts:

Any quotation – must not exceed reasonable justifiable purpose. Source and author must be named.

Illustration in a publication, broadcast, sound or visual record for purpose of teaching: the use must not exceed justified purpose; the source and name of the author must be mentioned if practicable

Reproduction of work by broadcaster where the reproduction is intended for lawful broadcast and destroyed before 6 months following the date of making the production or as agreed by owner of the copyright work. If the work is an exceptional documentary nature it may be preserved in the archives of the broadcaster

The reproduction in the press or by broadcasting of a lecture, address which is delivered in public if such is for information purpose

Section 12A

12A(vii) Underserved population can be removed. The entire provision of making access to information is to ensure access. The term is too wide.

Section 12B(f)(iii)

Remove 'public information'.

The aim is to provide information for non commercial purposes. It can read as "such work is translated and communicated to the public for non commercial purposes".

Clause 14
insertion of
section 12A,
12B, 12C and
12D General
exceptions
from
copyright
protection

Section 12 C provision allows for transient or incidental copies or adaptations of work where such are integral and essential part of technical process and where the purpose of those copies is to enable transmission of work in a network between third parties or to adapt work to allow use in a different device.

Section 12B(6): The term "exhaustion" refers to the principle in IP law that a right holder cannot prevent the further distribution or resale of goods after consenting to the first sale (reason why it is also known as the "first-sale doctrine"). Once a good has been put on the market by or with the consent of the right owner, further circulation of that good can no longer be controlled by him. The right holder is considered to have "exhausted" his rights over those goods.

Section 12C temporary reproduction and adaptation:

Provision allows for transient or incidental copies or adaptations of work where such are integral and essential part of technical process and where the purpose of those copies is to enable transmission of work in a network between third parties or to adapt work to allow use in a different device.

Section 12B(6)-Use the international, national and regional system?
International Regime should be followed as it also addresses our developmental needs as a country because we cannot benefit from those international arrangements. Chile, Costa Rica and India also follow international regime exhaustion. The TRIPS Agreement allows each member to choose its own regime of exhaustion so as best to serve its policy objectives.

Clause 14 insertion of section 12A, 12B, 12C and 12D General exceptions from copyright protection

Section 12D Reproduction for educational and academic activities:
Provision allows person to make copies or recording of works for purposes of educational and academic purposes provided it does not exceed the extent justified by the purpose.
Educational institutions may incorporate such copies in printed and electronic course packs, study packs etc. It allows for reproduction of a whole textbook where the text book is out of print or where the owner of the copyright can not be found or where the same edition of the text book is not for sale in RSA.

12D – “who determines whether or not terms and conditions are reasonable”:
proposal that the clause end after the words “Collecting Society” and the rationale of removing Indigenous Community and National Trust is to not borrow anything from IPLAA.
We agree to the principle that licensing agreements should be between the parties and failure to reach resolution then matters can be referred to the Tribunal. The clause is informed by the Canadian Model.

- Clause 15 Amendment to section 16 Deals with deletion of cinematographic films
- Clause 16 repeals section 17
- Section 17 deals with general exceptions for protection of sound recordings.
- Clause 17 repeals section 18 which deals with protection of broadcast.
- Clause 18 repeals section 19A which deals with published editions.
- Section 19 deals with general exceptions for protection of programme carrying signal.

Clause 19 insertion of section 19B
Section 19B deals with general exceptions for protection of computer programs.

Provides that a person with a right to use a copy of a computer program may without authorization of owner, observe, study or tests the functioning of the program.

19B - the dti supports the broadening of the use as this will advantage the educational sector in terms of platforms such as eLearning.

Clause 20 insertion of section 19C and section 19D
Section 19C deals with general exceptions for protection of copyright work for libraries, archives, museums and galleries.

The provision allows for library, archive, museum or gallery to use copyright work in its activities without authorization provided it is not for commercial use. It further allows them to make copy of any work in its collection for purposes of back up and preservation, to procure or make a copy of missing parts from another library, archive or museum. It allows for format-shifting or conversion of work from ageing to obsolete technologies to new technologies in order to preserve works without consent.

