



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**COPYRIGHT AMENDMENT BILL –
FLAGGED ISSUES**

PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

14 JUNE 2018

Purpose

The purpose of this presentation is to provide responses to the flagged issues on the Copyright Amendment Bill 2017.

Retrospective: Clauses 4 6A, 7A
and 8A

- **the dti** does not support a retrospective provision as it may have unintended consequences.
 - It is also arbitrary (how far back can one go? How can the rate apply?).
 - It may be challenged legally.
- The issue of Orphan works do not apply here, it may be applied in the correct clause.

Commissioned works: Clause 22

- In the Principal Act the commissioned works are owned by the person who commissions the work as he agreed and paid the author for the work carried out.
- In the UK, Canada, Australia and the US the opposite is happening as the first owner of the commissioned work is the author unless there is a written contract stipulating otherwise.
- South Africa has a unique situation where it comes to the commissioning of works, simply because there are only three Broadcasting Organisations (SABC, Multi-Choice and ETV) practicing the commissioning works. This is not the situation in other jurisdictions like the UK, US and Canada.
- It can certainly be mentioned that the actors in the soapie Generations, Uzalo Rhythm City, Backstage and Scandal will lose employment once we legislatively vary the current position of commissioned works.
- While we sympathize with the authors who will not access their works if the Broadcasters decide to shelve the works.

Commissioned works: Clause 22

- The commissioned works should not be confused with the author who produced copyright work under the employment relationship. The employment relationship has its own legal principles such as whether the work is produced within the job description of the author.
- The policy intervention that we can deliberate is whether we can say if the commissioned work is not commercialized (or shelved) the author must approach the Copyright Tribunal for a compulsory license and must be the preferred licensee.
- Where the work has been used for a purpose other than the commissioned purpose- the author shall be the owner of the copyright subsisting in the work by virtue of Section 3 or 4 of the Principal Act.
- Proposed drafting:

Clause 22

- “Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film (audio visual work) or the making of a sound recording and pays or agrees to pay for it in money or moneys’ worth, and the work is made for the purpose it was commissioned for, otherwise the author shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4”.

Orphan works: Clause 24

- In Canada, Japan, India, Denmark and France an upfront payment is usually required in exchange for using orphan works.
- In the UK, the Intellectual Property Office (IPO) is used as a licensing authority.
- The system defines orphan works, it also provides overview of orphan works for applicants, diligent search guidelines for applicants, deals with commercial and non-commercial licenses, deals with the process of retaining rights, deals with appeal processes and provides annual reports on how the orphan works performed commercially.
- We propose a similar model to apply as our legislation.
- Currently the CIPC does not have a database however if it envisaged for the Bill to create this function for the CIPC then the drafting in the clause is correct.

Penalties Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
Singapore	No example	Fines and imprisonment depending on the type of infringement-e.g. Sale of infringing copies: \$10 000 (R130 000) per infringing copy. Possession or importation of infringing copies for commercial purposes: Imprisonment up to 5 years.

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
United States (US)	No example	<p>Civil copyright infringer may be ordered to pay damages that are not less than \$750 (R9 800) and not more than \$30 000 (R392 148).</p> <p>Criminal Penalties: imprisonment for up to 5 years and \$250 000 (R3,2 Million).</p>

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
Peoples Republic of China (PRC)	No example	<p>Civil liability for copyright infringement: ceasing the infringing act; eliminating the effects of the act; making a public apology or paying compensation for damages, depending on the circumstances.</p> <p>Infringer shall compensate for the actual injury suffered by the right holder.</p>

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
Peoples Republic of China (PRC)	No example	<p>Where the actual injury is difficult to compute, the damages shall be paid on the basis of the unlawful income of the infringer.</p> <p>The amount of damages shall also include the appropriate fees paid by the right holder to stop the infringing act.</p> <p>There is No criminal liability.</p>

