



arts & culture

Department:
Arts and Culture
REPUBLIC OF SOUTH AFRICA

Copyright Amendment Bill

PRESENTATION TO THE PORTFOLIO COMMITTEE ON TRADE & INDUSTRY MAY 2018

**LED BY THE OFFICE OF THE ACTING DEPUTY DIRECTOR GENERAL: ARTS, CULTURE,
PROMOTION & DEVELOPMENT**

**PRESENTERS: MR CHARLES MABASO, MR ZWELAKHE MBIBA, MS CLEON NOAH,
MS BRENDA KOTZE, MR SIZEKA MABUNDA**

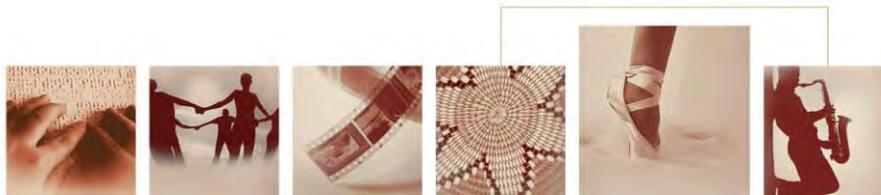
LAYING THE FOUNDATION FOR GREATNESS



PURPOSE OF THE PRESENTATION

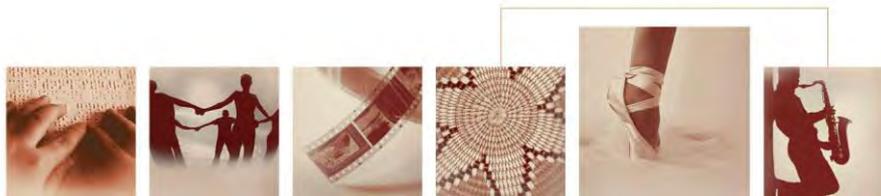
The purpose of this presentation is;

- To provide DAC's position on the draft Copyright Amendment Bill, focusing mainly on the sections that have got a bearing on the work of the Department;
- To flag issues of concern in relation to the Bill, taking into account the points that were raised by various stakeholders in the CCI;
- To respond to the presentation that was done by the DTI, proposing two phases in implementing the Bill.



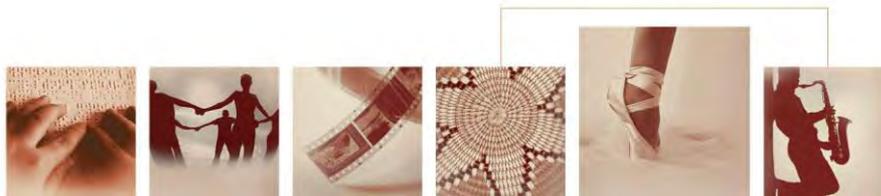
BACKGROUND

- In 2017, the DTI introduced the Copyright Amendment Bill to Parliament;
- The purpose of the Bill is to Amend the Copyright Act of 1978;
- Subsequently, Public Hearings were held to get inputs from various stakeholders;
- There were larger developmental issues envisaged from the outcome of the process but following concerns raised during the Public Hearings, a drafting team comprising of the parliamentary legal services, DTI and consultants was established to address technical issues such as incorrect terminology being used that was contradictory to copyright law
- The DTI has recently presented the corrected version with a proposal that it should be implemented in two phases, firstly addressing issues that are amicable to various stakeholders, then later deal with contested issues,
- The PC has requested the DAC to present its position on the content of the Bill, and also to respond to the proposal made by the DTI.