DAC: libraries, archives, museums, galleries differ on type of materials accessed and held. The Bill treats libraries and archives as the same.

Exceptions for libraries and archives should be in same category as this is international best practice and the treaty currently being negotiated is dealing with exceptions for both libraries and archives together (Eifl Model). DAC raised a concern on galleries.

Libraries, archives and museums can be retained in the Bill.



**Clause 20
insertion of
section 19C and
section 19D
Section 19D deals
with general
exceptions for
protection of
copyright work for
persons with
disability**

This provisions allows for any person serving persons with disabilities to make accessible format copy for the benefit of person with disability without authorization. The person making an accessible format must have lawful access to the copyright work, must convert the work into accessible format copy and must not introduce changes except those needed to make work accessible to person with disability. Must not be for commercial purposes.

**Clause 21
amendment to
section 20 dealing
with Moral work**

The provision allows the author of work a right to claim authorship and object to any distortion , mutilation or modification of the work where an action seeks to prejudice the honour or reputation of the author
Section 20 (2) subsection 2 takes away the rights of the copyright owner without any clear policy rationale.
The section must be written in manner that the rights of the author are clear and protected.

DAC supports this provision on moral rights because the copyright owners are at risk of manipulation that may impact the quality of the original work. The provision will strenghten the bargaining power of the author to be able to claim if their moral rights are infringed.

Traditionally moral rights were not granted for sound recordings, however new development necessitated the inclusion to cover sound recordings. New Zealand as an example in their new Copyright legislation. Broadcasts, programme carrying signals and unpublished editions remain excluded.

With regard to subsection (2) Moral rights are granted to the author, and author is not always copyright owner. Moral rights is not a policy issue, it is a regime principle.



**Clause 22
amendment to
section 21
dealing with
Commissioned
work**

The provision deals where a person commissioned work such as taking photograph, painting, drawing of portrait, making sound recording or audiovisual work and agrees to pay money for it, the ownership of such work is governed by contract where contract does not exist ownership vests in a person commissioning the work.

The Bill provides. Whoever pays owns. Contractual arrangements prevail.

The proviso results in 2 copyright owners, exclusively commissioned painting can be re-printed by the author and sold.

It is not the intention of the Bill to create confusion on who owns the copyright.

The contractual arrangement must clarify.

Problem Statement: The broadcaster commissions a work and then shelves it for years without using it while preventing access by author who created it.

The model proposed to deal with commissioned works is to allow the author of the work to approach the Copyright Tribunal for compulsory license to use the work. The Copyright Tribunal will take into account the following:

The nature of the work;

The rationale for not using the work by the owner if not used;

Public interest for the granting of the license; and
Applicable tariff.

This approach is premised on the existing Copyright provisions dealing with license schemes. Secondly this is to avoid reinventing legislative provisions.

DAC does not support the provision of the Bill-proposes creator owns, the one who commissioned has a license. the dti flagged this provision for further consideration and suggested it be removed for now.



Clause 23 amendment to section 22 dealing with government funded work and ownership of the work

The provision provides that government funded work may not be assigned. **DAC agrees.**

Any assignment of copyright work must be in writing and assignment shall be valid for a period of 25 years from the date of agreement of such assignment.

However the concern is that the clause limits the rights of authors/copyright owners to assign for less than 25 years. The drafting team proposes that this reads 'up to 25 years'.

This provision must be amended to include composers.

DAC proposes clear rights management be introduced. Records are being exploited by commercially by researchers and some are made available online. the dti flagged this area to be removed. It can be strengthened.

The suggested wording "up to 25 years" is acceptable because the intention of the 25 years was to ensure that assignment does not exceed 25 years. If copyright owners are of the opinion that they can recoup their investment in less than 25 years, then they assign for less as long as it does not exceed 25 years.