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Saudi Arabia</p>	<p>No example</p>	<p>Penalties for civil liability:</p> <p>(1) Warning.</p> <p>(2) A fine not exceeding two hundred and fifty thousand riyals (R871 416) – <i>if it exceeds one hundred thousand riyals (R350 000), the case is submitted to Minister of Culture and Information for referral to Board of Grievances.</i></p>

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Saudi Arabia</p>	<p>No example</p>	<p>(3) Closing the violating establishment for a period not exceeding two (2) months.</p> <p>(4) Confiscation of all copies and materials used or intended to be used in infringing activities.</p> <p>Penalty for criminal liability: Imprisonment for a period not exceeding six (6) months.</p>

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Saudi Arabia</p>	<p>No example</p>	<p>Upon repetition of the infringement - the maximum limit of penalty, fine and closure may be doubled.</p>

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Competition Act</p>	<p>No example</p>	<p>Penalties:</p> <p>(1) Any person convicted of an offence in terms of this Act, is liable -</p> <p>(a) in the case of a contravention of section 73(1), to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or</p>



Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
Competition Act	No example	(b) in any other case, to a fine not exceeding R2 000-00 or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment.
Companies Act	Administrative fines: (1) A court, on application by the Commission or Panel, may impose an administrative fine— (a) only for failure to comply with a compliance notice, as contemplated in	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Companies Act</p>	<p>section 171(7); and</p> <p>(b) not exceeding the greater of—</p> <p>(i) 10% of the respondent’s turnover for the period during which the company failed to comply with the compliance notice; and</p> <p>(ii) the maximum prescribed in terms of subsection (5).</p> <p>(2) When determining the amount of an appropriate administrative fine, the following must be considered:</p>	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Companies Act</p>	<ul style="list-style-type: none"> (a) The nature, duration, gravity and extent of the contravention; (b) any loss or damage suffered as a result of the contravention; (c) the behaviour of the respondent; (d) the market circumstances in which the contravention took place; (e) the level of profit derived from the contravention; 	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Companies Act</p>	<p>(f) the degree to which the respondent has co-operated with the Commission or Panel, as the case may be, and a court; and</p> <p>(g) whether the respondent has previously been found in contravention of this Act.</p> <p>(3) For the purpose of this section, the annual turnover of any person, is the amount determined in the prescribed manner.</p>	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Companies Act</p>	<p>(4) A fine payable in terms of this section must be paid into the National Revenue</p> <p>Fund referred to in section 213 of the Constitution.</p> <p>(5) The Minister may make a regulation prescribing the maximum amount of an administrative fine, which amount must be not less than R1 000 000.</p>	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Credit Act</p>	<p>Administrative fines:</p> <p>(1) The Tribunal may impose an administrative fine in respect of prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008.</p> <p>[Subs. (1) substituted by s. 121 (1) of Act No. 68 of 2008 with effect from 31 March, 2011.]</p>	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Credit Act</p>	<p>Wording of Sections</p> <p>(2) An administrative fine imposed in terms of this Act, or the Consumer Protection Act, 2008, may not exceed the greater of (a) 10 per cent of the respondent's annual turnover during the preceding financial year; or</p> <p>(b) R1 000 000.</p> <p>(2) amended by s. 121 (1) of Act No. 68 of 2008 with effect from 31 March, 2011.]</p>	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
Credit Act	<p>(3) When determining an appropriate fine, the Tribunal must consider the following factors:</p> <ul style="list-style-type: none"> (a) The nature, duration, gravity and extent of the contravention; (b) any loss or damage suffered as a result of the contravention; (c) the behaviour of the respondent; (d) the market circumstances in which the contravention took place; 	



Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
Credit Act	<p>(e) the level of profit derived from the contravention;</p> <p>(f) the degree to which the respondent has cooperated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection</p>	

Clause 27

Comparable Jurisdictions/Legislation	Non Compliance	Infringement
<p>Credit Act</p>	<p>Wording of Sections</p> <p>(g) whether the respondent has previously been found in contravention of this Act, or the Consumer Protection Act, 2008, as the case may be.</p> <p>[Para. (g) amended by s. 121 (1) of Act No. 68 of 200.</p>	



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Thank You