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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

**Key Issues Raised by Stakeholders per Policy
Area on the Copyright Amendment Bill 2017**

Portfolio Committee on Trade and Industry Sub-committee on Copyright
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TEAM

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Purpose

The purpose of this presentation is to provide responses to the key issues raised by stakeholders on policy positions as introduced in the Copyright Amendment Bill, 2017.



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Background

Background:

- Intellectual Property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. IP is divided into two categories, namely:
 - ✓ **Industrial Property:** includes inventions (patents), trademarks, industrial designs, and geographic indications of source, AND
 - ✓ **Copyright and Related Rights:** includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.
- In 2013 a Draft IP Policy was published and 118 written submissions were received.
- Copyright Amendment Bill (Copyright and Performers Protection Amendment Bill) were consulted upon and 122 written submissions were received.
- Presidential Task Team (led by DM Manamela at the Presidency) and the Presidency (Budget Speech 2016/2017) want these Bills to be concluded.

Background:

- Through the public participation process the **dti** began to unpack the issues facing the performers (musicians and actors) and other sectors in South Africa.
- In 2017 public hearings took place on the Copyright Amendment Bill at Parliament.
- In 2018 due to the urgency of the Copyright Amendment Bill in relation to timeframes, projects related to quick wins in terms of certain amendments identified and refocusing the amendments into phases (identified) in terms of the different policy areas.

Collecting societies

Background

Abbreviations:

SAMRO-Southern African Music Rights Organisation

CAPASSO-Composers, Authors and Publishers Association

DALRO-Dramatic, Artistic and Literary Rights Organisation

SAMPRA-South African Music Performance Rights Association

IMPRA-Independent Music Performance Rights Association

RISA-Recording Industry of South Africa

SARRAL-South African Recording Rights Association Limited

POSA-Performers' Organisation of South Africa Trust

NORM-National Organisation for Reproduction Rights in Music

- There are 5 collecting societies in South Africa.
- There are collecting societies that are not under CIPC regulatory framework, namely:- SAMRO, CAPASSO.
- **SAMRO** administers Section 6 rights which deals with music compositions. This is a self-regulating agency as it is only accountable to its members (right holders – composers). Further note that SAMRO has a wing called “**DALRO**” which administers authors rights in literary works.
- **CAPASSO** administers reproduction rights which emanates from both Section 6 and 9 rights. CAPASSO is also a self –regulating agency and accountable to its members through the company legislation.
- Collecting Societies under CIPC regulatory framework are: **SAMPRA** and **IMPRA**
- These collecting agencies administers Section 9 rights (commonly known as needle-time rights) and are subjected to CIPC supervision.
- SARRAL and NORM are no longer in existence. NORM merged with CAPPASSO. **SARRAL** was liquidated. POSA was never a collecting society but just a wing within SAMRO responsible for needle-time rights administration. **POSA** merged with SAMPRA.
- **RISA** is an association of recording companies also acting as a collecting society.



Collecting societies

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

Response by the dti:

Challenges

- Based on the CRC recommendations a commission specifically established to recommend a model for effective collective management in terms of music.
- The current situation with multiple collecting societies is the vacuum that has been created from a practical and implementation perspective.
- Many lessons have been learnt through the music industry and the CRC the other areas that require collective management do not have as many set of rights to be collected therefore it can be streamlined more effectively.



Collecting Societies

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:	Response by the dti:
Challenges	<ul style="list-style-type: none">• Most Collecting Societies collapse as they couldn't cope with collecting for all the different rights holders all in one.• Currently South Africa has very few collecting societies, the impact of one collecting society per set of rights will not be affecting many other than the main role players.• When many rights are collected for administering licenses for use are also not done correctly if at all.

Collecting societies

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

Freedom of association, as it implies that affected individuals must be members of a collecting society where one exists and only one collecting society for the set of rights is allowed.

The grouping of rights and stakeholders within collecting societies to ensure efficient access by users.

Response by the dti:

- Freedom of association with regard to collection of royalties is not impaired as the CRC did not make it compulsory for artists' to be part of a collecting society in order to get their royalties.
- Artists who wish to administer the collection of royalties for the use of their work can do so using contract. One collecting society for performance rights; one collecting society for needletime rights; and one collecting society for mechanical rights is due to the confusion around certain collecting societies' repertoires, arising as a result of the overlapping membership between organisations. This approach could assist the artists greatly by providing certainty to artists on who is collecting and which royalty is being collected. It further assists in addressing the problem of CS collecting for artists not registered under them.