The capping of the reversion right is flexible as it creates room to negotiate terms under favorable conditions. It seeks to address imbalances of the past where authors assigned their copyright. The USA, UK and most of Europe have a reversionary right as well.

Clause 24 insertion of section 22A assignment and licences in respect of orphan works

Orphan work is copyright protected work for which right holder cannot be located.

The section provides that where a person wishes to obtain licence or resale royalty right in respect of orphan work can apply to Commission.

The Commission may conduct an enquiry before granting the licence and order the applicant to deposit the amount for royalties as determined into a particular account for his heirs, executor to claim at any time.

DAC: amendments do not clarify how this income will be distributed or used in cases when the rightful owners are not identified. Creation of orphan works should be avoided. the dti flagged this area. More work and clarity still to be done. Committee flagged that this be dealt after fair dealing fair use discussion. If the Committee goes with fair use, then need to see if orphan works adequately covered for that. To be addressed under fair use.

Questions for clarity: (8) Why the limit of 5 years? **the dti** indicates that it was not the intention to expropriate moneys by placing this limit on recovery-a copyright owner should always be able to recover royalties-propose 5 year limit be deleted.

(9) This is not sound in law, the orphan work did not change owners. It is still the owner's. Propose replace with 'must be entered onto the database of the register referred to in sub section (6) (a) and may for a period during which the owner of copyright was unknown, recover royalties as contemplated in subsection (8).



'5 year limit'(8) – the USA has a limit of ten (10) years. India approached royalty of Orphan Works through Collecting Societies; therefore they used law governing Collecting Societies to retain unclaimed monies. The abovementioned is subject to the Prescription Act not finding applicability.

Proposed drafting language in subsection nine (9)-
“once owner is known or located and has claimed royalties, his work will then be registered in his name in the register.”

**Clause 25 to
Clause 27
insertion of
Chapter 1A
Collection
Societies and
related matters**

Section 22B provides for the registration and accreditation of Collecting societies
Provides for an application to be made to the Commission
Commission may issue a registration certificate after consultation with any person
Registration certificate shall be valid for period not more than 5 years and be renewable.

We propose that registration be removed and focus be on accreditation. Registration under companies Act. They are NPOs.

DAC raised a concern with one CS per set of rights. **the dti's view:** There is freedom of association. Few CS established and some collapsed. Collecting societies battle in court over membership related issues to the detriment of copyright artists. DAC suggests flexibility in this clause to allow for potential arrangements, e.g other industries rights and CS.

Section 22C provides for the administration of rights by collecting society

Provides that any collecting society may accept an authorization from performer or owner or another collecting society to administer any right by issuing a licence or collecting of licence fee.
 CS may therefore issue a licence, collect fees and royalties, distribute such collected royalties and may negotiate royalty rates
 CS may enter agreements with foreign societies to administer corresponding rights.

Section 22D provides for the control of CS by performers or copyright owners

CS must collect and distribute royalties in accordance to constitution of the CS.
 Must provide each performer or owner full and detailed information relating to the administration of the rights of the performer or owner.

Section 22E provides submission of reports and returns to the Commission

Reports may relate to affairs of the CS and royalties collected.

Section 22F Suspension and cancellation of CS

Commission may issue the CS with compliance notice if the Commission believes the CS contravenes the registration conditions or manages in a manner detrimental to interest of the performer or owner
 Commission may apply to Tribunal for an order suspending registration of the Tribunal pending inquiry. Commission will take responsibility of CS during suspension.

Clause 26 amendment of section 23

Provides for infringement of copyright where person tampers with information kept to administer copyright or abuse copyright and technological protection measures in order to constitute a defence to claim copyright liability.

Clause 27 proposes the insertion of section 28O, 28P, 28Q, 28R and 28S in the Bill

providing for the prohibited conduct in respect of technological protection measures; exceptions in respect of technological protection measures and prohibited conduct in respect of copyright management information and exceptions.
Provides for restricting importation of copies and infringement in country of origin.