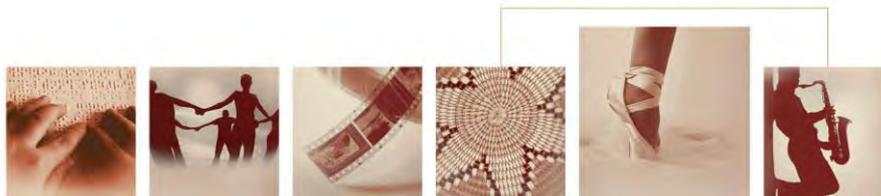
DAC MANDATE

- **DAC's mandate is to develop, promote, collect, preserve and give access to South African culture, memory and documentary heritage to ensure social cohesion and nation-building.**
- **It is the intention of the DAC to flourish arts, culture and heritage sector, and use it as a tool to contribute to sustainable economic development, leveraging on partnerships for a socially cohesive nation, sustain democracy and build the nation.**



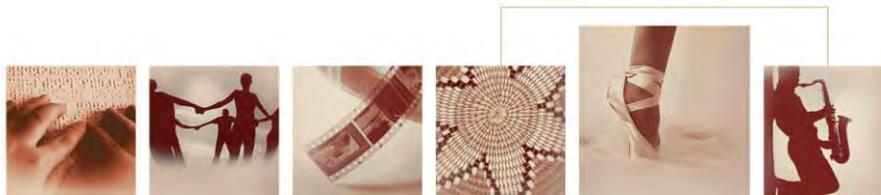
KEY CLIENTS

- In line with our mandate, the DAC serves and works with the following key stakeholders: artists and other practitioners in various cultural and creative sectors, as well as DAC institutions that are providing social services, these are museums, libraries and archives. With local and foreign researchers as clients;
- Given the nature of our work, all these stakeholders are in one way or another affected by the IP legislation, with diverse and competing interests;
- The DAC institutions are not only users, but are also custodians of both state and private Intellectual Property.



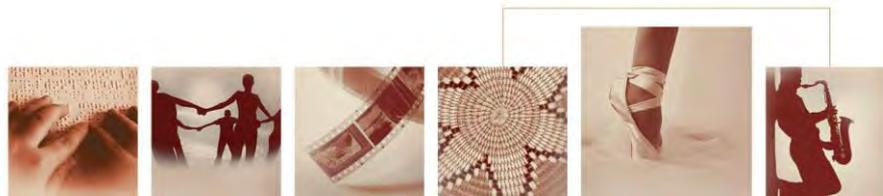
A DILEMMA OF COMPETING RIGHTS

- In dealing with our mandate, the DAC is therefore faced with realities of having to manage competing interests from key stakeholders.
- On the one hand, we have the creators of content: artists, publishers, record companies, etc. whose rights need to be protected.
- On the other hand, we have our institutions, which are providing services for social development, such as education institutions, museums, libraries, archives and institutions representing people with disability, and these stakeholders need access to materials without impeding on the rights of the creators.
- The challenge we face, is reaching a balance between the two, (rights of creators and public interests).



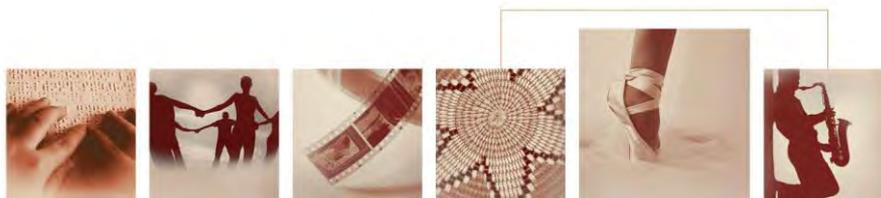
OUR EXPECTATION

- **There are two main reasons for granting Copyright: one is to provide statutory protection - both economic and moral rights to creators, and the other is to provide such rights to the public to get access to the creative works.**
- **Given our history, the local copyright regime should be premised on socio-economic development agenda, resulting into effective and inclusive participation in the CCI affairs, improve business practices, address the skewed ownership and control of CCI economy, while at the same time provides reasonable access to creative work.**
- **We believe that a well balanced copyright regime with solid and unambiguous foundation, clear rights, limitations, exceptions can assist towards realisation of this dream.**



