



**the dti**

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

**PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY**

**PRESENTATION ON FLAGGED PROVISIONS IN THE COPYRIGHT AMENDMENT BILL**

**07 JUNE 2018**

## Presenters

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## Purpose of the Presentation

To present responses to flagged issues in the B Bill.



Clause 1

DAC - we need a definition of “user”

In the introduced Bill there were many references to ‘user’ with ‘user’ as entitled to receiving royalties. The technical clean up of the ‘B’ Bill removed the term ‘user’. Currently reference to ‘user’ made in only two instances in sound recording (9A) and exceptions for libraries, archives and galleries. In each instance the ‘user’ is different and according to other copyright laws the term ‘user’ is not defined.

Clause 3:  
Amendment to  
Section 5 Work  
funded by the State

A concern was raised by the DAC that works owned by the State are being commercially exploited by researchers / made available online: Propose to introduce clear rights management.

**Rights Management Information** – is information that identifies content protected by copyright or related rights, the rights owners (e.g. State) in such content and the terms and conditions of use associated with it. Rights Management Information often takes the form of electronic water mark placed in protected content. Water marks may also interact with devices that receiver and play content.

Clause 7 (Section 7B) in conjunction with section 3(1)(a)

the author is a South African citizen ~~or is resident in the Republic~~ a citizen of a designated country.

Section 3(1)(a) of principal Act reads as follows ‘**a person who is a South African citizen or is domiciled or resident in the republic or a citizen of a designated country**’ should be retained.

Clause 7 (section 7B) with regard to Resale Royalty Rights (RRR)

The Minister after consultation with Minister of Arts and Culture will prescribe payable rate. That rate must be fixed and the increase thereafter will be issued by Notice by the Minister from time to time.

**Proposed clause for increasing Rate**

“7B(2)(c) The Minister may by Notice in the Gazette increase the rate prescribed in terms of paragraph (a) from time to time.”



## Clause 7 (Section 7C)

Consider a method for artists to register work so that it cannot be adapted later by a company to whom the work was shown and who rejected the work at the time.

There is no policy position on proof of author, if we include it in artistic works there will be a vacuum in other works. There are currently affordable and easy mechanisms to provide proof as author. E.g. send yourself an email as well registered mail. If we are to include proof of author for all works it will change entire copyright regime because copyright protection is automatic when copyright requirements are met – work must be original; reduced to material form and done by a qualified person.



Clause 7 (Section 7E)

“indigenous community” – **dti** is of the view that these phrases can be deleted as the reliance will be on the DST Bill. The concern is that the Committee cannot legislate on a Bill that has not yet been passed.

The dti will align with DST Institutional mechanisms when the DST Act comes to effect. Dti proposes removal of ‘National Trust’ and retain ‘Indigenous Community’. This will be provided for in the transitional provisions.



Clause 11: Section  
9A

Should failure to report fully be an  
offence?

We propose that failure to comply with log sheets will be punishable by a fine to be determined by the Tribunal. We request PC to consider reviewing the penalty clause (Section 27 of principal Act) e.g. infringement of copyright is a fine of R5000 or 3 years imprisonment or both.



Clause 14

12D – who determines what a reasonable price of a comparative work is where there is a comparative work in the Republic as well as when it is not available in the Republic.

The Market determines what a reasonable price is.

## Reciprocity

South Africa pays foreign royalties but there are no reciprocal arrangements with foreign Collecting Societies to pay royalties for South African music played in foreign jurisdictions.

Jurisdictions where South Africa has no reciprocal agreements with Collecting Societies, royalties must not be paid. The dti to propose a clause along the proposed position. Collecting Societies should apply the principle of national treatment in accounting for royalties.

## Hybrid Model

- There is a shift in the Copyright regime moving towards open and flexible exceptions. Most commonwealth countries who have Fair Dealing remained with the name due to the history of the common wealth but opened up their provisions based on the Fair Use provision to allow flexibility of the law.
- In the past decade policy makers and commenters across the world have called for copyright reform based on the fair use model in the US. So far Israel, Liberia, Malaysia, Philippines, Singapore, South Korea, Sri Lanka and Taiwan have adopted fair use regimes or similar variants.
- The B Bill contains a modern general exception in order to create an environment conducive to the development of creative works and also to facilitate greater investment, research and development in copyright industries.
- There is an increasing trend for countries to move towards fair use into their copyright regimes. Australia, Hong Kong, and Kenya are currently amending their legislation to fair use models.
- In 2006 Singapore authorized fair dealing for any purposes thus doing away with lists of purposes.