Collecting societies

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

Appropriateness of extending the CRC recommendation of one collecting society per set of rights beyond the music industry.

Response by the dti:

- The extension of the CRC recommendation concerned with one collecting society per set of rights beyond the music industry is due to the fact that firstly, there are no collecting societies in other areas (Audio Visual sector/Artist Resale Right) that are copyright based, with exception of one.
- Secondly, it is important for purposes of consistency and legal certainty to have collecting societies in other areas that are copyright based.
- These industries requested that their sector be allowed to have a CS and similar provisions if not the same can be used to regulate these.
- In new areas requiring a form of collective management the royalty streams are not many and therefore one CS can collect for their set of rights, for the artist resale right for example there is only royalty stream linked to the resale of the work. In terms of the audio visual sector the royalty stream will stem from the four economic rights in the Beijing Treaty for audio visual performances and replaces the two existing rights.



Indigenous Knowledge

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

The possible inclusion of the collecting society for indigenous knowledge works.

Response by the dti:

- In terms of the Intellectual Property Laws Amendment Act (IPLAA) communities are meant to set up community trusts as community protocols differ greatly, it is not advised to subject indigenous works to collective management.
- Cross cutting in nature and the Patents Amendment Act 2005, Biodiversity Act 2004 and the current IKS Bill all have set mechanisms for protection all include, prior informed consent from the community to use the work, access to benefit sharing an agreements must be concluded with the community and disclosure of the IK being used.
- The Intellectual Property Laws Amendment Act, 2013 (IPLAA) provides for the protection of Indigenous work through the Intellectual Property system to prevent misappropriation but the Act is not in force.
- The current system of collective management for music is applicable to songs that are indigenous because copyright is part of the IPLAA. This should be limited to music as the IPLAA provides for its own mechanisms of protection. Any amendment made the Copyright Act will fall part of the IPLAA but is not dependant on the IPLAA being in force.
- Due to the IK Bill in DST, the regulations on IK were put on hold.

Royalty management

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

The maximum period that collecting societies may retain royalties before distributing these.

Response by the dti:

- The legislation should prescribe the maximum period royalties may be retained as the non payment of royalties gathers interest and the artist is not necessarily paid a portion of the interest.
- Collecting Societies have a practice of distributing unclaimed royalties and collecting for people who are not members, this is the rationale of the amendment.
- SAMRO currently keeps royalties for 3yrs and make attempts to look for the beneficiaries thereafter unclaimed money is written back to income and distributed to members.

Royalty management

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- The maximum period that collecting societies may retain royalties before distributing these.
- The need to prescribe maximum administration fees.

Response by the dti:

- Collecting Society accreditation is only valid for 5 years subject to renewal by the CIPC, if collection is taking place effectively the CS should not have a balance left after distribution in an ideal situation.
- The CRC found that around the world administration fees are low except in South Africa where the administration fees are high-The highest rate for administration fees was 30%-SAMRO.
- Need to bring administration costs in line with best practice.

Royalty management

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- The maximum period that collecting societies may retain royalties before distributing these.
- The need to prescribe maximum administration fees.

Response by the dti:

- The CRC report provided that the cost- to- royalty income ratio, which is the administration costs as a percentage of total collections, for the collecting societies selected for international benchmarking varies between 10% and 24%, bearing in mind that the maximum allowable ratio is 20% in terms of the current local regulations for needletime collecting societies (which the CRC regards as appropriate). Therefore, retaining 30% is excessive in relation to the international average. Capping it at 20% is reasonable and in line with other jurisdictions and ring fences the administration fees which caps unneeded profits, whereby a portion could rather be used to assist the industry.

Royalty reporting

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

The need to prescribe reporting by users to facilitate royalty payments.

Response by the dti:

- The CRC recommended that the legislation should be amended that the retention of music usage information to be compulsory for essential music users.
- The CRC found that Collecting Societies are not able to accurately distribute royalties based on usage as general users are not retaining any log sheets. The problem can be attributed to the fact that the CRC found the user pays R1000 for instance for a license, if all music usage was recorded properly this would increase the license fee.
- This information is essential without the law prescribing that such information must be retained the musician suffers to the lack of accurate information of use.

Royalty reporting

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

The need to prescribe reporting by users to facilitate royalty payments.

