



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**PROVISIONS IN THE COPYRIGHT
AMENDMENT BILL**

PRESENTATION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

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Purpose of the Presentation

To make a proposal to the Portfolio Committee on the issues to include in the Copyright Bill and to flag issues of concerns in the Bill.

To present the proposed approach to the Bill Clause by Clause.

The proposed approach

- Creators especially musicians have not been catered for properly in the economy. Many have and continue to die as paupers. There are many abuses in the music industry that have occurred over time.
- **the dti** is concerned about the plight of the copyright based industries and aims to create an enabling and fair economic environment that recognises the rights of creators.
- Given the outcomes of the public hearings and issues raised, more work is still required in some areas of policy.
 - Fair use, other sectors in the copyright based industries, freedom of panorama, private copy levy, etc.
- **the dti** proposes two phases to the Bill, phase 1 and phase 2.
- **the dti** proposes that focus of the Bill be on the Copyright Review Commission Report recommendations and include issues of the blind and people with disabilities.
- **the dti** proposes that the fair use doctrine be in the next phase of the legislative process, which is phase 2.
- The Clause by Clause proposals will be outlined in terms of what the Department proposes will remain and be removed in the Bill.

Why phase 1?

- Musicians and other role players in the music industry have been deprived of rights for many years.
 - They have been deprived of economic benefits and protection of their copyright works.
- The President met with the musicians in 2009 and their issues were highlighted. These issues have remained over time.
- Musicians have no rights and the legislative framework has not benefitted them.
- The Copyright Review Commission provides a basis.
- Other sectors are important however it is proposed that the industry within which much work has been done, lessons learnt should be prioritised as a quick win.
- With the other sub sectors, more work still needs to be done. And there are strong debates with diverse opposing views.
- Given the dire need for access to those with disabilities and visually impaired, an opportunity should be provided for them.

CRC Recommendations

The CRC recommendations are summarised as follows:

- The right to communicate literary and musical works to the public and the right to make available copies of sound recordings;
 - Section 6(eA)
- Allow the Registrar to take over the administration (as opposed to the withdrawal of accreditation) of any relevant Collecting Society;
 - Chapter 1A section 22F
- Allow for one collecting society per set of rights.
 - 22B (6) and (7)
- All music-rights Collecting Societies to fall within the ambit of the Regulations issued under the Act;
 - Section 22B-22F
- Retention of music usage information to be compulsory for essential music users;
 - Section 9A
- Rights holders (as well as users) to engage the Copyright Tribunal in disputes about the appropriate tariffs to be applied;
 - Section 29A(2e)

Background

- 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;
 - Section 9A (2a)
- The reversion of assigned rights twenty five (25) years after the copyright came into existence;
 - Section 22(3)
 - This clause to be amended to apply to composers.
- Adopt the right to communicate the work to the public and the making available right as two exclusive rights of copyright owners.

Proposals

- Propose the strengthening of the Copyright Tribunal-Clause 29-29S
 - Remove the IP Tribunal in the Bill, replace with the Copyright Tribunal.
 - Remove the provisions that concerns the establishment of the IP Tribunal
 - Give certain powers to the Commissioner and **the dti**
 - Widen the scope of the existing Copyright Tribunal and its mandate
 - Established in terms of section 29 of the Copyright Act of 1978.
 - CIPC in process to advise what to retain and remove in current Bill
 - There might be legal challenges that require the amendments of the Patents Act of 1978
- Include issues of the Blind and visually impaired
 - Section 19D
- Ratification of the Treaties
 - Processes underway.
 - Bills can be ratified before the domestic law is in place.
- Other proposals
 - Administration fee
 - Rate of royalty-currently amongst lowest in the world
 - Retention of royalties

Proposals

Local content

- The CRC report recommended that the local content quota for radio stations should be as follows: 80% for public broadcasters and 60% for private broadcasters.
- In 2016, SABC announced a 90% local content quota for public broadcasters only which has been subsequently withdrawn.
- Local content not in the Bill as it is a Department of Communications mandate.

Fair use/ Fair dealing Doctrines

Fair use

- The Bill adopted fair use
- Enables legitimate use of copyrighted materials and permits certain uses without the copyright holder's permission.
- Critical for all users of information.
- Users can use copyright work without permission or payment when the benefit to society outweighs the cost to the copyright holder.
 - Educators, students, artists, musicians, libraries, archives, authors, lawyers, government officials.
- Countries that use fair use are innovate and have evidence of economic growth.
- Fair use test to determines the fairness in using the materials.
 - Purpose and character of use, nature of the work, the effect of the use.