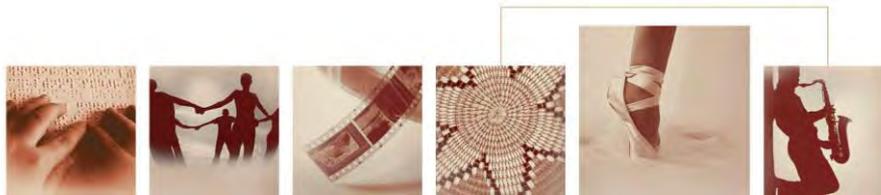
THE INTENTION OF THE BILL

- To amend certain definitions in order to spread protection, in line with international standards;
- To provide for the accreditation and registration of Collecting Societies;
- To provide for the procedure for settlement of royalties disputes;
- To allow limitation and exceptions in line with the applicable international standards;
- To provide for access to copyright works for persons with disabilities and education institutions; including national and international researchers
- To provide for the protection and ownership of orphan works by the state;
- To provide for protection of performers' moral and economic rights;
- To provide for the protection of rights of producers of phonograms and all other audiovisual records and related materials;
- To provide for prohibited conducts in respect technological protection measure;
- To provide for prohibited conduct in respect of copyright management information;
- Provide for management of digital rights;
- To provide for the establishment of Copyright Tribunal to deal with disputes;
- To provide for certain new offences; and to provide for matters connected therewith.
- To provide for the promotion of broadcasting of local content;



DAC STANCE

- **Coming from our past, it is critical that the most vulnerable are protected, in order to assist the country in its journey towards building a better life for all; and**
- **Based on what the Bill seeks to achieve, the DAC welcomes the process as it seeks to create relevant regulatory regime and predictability rules of engagement for our stakeholders;**
- **However, since the process is linked to the 2001 MTT recommendations, the DAC would want to put it on record that finalisation of the Bill is long overdue;**

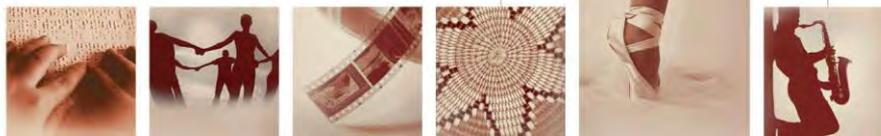


**PROPOSED
AMENDMENTS**

DAC POSITION

**Clause 2 – Insertion
of Section 2A,
Scope of Copyright
Protection**

DAC welcomes the insertion of the section as it helps to clarify the scope of protection, it excludes protection of ideas, it further excludes cases when distinction between ideas and expression become obscured or inseparably,

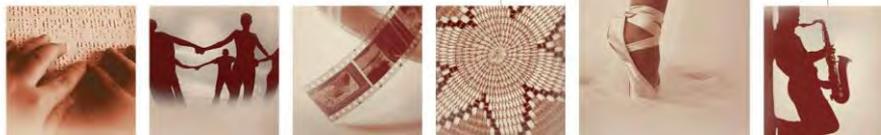


DAC POSITION

PROPOSED AMENDMENTS

CLAUSE 3 – Funded by the state

Though the DAC supports the protection of state owned IP, this clause is ambiguous. The word “funded by” should be removed, to avoid the risk of impacting on many creative works that are funded by government, especially in cases when government merely provides incentives and support measures, with no intention to own the creative work.



**PROPOSED
AMENDMENTS**

**Clause 4 – Section
6 (a) (eA) -
Communicating the
work by wire or
wireless to the
public**

DAC POSITION

DAC supports the proposed amendments to extend the scope of copyright protection as proposed by the Bill. This protection is in line with the WIPO Copyright Treaty and it covers the making available’ - an exclusive right for authors to authorise or prohibit the dissemination of their works and other protected material through interactive networks.

This exclusive right is one of the most important achievements in the history of copyright and constitutes a basic requirement in the digital age.



DAC POSITION

PROPOSED AMENDMENTS

CLAUSE 5 Insertion of Section 6A – Royalties regarding literary or musical works

The understanding is that this clause intends to protect authors of literary and musical work to receive royalties when the work is transferred to music publishers through contractual arrangements, in order to prevent the unfair assignments. The DAC proposes that the clause be removed. The alternative is to address the issue of unfair contract through the introduction of standard contracts, this should happen across the value chain.