Response by the dti:

- Regarding the need to prescribe reporting by users in order to facilitate royalty payments, 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.
- Therefore, this is critical as CS must have systems in place to capture correct data in the long term this will ensure royalties are paid to the correct recipient.

Royalties

<p>Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:</p>	<p>Response by the dti:</p>
<p>Applicability to on-demand communications, such as digital services and radio play requests (making available right)? Given that we are in the digital space. The application of the digital environment must be allowed.</p> <p>•Should the 50/50 split between performers and copyright owners be mandatory or subject to a contract for needletime?</p>	<ul style="list-style-type: none"> • The copyright law is old and not in line with technological trends as well as recent developments. There is a need for the legislation to be in line with digital developments. • The Bill provides for the artist to make their work available to the public via wire or wireless means. • In light of the history of non-payment of the needletime royalty after the 2002 amendment, the legislation must prescribe the 50/50 split. • The 50:50 split should be mandatory. It will create certainty. It should be allowed. The contracts will be guided.

Rights of copyright holders

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- Maintenance of the liability rule in terms of broadcasting sound recordings or introducing the need to receive preapproval before broadcasting (property rule)?
- Should rights holders have the right to choose whether to license or not? If not, there may be a risk of abuse by users broadcasting their works without permission or payment
- Should the Tribunal have the right to set the terms of licence agreements between a right holder and a user?

Response by the dti:

- In theory entering into any form of contract whether license, assignment etc. should be a choice however the market forces do not allow for this because distribution channels are required to get the work onto the market.
- Licensing is a form of entering the market and for permission of the work to be used in terms of Copyright, Right holders should have the right to choose whether to license or not.
- ICASA is responsible for the terms of the license agreements for broadcasters. The CRC only says that users should be allowed to engage the Tribunal on the tariff, when the conditions are not met.
- The royalty rate should be prescribed to be in line with best practice and benchmarking. The current rate is very low.
- The Tribunal is a dispute resolution mechanism. The legislation must create clarity. The Tribunal can set the terms in the case of disputes. If the conditions of the license are not being followed the license should be revoked.

Resale Rights

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- Should this be limited to the original embodiment of artwork?
- What types of artistic works should be included/excluded?
- Should this be subject to a minimum threshold value or sliding scale for professional art market sales?
- Should the royalty rate be prescribed?
- Who should collect the royalties and how?
- Should there be some registration requirement?
- What should the applicable period be for the resale royalty right of an artwork?
- Should the assignment of a resale royalty be unlawful given commissioned work

Response by the dti:

- The scope must be limited to original work, limited to certain forms of art works namely visual arts such as paintings and sculptors for example but not extended to architectural drawings.
- The right should only be applicable to sales of a certain value, a sliding scale should be used like the UK.
- The rate in resale right needs to be in ascendancy as work appreciates as it matures.
- A collecting society should be set up to collect the royalty.
- The collecting society must register and be accredited by CIPC.
- The CRC only focused on the music industry and its recommendation on resale work was on the music industry.



Assignment

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- Should the reversionary period be set at 25 years or should composers and performers have a contractual right to shorten or lengthen this period?
- Should the reversion be automatic or requires some process?
- Should this be extended beyond musical works, considering the impact of extending this to functional or technical types of works such as computer programs, databases and industrial design drawings on businesses, etc., as well as to commissioned works?

Response by the dti:

- The CRC states that the Copyright Act must be amended to provide for the reversion of assigned rights to royalties 25 years after the assignment of such rights.
- Reversion clause supported only in the royalty payments/music rights as per the CRC report. It assists the creator to an option to renegotiate new favourable clauses.
- The reversion of assigned rights should be automatic after 25 years from the date of assignment.
- The assignment/reversion is applicable to composers, songwriters and music publishers.
- Such an amendment will help relieve the plight of composers whose works still earn large sums of money, which are going to the assignees of the composers' rights long after the assignees (or their predecessors) have recouped their initial investment and made substantial profits, in excess of those anticipated when the original assignment was taken.
- The initial amendment was applicable to all sectors-limit to the CRC.

Assignment

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- Should this be extended beyond musical works, considering the impact of extending this to functional or technical types of works such as computer programs, databases and industrial design drawings on businesses, etc., as well as to commissioned works?
- Should there be compulsory and standard contractual terms to be included in agreements?