Fair dealing

- The 1978 Act is based of fair dealing
- Fair dealing not defined in the Act
- Exempts the use of Copyright for certain statutorily defined purposes and relates to certain types of works
- Provides closed list of exceptions and the usage of copyright is only fair if specifically provided for in the Act.
- Any use outside the scope of the exception is considered an infringement.
- Limiting the digital space, is outdated, provides no flexibility, requires constant updating

Context

Section 2 of the Act identifies that the following works are eligible for copyright:

- (a) literary works,
- (b) musical works,**
- (c) artistic works; ,
- (d) cinematographic films,
- (e) sound recordings,**
- (f) broadcasts,**
- (g) programme-carrying signals,
- (h) published editions,
- (i) computer programs.

The Bill will be presented Clause by Clause.

PREAMBLE

PREAMBLE

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

CLAUSE 1

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: to be retained

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.

Clause 2 to be retained

- 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.
- What about when you make a speech, for the press and the words are distorted or misquoted? Can this be copyright work?
 - Applicable legislation will apply.

Clause 3: may be removed

Clause 3: Amendment 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 was highly contested in the public comments and hearings.
- This is problematic because government funds many things and they cannot be perceived as copyright, e.g **the dti** incentives.
- **the dti** proposes that this clause be removed.
- There is a contradiction with the Department of Science and Technology on state funded programmes.
- NIPMO-The National Intellectual Property Management Office (NIPMO) was established in terms of Section 8 of the Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008.
- Its aim is to protect intellectual property and intellectual property rights that are created with public funds.
- It was proposed that the words funded be removed in this clause.

Clause 4: To be removed- literal work

Clause 4: Amendment to section 6 Communicating of literal and musical work to the public

- 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.
- The provision to focus only on musical works.
- Also recommended in the Farlam report.

Clause 5: may be retained

Clause 5: insertion of section 6A Royalties regarding literal or musical work.

- 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.
- Retain for musical works.
- 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.
- The contract to be the first option.
- The royalty split 50% to be determined between the copyright holder and other contracting parties. There might be more than 3 parties in the arrangement.
- This provision can be phrased like Clause 9A.

Clause 5

- The arrangement can be mediated by the Copyright Tribunal.
- Contractual arrangement should be the first option. The contract template must be addressed.
- The contract template aims to address the abuses that the creators have endured over time.
- The word transfer to be defined.
- There could be a clause that focuses on transfer and an insertion be on royalties, to avoid the contradictions.
- Benchmarks can be used to check the international royalty rates.

Clause 6

The royalty value chain role players

- Users are broadcasters, malls, radio stations-they pay licenses to collecting societies each time music is played.
- Records of usage of music is critical
- The quota of usage in the broadcasting is important.
 - Foreign music used to be played more and it led to foreign royalties being paid **Needletime rights** substantially.
- (performers and recording artists paid when music played in public.
 - Author, performer, publisher, recording company, instrument player (saxophonist), publisher, collecting society (SAMPRA and IMPRA).
- **Performance rights** (allows music to be performed live or broadcast)
 - Composer, author, music publisher, collecting society (SAMRO).
- **Mechanical rights** (to reproduce into cds, cassettes, DVDs)
 - Author, publisher, recording company, collecting society (CAPASSO)

Clause 6: to be retained

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: may be retained

Clause 7 insertion of section 7A Royalties regarding artistic works

- Policy: The intention of the provision is to provide for royalties in artistic works. The word transfer must be reviewed as it may imply assignment of rights.
- The contract must also be provided for as the first option.
- Allows the author who transfers copyright in artistic work to have a right to claim half of the royalty payable to that other person for the use of the copyright work.

Section 7B may be removed

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.
 - Avoid abuses. Artists normally receive very little for their work
 - The sector is unlike the music industry, the legislation does not currently provide for it in the regulations.
 - Other jurisdictions have specific legislation on Artist resale rights.

Section 7B may be removed

- 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.
 - Illegal people must be treated differently. It may have a criminal element.
 - The asylum seekers and refugees will be recognised by the law and will receive royalties for their work.
- Retrospectivity is proposed to apply to artistic works.
- A legal opinion has to be sought on the matter.
- It may be difficult to apply it given that it may not be clear when the cut off date for retrospectivity will apply. In terms of how far back to go.

Section 7C to be removed

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 is deemed to be author where a mark or name purporting to identify as author of an artist appears on such work.

Section 7D may be removed

Insertion of section 7D resale of royalty right

- An artist-visual artist, sculptor, painter-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

Section 7E to be removed

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
- **Indigenous knowledge question: Between the dti and DST. Dti to engage with Minister:**
 - The DST legislation is supported by **the dti**.
 - **the dti** legislation awaited the finalisation of the DST legislation for alignment.
 - The institutions in **the dti** legislation, the community Trusts will not be implemented as they may have many unintended implications, the DST institutions will be utilised.
 - The intention of the intellectual amendment Act on indigenous knowledge is to recognise the intellectual property and heritage of our communities that have been neglected and abused for many years.
 - The DST legislation recognises indigenous knowledge in South Africa. It has established key institutions that oversees the documentation and promotion of indigenous knowledge.
 - DST will document IK. And CIPC will complement the work of DST by keeping the database of IK and addressing IP matters that emerge.
 - Reference to indigenous community or the National Trust to be removed in the Bill. 27

Clause 8: may be removed

Clause 8 amendment to section 8: Nature of copyright in audiovisual works

- The provision substitutes the use of the phrase film with work in this section.
- 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.