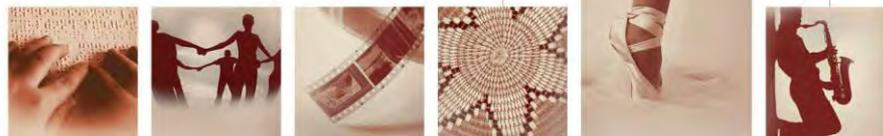
**PROPOSED
AMENDMENTS**

**CLAUSE 6 –
amendment to
section 7 -
Communicating
artistic work to the
public**

DAC POSITION

DAC supports the proposed amendments to extend the scope of copyright protection as proposed by the Bill - and it covers the making available - an exclusive right for creators to authorise or prohibit the dissemination of their works and other protected material through interactive networks.

This exclusive right is one of the most important achievements in the history of copyrights and constitutes a basic requirement in the digital environment.



PROPOSED AMENDMENTS

CLAUSE 7 Insertion of Section 7A, B, C, D & E– Royalties regarding artistic work, resale rights

DAC POSITION

The DAC supports the proposed amendments to introduce resale right, something that has been missing in our legislation. The DAC proposes that the clause should be specific in terms of its definition of the right holder – visual artists. The DAC further recommends that a consideration be given to the Senegalese Model - whereby the rates are set upfront by the statute. Secondly the liability for payment of the royalties should be well stipulated – whether is by the seller or the buyer. It should also be clear, as to who will be legally required to collect the royalties and to disclose any related information.

Though it is common in visual arts for individuals to sell and manage their creative work through individual contracts, the challenge is, many artists might not be in a position to manage and track down their work given the time and financial cost involved, thus running the risk of not getting benefits. Collective management of rights is a very significant and effective way of managing the rights but the Bill does not provide for such.

7B (3) (a) (i) requires that resale royalties be given to SA citizen or those residing in SA – this may undermine the principle of reciprocity, and the inclusion of 7B (3) (c), and the manner in which it is phrased does not imply any provision of reciprocity.



DAC POSITION

PROPOSED AMENDMENTS

Clause 8 –
substitution of
Section 8,
Nature of copyrights
in audio-visual work

DAC supports the proposed amendments to extend the scope of copyright protection as proposed by the Bill. This protection is in line with the Beijing Treaty on Audio-visual Performances (BTAP) and covers the making available - an exclusive right for performers and producers to authorise or prohibit the dissemination of their works and other protected material through interactive networks.

Like the other previous provisions, this exclusive right is one of the most important achievements in the history of copyrights and constitutes a basic requirement for the development of electronic commerce and has the potential of generating a vast amount of royalties for the copyright owners given the proliferation of audio-visual content distribution and consumption in the digital environment.



DAC POSITION

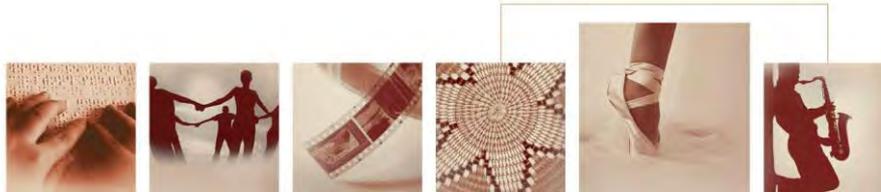
PROPOSED AMENDMENTS

CLAUSE 8

Substitution of
Section 8 – Nature of
copyrights in audio-
visual, Clause 9 - 8A
– Royalties
Regarding audio-
visual works

The main groups of right holders in audio-visual production are authors, performers, and producers. It is not clear how royalties derived from the usage of the audio-visual material could be split on a 50/50 basis. The Beijing Treaty says, under Article 12 (C) that a performer shall have the right to receive royalties or equitable remuneration for any use of the performance. However, the Bill only focuses on two right holders, thus excludes the third right holder.

Instead of the 50/50 split, perhaps the Bill should consider provision of equitable remuneration.

