

14 June 2018

Copyright – issues for discussion in the Committee Meeting

Retrospective application

- Clause 5 (Section 6A), clause 7 (section 7A), clause 9 (section 8A)
 - (1) Notwithstanding the assignment of the copyright in a literary or musical work the author shall have the right to a percentage of any royalty received by the copyright owner, subject to the provisions of this Act, for the execution, or authorisation, of any of the acts contemplated in section 6.
 - ...
 - (5) (a) A person who obtained the copyright in a literary or musical work prior to the commencement of the Copyright Amendment Act, 2019, must within 48 months after said commencement negotiate a percentage of royalty as contemplated in subsection (1) with the author of the copyrighted literary or musical work in question.
 - (b) Subsections (2), (3) and (4) apply to the negotiation contemplated in paragraph (a).
 - (c) Section 22A, with the necessary changes, applies where the author cannot be found.
 - (d) This subsection does not apply—
 - (i) to a copyright owner who commissioned, or who is the author of, the copyrighted literary or musical work in question; or
 - (ii) where the term of copyright in the copyrighted literary or musical work has ended.“.
- Concerns:
 - o Implementation challenges
 - From when would the amount be payable?
 - Commencement of the Amendment Act? (this creates uncertainty in law as the negotiations would not yet be completed)
 - Once negotiated? (everyone would wait until the 48 months are up before settling a contract)

- If taking the period for which copyright could subsist, this could go as far back as 120 years (the life of the author plus 50 years – section 3(2)(a))
- The current Copyright Act is only applicable from 1978. Before that we had the Acts of 1965 and 1916, so different regimes are affected.
- This interferes with an existing agreement
- Agreements may have long ago been destroyed or lost (because of the lengthy time period involved).

Commissioned work

The Bill proposes the following text (The department will provide other options):

- (c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of an audiovisual work or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the ownership of any copyright subsisting in the work shall, subject to subsection (3), be governed by agreement between the parties.
- (3) (a) The agreement contemplated in subsection (1)(c) may limit the ownership of copyright in the relevant work so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to one or more of such acts, necessary for the purpose of that commission.
- (b) Where the agreement contemplated in subsection (1)(c) does not specify who the copyright owner is, limited ownership of the copyright shall vest in the person commissioning the work, so that the exclusive right to do or to authorise any of the acts contemplated in sections 7, 8 or 9, as may be applicable, is limited to such rights as may be necessary for the purpose of the commission.
- (c) The author of a work contemplated in subsection (1)(c) may approach the Tribunal for an order—
 - (i) where the work is not used by the copyright owner for the purpose commissioned, licencing the author to use that work for such

- purpose, subject to a tariff determined by the Tribunal payable to the copyright owner; or
- (ii) where the work is used for a purpose other than that for which it was commissioned, ordering the copyright owner to make payment of royalties to the author for such other use.
- (d) When considering a licence contemplated in paragraph (c)(i), the Tribunal must take all relevant factors into account, including the following:
- (i) The nature of the work;
 - (ii) the reason why, and period for which, the copyright right owner did not use the work; and
 - (iii) public interest.
- (e) Where the work contemplated in subsection (1)(c) is of a personal nature to the copyright owner, the Tribunal may not licence the author to use that work.“

Penalties for infringement and penalties for non-compliance

- We had to separate infringement (Section 27) and non-compliance as section 27 was headed “infringements” and it is housed in a chapter that deals with “infringements” – included the issue of non-compliance in the section where compliance is required (Clause 11, section 9A).
- Clause 11, section 9A: **Non-compliance**
 - (4) (a) Any person who intentionally fails to register an act as contemplated in subsection (1)(aA)(i), or who intentionally fails to submit a report as contemplated in subsection 9A(1)(aA)(ii), shall be guilty of an offence.
 - (b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.

(c) For the purpose of paragraph (b), the annual turnover of convicted non-natural person at the time the fine is assessed, is the total income of that person during the year immediately preceding the calculation, under all transactions to which this Act applies.

Natural persons	A fine or 5 years imprisonment
Persons who are not natural persons	A fine of a minimum of 10 per cent of its annual turnover

- Clause 27 (Section 27): **Infringement**

(6) A person convicted of an offence under this section shall be liable—

- (a) in the case of a first conviction, to a fine **[not exceeding five thousand rand]** or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of five per cent of its annual turnover, for each article to which the offence relates; or
- (b) in any **[other]** case other than those contemplated in paragraph (a), to a fine **[not exceeding ten thousand rand]** or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover, for each article to which the offence relates.“

Natural persons	First offence	A fine or 3 years imprisonment	Per article
	Further offences	A fine or 5 years imprisonment	
Persons who are not natural persons	First offence	A fine of a minimum of 5 per cent of its annual turnover	Per article
	Further offences	A fine of a minimum of 10 per cent of its annual turnover	

Copyright – Matters that must be advertised

- Clause 1, par (j): The definition of “usual artistic work”;
- Clause 5: Section 6A(4): The minimum content of the agreement related to royalty percentages;
- Clause 5: Section 6A(5): The issue of retrospective application ;
- Clause 7: Section 7A(4): The minimum content of the agreement related to royalty percentages;
- Clause 7: Section 7A(5): The issue of retrospective application;
- Clause 7: Section 7B(3)(a)(i) read with section 7B(5): Reciprocal application of the resale royalty right;
- Clause 9: Section 8A(4): The minimum content of the agreement related to royalty percentages;
- Clause 9: Section 8A(5): The issue of retrospective application;
- Clause 11: Section 9A(1)(aA): Log Sheets;
- Clause 11: Section 9A(4): Failure to record acts or to report constituting an offence and the penalty for that offence;
- Clause 15: Section 15: Panorama rights and incidental use;
- Clause 22: Section 21(3): New process for commissioned work aimed at giving the author more rights;
- Clause 25: Section 22B(7): Transitional provisions to provide for existing Collecting Societies;
- Clause 25: Section 22C(3)(c): Reciprocity applying to pay-outs of royalties by Collecting Societies to foreign countries;

- Clause 25: Section 22D(2)(b) and 22D(3): How Collecting Societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer.
- Clause 27: Section 27: Increased penalties for infringement. Provision for fines when the convicted person is not a natural person.
- Clause 30: Copyright Tribunal:
 - o Section 29: Composition
 - o Section 29A(3): No power to review administrative action by the Commission.
 - o Section 29E: Proceedings of the Tribunal
- Clause 37: Transitional provision