Clause 9 may be removed

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.

Clause 10 to be retained

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 to be retained

Clause 11 insertion of section 9A Royalties regarding sound recording

- Provide certainty on sound recordings. Also to provide for the royalties.
- Contract must be prescribed. To include termination, dispute resolution, etc
- **9A (Aa) to be reviewed. This clause must not be cumbersome to performers and copyright holders.**
- Problem: How to work out what has been done and recorded to ensure royalty payment.
- 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
- 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.

Music Log sheets

- The CRC report noted that 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.
- 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 continues

- 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 12 to be removed

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

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

Clause 14 Fair Use to be removed

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 underserved 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 Fair Use to be removed

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.

Clause 14 Fair Use to be removed

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

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.

Issues in Clause 14

- Section 12A
 - 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’.
- Section 12B(1)(j)
 - Ji, the word ‘copy’ can be removed. It might create confusion about making copies and may be abused.
 - Personal use of the work for non commercial purposes –reference to copy must be removed.
 - Section 12B(6)-Use the international, national and regional system?
 - Section 12C(3)

Clause 14 Fair Use to be removed

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

Clause 15 to be retained

Clause 15 Amendment to section 16

- Deals with deletion of cinematographic films

**Clause 16 to be removed and
revive section 17**

Clause 16 repeals section 17

- Section 17 deals with general exceptions for protection of sound recordings
- If section 12 (fair dealing is retained exceptions relating thereto in relation to sound recording may need to be revived.

**Clause 17 to be removed and
revive section 18**

Clause 17 repeals section 18

- Section 18 deals with general exceptions for protection of broadcasts
- If section 12 (fair dealing) is retained exceptions relating thereto in relation to broadcasts may need to be revived.

clause 18 to be retained

Clause 18 repeals section 19A

- Section 19 deals with general exceptions for protection of programme carrying signal.
- If section 12 is retained exception relating thereto in relation to exceptions for protection of programme carrying signal may need to be revived.

Clause 19 to be removed

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.
- Clause 19-broaden it to educational uses?
 - This clause to be widened for educational purposes.
 - Specific subsections can be added.

Clause 20 to be removed

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.

**Clause 20 fair use exception:
to be retained**

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.
- Can the fair dealing doctrine allow this exceptions?

Clause 21 may be removed

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.

Clause 22 may be removed

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.
- Issues identified with this Clause by the drafters to be resolved.
 - 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.

**Clause 23 on state funded
copyright may be removed**

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
- 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.

Clause 24 may be removed

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

- Orphan work is copyright protected work for which right holder can not be located.
- The section provides that where 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.
- 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).
- 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.

Clause 25 may be retained

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.

Clause 25 may be retained

Clause 25 to Clause 27 insertion of Chapter 1A COLLECTION SOCIETIES (CS) AND RELATED MATTERS

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

Clause 25 may be retained

Clause 25 to Clause 27 insertion of Chapter 1A COLLECTION SOCIETIES (CS) AND RELATED MATTERS

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 submission of reports and returns to the Commission
Reports may relate to affairs of the CS and royalties collected

Clause 25 may be retained

Clause 25 to Clause 27 insertion of Chapter 1A COLLECTION SOCIETIES (CS) AND RELATED MATTERS

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 may be retained

Clause 26 amendment of section 23

Provides for infringement of copyright where person tamperees 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.
- 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.

Clause 28 may be retained

Clause 28 amendment of section 28

Provides for restricting importation of copies and infringement in country of origin

Clause 29 may be retained

Clause 29 the insertion of section 28O

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
- Question: Section 28P: Are the provisions of (2) and (3) the process not too onerous? (1) in any event allows the circumvention. This is not something that is a normal requirement.
 - This should be checked with legal experts.

Clause 30 and 31

Clause 30 the insertion of REGULATORY ENFORCEMENT AGENCIES

Clause 31 Provides for 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 continues 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.
- Can this be done without amendment to the patent Act of 1978?

Clause 35 may be retained

Clause 35 the insertion of section 39A unenforceable contracts

- 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.
- 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. Unenforceable Contracts – clarity sort on what is meant. 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.

Clause 36 may be retained

Clause 36 the insertion of Schedule 2

Part A Translation of Licences

- 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

Clause 36 may be retained

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.



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

THANK YOU