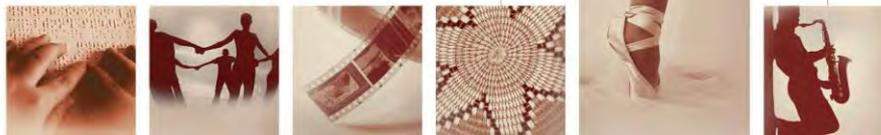


DAC POSITION

PROPOSED AMENDMENTS

Clause 10 -
amendment to
section 9 –
communicating
sound recording to
the public

DAC supports the proposed amendments to extend the scope of copyright protection as proposed by the Bill. This protection is in line with WIPO Performances and Phonograms Treaty (WPPT), and covers the making available - an exclusive right for performers and producers to authorise or prohibit the dissemination of their works and other protected material through interactive networks.



DAC POSITION

PROPOSED AMENDMENTS

Clause 11 - insertion
of 9 A- royalty
regarding sound
recording

The provision will assist with collection of royalties; and it will strengthen, and enforce compliance, seeking to address the concerns that were raised by both the MITT and CRC – regarding payment of royalties by users.

However, the question of who constitute a “User” is something that still need to addressed, as our legislation is still not clear, and this results into depraving many content creators of their potential income.

DAC noted the inclusion of Indigenous Community or National Trust, a matter for discussion until the Bill that deals with IKS legislation is finalised.



DAC POSITION

PROPOSED AMENDMENTS

CLAUSE 13

Repeal Section 12 that deals with fair dealing in favour of fair use, inclusion of personal use (12A,B,C & D)

Fair use by its nature is open-ended and it creates uncertainties in the management of rights. If adopted, this model will permit uncontrollable and unreasonable access to copyright materials resulting into reduction of real income for copyright owners. Actually, only less than 10 of the 176 members of the Berne Convention adopted the fair use model. Policy makers have labelled the Fair Use Model – The Right to Hire a Lawyer.

Adopting the fair use model into our legislation would be an undercut for content creators and it will only serve the interest of big corporations especially Wireless Service Providers.

Furthermore, DAC noted with concern the inclusion “personal use”. We believe that technology has diversified reproduction, distribution and consumption of content making it difficult to deal with unauthorized exploitation and all is in the name of “private use”. We therefore appeal for a law that will adequately respond to this reality. It is for this reason that we recommend the introduction of private copying levy into the Bill.



DAC POSITION

PROPOSED AMENDMENTS

CLAUSE 20 General exceptions for protection of copyright work for libraries, archives, museums and galleries (19 C)

Though libraries, archives, museums and galleries exist to make their collections available to people, but they differ in both the types of materials they hold, and the way materials are accessed. Just to give two examples: Libraries acquire, preserve and make materials accessible, to meet the information needs of the people - mainly for personal and socio-economic development. On the other hand Archives are distinguished from libraries in terms of their primary responsibility which is to preserve the nation's history, heritage and memory and provide access to researchers – to both national and foreign persons for private, academic and commercial purposes.

While the provision of this General Exceptions might be applicable and favourable for the Libraries, it might not be the case with the Archives. For instance the Archives Act (Section 12 (2), states that “A non-public record in the custody of the National Archives shall be available for public access subject to any conditions agreed upon at its acquisition in terms of section 14 (1) of this Act”. Problems arise if the Bill treats these institutions and put them in one basket of exceptions without revisiting the legislations that govern them.

It is for this reason that the DAC would not support the provisions of this Bill, we therefore recommend that there be further discussions on this Clause.



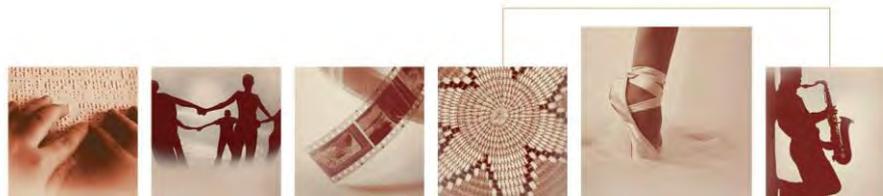
DAC POSITION

PROPOSED AMENDMENTS

General exceptions
regarding
protection of
copyright work for
persons with
disability (19 D)

The DAC supports the proposed amendments to the legislation as it will extend the scope of exceptions and thus facilitates access to published works for persons who are blind, visually impaired, or otherwise print disabled, in line with the Marrakesh Treaty.