Response by the dti:

- The default position is that the commissioner owns. If the work is commissioned, the stakeholders must be treated equally. The owner of the rights has the similar rights like the creative work owner. The Bill introduces that contract should be the default position to allow for parties to negotiate the terms. The purpose was to give more negotiation power to the author. This provision aims to avoid having two copyright owners both exercising exclusive rights.
- The author should have the right to reassign the rights as the rightful owner of the creative work.
- There is a need to make standard contractual clauses because of how the rights of artists have been infringed through contracts. The CRC report recommends that the standard contract template be developed for artists.
- Challenges with contracts include
 - Contracts are indefinite with no provision for review
 - Silent on issues of change of ownership
 - No clauses on dispute resolution.

Assignment

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- If limited to musical works, should the reversionary period be applicable to all music works i.e. the sound recording and musical composition?
- Should the provision be retrospective?

Response by the dti:

The Bill as it stands provide the rights to composers, songwriters and publishers. Consideration may be provided for sound recording as it forms part of the creation process.

The Bill can be retrospective to address the imbalances and injustices of the past for artists. However legal counsel may be sought to verify the implications of retrospectivity.



Copyright Tribunal

Background

Existing IP Tribunals

- Within CIPC there are currently 3 intellectual property dispute processes being the:
- **Patents and Designs Commissioner-** The Judge President of the Transvaal Provincial Division of the Supreme.
- Court of South Africa from time to time designate one or more judges or acting judges of that Division as commissioner or commissioners of patents to resolve patents or designs related dispute.
- **Copyright Tribunal-** The judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978, is also the Copyright Tribunal and adjudicates on copyright related disputes.
- Trademarks- the Act does not provide for a Tribunal. Disputes were generally referred to the Registrar of Trademarks within CIPC and the party can appeal to the court when not satisfied. Due to capacity constrains the Registrar now refers this matters to the high court for adjudication.

How the Copyright Tribunal works

- Once a dispute is lodged, CIPC constructs a file and sends it to the Judge President of the High Court. The Judge President then appoints a Judge with experience to adjudicate on the matter. The findings are then sent to CIPC.²⁴

Copyright Tribunal

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- DTI needs to clarify whether the intention is for the IP Tribunal to consolidate all existing IP related tribunals, including the Patents Court.
- What the scope of the IP Tribunal's powers should be? Only copyright or all IP related matters?
- How will this Tribunal affect other tribunals linked to other IP related matters?
- What are the requirements for appointment as a chairperson/member on the Tribunal? E.g. specialisation in IP, legal background and experience, technical qualification (patents or designs), judicial appointment, etc. (See CRC proposal paragraph 3.3.11).

Response by the dti:

- The establishment of an IP Tribunal was proposed to settle disputes in an efficient manner similar to the Companies Tribunal, the Trade Marks Tribunal, the Competition Tribunal and the National Consumer Tribunal. Appropriate human resource capacity should be developed for this initiative.
- Initially the Tribunal was to address various IP related matters.
- The rationale is the development of an effective, efficient and accessible IP dispute resolution mechanism.
- The Copyright Act provides for a statutory body who deal with all matters of IP not limited to copyright.
- Due to current severe financial constraints and the need for a focused approach, the Tribunal should be limited to Copyright and its current scope extended as per the CRC and not all IP. The Bill should be amended to strengthen the existing Tribunal instead of establishing a new IP Tribunal.
- The requirement for the appointment can include years of experience to be determined with specialisation in IP, legal background and experience, judicial appointment, etc. 25

Copyright Tribunal

Policy areas raised as concerns within the Copyright Amendment Bill [B13-2017]:

- Whether it is desirable for proceedings to be inquisitorial in nature?
- Who should qualify as a representative in Section 29I?
- Should the right of access to a court be conditional?
- Should the Tribunal be able issue administrative fines given that most hearings would be of a private nature?
- Will the current provisions in terms of finances and reviews and reporting to the Minister undermine the Tribunal's independence and impartiality?

Response by the dti:

- Proceedings will include hearing appeals, reviewing decisions. Proceedings will ensure fair and just redress to artists. If they have to be inquisitorial, then they should be.
- The right to access to a court should be optional but not conditional. A Tribunal provides a cheaper and faster dispute resolution mechanism. It provides an alternative option for artists.
- The Tribunal should be empowered to impose penalties that will bring redress to artists and that include issuing of fines.
- The provisions in terms of finances and reviews may undermine the Tribunal's independence. It should be independent outside the oversight of the Department.



RECOMMENDATIONS

- The Subcommittee on Copyright Amendment Bill to note the presentation.



Thank You