



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

PRESENTATION TO THE SUBCOMMITTEE: TRADE AND INDUSTRY
KEY POLICY PROPOSALS IN THE COPYRIGHT AMENDMENT BILL

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PURPOSE OF PRESENTATION

The purpose of the presentation is to brief the Sub-Committee on Copyright on the key policy issues under consideration in the Copyright Amendment Bill and **the dti** position.

Policy Issues & the dti Position

Key Policy Issues Under Consideration:

do we adopt “fair use”/”fair dealing” in the proposed Copyright law

the dti Position

adopted the “fair use” of copyright work

Concerns were raised regarding fair dealing that it deals with closed issues regarding exceptions.

There are many supporters of fair use system (32) than fair dealing system (18). Fair use is viewed as a technology neutral and an open system, equitable, future proof with potential innovation.

Some stakeholders are of the view that fair dealing should only draw from the United Kingdom where it originates.

Fair use as it emanates from the Unites States was also raised.

the Bill proposes that four factors be used to determine whether the use will be fair or not.

Proponents of fair use also indicate that certain jurisdictions that use fair dealing doctrine are either broadening the scope of fair dealing or are migrating from fair dealing to fair use.

Most significantly, the fair use system is adaptable and can cover unanticipated new uses and technologies.

Policy Issues & the dti Position

Key Policy Issues Under Consideration:

do we adopt “fair use”/“fair dealing” in the proposed Copyright law

General Exceptions from Copyright protection (Fair Use/Fair Dealing)

the dti Position

adopted the “fair use” of copyright work

For example soundtracks are a core market use of music and the tracks/songs must be licensed in fair use and non fair use countries. The use cannot be fair when copies of a book or a song are made instead of buying it, the latter harms the market and the rights holder.

The test for fairness in both fair use and fair dealing rights is whether the use substitutes for the work in the market.



Policy Issues & the dti Position

Key Policy Issues Under Consideration: Artist Resale Right/Resale Royalty

Concerns raised in resale royalty right is that the user rights are unworkable in practice.

the dti Position

Copyright Bill covered this area and provides for authors to enjoy an inalienable resale royalty right on the commercial resale of his or her work of art, subsequent to the first transfer by the author of such work of art. *The person commissioning the work is the first copyright owner **subject to any agreement**. Thus, the agreement may cover situations where the person commissioning the work informs the artist of the purpose of the work, which may mean the artist can legally retain the use of the work for any other purpose]*

The European Union, California (US) and the United Kingdom all have the Resale right and the Gallery industry did not crumble. **the dti** repositioned itself appropriately with jurisdictions where resale royalty right is practiced. Although benchmarks were done, South Africa emphasises on the need to provide a solution to locals.

Policy Issues & the dti Position

Key Policy Issues Under Consideration: Collecting societies

Collecting Society was expressly recommended by the CRC as the best mechanism for licensing copy right works.

Collecting Societies are required to adhere to good corporate governance principles and comply with Regulations.

the dti Position

Collecting Society is provided for in Regulations that were promulgated in 2006. Since the promulgation of Regulations the following Collecting Societies were accredited:

SAMPRA – (South African Performers Rights Association - for copyright owners of sound producers, entitled to issue licences, collect royalties and distribute them to its members, but has no responsibility towards performers.

SAMRO – (South African Music Rights Organisation) for composers, lyricists and publishers.

SARRAL –(South African Recording Rights Association) for Composers and publishers. SARRAL was liquidated in 2009. The Company was wound up due to misappropriating composers' royalties. The royalties money was used for management and running of the company.

The Copyright Bill reinforces the intention of the Regulations and provides for the establishment of a Collecting Society. The Bill also stands as a statutory measure for non-compliance of a Collecting Society.

Policy Issues & the dti Position

Key Policy Issues Under Consideration: Collecting Societies

the dti Position

Owners of copyright authorise/assign one or two Collecting Societies to administer their rights, that is, to act as their agent or licensee.

the dti is determined that one Collecting Society must administer and manage a set of rights eg. with regards to all music rights, a set will be: performance, needletime and mechanical rights.

When Collecting Societies act as agents for copyright holders, the rights of copyright holders should remain with them and copyright holders should receive royalties from whoever exploits their rights.

The Collecting Society would be a proactive protection measure for individual users and copyright owners who get disadvantaged in negotiating and subsequently enforcing contractual arrangements.

The CRC recommended an amendment to allow for automatic reversion of assigned rights after 25 years from the date of assignment.

Collecting Societies collect from members (those registered with the institution) only. Private levy is also allowed by **the dti** as it is already happening with RISA, MASA, CCIFSA and DALRO etc.

Policy Issues & the dti Position

Key Policy Issues Under Consideration: Freedom of Panorama

Freedom of Panorama is viewed as a legally grey area. General concerns raised in this area are that the provision fails to authorise the use of audio visual works and photographs and that it is unduly restrictive. The right must be included in the Bill as it expands into all media forms.

the dti Position

[Freedom of Panorama is not provided for in the Bill]

The principal Act says that a person does not infringe a copyright if he or she reproduce, in a painting, drawing, engraving, photograph or cinematographic work, an architectural work, provided the copy is not in the nature of an architectural drawing or plan, or a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building. Thus, the position held in the principal Act remains unchanged.

Policy Issues & the dti Position

Key Policy Issues Under Consideration:

Parallel importation

Original products sold by the right holder or with his consent in another market and then imported through a channel parallel to that authorised by the right holder. They are not counterfeit or pirated products. They do not infringe intellectual property right in the country of origin.

the dti Position

Section 23 (2) of the principal act refers specifically to an infringement of copyright works by importing a work into the Republic for use other than for private or domestic use whereby such work is being distributed in channels authorised by the rightholder. Parallel importation is an exception which does not infringe copyright.

Policy Issues & the dti Position

Key Policy Issues Under Consideration:

Private copying levy

The 2015 Bill did not introduce a private copy levy due to the intricacies and size. Such an amendment will require its own research and impact assessment. The provision was included in the Bill that went for final certification. The state law advisors removed the provision of the Bill.

the dti Position

This provision would also create a balance in light of the fact that the Bill introduces copyright exceptions.

Policy Issues & the dti Position

Key Policy Issues Under Consideration:

Ownership and public funding

In the Act the default position is that the author who commissions owns. The contract is the default position that allows for negotiation. If the proviso contradicts this position as the purpose was to still have a strengthened negotiation power for the author, the proviso should be deleted or the rights given to the author should be limited to avoid the problem of having two copyright owners both exercising exclusive rights.

the dti Position

The Bill introduces that contract should be the default position to allow for parties to negotiate terms.

Treaties Informing the Bills

International prescripts that influence the review of legislation in the creative industry amongst others, the following:

- Trade Related Aspects of Intellectual Property (TRIPS Agreement)** administered by the World Trade Organisation, South Africa is a member;
- WIPO Performances and Phonograms Treaty (WPPT)** administered by the World Intellectual Property Organisation (WIPO), South Africa is not a member;
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations** administered by WIPO, International Labour Organisation (ILO) and United Nations Educational Scientific and Cultural Organisation (UNESCO), South Africa is not a member; and
- The Beijing Treaty for Audio Visual Performances (BTAP)** administered by WIPO

Treaties Informing the Bills

- ❑ **WIPO Copyright Treaty (WCT)** deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs, South Africa is not a member;
- ❑ **Marrakesh Treaty** (South Africa not a member): to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled, South Africa is not a member; and
- ❑ **Berne Convention** (South Africa is a member): deals with the protection of literary and artistic works.



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THANK YOU