This provision aimed at safeguarding fundamental human rights and freedoms through a reasonable balance of both the interests of right holders and the intended users. The provision further assist to regulate symptoms of market failure.



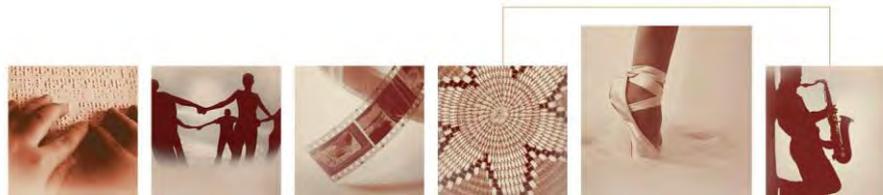
**PROPOSED
AMENDMENTS**

DAC POSITION

**Clause 21 –
Amendments to
Section 20 – Moral
Rights**

CCI markets are dominated by e-commerce, of which the Internet and technology play a substantial role, leading into copyright owners more vulnerable than ever. The decision to put content into this space comes with real risks including manipulation of quality, hence digitization may impact on the quality of the original product.

Though there is no availability of real cure against violation of the moral rights, the DAC would like to support this provision as it will strengthens the bargaining power of the author to be able to claim if their Moral rights are infringed.



DAC POSITION

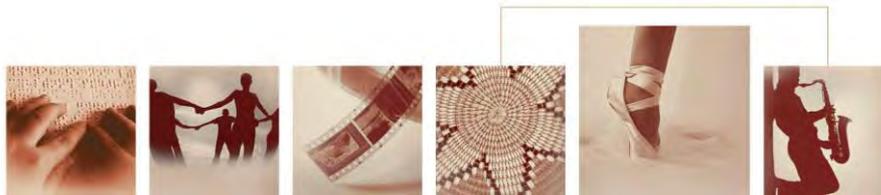
PROPOSED AMENDMENTS

Clause 22 – Amendment to section 21 – Commissioned Work

Many companies in South Africa often think that if they Commission or Hire a freelance writer, photographer, graphic artist, composer to create a work they automatically or by virtue of paying, they own the creative work; this has always been the case with broadcasting companies, resulting into continued re-use of the work without payment of royalties to the creator. This should not be the case, without a clear agreement.

The standard practice in most countries is that the creator owns the right in a commissioned work, and the person who commissioned the work will only have a licence to use the work for the purpose for which it was commissioned. If the person who commissioned the work re-uses it for other purposes, he/she must obtain permission from the creator to use the work in a new way. This is also in line with the licensing agreement that NFVSA issues when audio-visual records belonging to the state is released for copying and broadcasting.

The DAC does not support the provision of the Bill, and would like to propose that the Clause be adjusted to be similar to the Canadian Law.



PROPOSED AMENDMENTS

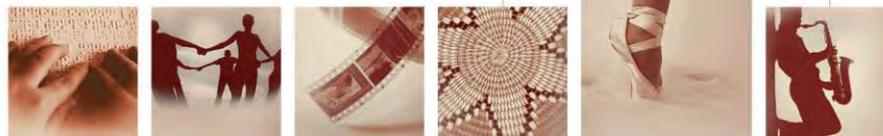
Clause 23 –
Ownership of work
that belongs to the
state may not be
assigned (Section
22 – a (1), (b) 3, 4,
(C)

DAC POSITION

The DAC supports the proposed amendments to extent the scope of copyright protection of stated owned copyrights.

However, it is proposed that clear rights management be introduced. Often this records are being exploited commercially by researchers and it has come to our attention that some are made available online and by other means by individuals and institutions who subsequently also claim the rights to these records.

Perhaps this is because of a possible loophole of the old copyright act, mainly referring to published materials, giving opportunity for unfair exploitation of our recorded National History, Heritage and Memory. This happens on a National and International platform.