Does section 27 cover the new rights provided for in the Bill, especially RRR and the Royalty provisions in the new section 6A, 7A and 8A?

TPM's are applicable to all digital works because the digital arena is a new platform for exploitation of copyrighted works. However, TPM's need to be looked at carefully because they in one hand prevent abuses of copyrighted works digitally, and on the other hand clash with the use of exceptions and limitations allowed in copyright law.

		<p>RRR is a right available to the author of an artistic work (paintings) to earn royalty when it is resold; therefore it cannot be infringed. However, only the original work can be infringed and it is covered in the Bill. The proposed clause covers all the works.</p>
<p>Clause 28 amendment of section 28</p>	<p>Provides that any copy work in question made outside the Republic, if the making of such copy constituted an infringement of copyright in the country in which the work was made.</p>	
<p>Clause 29 the insertion of section 28O</p>	<p>Provides prohibited conduct in respect of technological protection measure It prohibits a person from making, selling, importing, distributing a technological protection measure circumvention if a person knows it will be used to infringe copyright in technological protected work Technological protection measure is deemed to be effective if the use of the work is controlled by exclusive licensee or copyright owner.</p>	

Section 28P

Provides for the use of technological protection circumvention device measure

With regard to subsection two (2) and (3) – the subsections are deemed necessary as they outline the process. However, in the event that the owner refuses, the person who intends to circumvent should approach the Copyright Tribunal to get permission to allow any other person for assistance. The Copyright Tribunal will deal with the matter in the same manner it deals with licensing schemes where permission by the owner has been refused.

Clause 30 the insertion of Regulatory enforcement agencies clause 31 provides for the establishment of the Tribunal

The provision establishes a Tribunal which is a juristic person This clause can only be retained if the Tribunal is established in terms of legislation. Should the Tribunal continue under the umbrella of the CIPC, then this clause and related clauses in this chapter will have to be removed.

the dti proposes to remove the establishment of the IP but to strengthen the Copyright Tribunal. To widen the powers of the Tribunal, empower the Commissioner. To confirm if this requires amendment to the patent Act of 1978.
DAC: suggested the cost of Tribunal to the indigent-Legal aid as a necessity.

<p>Clause 35 the insertion of section 39A unenforceable contracts.</p>	<p>Unenforceable contracts are those that purports to prevent or restrict an act which by virtue of this Act would not infringe copyright without necessarily prohibiting open licence, settlement agreement and terms of service licences.</p>	
	<p>Section 35: Further discussion on (b) and (c) in terms of settlement agreements and terms of services licenses needed. These paragraphs allows the exclusion of protection afforded by the Act by way of a licence or settlement arrangement.</p>	<p>The exclusion does not seem to be problematic for example in terms of a settlement agreement the parties have agreed to the terms in the settlement agreement. However, this should be checked with the legal experts.</p>
<p>Clause 36 the insertion of Schedule 2 Part A Translation of Licences</p>	<p>Allows for translation of work to language that is official language in RSA or foreign language regularly used in RSA, by making application for licence to the Tribunal. The Tribunal may grant the licence Or grant the licence with conditions.</p>	

**Clause 36 the insertion of
Schedule 2
Part B Reproduction
Licences**

Allows for application for licence to reproduce and publish copyright work before the Tribunal for licence to reproduce and publish particular edition of the work in printed or analogous form of reproduction
The Tribunal may grant the licence.
Or grant the licence with conditions
The applications for the licence in terms of Part A and B before the Tribunal will have to be assessed if current Tribunal is well capacitated to handle the process required in terms of these provisions.

Translation under the current Act are dealt with under adaptations, adaptation is one of the restricted acts under section 6, 7, 8 and 11B copyright work
Any person intending to adapt a copyright work belonging to another person must request permission to do so, should the owner refuse to grant permission then the Copyright Tribunal may be approached for a compulsory licence.
These provisions must be deleted from the Bill.



the dti

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Trade and Industry
REPUBLIC OF SOUTH AFRICA

THANK YOU