## Hybrid Model

- Mixing fair use with preexisting fair dealing provisions creating a truly hybrid model. An excellent example is Singapore:
- Section 35 of the Singapore Copyright Act- ironically carries the heading fair dealing tracks the fair use provision of the US Copyright Act (s 107).
- Therefore, the Singapore provision is therefore a fair dealing provision in name but a fair use provision in effect this is also similar to the Malaysian Act.
- (Article, Customizing Fair Use Transplants by Peter K Yu. Published 26 February 2018.)

## Hybrid Continued....

### Singapore Model: [Section 35 (2)]

#### Fair dealing in relation to works

Section 35. For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for any purpose other than a purpose referred to in section 36 or 37 shall include —

### The B Bill in section 12A :

“General exceptions from copyright protection 12A. (1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;
- (ii) criticism or review of that work or of another work;
- (iii) reporting current events;

## Hybrid Continued....

### Singapore Model: [Section 35 (2)]

- (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
- (b) the nature of the work or adaptation;
- (c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
- (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
- (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

### The B Bill in section 12A :

- (iv) scholarship, teaching and education;
- (v) comment, illustration, parody, satire, caricature or pastiche;
- (vi) preservation of and access to the collections of libraries, archives and museums;  
and
- (vii) ensuring proper performance of public administration.
- (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
  - (i) the nature of the work in question;

## Hybrid Continued....

### Singapore Model: [Section 35 (2)]

Fair dealing for purpose of criticism or review

36. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, shall not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgment of the work is made.

### The B Bill in section 12A :

- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
- (iii) the purpose and character of the use, including whether—
  - (aa) such use serves a purpose different from that of the work affected; and
  - (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
- (iv) the substitution effect of the act upon the potential market for the work in question.

## Hybrid Continued....

### Singapore Model: [Section 35 (2)]

Fair dealing for purpose of reporting current events

37. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, shall not constitute an infringement of the copyright in the work if it is for the purpose of, or is associated with, the reporting of current events —

(a) in a newspaper, magazine or similar periodical and a sufficient acknowledgment of the work is made; or  
(b) by means of broadcasting or a cable programme service or in a cinematograph film.

### The B Bill in section 12A :

(c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.

## Microsoft Case On Computer Programmes

- In ***Microsoft v Moonbox*** 2017 case Microsoft was awarded one (1) million dollars for copyright infringements by online software seller, Moonbox Software.
- Moonbox Software sold more than 3600 pirated product keys relating to 17 different Microsoft software products, over the period of a year. As part of its ruling, the Federal Court restrained Moonbox and its directors from infringing copyright in Microsoft software products in the future.
- It was found that Moonbox software sold the unlawful product keys on its website. The ruling follows other infringement cases in which Microsoft was awarded damages by the court.

Clause 22 (Section 21) –  
Commissioned Work

The clause currently provides that if there is not contract governing the relationship, the person who commissions is the copyright owner and the author has a license to do anything with the work that the copyright owner may do.

We are proposing the Canadian model to support DAC proposal where author owns.

Dutch Copyright law also follows the Canadian model.

This was opposed by big companies including broadcasters during public hearings.

Clause 23 (Section 22) –  
Assignment and licences in  
respect of copyright

We want composers and  
publishers to recover  
economic benefits from the  
assigned copyright works.

We want to limit the  
application to composers and  
publishers.

We want to ensure that the  
life of a contract does not  
exceed the assignment  
period.

## Proposed clause for reversion of right for composers and publishers

Amendment of Section 22 of Act 98 of 1978

Section 22 of the principal Act is hereby amended-

(b) by the substitution for subsection 3 of the following subsection

“(3) No assignment of copyright in literary or musical work and no exclusive licence to do an act which is subject to copyright in such work shall have effect unless it is in writing and signed by or on behalf of the assignor, the **[licenser]** licensor or, in the case of an exclusive **[principal act]** sub-licence the exclusive **[sub-licenser, as the case may be]** sub-licensor, as stipulated in Schedule 2; Provided that assignment of copyright in literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.