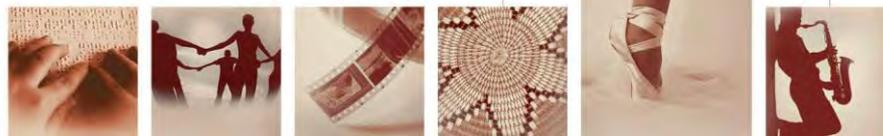
PROPOSED AMENDMENTS

Clause 24 –
Insertion of Section
22A – assignment
and licenses in
respect of orphan
work.

DAC POSITION

Orphan works is by nature subject to royalty payments. The proposed amendment does not clarify how this income will be distributed or used in cases when the rightful owners are not identified following the expiry of the stipulated period of five years. The DAC would like to suggest that this clause be reworked to avoid ambiguity and vagueness.

DAC also is of the view that creation of orphan works should be avoided as far as possible, and only under reasonable situation should the unclaimed orphan royalties be directed towards supporting the development of the arts, than to keep the money in a trust account.



PROPOSED AMENDMENTS

Clause 25 – Clause 27 – Collecting Societies and Related matters

DAC POSITION

The functioning of collecting societies has raised concerns as to their transparency, governance and the handling of revenues collected on behalf of right-holders. For this reason, DAC support the provision for accreditation and registration of all collecting societies and the legal requirements for management of the institutions and the royalties. It is necessary that CMOs provide a more efficient service to right holders and users. This provision will strengthen good governance in CMOs, a pillar to preserve the existence of a vibrant business environment among all stakeholders. The provision is in line with the MITT and the CRC recommendations.

However, on 22C that deals with Administration of Rights by collecting societies and 22D that deal with Control of Collecting Society: DAC noted that “authors” as key stakeholder have not been covered by the sections. It is proposed that the sections be reworked to include word “author”.

Furthermore, DAC is questioning the notion One Collecting Society per set of rights. This notion is good at face value especially for effective management and distribution of copyrights, however, with structural monopoly currently at play, the creation of statutory monopoly could result into a situation where the strong collecting societies overshadow the weaker societies, if not carefully done this may defeat efforts of transformation.

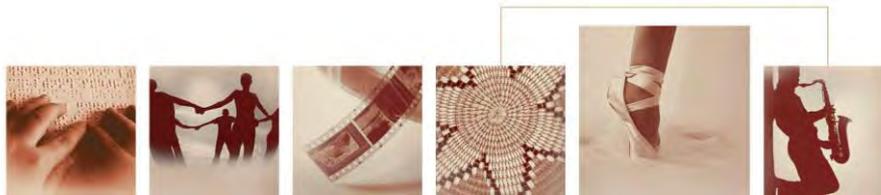


**PROPOSED
AMENDMENTS**

DAC POSITION

**Clause 29 –
insertion of Section
28O – 28S –
Prohibited conduct
in respect of
technological
protection
measures, and
enforcement
measures,
prohibited conduct,
exceptions**

The DAC support law against circumvention of technological measures in order to restrict unauthorized downloading of content. This provision is not a means to restrict access to information but will be used as a means to promote reasonable access.



**PROPOSED
AMENDMENTS**

DAC POSITION

**Clause 31- 34
Tribunal,
proceeding and
processes**

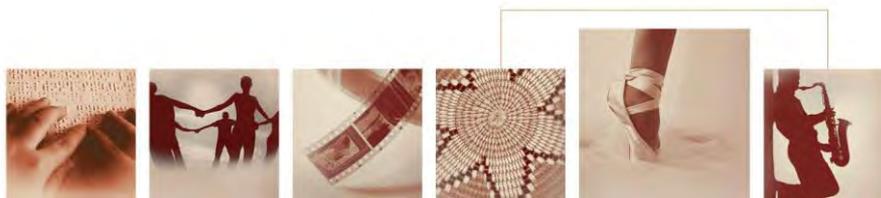
The DAC support the establishment of the Tribunal to assist in the management and enforcement of legislation and to create a more accessible means of dealing with disputes.