Clause 24 (Section 22A) –  
Assignment and licences in  
respect of orphan works

The process of identifying  
orphan works in the Bill was  
cumbersome and awaited  
clarity on Fair Use/Fair  
Dealing finalisation.

With the hybrid model the fair  
use doctrine will be used and  
the orphan works can be  
used without permission of  
the author.

We agree with the proposal  
that the author must have  
access to the copyright work  
immediately when they  
resurface.



Clause 25 - Chapter 1A –  
(Sections 22A to 22F)  
Collecting Societies

Remove “registration” and  
retain “accreditation” only  
(these are already registered  
by CIPC)

Accreditation – current  
Regulation on Collecting  
Society uses accreditation  
and not registration.

Internationally accreditation  
is preferred.

Important to distinguish  
accreditation and registration  
within CIPC so that you do  
not register a registered  
company.



Clause 25 - Chapter 1A –  
(Sections 22A to 22F)  
Collecting Societies

Remove “registration” and  
retain “accreditation” only  
(these are already registered  
by CIPC)

Criteria for Accreditation:

There are 3 forms of  
accreditation:

- 50 or more copyright owners;
- 50 or more performers;
- 50 or more copyright owners and performers;
- Application must be in writing and lodged with CIPC;
- There must be able to administer rights of their members throughout the Republic;

## clause 25 continued...

Clause 25 - Chapter 1A –  
(Sections 22A to 22F)  
Collecting Societies

Remove “registration” and  
retain “accreditation” only  
(these are already registered  
by CIPC)

Criteria for Accreditation:

- Membership to the Collecting Society must be open;
- Members must have an appropriate right and opportunity to take part in decision making;
- The applicant is able to comply with obligations set out in chapter 2 (membership structure; administration of rights; licensing and distribution)
- Representatives, managers and members of the governing body must be fit and proper persons;

## clause 25 continued...

Clause 25 - Chapter 1A –  
(Sections 22A to 22F)  
Collecting Societies

Remove “registration” and  
retain “accreditation” only  
(these are already registered  
by CIPC)

Criteria for Accreditation:

- The principal place of business must be within the Republic;
- The accreditation does not conflict with the effective administration of a Collecting Society already accredited.

## clause 25 continued...

Clause 25 - Chapter 1A –  
(Sections 22A to 22F)  
Collecting Societies

Remove “registration” and  
retain “accreditation” only  
(these are already registered  
by CIPC)

BBB-EE Requirement on  
Criteria for Accreditation:

CIPC is of the view that due to the nature of Collecting Societies which are membership based and non-profit making, BBBEE requirement will create a burden for the members and most of the members of Collecting Societies are historically disadvantaged individuals.

clause 25 continued...

Clause 25 - Chapter 1A –  
(Sections 22A to 22F)  
Collecting Societies

One Collecting Society per  
right

The accreditation of the applicant does not conflict with, undermine or diminish the adequate, efficient and effective administration of the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978 or section 5(1)(b) of the Performers' Protection Act, 1967, as undertaken by a Collecting Society already accredited and established under the Copyright Act, 1978.

## clause 25 continued...

Clause 25 - Chapter 1A –  
(Sections 22A to 22F)  
Collecting Societies

One Collecting Society per  
right

Users will be required to pay all Collecting Societies on the same right – this will diminish efficiency and effectiveness, consequently weaken the system. In most countries they are using one Collecting Society per right.

Having more than one Collecting Society will result in the user being offered different tariffs on the same work and this will be chaotic.



Difference between non compliance and infringement:

Non Compliance: Is a civil liability.

Infringement: Is both civil and criminal liability.



Comparable Jurisdictions	Non Compliance	Infringement
Singapore	No example	Fines and imprisonment depending on the type of infringement-e.g. Sale of infringing copies:\$10 000 per infringing copy. Possession or importation of infringing copies for commercial purposes: Imprisonment up to 5 years.
United States (US)	No example	Civil copyright infringement may be ordered to pay damages that are not less than \$750 and not more than \$30 000. Criminal Penalties is imprisonment for up to 5 years and \$250 000.

The regulations on collecting societies gives the 90 days period to remedy the situation after which the user may be blacklisted. Administrative fines are mostly applicable to industries that are regulated.

Clause 27 (Section 27)

Technological protection measures (TPM) must be carefully considered because on the one hand they prevent abuses of copyrighted works digitally, but on the other, they clash with the use of exceptions and limitations allowed in copyright law.

The dti relooked at clause and can say balance properly struck between TPM's and exceptions and limitations.

clause 27 (section 27 - Offences)  
proposal

## Proposed clause for Penalty:

Amendment of section 27 of Act 98 of 1978

Section 27 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) A person convicted of an offence under this section shall be liable to a fine or to imprisonment for a period not exceeding 5 years or to both a fine and such imprisonment or, if the convicted person is not a natural person, to a fine not exceeding 10 per cent of its annual turn over.”

Clause 31 (Section 29 -  
Tribunal)

- Dti proposes to remove the establishment of the IP but to strengthen the Copyright Tribunal.
- Should the Tribunal continue under the umbrella of the CIPC, then this clause and related clauses in this chapter will have to be removed.
- Depending on what changes are required to the Bill, this may require advertising to call for comment.
- Propose widening the powers of the Tribunal, empower the Commissioner.
- Dti to confirm if this requires amendment to the Patent Act of 1978.

## Clause 31 (section 29) proposal

### Proposal of Model for the Copyright Tribunal:

- The current constraints on the effectiveness and efficiency of the Copyright tribunal revolves on the availability of the judges from the bench to hear and adjudicate on Copyright licence schemes.
- The judges sitting as commissioners are designated by Judge President of the Transvaal from time to time to hear and adjudicate on matters of licence schemes.
- In order to respond and address these two challenges we propose the following model and set up:
  - 1.The Department of Trade and Industry formally in writing request the Chief Justice / Judge President to designate the five retired judges and ten acting judges for a term period not exceeding five years to hear and adjudicate copyright disputes as commissioners of Copyright tribunal.
  - 2.The Department of Trade and Industry will then introduce the legislative changes in the Copyright Act to expand the current jurisdiction to include the following functions:

Clause 31 (section 29) proposal

Continued...

- Adjudicate any application or referral made to it in terms of this Act, the Companies Act or any other relevant legislation, and may make any appropriate order in respect of an application or referral;
- Hear matters referred to it by the Commission, a dispute resolution institution or any regulatory authority, only if the dispute relates to copyright;
- Adjudicate any application or referral made to it by any person, institution or regulatory authority where the dispute can only be directly referred to the Tribunal in terms of this Act and such disputes relates to copyright;
- Settle disputes relating to payment of royalties or terms of agreements entered into as required by the Act or agreements entered into in order to regulate any other in relation to copyright;
- Any other disputes of copyright nature.

Clause 31 (section 29) proposal  
Continued....

3. The hearings before the Copyright Tribunal;

- The tribunal must conduct its hearings in public-
  - in an inquisitorial manner;
  - as expeditiously as possible;
  - as informally as possible;
  - in accordance with the principles of natural justice.

4. Right to participate in hearing

- The following persons may participate in a hearing before the tribunal in person or through a representative and may, put questions to witnesses and inspect any book, document or items presented at the hearing.



Clause 33

DAC proposed that to assist indigent artists, services of legal aid should be used.

This can be done outside this Bill. DAC can still build an assistance programme linking indigent people with Legal Aid Clinic to be represented in the copyright disputes adjudication process.

Clause 35 (Unenforceable Contracts – section 39B)

This clause protects a vulnerable party who contracted him or herself out of the rights afforded by the Act by allowing that vulnerable party to say – “This is an unenforceable term so I remain protected”. However, paragraphs (b) and (c) allows a settlement agreement and a service licence to exclude the protection afforded by the Act. Is this the policy intention?

Spirit of the clause is catered for in subsection 1, therefore dti proposes deletion of paragraph (b) and (c) in subsection 2.



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THANK YOU