29P requires that each party participating in a hearing of the Tribunal to bear its own costs. This might not assist indigent right holders/practitioners – hence they would need some kind of assistance, and perhaps Legal Aid could be a necessity.



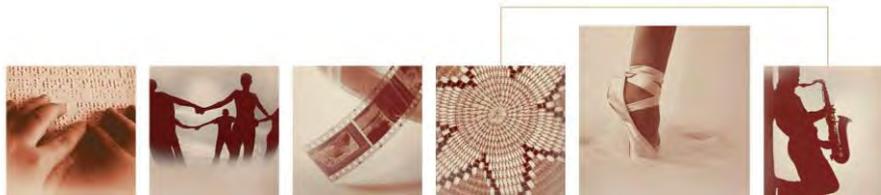
GENERAL COMMENTS

- **Archival Materials: Public Records** are usually in the public domain and available to researchers free of charge without any restriction. However, audio-visual records generated by government are generally subject to copyright with the exclusion of court recordings (i.e. Rivonia Trial sound recordings). Copyright fees are charged as set out by Treasury. In this case, Copyright ownership is vested in the State or Government Printer, different government Departments however applied (billing and licensing) as officials at the Government Printer are unaware of the billing and licensing responsibility. In view of this, it is proposed that economic rights be vested in one institution preferable the NARSSA as the legal custodian of all government generated records. This would prevent a situation similar to that where the copyright of TRC records for example is claimed by both the Department of Justice and the SABC.



GENERAL COMMENTS

- **Local Content:** The CRC recommends that local content be increased to 80% for all public broadcasters. This matter has since been removed from the Bill as it impacts on issues of mandate between the DTI and DOC, however Section 39 (cL) still raises the importance of local content quota. Perhaps what needs to be done is to also review the definition of local content to include ownership of the content in the definition, hence in some cases what seems to be local content might not be local in a true sense of ownership.
- **Absence of contracts:** It was noted during the implementation of needletime that contracts between recording artists and record companies were NOT designed for needletime. Names and contact details of session artists who contributed to the sound recording were not recorded and this created a challenge on the sharing and distribution of needletime income. We should therefore think ahead on how some of the provision of the Bill will be implemented (i.e. indigenous community).



GENERAL COMMENTS

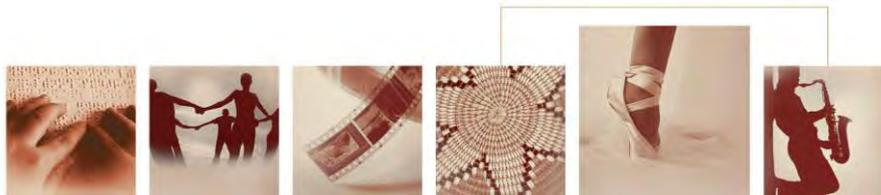
Keeping proprietorship of copyrights to 50 years after the death of creator, while international trends is to move copyrights tenure to 70 years. Traditionally, physical assets have been key to the economy of a nation, but in recent years the situation has changed significantly and intangible asset are becoming valuable than their physical assets. We may need to think of ways of how South Africa protects its investment in the CCI.

Ratification to International Treaties: South Africa is not party to a number of International Treaties and this disadvantages content creators as they cannot be protected in certain countries where their works are being used. It was recommended that DTI as the lead department will start the process of ratifying international copyright treaties and this will benefit the development of the local arts and culture.



CONCLUSION

- The DAC welcomes the amendment of the copyright legislation with reservation as highlighted in this presentation.
- We recommend to remove ambiguity and vagueness that may hamper efficient and effective implementation.
- We recommend the creation of relevant institutions to support and complement the legislation where necessary.
- We further noted that the proposal by the DTI to implement the amendment of the Bill in two phases is based on the realisation that there are serious concerns raised pertaining the Bill, and taking into consideration the concerns raised in this presentation, the DAC support the proposal from the DTI.
- We further recommend a broader consultation with CCI stakeholders and other affected parties, in particular relevant government Ministries, to ensure proper alignment with needs and expectations.



**SIYABONGA
ENKOSI
RE A LEBOGA
THANK YOU
DANKIE**

